AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

# FEDERAL REGISTER

Vol. 83 Wednesday,
No. 246 December 26, 2018

Pages 66077–66554

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

**The seal of the National Archives and Records Administration authenticates the Federal Register** as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

**How To Cite This Publication:** Use the volume number and the page number. Example: 83 FR 12345.

**Postmaster:** Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

## SUBSCRIPTIONS AND COPIES

**PUBLIC**

**Subscriptions:**

| | |
|---|---|
| Paper or fiche | **202–512–1800** |
| Assistance with public subscriptions | **202–512–1806** |

**General online information** **202–512–1530; 1–888–293–6498**

**Single copies/back copies:**

| | |
|---|---|
| Paper or fiche | **202–512–1800** |
| Assistance with public single copies | **1–866–512–1800 (Toll-Free)** |

**FEDERAL AGENCIES**

**Subscriptions:**

Assistance with Federal agency subscriptions:

| | |
|---|---|
| Email | *FRSubscriptions@nara.gov* |
| Phone | **202–741–6000** |

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

Printed on recycled paper.

# Contents

**Federal Register**

Vol. 83, No. 246

Wednesday, December 26, 2018

**Agency for Toxic Substances and Disease Registry**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66265–66266

**Agricultural Marketing Service**
RULES
Decreased Assessment Rates:
Kiwifruit Grown in California, 66077–66079

**Agriculture Department**
*See* Agricultural Marketing Service
*See* Animal and Plant Health Inspection Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66237–66238

**Alcohol, Tobacco, Firearms, and Explosives Bureau**
RULES
Bump-Stock-Type Devices, 66514–66554

**Animal and Plant Health Inspection Service**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66240–66241
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Importation of Tomatoes From Certain Central American Countries, 66238–66239
Volunteer Service Agreements and Volunteer Service Time and Attendance Record, 66239–66240
Intent To Reestablish a Committee:
National Wildlife Services Advisory Committee, 66239

**Army Department**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66253

**Centers for Disease Control and Prevention**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66267–66271
Meetings:
Disease, Disability, and Injury Prevention and Control Special Emphasis Panel, 66266–66267, 66270

**Centers for Medicare & Medicaid Services**
NOTICES
Medicare Program:
Request for Renewal of Deeming Authority of the Utilization Review Accreditation Commission for Health Maintenance Organizations and Preferred Provider Organizations, 66271–66273
Meetings:
Medicare and Medicaid Programs, and Other Program Initiatives, and Priorities; Advisory Panel on Outreach and Education, 66273–66275

**Civil Rights Commission**
NOTICES
Meetings:
Arkansas Advisory Committee, 66242
Indiana Advisory Committee, 66241
Minnesota Advisory Committee, 66242–66243
Mississippi Advisory Committee, 66241–66242

**Coast Guard**
RULES
Drawbridge Operations:
Duwamish Waterway, Seattle, WA, 66131
Safety Zones:
Mathai Fireworks, Detroit River, Detroit, MI, 66131–66133
Special Local Regulations:
Marine Events in the Coast Guard Sector Detroit Captain of the Port Zone, 66128–66131
NOTICES
Recreational Boating Safety Projects, Programs, and Activities Funded Under Provisions of the Fixing America's Surface Transportation Act; Fiscal Year 2018, 66291–66292

**Commerce Department**
*See* International Trade Administration
*See* National Oceanic and Atmospheric Administration

**Community Living Administration**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Centers for Independent Living Program Performance Report, 66278–66279
Independent Living Services Program Performance Report, 66275–66276
Inventory of Adult Protective Services Practices and Service Innovations, 66276–66277

**Comptroller of the Currency**
PROPOSED RULES
Regulatory Capital Treatment for High Volatility Commercial Real Estate Exposures; Correction, 66166–66167

**Copyright Office, Library of Congress**
PROPOSED RULES
Simplifying Copyright Registration for Architectural Works, 66182–66184

**Copyright Royalty Board**
NOTICES
Distribution of the 2007, 2008, 2009, 2010, and 2011 Digital Audio Recording Technology Royalty Funds for the Sound Recordings Funds, 66312–66313

**Defense Department**
*See* Army Department
*See* Navy Department
PROPOSED RULES
Federal Acquisition Regulations:
Whistleblower Protection for Contractor Employees, 66223–66228
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66254–66255

Meetings:
Vietnam War Commemoration Advisory Committee, 66254

**Education Department**
**PROPOSED RULES**
Negotiated Rulemaking Committee; Location of Negotiations and Subcommittee Meetings—Accreditation and Innovation, 66181–66182
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
FSA Payment Vehicle Account Program Pilot Institutions, 66257
National Advisory Committee on Institutional Quality and Integrity Membership, 66256–66257

**Employment and Training Administration**
**NOTICES**
Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States:
2019 Adverse Effect Wage Rates for Non-Range Occupations, 66306–66307
Adverse Effect Wage Rate for Range Occupations in 2019, 66307

**Energy Department**
*See* Western Area Power Administration
**RULES**
Inflation Adjustment of Civil Monetary Penalties, 66080–66084

**Environmental Protection Agency**
**RULES**
Air Quality State Implementation Plans; Approvals and Promulgations:
California; Feather River Air Quality Management District, 66136–66138
North Carolina: $NO_X$ Rule Revisions, 66133–66136
Authorization of State Hazardous Waste Management Program Revision:
Louisiana, 66143–66145
Pesticide Tolerance Exemptions:
Chlorate, 66138–66143
**PROPOSED RULES**
Air Quality State Implementation Plans; Approvals and Promulgations:
Maine; Infrastructure State Implementation Plan Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standards, 66184–66196
Ohio; Open Burning Rules, 66197–66200
Ohio; Redesignation of the Cleveland Area to Attainment of the 2012 Annual Standard for Fine Particulate Matter, 66200–66209
Ohio; Removal of Obsolete Gasoline Volatility Regulations, 66196–66197
Approval of State Plans for Designated Facilities and Pollutants; Kansas; Sewage Sludge Incineration Units, 66209–66210
Criteria for Municipal Solid Waste Landfills To Address Advances in Liquids Management, 66210–66223
**NOTICES**
Pesticide Experimental Use Permits; Applications, 66258–66259
Pesticide Product Registrations:
Applications for New Active Ingredients, 66259–66260
Applications for New Uses, 66260–66261
Pesticides:
Petition Seeking Rulemaking or a Formal Agency Interpretation for Planted Seeds Treated With Systemic Insecticides, 66260

**Federal Aviation Administration**
**RULES**
Airworthiness Directives:
Airbus Helicopters (Previously Eurocopter France) Helicopters, 66093–66095
CFM International S.A. Turbofan Engines, 66090–66093
Zodiac Aero Evacuation Systems (also known as Air Cruisers Company) Airplanes, 66088–66090
Establishment of Class E Airspace:
Glen Ullin, ND; Correction, 66095–66096
Special Conditions:
Airbus Model A330–200, A330–200F, A330–300 and A330–900 Series Airplanes; Electronic System Security Protection From Unauthorized External Access, 66084–66088
Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures, 66096–66100
**PROPOSED RULES**
Airworthiness Directives:
Pilatus Aircraft Ltd. Airplanes, 66175–66178
Sikorsky Aircraft Corporation Helicopters, 66167–66172
The Boeing Company Airplanes, 66172–66175, 66178–66181

**Federal Communications Commission**
**RULES**
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, 66146–66148
Cellular Service, Including Changes in Licensing of Unserved Area, 66145–66146
Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative, 66149–66158
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66261–66262

**Federal Highway Administration**
**NOTICES**
Final Federal Agency Actions on Proposed Highway in California, 66337

**Federal Reserve System**
**NOTICES**
Change in Bank Control Notices:
Acquisitions of Shares of a Bank or Bank Holding Company, 66262

**Fish and Wildlife Service**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Control and Management of Resident Canada Geese, 66294–66296
Endangered and Threatened Species:
Capitol Boulevard Infrastructure Improvements Habitat Conservation Plan and Environmental Assessment for the Olympia Subspecies of the Mazama Pocket Gopher, Thurston County, Washington, 66292–66294
Draft Recovery Plan for Franciscan Manzanita, 66297–66298

Proposed Crestmont Farm Safe Harbor Agreement for the Taylor's Checkerspot Butterfly in Benton County, Oregon, 66296–66297

**Food and Drug Administration**
**RULES**
Neurological Devices; Reclassification of Electroconvulsive Therapy Devices; Effective Date of Requirement for Premarket Approval for Electroconvulsive Therapy Devices for Certain Specified Intended Uses, 66103–66124
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Medicated Feed Mill License Application, 66280–66282
Determination of Regulatory Review Period for Purposes of Patent Extension:
ADLYXIN, 66279–66280
Modified Risk Tobacco Product Applications for IQOS System With Marlboro Heatsticks, IQOS System With Marlboro Smooth Menthol Heatsticks, and IQOS System With Marlboro Fresh Menthol Heatsticks Submitted by Philip Morris Products S.A.; Closing of Comment Period, 66282–66283

**General Services Administration**
**PROPOSED RULES**
Federal Acquisition Regulations:
Whistleblower Protection for Contractor Employees, 66223–66228
**NOTICES**
2019 Privately Owned Vehicle Mileage Reimbursement Rates; 2019 Standard Mileage Rate for Moving Purposes, 66263–66264
Agency Information Collection Activities; Proposals, Submissions, and Approvals
Mentor Protege Program and Subcontracting Plans, 66262–66263
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Construction Contract Administration, 66264–66265
Mentor Protege Program and Preparation, Submission, and Negotiation of Subcontracting Plans, 66263

**Health and Human Services Department**
*See* Agency for Toxic Substances and Disease Registry
*See* Centers for Disease Control and Prevention
*See* Centers for Medicare & Medicaid Services
*See* Community Living Administration
*See* Food and Drug Administration
*See* Indian Health Service
**NOTICES**
Findings of Research Misconduct, 66283–66284

**Homeland Security Department**
*See* Coast Guard
*See* U.S. Customs and Border Protection

**Indian Health Service**
**NOTICES**
Organizations, Functions, and Delegations of Authority, 66284–66291

**Institute of Museum and Library Services**
**PROPOSED RULES**
Freedom of Information Act Regulations and Additional Incidental Technical Amendments to Other IMLS Regulations, 66163–66166

**Interior Department**
*See* Fish and Wildlife Service
*See* Land Management Bureau
*See* Ocean Energy Management Bureau

**International Trade Administration**
**NOTICES**
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Advance Notification of Sunset Review; Correction, 66244–66245
Certain Frozen Warmwater Shrimp From India, 66244
Certain New Pneumatic Off-the-Road Tires From the People's Republic of China, 66243

**International Trade Commission**
**RULES**
Rules Relating to the Submission and Consideration of Petitions for Duty Suspensions and Reductions, 66102–66103
**NOTICES**
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Dental Ceramics, Products Thereof, and Methods of Making the Same, 66303–66304

**Justice Department**
*See* Alcohol, Tobacco, Firearms, and Explosives Bureau
**RULES**
Paroling, Recommitting, and Supervising Federal Prisoners:
Prisoners Serving Sentences Under the United States and District of Columbia Codes, 66124–66125
Privacy Act; Implementation, 66125–66128
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
National Standards to Prevent, Detect, and Respond to Prison Rape, 66304–66305
Public Safety Officer Medal of Valor, 66305–66306

**Labor Department**
*See* Employment and Training Administration
*See* Labor Statistics Bureau
*See* Occupational Safety and Health Administration
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Implementation Evaluation of the National Health Emergency Demonstration Grants To Address the Opioid Crisis, New Collection, 66308–66309
National Database of Childcare Costs Submission for Review: National Database of Childcare Costs, 66309–66310

**Labor Statistics Bureau**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66310–66311

**Land Management Bureau**
**NOTICES**
Decision Approving Lands for Conveyance:
Alaska Native Claims Selection, 66298–66300

**Library of Congress**
*See* Copyright Office, Library of Congress
*See* Copyright Royalty Board

**National Aeronautics and Space Administration**
PROPOSED RULES
Federal Acquisition Regulations:
Whistleblower Protection for Contractor Employees, 66223–66228

**National Endowment for the Arts**
NOTICES
Meetings:
Arts Advisory Panel, 66313–66314

**National Foundation on the Arts and the Humanities**
*See* Institute of Museum and Library Services
*See* National Endowment for the Arts

**National Highway Traffic Safety Administration**
RULES
Temporary Exemption From Motor Vehicle Safety and Bumper Standards, 66158–66160
PROPOSED RULES
Federal Motor Vehicle Safety Standards; Motor Vehicle Brake Fluids, 66228–66229

**National Oceanic and Atmospheric Administration**
RULES
Fisheries of the Northeastern United States:
Atlantic Deep-Sea Red Crab Fishery; 2019 Atlantic Deep-Sea Red Crab Specifications, 66161–66162
Atlantic Herring Fishery; 2018 River Herring and Shad Catch Cap Reached for Midwater Trawl Vessels in the Cape Cod Catch Cap Area, 66160
PROPOSED RULES
Fisheries of the Northeastern United States:
Atlantic Bluefish Fishery; 2019 Bluefish Specifications, 66234–66236
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66249–66250
Fisheries Off West Coast States:
Pacific Coast Groundfish Fishery; Trawl Rationalization Program; 2019 Cost Recovery, 66251–66253
Meetings:
Gulf of Mexico Fishery Management Council, 66248–66249
New England Fishery Management Council, 66247–66248
Pacific Fishery Management Council, 66247–66248, 66251
South Atlantic Fishery Management Council, 66250
Permit Applications:
Marine Mammals; File No. 22187, 66250–66251
Taking and Importing Marine Mammals:
Navy Training and Testing Activities in the Atlantic Fleet Training and Testing Study Area, 66245–66246

**Navy Department**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66255
Record of Decision:
Hawaiian Islands and Southern California Training and Testing Final Environmental Impact Statement/Overseas Environmental Impact Statement, 66255–66256

**Nuclear Regulatory Commission**
RULES
List of Approved Spent Fuel Storage Casks:
TN Americas LLC, Standardized NUHOMS System, Certificate of Compliance No. 1004, Renewed Amendment No. 15, 66079–66080
NOTICES
Guidance:
Spent Fuel Heat Generation in an Independent Spent Fuel Storage Installation, 66317–66318
License Amendments; Applications:
Florida Power and Light Co., Turkey Point Nuclear Generating Unit Nos. 3 and 4, 66318–66323
License Renewal Applications:
Pacific Gas and Electric Co.; Humboldt Bay Independent Spent Fuel Storage Installation; Renewal of Special Nuclear Materials License, 66314–66316
Meetings:
Advisory Committee on Reactor Safeguards, 66316–66317

**Occupational Safety and Health Administration**
NOTICES
Applications:
Expansion of Recognition; Curtis-Straus LLC, 66311–66312

**Ocean Energy Management Bureau**
NOTICES
Call for Information and Nominations:
Outer Continental Shelf, Western, Central, and Eastern Gulf of Mexico, Oil and Gas Lease Sales for Years 2019–2024, 66300–66302
Environmental Impact Statements; Availability, etc.:
Outer Continental Shelf, Gulf of Mexico, Oil and Gas Lease Sales for 2020, 66302–66303

**Railroad Retirement Board**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66323–66325

**Securities and Exchange Commission**
RULES
Adoption of Updated EDGAR Filer Manual, 66100–66101
Modernization of Property Disclosures for Mining Registrants, 66344–66461
NOTICES
Joint Industry Plans:
National Market System Plan To Address Extraordinary Market Volatility by Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., et al., 66464–66511
Self-Regulatory Organizations; Proposed Rule Changes:
Cboe BYX Exchange, Inc., 66329–66330
Cboe BZX Exchange, Inc., 66328–66329
Nasdaq BX, Inc., 66325–66328

**Social Security Administration**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 66330–66334

**State Department**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Request To Change End User, End Use and/or Destination of Hardware, 66334

**Surface Transportation Board**
**PROPOSED RULES**
Water Carrier Tariff Filing Procedures, 66229–66234
**NOTICES**
Abandonment Exemption:
CSX Transportation, Inc.; Alachua County, FL, 66334–66335
Lease Exemptions With Interchange Commitments:
Progressive Rail Inc.; Soo Line Railroad Co, and Dakota, Minnesota and Eastern Railroad Corp., 66335–66336
Railroad Revenue Adequacy—2017 Determination, 66336

**Susquehanna River Basin Commission**
**NOTICES**
Projects Approved for Consumptive Uses of Water, 66336–66337

**Transportation Department**
*See* Federal Aviation Administration
*See* Federal Highway Administration
*See* National Highway Traffic Safety Administration
**NOTICES**
Requests for Comments:
V2X Communications, 66338–66340

**Treasury Department**
*See* Comptroller of the Currency
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Extension of Time for Payment of Tax Due to Undue Hardship, 66340
Labeling and Advertising Requirements Under the Federal Alcohol Administration Act, 66340–66341

**U.S. Customs and Border Protection**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate and Release, 66292

**Veterans Affairs Department**
**NOTICES**
Meetings:
Veterans and Community Oversight and Engagement Board, 66341

**Western Area Power Administration**
**NOTICES**
Falcon and Amistad Projects' Rate, 66257–66258

---

**Separate Parts In This Issue**

**Part II**
Securities and Exchange Commission, 66344–66461

**Part III**
Securities and Exchange Commission, 66464–66511

**Part IV**
Justice Department, Alcohol, Tobacco, Firearms, and Explosives Bureau, 66514–66554

---

**Reader Aids**

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

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

## CFR PARTS AFFECTED IN THIS ISSUE

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


**2 CFR**
**Proposed Rules:**
3187 ..... 66163

**7 CFR**
920 ..... 66077

**10 CFR**
72 ..... 66079
207 ..... 66080
218 ..... 66080
429 ..... 66080
431 ..... 66080
490 ..... 66080
501 ..... 66080
601 ..... 66080
820 ..... 66080
824 ..... 66080
851 ..... 66080
1013 ..... 66080
1017 ..... 66080
1050 ..... 66080

**12 CFR**
**Proposed Rules:**
3 ..... 66166

**14 CFR**
25 (2 documents) ..... 66084, 66086
39 (3 documents) ..... 66088, 66090, 66093
71 ..... 66095
97 (2 documents) ..... 66096, 66097
**Proposed Rules:**
39 (4 documents) ..... 66167, 66172, 66175, 66178

**17 CFR**
229 ..... 66344
230 ..... 66344
232 ..... 66100
239 ..... 66344
249 ..... 66344

**19 CFR**
220 ..... 66102

**21 CFR**
882 ..... 66103

**27 CFR**
447 ..... 66514
478 ..... 66514
479 ..... 66514

**28 CFR**
2 ..... 66124
16 ..... 66125

**33 CFR**
100 ..... 66128
117 ..... 66131
165 ..... 66131

**34 CFR**
**Proposed Rules:**
Ch. VI ..... 66181

**37 CFR**
**Proposed Rules:**
202 ..... 66182

**40 CFR**
52 (2 documents) ..... 66133, 66166
180 ..... 66138
271 ..... 66143
**Proposed Rules:**
52 (4 documents) ..... 66184, 66196, 66197, 66200
62 ..... 66209
81 ..... 66200
258 ..... 66210

**45 CFR**
**Proposed Rules:**
1181 ..... 66163
1182 ..... 66163
1184 ..... 66163

**47 CFR**
22 ..... 66145
51 ..... 66146
63 ..... 66147
76 ..... 66149

**48 CFR**
**Proposed Rules:**
3 ..... 66223
31 ..... 66223
52 ..... 66223

**49 CFR**
555 ..... 66158
**Proposed Rules:**
571 ..... 66228
1002 ..... 66229
1312 ..... 66229

**50 CFR**
648 (2 documents) ..... 66160, 66161
**Proposed Rules:**
648 ..... 66234

# Rules and Regulations

Federal Register
Vol. 83, No. 246
Wednesday, December 26, 2018

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.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Part 920

**[Doc. No. AMS–SC–18–0060; SC18–920–1 FR]**

## Kiwifruit Grown California; Decreased Assessment Rate

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule implements a recommendation from the Kiwifruit Administrative Committee (Committee) to decrease the assessment rate established for the 2018–2019 and subsequent fiscal periods. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Effective January 25, 2019.

**FOR FURTHER INFORMATION CONTACT:** Maria Stobbe, Marketing Specialist, or Terry Vawter, Senior Marketing Specialist, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906, or Email: *Maria.Stobbe@ams.usda.gov* or *Terry.Vawter@ams.usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Richard.Lower@ams.usda.gov.*

**SUPPLEMENTARY INFORMATION:** This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Agreement and Order No. 920, as amended (7 CFR part 920), regulating the handling of kiwifruit grown in California. Part 920 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Committee locally administers the Order and is comprised of producers of kiwifruit operating within the area of production, and one member of the public.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled ''Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' '' (February 2, 2017).

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, kiwifruit handlers in California are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate will be applicable to all assessable kiwifruit for the 2018–2019 fiscal period and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act (7 U.S.C. 608c(15)(A)), any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The Order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers of California kiwifruit, and one member of the public. They are familiar with the Committee's needs and with the costs of goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

This rule decreases the assessment rate for the 2018–2019 and subsequent fiscal periods from $0.040 to $0.025 per 9-kilo volume-fill container or equivalent of kiwifruit handled.

The Committee met on July 19, 2018, and unanimously recommended 2018–2019 expenditures of $119,000 and an assessment rate of $0.025 per 9-kilo volume-fill of kiwifruit. In comparison, last year's budgeted expenditures were $114,383. The assessment rate of $.025 is $0.015 lower than the rate currently in effect. The Committee currently has a cash reserve of approximately $52,056. The decreased assessment rate plus the cash reserve are sufficient to fund the 2018–2019 budgeted expenses.

The major expenditures recommended by the Committee for 2018–2019 include $80,000 for management services, $29,000 in office expenditures, and $10,000 for research. Budgeted expenses for these items in 2017–2018 were $80,000 for management services, $24,383 in office expenditures, and $10,000 for research.

The assessment rate recommended by the Committee was derived by considering anticipated expenses, expected shipments of kiwifruit in the production area, and the level of funds in the authorized reserve. Kiwifruit shipments for the 2018–2019 season are estimated at 4,207,071 9-kilo volume-fill containers, which should provide $105,177 in assessment income (4,207,071 9-kilo volume-fill containers times $0.025 per container equals $105,177). Income derived from handler assessments, along with interest income and funds from the Committee's

authorized reserve, should be adequate to cover budgeted expenses. Funds in the reserve (currently $52,056) will be kept within the maximum permitted by the Order (approximately one fiscal period's expenses).

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee and other available information. Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's budget for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

**Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 140 producers of kiwifruit in the production area and approximately 20 handlers subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $7,500,000 (13 CFR 121.201).

According to Committee, USDA Market News, and National Agricultural Statics Service (NASS) data, the average price of kiwifruit for the 2016–2017 season was approximately $0.92 per pound, and the total crop was approximately 9.0 million tray equivalents, or 63 million pounds. Based on the average price and handler-specific annual kiwifruit sales data provided by the Committee, 19 of the 20 handlers have average annual receipts less than $7,500,000. Thus, the majority of kiwifruit handlers may be classified as small business entities.

In addition, based on information from the NASS, the average grower price for kiwifruit during the 2016–2017 season was approximately $0.525 cents per pound. The Committee analyzed grower-specific production data and determined that growers with production over 204,081 9-kilo volume-fill containers would be classified as large entities (204,081 9-kilo volume-fill containers times 7 pounds per container times $0.525 per pound equals $749,998). Using the NASS average grower price and the Committee's specific grower production information, at least 130 of 140 producers have annual receipts of less than $750,000. Thus, the majority of the kiwifruit producers may be classified as small entities.

This rule decreases the assessment rate collected from handlers for the 2018–2019 and subsequent fiscal periods from $0.040 to $0.025 per 9-kilo volume-fill container of kiwifruit. The Committee unanimously recommended 2018–2019 expenditures of $119,000 and an assessment rate of $0.025 per 9-kilo volume-fill container. The assessment rate of $0.025 is $0.015 lower than the 2017–2018 rate. The quantity of assessable commodity for the 2018–2019 fiscal year is estimated at 4,207,071 9-kilo volume-fill container. Thus, the $0.025 rate should provide $105,177 in assessment income (4,207,071 × $0.025). Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve (currently $52,056), should be adequate to cover budgeted expenses.

The major expenditures recommended by the Committee for the 2018–2019 fiscal year include $80,000 for management services, $29,000 in office expenditures, and $10,000 for research. Budgeted expenses for these items in 2017–2018 were $80,000 for management services, $24,383 in office expenditures, and $10,000 for research. The Committee estimates that the funds in the reserve (currently $52,056) would be reduced by $13,303 to ensure the reserve remains within the maximum permitted by the Order (approximately one fiscal period's expenses).

Prior to arriving at this budget and assessment rate, the Committee considered various options, such as maintaining the current assessment rate and expenditure levels. Alternative expenditure levels were discussed by the Committee, based upon the relative value of various activities to the kiwifruit industry. The Committee ultimately determined that 2018–2019 expenditures of $119,000 were appropriate, and the recommended $0.025 assessment rate, and the use of $13,303 from the financial reserve, would be sufficient to meet its expenses.

A review of historical crop and price information, as well as preliminary information pertaining to the upcoming fiscal period, indicates that the shipping point price for the 2017–2018 season averaged about $17.32 per 9-kilo volume-fill container of California kiwifruit handled. If the 2018–2019 price is similar to the 2017–2018 price, estimated assessment revenue as a percentage of total estimated handler revenue would be 0.14 percent for the 2018–2019 season ($0.025 divided by $17.32 per 9-kilo volume-fill container).

This rule decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers and may reduce the burden on producers. This rule will not have a significant economic impact on a substantial number of small entities.

The Committee's meeting was widely publicized throughout the production area. All interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the July 19, 2018, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0189, Fruit Crops. No changes in those requirements are necessary as a result of this rule. Should any changes become necessary, they would be submitted to OMB for approval.

This rule imposes no additional reporting or recordkeeping requirements on either small or large California kiwifruit handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the initial

regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the **Federal Register** on October 1, 2018 (83 FR 49312). Copies of the proposed rule were provided to all kiwifruit handlers. The proposal was also made available through the internet by USDA and the Office of Federal Register. A 30-day comment period ending October 31, 2018, was provided for interested persons to respond to the proposal.

One comment was received regarding the proposed rate change. The commenter questioned the Committee's authority to recommend a reduction in the rate and the potential impact of the rate change on the quality of kiwifruit.

As stated in the Act (7 U.S.C. 610(b)(2)(ii)), assessments collected by the Committee are used to cover the costs of administering the program. When the collection of assessments surpasses budget needs and reserve funds are at their maximum, the Committee and USDA are obligated by the Order (§ 920.41 Assessments and § 920.42 Accounting) to adjust the amount of assessment funds collected. This adjustment can be made either by refunding assessments or by reducing the assessment rate. Reducing the assessment rate is less costly and more efficient for both the Committee and handlers. Therefore, to prevent the collection of surplus revenue if the assessment rate were not changed, the authority to reduce the assessment rate is both implied in, and necessary under the Order.

Regarding the commenters question about the quality of kiwifruit, the amount of assessments collected are tied to volume of kiwifruit handled, not the quality of the kiwifruit. Therefore, the assessment rate and kiwifruit quality are not directly correlated.

The remainder of the comment was related to general information about the kiwifruit marketing order and was outside the scope of this action. Accordingly, no changes will be made to the rule as proposed, based on the comment received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule will tend to effectuate the declared policy of the Act.

**List of Subjects in 7 CFR Part 920**

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 920 is amended as follows:

## PART 920—KIWIFRUIT GROWN IN CALIFORNIA

■ 1. The authority citation for part 920 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. Section 920.213 is revised to read as follows:

**§ 925.213 Assessment rate.**

On and after August 1, 2018, an assessment rate of $0.025 per 9-kilo volume-fill container or equivalent of kiwifruit is established for kiwifruit grown in California.

Dated: December 19, 2018.

**Bruce Summers,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 2018–27888 Filed 12–21–18; 8:45 am]

BILLING CODE 3410–02–P

## NUCLEAR REGULATORY COMMISSION

## 10 CFR Part 72

**[NRC–2018–0212]**

**RIN 3150–AK16**

## List of Approved Spent Fuel Storage Casks: TN Americas LLC, Standardized NUHOMS® System, Certificate of Compliance No. 1004, Renewed Amendment No. 15

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Direct final rule; confirmation of effective date.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is confirming the effective date of January 22, 2019, for the direct final rule that was published in the **Federal Register** on November 7, 2018. This direct final rule amended the NRC's spent fuel storage regulations by revising the ''List of approved spent fuel storage casks'' to include Renewed Amendment No. 15 to Certificate of Compliance No. 1004 for the TN Americas LLC Standardized NUHOMS® Horizontal Modular Storage System (NUHOMS® System). Because this amendment is subsequent to the renewal of the TN Americas LLC Standardized NUHOMS® Certificate of Compliance No. 1004 system and, therefore, subject to the Aging Management Program requirements of the renewed certificate, it is referred to as ''Renewed Amendment No. 15.''

**DATES:** *Effective Date:* The effective date of January 22, 2019, for the direct final rule published November 7, 2018 (83 FR 55601), is confirmed.

**ADDRESSES:** Please refer to Docket ID NRC–2018–0212 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0212. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individuals 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 proposed amendment to the certificate, the proposed changes to the technical specifications, and preliminary safety evaluation report are available in ADAMS under Accession No. ML18228A529. The final amendment to the certificate, final changes to the technical specifications, and final safety evaluation report can also be viewed in ADAMS under Accession No. ML18347B333.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

**FOR FURTHER INFORMATION CONTACT:** Christian Jacobs, Office of Nuclear

Material Safety and Safeguards; telephone: 301–415–6825; email: *Christian.Jacobs@nrc.gov* or Edward M. Lohr, Office of Nuclear Material Safety and Safeguards; telephone: 301–415–0253; email: *Edward.Lohr@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

**SUPPLEMENTARY INFORMATION:** On November 7, 2018 (83 FR 55601), the NRC published a direct final rule amending its regulations in part 72 of title 10 of the *Code of Federal Regulations* by revising the ''List of approved spent fuel storage casks'' to include Renewed Amendment No. 15 to Certificate of Compliance No. 1004 for the TN Americas LLC Standardized NUHOMS® Horizontal Modular Storage System. Renewed Amendment No. 15 revised the technical specifications of the certificate of compliance to: Unify and standardize fuel qualification tables; revise existing and add new heat load zoning configurations; increase the allowable maximum assembly average burnup; allow loading of damaged fuel assemblies under certain conditions; expand the definition of the poison rod assemblies to include rod cluster control assembly materials; allow other zirconium alloy cladding materials; add model OS197 as an authorized transfer cask; add the description for the solar shield in the updated final safety analysis report; and add flexibility to general licensees in verifying compliance regarding the storage pad location and the soil-structure interaction. Additionally, the rulemaking made clarifications to rule text related to the certificate of compliance by removing redundant language.

In the direct final rule, the NRC stated that if no significant adverse comments were received, the direct final rule would become effective on January 22, 2019. As described more fully in the direct final rule, a significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change.

The NRC received two comments and has determined that they are not significant adverse comments. One comment agreed with the proposed changes to the regulations. The second comment concerned transportation of nuclear waste fuel to another country. As this rulemaking only addressed the changes to the technical specifications for dry shielded canisters used to store nuclear waste on-site, the NRC determined this comment to be out of scope. Because no significant adverse comments were received, the direct final rule will become effective as scheduled.

Dated at Rockville, Maryland, this 18th day of December, 2018.

For the Nuclear Regulatory Commission.

**Cindy K. Bladey,**

*Chief, Regulatory Analysis and Rulemaking Support Branch, Division of Rulemaking, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2018–27810 Filed 12–21–18; 8:45 am]

**BILLING CODE 7590–01–P**

---

## DEPARTMENT OF ENERGY

## 10 CFR Parts 207, 218, 429, 431, 490, 501, 601, 820, 824, 851, 1013, 1017, and 1050

## Inflation Adjustment of Civil Monetary Penalties

**AGENCY:** Office of the General Counsel, U.S. Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (''DOE'') publishes this final rule to adjust DOE's civil monetary penalties (''CMPs'') for inflation as mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (collectively referred to herein as ''the Act''). This rule adjusts CMPs within the jurisdiction of DOE to the maximum amount required by the Act.

**DATES:** This rule is effective on December 26, 2018.

**FOR FURTHER INFORMATION CONTACT:** Preeti Chaudhari, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–8078.

**SUPPLEMENTARY INFORMATION:**

I. Background
II. Method of Calculation
III. Summary of the Final Rule
IV. Final Rulemaking
V. Regulatory Review

### I. Background

In order to improve the effectiveness of CMPs and to maintain their deterrent effect, the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note (''the Inflation Adjustment Act''), as further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74) (''the 2015 Act''), requires Federal agencies to adjust each CMP provided by law within the jurisdiction of the agency. The 2015 Act requires agencies to adjust the level of CMPs with an initial ''catch-up'' adjustment through an interim final rulemaking and to make subsequent annual adjustments for inflation, notwithstanding 5 U.S.C. 553. DOE's initial catch-up adjustment interim final rule was published June 28, 2016 (81 FR 41790) and adopted as final without amendment on December 30, 2016 (81 FR 96349). The 2015 Act also provides that any increase in a CMP shall apply only to CMPs, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect.

In accordance with the 2015 Act, the Office of Management and Budget (OMB) must issue annually guidance on adjustments to civil monetary penalties. This final rule to adjust civil monetary penalties for 2019 is issued in accordance with applicable law and OMB's guidance memorandum on implementation of the 2019 annual adjustment.[1]

### II. Method of Calculation

The method of calculating CMP adjustments applied in this final rule is required by the 2015 Act. Under the 2015 Act, annual inflation adjustments subsequent to the initial catch-up adjustment are to be based on the percent change between the October Consumer Price Index for all Urban Consumers (CPI–U) preceding the date of the adjustment, and the prior year's October CPI–U. Pursuant to the aforementioned OMB guidance memorandum, the adjustment multiplier for 2019 is 1.02522. In order to complete the 2019 annual adjustment, each CMP is multiplied by the 2019 adjustment multiplier. Under the 2015 Act, any increase in CMP must be rounded to the nearest multiple of $1.

### III. Summary of the Final Rule

The following list summarizes DOE authorities containing CMPs, and the penalties before and after adjustment.

[1] OMB's annual guidance memorandum was issued on December 14, 2018, providing the 2019 adjustment multiplier and addressing how to apply it.

| DOE authority containing civil monetary penalty | Before adjustment | After adjustment |
|---|---|---|
| 10 CFR 207.7 | $10,371 | $10,633 |
| 10 CFR 218.42 | $22,464 | $23,031 |
| 10 CFR 429.120 | $449 | $460 |
| 10 CFR 431.382 | $449 | $460 |
| 10 CFR 490.604 | $8,697 | $8,916 |
| 10 CFR 501.181 | −$91,901 | −$94,219 |
| | −$8/mcf | −$8/mcf |
| | −$37/bbl | −$38/bbl |
| 10 CFR 601.400 and App A | − minimum $19,639 | − minimum $20,134 |
| | − maximum $196,387 | − maximum $201,340 |
| 10 CFR 820.81 | $205,211 | $210,386 |
| 10 CFR 824.1 and App A | $146,648 | $150,346 |
| 10 CFR 824.4 and App A | $146,648 | $150,346 |
| 10 CFR 851.5 and App B | $95,237 | $97,639 |
| 10 CFR 1013.3 | $11,181 | $11,463 |
| 10 CFR 1017.29 | $264,093 | $270,753 |
| 10 CFR 1050.303 | $20,021 | $20,526 |
| 42 U.S.C. 2282(a) [2] | $100,000 | $102,522 |
| 50 U.S.C. 2731 [3] | $8,977 | $9,203 |

## IV. Final Rulemaking

The 2015 Act requires that annual adjustments for inflation subsequent to the initial ''catch-up'' adjustment be made notwithstanding 5 U.S.C. 553.

## V. Regulatory Review

### *A. Executive Order 12866*

This rule has been determined not to be a significant regulatory action under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

### *B. National Environmental Policy Act*

DOE has determined that this final rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A5 of appendix A to subpart D, 10 CFR part 1021, which applies to a rulemaking that amends an existing rule or regulation and that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment. As discussed above, the 2015 Act requires that annual inflation adjustments subsequent to the initial catch-up adjustment be made notwithstanding 5 U.S.C. 553. Because a notice of proposed rulemaking is not required for this action pursuant to 5 U.S.C. 553, or any other law, no regulatory flexibility analysis has been prepared for this final rule.

### *D. Paperwork Reduction Act*

This final rule imposes no new information collection requirements subject to the Paperwork Reduction Act.

### *E. Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Section 201 excepts agencies from assessing effects on State, local or tribal governments or the private sector of rules that incorporate requirements specifically set forth in law. Because this rule incorporates requirements specifically set forth in 28 U.S.C. 2461 note, DOE is not required to assess its regulatory effects under section 201. Unfunded Mandates Reform Act sections 202 and 205 do not apply to this action because they apply only to rules for which a general notice of proposed rulemaking is published. Nevertheless, DOE has determined that this regulatory action does not impose a Federal mandate on State, local, or tribal governments or on the public sector.

### *F. Treasury and General Government Appropriations Act, 1999*

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

### *G. Executive Order 13132*

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

### *H. Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification

[2] Adjustment applies only to violations of 42 U.S.C. 2077(b), consistent with Public Law 115–232 (August 13, 2018).

[3] Implemented by 10 CFR 820.81, 10 CFR 851.5, and appendix B to 10 CFR part 851.

and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

*I. Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*J. Executive Order 13211*

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

*K. Congressional Notification*

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

*L. Approval of the Office of the Secretary*

The Secretary of Energy has approved publication of this final rule.

**List of Subjects**

*10 CFR Part 207*

Administrative practice and procedure, Energy, Penalties.

*10 CFR Part 218*

Administrative practice and procedure, Penalties, Petroleum allocation.

*10 CFR Part 429*

Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

*10 CFR Part 431*

Administrative practices and procedure, Confidential business information, Energy conservation, Incorporation by reference, Reporting and recordkeeping requirements.

*10 CFR Part 490*

Administrative practice and procedure, Energy conservation, Penalties.

*10 CFR Part 501*

Administrative practice and procedure, Electric power plants, Energy conservation, Natural gas, Petroleum.

*10 CFR Part 601*

Government contracts, Grant programs, Loan programs, Penalties.

*10 CFR Part 820*

Administrative practice and procedure, Government contracts, Penalties, Radiation protection.

*10 CFR Part 824*

Government contracts, Nuclear materials, Penalties, Security measures.

*10 CFR Part 851*

Civil penalty, Hazardous substances, Occupational safety and health, Safety, Reporting and recordkeeping requirements.

*10 CFR Part 1013*

Administrative practice and procedure, Claims, Fraud, Penalties.

*10 CFR Part 1017*

Administrative practice and procedure, Government contracts, National Defense, Nuclear Energy, Penalties, Security measures.

*10 CFR Part 1050*

Decorations, medals, awards, Foreign relations, Government employees, Government property, Reporting and recordkeeping requirements.

Dated: Signed in Washington, DC, on December 17, 2018.

**Theodore J. Garrish,**

*Acting General Counsel.*

For the reasons set forth in the preamble, DOE amends chapters II, III, and X of title 10 of the Code of Federal Regulations as set forth below.

## PART 207—COLLECTION OF INFORMATION

■ 1. The authority citation for part 207 continues to read as follows:

**Authority:** 15 U.S.C. 787 *et seq.;* 15 U.S.C. 791 *et seq.;* E.O. 11790, 39 FR 23185; 28 U.S.C. 2461 note.

■ 2. Section 207.7 is amended by revising the first sentence of paragraph (c)(1) to read as follows:

### § 207.7 Sanctions.

* * * * *

(c) * * * (1) Any person who violates any provision of this subpart or any order issued pursuant thereto shall be subject to a civil penalty of not more than $10,633 for each violation. * * *

* * * * *

## PART 218—STANDBY MANDATORY INTERNATIONAL OIL ALLOCATION

■ 3. The authority citation for part 218 continues to read as follows:

**Authority:** 15 U.S.C. 751 *et seq.;* 15 U.S.C. 787 *et seq.;* 42 U.S.C. 6201 *et seq.;* 42 U.S.C. 7101 *et seq.;* E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267; 28 U.S.C. 2461 note.

■ 4. Section 218.42 is amended by revising paragraph (b)(1) to read as follows:

**§ 218.42 Sanctions.**

* * * * *

(b) * * * (1) Any person who violates any provision of this part or any order issued pursuant thereto shall be subject to a civil penalty of not more than $23,031 for each violation.

* * * * *

## PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 5. The authority citation for part 429 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 6. Section 429.120 is amended by revising the first sentence to read as follows:

**§ 429.120 Maximum civil penalty.**

Any person who knowingly violates any provision of § 429.102(a) may be subject to assessment of a civil penalty of no more than $460 for each violation. * * *

## PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 7. The authority citation for part 431 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 8. Section 431.382 is amended by revising paragraph (b) to read as follows:

**§ 431.382 Prohibited acts.**

* * * * *

(b) In accordance with sections 333 and 345 of the Act, any person who knowingly violates any provision of paragraph (a) of this section may be subject to assessment of a civil penalty of no more than $460 for each violation.

* * * * *

## PART 490—ALTERNATIVE FUEL TRANSPORTATION PROGRAM

■ 9. The authority citation for part 490 continues to read as follows:

**Authority:** 42 U.S.C. 7191 *et seq.;* 42 U.S.C. 13201, 13211, 13220, 13251 *et seq;* 28 U.S.C. 2461 note.

■ 10. Section 490.604 is amended by revising paragraph (a) to read as follows:

**§ 490.604 Penalties and Fines.**

(a) *Civil penalties.* Whoever violates § 490.603 shall be subject to a civil penalty of not more than $8,916 for each violation.

* * * * *

## PART 501—ADMINISTRATIVE PROCEDURES AND SANCTIONS

■ 11. The authority citation for part 501 continues to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.;* 42 U.S.C. 8301 *et seq.;* 42 U.S.C. 8701 *et seq.;* E.O. 12009, 42 FR 46267; 28 U.S.C. 2461 note.

■ 12. Section 501.181 is amended by revising paragraph (c)(1) to read as follows:

**§ 501.181 Sanctions.**

* * * * *

(c) * * * (1) Any person who violates any provisions of the Act (other than section 402) or any rule or order thereunder will be subject to the following civil penalty, which may not exceed $94,219 for each violation: Any person who operates a powerplant or major fuel burning installation under an exemption, during any 12-calendar-month period, in excess of that authorized in such exemption will be assessed a civil penalty of up to $8 for each MCF of natural gas or up to $38 for each barrel of oil used in excess of that authorized in the exemption.

* * * * *

## PART 601—NEW RESTRICTIONS ON LOBBYING

■ 13. The authority citation for part 601 continues to read as follows:

**Authority:** 31 U.S.C. 1352; 42 U.S.C. 7254 and 7256; 31 U.S.C. 6301–6308; 28 U.S.C. 2461 note.

■ 14. Section 601.400 is amended by revising paragraphs (a), (b) and (e) to read as follows:

**§ 601.400 Penalties.**

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $20,134 and not more than $201,340 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B to this part) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $20,134 and not more than $201,340 for each such failure.

* * * * *

(e) First offenders under paragraph (a) or (b) of this section shall be subject to a civil penalty of $20,134, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $20,134 and $201,340, as determined by the agency head or his or her designee.

* * * * *

### Appendix A to Part 601 [Amended]

■ 15. Appendix A to part 601 is amended by:

■ a. Removing ''$19,639'' wherever it appears and adding in its place ''$20,134''; and

■ b. Removing ''$196,387'' wherever it appears and adding in its place ''$201,340''.

## PART 820—PROCEDURAL RULES FOR DOE NUCLEAR ACTIVITIES

■ 16. The authority citation for part 820 continues to read as follows:

**Authority:** 42 U.S.C. 2201; 2282(a); 7191; 28 U.S.C. 2461 note; 50 U.S.C. 2410.

■ 17. Section 820.81 is amended by revising the first sentence to read as follows:

**§ 820.81 Amount of penalty.**

Any person subject to a penalty under 42 U.S.C. 2282a shall be subject to a civil penalty in an amount not to exceed $210,386 for each such violation. * * *

## PART 824—PROCEDURAL RULES FOR THE ASSESSMENT OF CIVIL PENALTIES FOR CLASSIFIED INFORMATION SECURITY VIOLATIONS

■ 18. The authority citation for part 824 continues to read as follows:

**Authority:** 42 U.S.C. 2201, 2282b, 7101 *et seq.,* 50 U.S.C. 2401 *et seq.;* 28 U.S.C. 2461 note.

■ 19. Section 824.1 is amended by revising the second sentence to read as follows:

**§ 824.1 Purpose and scope.**

* * * Subsection a. provides that any person who has entered into a contract or agreement with the Department of Energy, or a subcontract or subagreement thereto, and who violates (or whose employee violates) any applicable rule, regulation or order under the Act relating to the security or safeguarding of Restricted Data or other classified information, shall be subject to a civil penalty not to exceed $150,346 for each violation. * * *

■ 20. Section 824.4 is amended by revising paragraph (c) to read as follows:

**§ 824.4 Civil penalties.**

* * * * *

(c) The Director may propose imposition of a civil penalty for violation of a requirement of a regulation or rule under paragraph (a) of this section or a compliance order issued under paragraph (b) of this section, not to exceed $150,346 for each violation.

* * * * *

## PART 851—WORKER SAFETY AND HEALTH PROGRAM

■ 21. The authority citation for part 851 continues to read as follows:

**Authority:** 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 42 U.S.C. 5801 *et seq.;* 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* 28 U.S.C. 2461 note.

■ 22. Section 851.5 is amended by revising the first sentence of paragraph (a) to read as follows:

### § 851.5 Enforcement.

(a) A contractor that is indemnified under section 170d. of the AEA (or any subcontractor or supplier thereto) and that violates (or whose employee violates) any requirement of this part shall be subject to a civil penalty of up to $97,639 for each such violation. * * *

* * * * *

■ 23. Appendix B to part 851 is amended by:

■ a. Revising the last sentences of paragraphs (b)(1) and (2) in section VI; and

■ b. Revising paragraph 1.(e)(1) in section IX.

The revisions read as follows:

**Appendix B to Part 851—General Statement of Enforcement Policy**

* * * * *

VI. Severity of Violations

* * * * *

(b) * * *

(1) * * * A Severity Level I violation would be subject to a base civil penalty of up to 100% of the maximum base civil penalty of $97,639.

(2) * * * A Severity Level II violation would be subject to a base civil penalty up to 50% of the maximum base civil penalty ($48,820).

* * * * *

IX. Enforcement Actions

* * * * *

*1. Notice of Violation*

* * * * *

(e) * * *

(1) DOE may assess civil penalties of up to $97,639 per violation per day on contractors (and their subcontractors and suppliers) that are indemnified by the Price-Anderson Act, 42 U.S.C. 2210(d). *See* 10 CFR 851.5(a).

* * * * *

## PART 1013—PROGRAM FRAUD CIVIL REMEDIES AND PROCEDURES

■ 24. The authority citation for part 1013 continues to reads as follows:

**Authority:** 31 U.S.C. 3801–3812; 28 U.S.C. 2461 note.

■ 25. Section 1013.3 is amended by revising paragraphs (a)(1)(iv) and (b)(1)(ii) to read as follows:

### § 1013.3 Basis for civil penalties and assessments.

(a) * * *

(1) * * *

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $11,463 for each such claim.

* * * * *

(b) * * *

(1) * * *

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $11,463 for each such statement.

* * * * *

## PART 1017—IDENTIFICATION AND PROTECTION OF UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION

■ 26. The authority citation for part 1017 continues to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* 42 U.S.C. 2168; 28 U.S.C. 2461 note.

■ 27. Section 1017.29 is amended by revising paragraph (c) to read as follows:

### § 1017.29 Civil penalty.

* * * * *

(c) *Amount of penalty.* The Director may propose imposition of a civil penalty for violation of a requirement of a regulation under paragraph (a) of this section or a compliance order issued under paragraph (b) of this section, not to exceed $270,753 for each violation.

* * * * *

## PART 1050—FOREIGN GIFTS AND DECORATIONS

■ 28. The authority citation for part 1050 continues to read as follows:

**Authority:** The Constitution of the United States, Article I, Section 9; 5 U.S.C. 7342; 22 U.S.C. 2694; 42 U.S.C. 7254 and 7262; 28 U.S.C. 2461 note.

■ 29. Section 1050.303 is amended by revising the last sentence in paragraph (d) to read as follows:

### § 1050.303 Enforcement.

* * * * *

(d) * * * The court in which such action is brought may assess a civil penalty against such employee in any amount not to exceed the retail value of the gift improperly solicited or received plus $20,526.

[FR Doc. 2018–27670 Filed 12–21–18; 8:45 am]

BILLING CODE 6450–01–P

---

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 25

**[Docket No. FAA–2018–1054; Special Conditions No. 25–740–SC]**

## Special Conditions: Airbus Model A330–200, A330–200F, A330–300 and A330–900 Series Airplanes; Electronic System Security Protection From Unauthorized Internal Access

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions; request for comments.

**SUMMARY:** These special conditions are issued for the Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes. These airplanes will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. This design feature is airplane electronic systems and networks that allow access, from aircraft internal sources (*e.g.,* wireless devices, internet connectivity), to the airplane's previously isolated, internal, electronic components. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

**DATES:** This action is effective on Airbus on December 26, 2018. Send comments on or before February 11, 2019.

**ADDRESSES:** Send comments identified by Docket No. FAA–2018–1054 using any of the following methods:

• *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.

• *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* Fax comments to Docket Operations at 202–493–2251.

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

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

**FOR FURTHER INFORMATION CONTACT:**

Thuan Nguyen, Airplane and Flight Crew Interface Section, AIR–671, Transport Standards Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206–231–3365; email *Thuan.T.Nguyen@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

The substance of these special conditions has been published in the **Federal Register** for public comment in several prior instances with no substantive comments received. Therefore, the FAA has determined that prior public notice and comment are unnecessary, and finds that, for the same reason, good cause exists for adopting these special conditions upon publication in the **Federal Register**.

## Comments Invited

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

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

## Background

On January 20, 2015, Airbus applied for an amendment to Type Certificate No. A46NM to include the new Model A330–900 series airplane. The Airbus Model A330–900 series airplane is a derivative of the Model A330–300 series airplane currently approved under Type Certificate No. A46NM.

On August 9, 2018, Airbus applied for a change to Type Certificate No. A46NM for the installation of electronic system architecture or Flight Operations and Maintenance Exchanger (FOMAX) equipment in Model A330–200, A330–200F, A330–300, and A330–900 series airplanes. These airplanes are twin-engine, transport category airplanes with a maximum passenger seating capacity of 406 for the A330–200 series and a maximum passenger seating capacity of 440 for the A330–300 and A330–900 series airplanes. These airplanes have a maximum takeoff weight of 533,518 pounds.

## Type Certification Basis

Under the provisions of title 14, Code of Federal Regulations (14 CFR) 21.101, Airbus must show that the Model A330–900 series airplane and the Model A330–200, A330–200F, and A330–300 series airplanes, as changed, meet the applicable provisions of the regulations listed in Type Certificate No. A46NM, or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

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

## Novel or Unusual Design Features

The Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes will incorporate the following novel or unusual design feature:

The installation and activation of electronic network system architecture or Flight Operations and Maintenance Exchanger (FOMAX) equipment that allows access from internal sources (*e.g.,* wireless devices, internet connectivity) to the airplane's once isolated internal electronic components.

## Discussion

The Airbus airplane Model A330–200, A330–200F, A330–300, and A330–900 series electronic network system architecture is novel or unusual for commercial transport airplanes because it allows connection to previously isolated data networks connected to systems that perform functions required for the safe operation of the airplane. This data network and design integration may result in security vulnerabilities from intentional or unintentional corruption of data and systems critical to the safety and maintenance of the airplane. The existing regulations and guidance material did not anticipate this type of system architecture or electronic access to aircraft systems. Furthermore, 14 CFR regulations and the current system safety assessment policy and techniques do not address potential security vulnerabilities, which could be exploited by unauthorized access to airplane networks and servers. Therefore, these special conditions are to ensure that the security of airplane systems and networks is not compromised by unauthorized wired or wireless internal access.

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

## Applicability

As discussed above, these special conditions are applicable to the Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes. Should Airbus apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well.

## Conclusion

This action affects only a certain novel or unusual design feature on Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes. It is not a rule of general applicability.

## List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

## Authority Citation

The authority citation for these special conditions is as follows:

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

## The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes.

1. The applicant must ensure that the design provides isolation from, or airplane electronic system security protection against, access by unauthorized sources internal to the airplane. The design must prevent inadvertent and malicious changes to, and all adverse impacts upon, airplane equipment, systems, networks, or other assets required for safe flight and operations.

2. The applicant must establish appropriate procedures to allow the operator to ensure that continued airworthiness of the aircraft is maintained, including all post type certification modifications that may have an impact on the approved electronic system security safeguards.

Issued in Des Moines, Washington, on December 12, 2018.

**Victor Wicklund,**

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

[FR Doc. 2018–27818 Filed 12–21–18; 8:45 am]

BILLING CODE 4910–13–P

---

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 25

**[Docket No. FAA–2018–1053; Special Conditions No. 25–739–SC]**

# Special Conditions: Airbus Model A330–200, A330–200F, A330–300 and A330–900 Series Airplanes; Electronic System Security Protection From Unauthorized External Access

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions; request for comments.

**SUMMARY:** These special conditions are issued for the Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes. These airplanes will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. This design feature is airplane electronic systems and networks that allow access from external sources (*e.g.,* wireless devices, internet connectivity) to the airplane's internal electronic components. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

**DATES:** This action is effective on Airbus on December 26, 2018. Send comments on or before February 11, 2019.

**ADDRESSES:** Send comments identified by Docket No. FAA–2018–1053 using any of the following methods:

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

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

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

**FOR FURTHER INFORMATION CONTACT:** Thuan Nguyen, Airplane and Flight Crew Interface Section, AIR–671, Transport Standards Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206–231–3365; email *Thuan.T.Nguyen@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

The substance of these special conditions has been published in the **Federal Register** for public comment in several prior instances with no substantive comments received. Therefore, the FAA has determined that prior public notice and comment are unnecessary, and finds that, for the same reason, good cause exists for adopting these special conditions upon publication in the **Federal Register**.

## Comments Invited

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

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

**Background**

On January 20, 2015, Airbus applied for an amendment to Type Certificate No. A46NM to include the new Model A330–900 series airplane. The Airbus Model A330–900 series airplane is a derivative of the Model A330–300 series airplane currently approved under Type Certificate No. A46NM.

On August 9, 2018, Airbus applied for a change to Type Certificate No. A46NM for the installation of electronic system architecture or Flight Operations and Maintenance Exchanger (FOMAX) equipment in Model A330–200, A330–200F, A330–300, and A330–900 series airplanes. These airplanes are twin-engine, transport category airplanes with a maximum passenger seating capacity of 406 for the A330–200 series and a maximum passenger seating capacity of 440 for the A330–300 and A330–900 series airplanes. These airplanes have a maximum takeoff weight of 533,518 pounds.

**Type Certification Basis**

Under the provisions of title 14, Code of Federal Regulations (14 CFR) 21.101, Airbus must show that the Model A330–900 series airplane and the Model A330–200, A330–200F, and A330–300 series airplanes, as changed, meet the applicable provisions of the regulations listed in Type Certificate No. A46NM, or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

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

**Novel or Unusual Design Features**

The Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes will incorporate the following novel or unusual design feature:

The installation and activation of electronic network system architecture or Flight Operations and Maintenance Exchanger (FOMAX) equipment that allows access from external sources (*e.g.,* wireless devices, internet connectivity) to the airplane's internal electronic components.

**Discussion**

The Airbus airplane Model A330–200, A330–200F, A330–300, and A330–900 series architecture and network configuration may allow increased connectivity to, and access from, external network sources and airline operations and maintenance networks to the aircraft control domain and airline information services domain. The aircraft control domain and airline information services domain perform functions required for the safe operation and maintenance of the airplane. Previously, these domains had very limited connectivity with external network sources. The architecture and network configuration may allow the exploitation of network security vulnerabilities resulting in intentional or unintentional destruction, disruption, degradation, or exploitation of data, systems, and networks critical to the safety and maintenance of the airplane.

The existing regulations and guidance material did not anticipate these types of airplane system architectures. Furthermore, 14 CFR regulations and the current system safety assessment policy and techniques do not address potential security vulnerabilities, which could be exploited by unauthorized access to airplane networks, data buses, and servers. Therefore, these special conditions are to ensure that the security (*i.e.,* confidentiality, integrity, and availability) of airplane systems is not compromised by unauthorized wired or wireless electronic connections.

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

**Applicability**

As discussed above, these special conditions are applicable to the Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes. Should Airbus apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well.

**Conclusion**

This action affects only a certain novel or unusual design feature on Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes. It is not a rule of general applicability.

**List of Subjects in 14 CFR Part 25**

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

**Authority Citation**

The authority citation for these special conditions is as follows:

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

**The Special Conditions**

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Airbus Model A330–200, A330–200F, A330–300, and A330–900 series airplanes.

1. The applicant must ensure that the airplane electronic systems are protected from access by unauthorized sources external to the airplane, including those possibly caused by maintenance activity.

2. The applicant must ensure that electronic system-security threats are identified and assessed, and that effective electronic system-security protection strategies are implemented to protect the airplane from all adverse impacts on safety, functionality, and continued airworthiness.

3. The applicant must establish appropriate procedures to allow the operator to ensure that continued airworthiness of the aircraft is maintained, including all post type certification modifications that may have an impact on the approved electronic system security safeguards.

Issued in Des Moines, Washington, on December 12, 2018.

**Victor Wicklund,**

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

[FR Doc. 2018–27817 Filed 12–21–18; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2016–9392; Product Identifier 2016–NM–003–AD; Amendment 39–19499; AD 2018–23–12]**

**RIN 2120–AA64**

## Airworthiness Directives; Zodiac Aero Evacuation Systems (Also Known as Air Cruisers Company) Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; correction.

**SUMMARY:** The FAA is correcting an airworthiness directive (AD) that published in the **Federal Register**. That AD applies to Zodiac Aero Evacuation Systems (also known as Air Cruisers Company) fusible plugs installed on emergency evacuation equipment for various transport category airplanes. As published, the email address for requesting service information specified in the preamble and regulatory text is incorrect. This document corrects that error. In all other respects, the original document remains the same.

**DATES:** This correction is effective December 28, 2018.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of December 28, 2018 (83 FR 59290, November 23, 2018).

**ADDRESSES:** For service information identified in this final rule, contact Air Cruisers, 1747 State Route 34, Wall Township, NJ 07727–3935; phone 732–681–3527; email *ZAESTechPubs@zodiacaerospace.com.* You may view this referenced service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9392.

### Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9392; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for Docket Operations (phone: 800–647–5527) is, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

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

**SUPPLEMENTARY INFORMATION:** As published, AD 2018–23–12, Amendment 39–19499 (83 FR 59290, November 23, 2018) (''AD 2018–23–12''), requires an inspection of the fusible plugs to determine the part number and lot number, and replacement of certain fusible plugs That AD applies to fusible plugs installed on emergency evacuation equipment for various transport category airplanes.

### Need for the Correction

As published, the email address for service information specified in the **ADDRESSES** section of the preamble and paragraph (l)(3) of the regulatory text of AD 2018–23–12 is incorrect. The email address *technicalpublications@zodiacaerospace.com* was given for requesting service information identified in AD 2018–23–12; the correct email address is *ZAESTechPubs@zodiacaerospace.com.*

### Related Service Information Under 1 CFR Part 51

We reviewed the following Air Cruisers service information. The service information identifies the affected fusible plugs. In addition, it describes procedures for inspecting and replacing affected fusible plugs. These documents are distinct since they apply to different airplane models or configurations.

- Air Cruisers Service Bulletin 737 103–25–50, dated August 27, 2010.
- Air Cruisers Service Bulletin 757 105–25–80, dated August 27, 2010.
- Air Cruisers Service Bulletin 757 105–25–81, dated August 27, 2010.
- Air Cruisers Service Bulletin 767 106–25–10, Rev. No. 1, dated October 15, 2010.
- Air Cruisers Service Bulletin 777 107–25–29, Rev. No. 1, dated July 8, 2011.
- Air Cruisers Service Bulletin A300/A310 001–25–19, dated August 27, 2010.
- Air Cruisers Service Bulletin A300/A310 003–25–33, dated August 27, 2010.
- Air Cruisers Service Bulletin A310 002–25–08, dated August 27, 2010.
- Air Cruisers Service Bulletin A320 004–25–87, Rev. No. 2, dated January 7, 2011.
- Air Cruisers Service Bulletin A321 005–25–21, dated August 27, 2010.
- Air Cruisers Service Bulletin BAe 146 201–25–23, dated December 10, 2010.
- Air Cruisers Service Bulletin F28 352–25–02, dated December 10, 2010.
- Air Cruisers Service Bulletin F100 351–25–07, dated December 10, 2010.
- Air Cruisers Service Bulletin Liferaft 35–25–79, dated August 27, 2010.
- Air Cruisers Service Bulletin MD11 305–25–35, dated August 27, 2010.
- Air Cruisers Service Bulletin MD80/90/717 304–25–45, dated August 27, 2010.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

### Correction of Publication

This document corrects an error and correctly adds the AD as an amendment to 14 CFR 39.13. Although no other part of the preamble or regulatory information has been corrected, we are publishing the entire rule in the **Federal Register**.

The effective date of this AD remains December 28, 2018.

Since this action only corrects the email address for requesting service information, it has no adverse economic impact and imposes no additional burden on any person. Therefore, we have determined that notice and public procedures are unnecessary.

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Correction

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Corrected]

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

**2018–23–12 Zodiac Aero Evacuation Systems (also known as Air Cruisers Company):** Amendment 39–19499; Docket No. FAA–2016–9392; Product Identifier 2016–NM–003–AD.

**(a) Effective Date**

This AD is effective December 28, 2018.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Zodiac Aero Evacuation Systems (also known as Air Cruisers Company) fusible plugs installed on emergency evacuation equipment identified in the service information specified in paragraphs (c)(1) through (c)(16) of this AD. These affected fusible plugs might be installed on the emergency evacuation equipment of the following manufacturers' airplanes: Airbus SAS, The Boeing Company, BAE Systems (Operations) Limited, and Fokker Services B.V.

(1) Air Cruisers Service Bulletin 737 103–25–50, dated August 27, 2010.

(2) Air Cruisers Service Bulletin 757 105–25–80, dated August 27, 2010.

(3) Air Cruisers Service Bulletin 757 105–25–81, dated August 27, 2010.

(4) Air Cruisers Service Bulletin 767 106–25–10, Rev. No. 1, dated October 15, 2010.

(5) Air Cruisers Service Bulletin 777 107–25–29, Rev. No. 1, dated July 8, 2011.

(6) Air Cruisers Service Bulletin A300/A310 001–25–19, dated August 27, 2010.

(7) Air Cruisers Service Bulletin A300/A310 003–25–33, dated August 27, 2010.

(8) Air Cruisers Service Bulletin A310 002–25–08, dated August 27, 2010.

(9) Air Cruisers Service Bulletin A320 004–25–87, Rev. No. 2, dated January 7, 2011.

(10) Air Cruisers Service Bulletin A321 005–25–21, dated August 27, 2010.

(11) Air Cruisers Service Bulletin BAe 146 201–25–23, dated December 10, 2010.

(12) Air Cruisers Service Bulletin F28 352–25–02, dated December 10, 2010.

(13) Air Cruisers Service Bulletin F100 351–25–07, dated December 10, 2010.

(14) Air Cruisers Service Bulletin Liferaft 35–25–79, dated August 27, 2010.

(15) Air Cruisers Service Bulletin MD11 305–25–35, dated August 27, 2010.

(16) Air Cruisers Service Bulletin MD80/90/717 304–25–45, dated August 27, 2010.

**(d) Subject**

Air Transport Association (ATA) of America Code 25, Equipment/furnishings.

**(e) Unsafe Condition**

This AD was prompted by reports indicating that affected fusible plugs activated (vented gas) below the rated temperature. We are issuing this AD to address fusible plugs that might activate below the rated temperature and render the evacuation system unusable.

**(f) Compliance**

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

**(g) Fusible Plug Identification**

Within 42 months after the effective date of this AD, do an inspection to determine if any fusible plug has part number (P/N) B13984–3, stamped with Lot PA–21 or PA–22. A review of the airplane maintenance records is acceptable to make this determination if it can be conclusively determined from that review that a part not having P/N B13984–3, stamped with Lot PA–21 or PA–22, has been installed.

Note 1 to paragraph (g) of this AD: Guidance for performing the inspection specified in paragraph (g) of this AD can be found in applicable service information specified in paragraphs (c)(1) through (c)(16) of this AD and the applicable component maintenance manuals (CMMs) that have incorporated the appropriate Air Cruisers service information.

**(h) Replacement of Affected Fusible Plug**

If, during the inspection or records review required by paragraph (g) of this AD, it is determined that any fusible plug has part number (P/N) B13984–3, stamped with Lot PA–21 or PA–22: Within 42 months after the effective date of this AD, replace that fusible plug with a serviceable fusible plug P/N B13984–3 that is not stamped with Lot PA–21 or PA–22.

Note 2 to paragraph (h) of this AD: Guidance can be found in the applicable CMM for the replacement. In addition, Air Cruisers Service Information Letter (SIL) 25–246, Rev. No. 1, dated February 21, 2014, provides information regarding affected fusible plugs and guidance on the replacement.

**(i) Parts Installation Prohibition**

As of the effective date of this AD, no person may install on any airplane any fusible plug having P/N B13984–3, stamped with Lot PA–21 or PA–22.

**(j) Alternative Methods of Compliance (AMOCs)**

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

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

**(k) Related Information**

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

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (l)(3) and (l)(4) of this AD.

**(l) Material Incorporated by Reference**

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

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

(3) The following service information was approved for IBR on December 28, 2018 (83 FR 59290, November 23, 2018).

(i) Air Cruisers Service Bulletin 737 103–25–50, dated August 27, 2010.

(ii) Air Cruisers Service Bulletin 757 105–25–80, dated August 27, 2010.

(iii) Air Cruisers Service Bulletin 757 105–25–81, dated August 27, 2010.

(iv) Air Cruisers Service Bulletin 767 106–25–10, Rev. No. 1, dated October 15, 2010.

(v) Air Cruisers Service Bulletin 777 107–25–29, Rev. No. 1, dated July 8, 2011.

(vi) Air Cruisers Service Bulletin A300/A310 001–25–19, dated August 27, 2010.

(vii) Air Cruisers Service Bulletin A300/A310 003–25–33, dated August 27, 2010.

(viii) Air Cruisers Service Bulletin A310 002–25–08, dated August 27, 2010.

(ix) Air Cruisers Service Bulletin A320 004–25–87, Rev. No. 2, dated January 7, 2011.

(x) Air Cruisers Service Bulletin A321 005–25–21, dated August 27, 2010.

(xi) Air Cruisers Service Bulletin BAe 146 201–25–23, dated December 10, 2010.

(xii) Air Cruisers Service Bulletin F28 352–25–02, dated December 10, 2010.

(xiii) Air Cruisers Service Bulletin F100 351–25–07, dated December 10, 2010.

(xiv) Air Cruisers Service Bulletin Liferaft 35–25–79, dated August 27, 2010.

(xv) Air Cruisers Service Bulletin MD11 305–25–35, dated August 27, 2010.

(xvi) Air Cruisers Service Bulletin MD80/90/717 304–25–45, dated August 27, 2010.

(4) For service information identified in this AD, contact Air Cruisers, 1747 State Route 34, Wall Township, NJ 07727–3935; phone 732–681–3527; email *ZAESTechPubs@zodiacaerospace.com.*

(5) You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

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

Issued in Des Moines, Washington, on December 13, 2018.

**Michael Kaszycki,**

*Acting Director, System Oversight Division, Aircraft Certification Service.*

[FR Doc. 2018–27881 Filed 12–21–18; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2018–1039; Product Identifier 2018–NE–14–AD; Amendment 39–19531; AD 2018–26–01]**

**RIN 2120–AA64**

## Airworthiness Directives; CFM International S.A. Turbofan Engines

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** We are superseding Airworthiness Directive (AD) 2018–18–01 for all CFM International S.A. (CFM) Model CFM56–7B turbofan engines. AD 2018–18–01 required initial and repetitive inspections of certain fan blades and, if they fail the inspection, their replacement with parts eligible for installation. This AD requires the same initial and repetitive inspections but revises the compliance time for the initial inspections and revises the installation prohibition based on the updated compliance time. This AD was prompted by further analysis by the manufacturer that indicated a need to reduce the initial fan blade inspection interval based on an ongoing root cause investigation of an April 2018 engine failure. We are issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective January 10, 2019.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 10, 2019.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of May 14, 2018 (83 FR 19176, May 2, 2018).

We must receive any comments on this AD by February 11, 2019.

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

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

For service information identified in this final rule, contact CFM International Inc., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH, 45125; phone: 877–432–3272; fax: 877–432–3329; email: *aviation.fleetsupport@ge.com.* You may view this service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA, 01803. For information on the availability of this material at the FAA, call 781–238–7759. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1039.

### Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1039; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations (phone: 800–647–5527) is listed above. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Christopher McGuire, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA, 01803; phone: 781–238–7120; fax: 781–238–7199; email: *chris.mcguire@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued AD 2018–18–01, Amendment 39–19380 (83 FR 49272, October 1, 2018), (''AD 2018–18–01''), for all CFM model CFM56–7B turbofan engines. AD 2018–18–01 required initial and repetitive ultrasonic inspections (USI) or eddy current inspection (ECI) of certain fan blades and, if they fail the inspection, their replacement with parts eligible for installation. AD 2018–18–01 resulted from analysis by the manufacturer that indicated a need to reduce the repetitive fan blade inspection interval based on ongoing root cause investigation of an April 2018 engine failure. The April 2018 engine failure was the result of a fractured fan blade leading to the engine inlet cowl disintegrating and debris penetrating the fuselage, causing a loss of pressurization and prompting an emergency descent. One passenger fatality occurred as a result. We issued AD 2018–18–01 to reduce the repetitive inspection interval from 3,000 cycles to 1,600 cycles.

### Actions Since AD 2018–18–01 Was Issued

Since we issued AD 2018–18–01, CFM gained a better understanding of the fan blade failures based on the inspections and further analysis of the detected cracks and the April 2018 event. As a result, CFM has published CFM International Service Bulletin (SB) CFM56–7B S/B 72–1033, Revision 3, dated November 6, 2018, to reduce the initial inspection requirement from 20,000 cycles since new (CSN) to 17,000 CSN. We are issuing this AD to address the unsafe condition on these products.

### Related Service Information Under 1 CFR Part 51

We reviewed CFM International SB CFM56–7B S/B 72–1033, Revision 3, dated November 6, 2018, and Subtask 72–21–01–220–091, of Task 72–21–01–200–001, from the CFM56–7B Engine Shop Manual (ESM), Revision 57, dated January 15, 2018. CFM International SB CFM56–7B S/B 72–1033, Revision 3, describes procedures for performing a USI of the affected fan blades. Subtask 72–21–01–220–091, of Task 72–21–01–200–001, from the CFM56–7B ESM, describes procedures for performing an ECI of the affected fan blades. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

### Other Related Service Information

We also reviewed CFM SB CFM56–7B S/B 72–1019, dated March 24, 2017; CFM SB CFM56–7B S/B 72–1019, Revision 1, dated June 13, 2017; CFM SB CFM56–7B S/B 72–1024, dated July 26, 2017; CFM International SB CFM56–7B S/B 72–1033, Revision 2, dated July 27, 2018; CFM SB CFM56–7B S/B 72–1033, Revision 1, dated May 9, 2018; CFM SB CFM56–7B S/B 72–1033, dated April 20, 2018; and General Electric Field Support Technology (FST) Procedure 2370, dated December 9, 2016. These SBs and the FST provide information on performing the USI.

**FAA's Determination**

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**AD Requirements**

This AD requires initial and repetitive USI or ECI of certain fan blades and, if they fail the inspection, their replacement with parts eligible for installation.

**Interim Action**

We consider this AD interim action. An investigation to determine the cause of the failure is ongoing, and we may consider additional rulemaking if final action is identified.

**FAA's Justification and Determination of the Effective Date**

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule. Due to the reduction in the initial inspection interval, some fan blades have reached or exceeded the revised initial inspection threshold and will require inspection within 1,000 cycles after the effective date of this AD. Because of this, the compliance time for the required action is shorter than the time necessary for the public to comment and for the FAA to issue the final rule to ensure the unsafe condition is addressed. Therefore, we find good cause that notice and opportunity for prior public comment are impracticable. In addition, for the reasons stated above, we find that good cause exists for making this amendment effective in less than 30 days.

**Comments Invited**

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2018–1039 and product identifier 2018–NE–14–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this final rule. We will consider all comments received by the closing date and may amend this final rule because of those comments.

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

**Costs of Compliance**

We estimate that this AD affects 3,716 engines installed on 1,858 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED INSPECTION COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Inspect engine fan blade | 2 work-hours × $85 per hour = $170 | $0 | $170 | $631,720 |

We estimate the following costs to complete any necessary replacement of a single fan blade that would be required based on the results of the inspection. We have no way of determining the number of engines that might need fan blades to be replaced.

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Replace fan blade | 1 work-hour × $85 per hour = $85 | $51,400 | $51,485 |

**Authority for This Rulemaking**

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

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

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

**Regulatory Findings**

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

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

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

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

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

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

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2018–18–01, Amendment 39–19380 (83 FR 49272, October 1, 2018) and adding the following new AD:

**2018–26–01 CFM International S.A.:** Amendment 39–19531; Docket No. FAA–2018–1039; Product Identifier 2018–NE–14–AD.

**(a) Effective Date**

This AD is effective January 10, 2019.

**(b) Affected ADs**

This AD replaces AD 2018–18–01, Amendment 39–19380 (83 FR 49272, October 1, 2018).

**(c) Applicability**

This AD applies to CFM International S.A.(CFM) CFM56–7B20, CFM56–7B22, CFM56–7B22/B1, CFM56–7B24, CFM56–7B24/B1, CFM56–7B26, CFM56–7B26/B2, CFM56–7B27, CFM56–7B27A, CFM56–7B26/B1, CFM56–7B27/B1, CFM56–7B27/B3, CFM56–7B20/2, CFM56–7B22/2, CFM56–7B24/2, CFM56–7B26/2, CFM56–7B27/2, CFM56–7B20/3, CFM56–7B22/3, CFM56–7B22/3B1, CFM56–7B24/3, CFM56–7B24/3B1, CFM56–7B26/3, CFM56–7B26/3B1, CFM56–7B26/3B2, CFM56–7B27/3, CFM56–7B27/3B1, CFM56–7B27/3B3, CFM56–7B27A/3, CFM56–7B26/3F, CFM56–7B26/3B2F, CFM56–7B27/3F, CFM56–7B27/3B1F, CFM56–7B20E, CFM56–7B22E, CFM56–7B22E/B1, CFM56–7B24E, CFM56–7B24E/B1, CFM56–7B26E, CFM56–7B26E/B1, CFM56–7B26E/B2, CFM56–7B27AE, CFM56–7B27E, CFM56–7B27E/B1, CFM56–7B27E/B3, CFM56–7B26E/F, CFM56–7B26E/B2F, CFM56–7B27E/F, and CFM56–7B27E/B1F turbofan engine models.

**(d) Subject**

Joint Aircraft System Component (JASC) Code 7230, Turbine Engine Compressor Section.

**(e) Unsafe Condition**

This AD was prompted by further analysis by the manufacturer that indicated a need to reduce the initial fan blade inspection requirement based on its ongoing root cause investigation of an April 2018 engine failure that resulted in one fatality. We are issuing this AD to prevent failure of the fan blade. The unsafe condition, if not addressed, could result in failure of the fan blade, the engine inlet cowl disintegrating and debris penetrating the fuselage, causing a loss of pressurization, and prompting an emergency descent.

**(f) Compliance**

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

**(g) Required Actions**

(1) Perform an ultrasonic inspection (USI) or eddy current inspection (ECI) of the concave and convex sides of the fan blade dovetail as follows:

(i) For a fan blade with less than or equal to 16,000 cycles since new (CSN), inspect prior to accumulating 17,000 CSN.

(ii) For a fan blade with more than 16,000 and less than 20,000 CSN, inspect within 1,000 cycles but no later than 20,000 CSN.

(iii) For a fan blade with 20,000 or more CSN, inspect before further flight.

(iv) Thereafter, repeat this inspection no later than 1,600 cycles since the last inspection, or within 450 cycles after October 16, 2018, the effective date of AD 2018–18–01, whichever occurs later.

(v) Use the Accomplishment Instructions, paragraphs 3.A.(3)(a) through (i), of CFM International Service Bulletin (SB) CFM56–7B S/B 72–1033, Revision 3, dated November 6, 2018, to perform a USI or use the instructions in subtask 72–21–01–220–091, of task 72–21–01–200–001, from CFM CFM56–7B Engine Shop Manual, Revision 57, dated January 15, 2018, to perform an ECI.

(2) If any unserviceable indication, as specified in the applicable service information in paragraph (g)(1)(v) of this AD, is found during the inspections required by paragraph (g) of this AD, replace the fan blade before further flight with a part eligible for installation.

**(h) Installation Prohibition**

Do not install any replacement fan blade unless it meets one of the following criteria:

(1) The replacement fan blade has fewer than 17,000 CSN, or;

(2) The replacement fan blade has been inspected, per paragraph (g)(1) of this AD, within the last 1,600 cycles before installation.

**(i) Definition**

For the purpose of this AD, a ''replacement fan blade'' is a fan blade that is being installed into an engine from which it was not previously removed. Removing and reinstalling a fan blade for the purpose of relubrication is not subject to the Installation Prohibition of this AD.

**(j) Credit for Previous Actions**

You may take credit for the actions that are required by paragraph (g) of this AD, if you performed those actions before the effective date of this AD using CFM SB CFM56–7B S/B 72–1019, dated March 24, 2017; CFM SB CFM56–7B S/B 72–1019, Revision 1, dated June 13, 2017; CFM SB CFM56–7B S/B 72–1024, dated July 26, 2017; CFM SB CFM56–7B S/B 72–1033 dated April 20, 2018; CFM SB CFM56–7B S/B 72–1033, Revision 1, dated May 9, 2018; or CFM International SB CFM56–7B S/B 72–1033, Revision 2, dated July 27, 2018; or performed an ECI using the instructions in task 72–21–01–200–001, subtask 72–21–01–220–091 of CFM56–7B Engine Shop Manual, earlier than Revision 57, dated January 15, 2018.

**(k) Alternative Methods of Compliance (AMOCs)**

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

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

(3) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (k)(3)(i) and (k)(3)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(4) AMOCs approved previously for AD 2018–10–11 (83 FR 22836, May 17, 2018) and AD 2018–18–01 (83 FR 49272, October 1, 2018) are approved as AMOCs for the corresponding provisions of this AD.

**(l) Related Information**

For more information about this AD, contact Christopher McGuire, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7120; fax: 781–238–7199; email: *chris.mcguire@faa.gov.*

**(m) Material Incorporated by Reference**

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

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

(3) The following service information was approved for IBR on January 10, 2019.

(i) CFM International (CFM) Service Bulletin CFM56–7B S/B 72–1033, Revision 3, dated November 6, 2018.

(ii) [Reserved]

(4) The following service information was approved for IBR on May 14, 2018 (83 FR 19176, May 2, 2018).

(i) Subtask 72–21–01–220–091, of Task 72–21–01–200–001, from the CFM CFM56–7B Engine Shop Manual, Revision 57, dated January 15, 2018.

(ii) [Reserved]

(5) For CFM service information identified in this AD, contact CFM International Inc., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; phone: 877–432–3272; fax: 877–432–3329; email: *aviation.fleetsupport@ge.com.*

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

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

Issued in Burlington, Massachusetts, on December 18, 2018.

**Robert J. Ganley,**

*Manager, Engine & Propeller Standards Branch, Aircraft Certification Service.*

[FR Doc. 2018–27920 Filed 12–21–18; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2018–0669; Product Identifier 2017–SW–041–AD; Amendment 39–19532; AD 2018–26–02]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Helicopters (Previously Eurocopter France) Helicopters

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** We are superseding Airworthiness Directive (AD) 2016–25–19 for Airbus Helicopters (previously Eurocopter France) Model AS350B3 and EC130B4 helicopters. AD 2016–25–19 required inspecting the pilot's and co-pilot's throttle twist for proper operation. This new AD retains the requirements of AD 2016–25–19 and adds certain model helicopters to the applicability. The actions of this AD are intended to address an unsafe condition on these products.

**DATES:** This AD is effective January 30, 2019.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 30, 2019.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of February 2, 2017 (81 FR 95854, December 29, 2016).

**ADDRESSES:** For service information identified in this final rule, contact Airbus Helicopters, 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.helicopters.airbus.com/website/en/ref/Technical-Support_73.html.* You may the review service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0669.

### Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov in* Docket No. FAA–2018–0669; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Aviation Safety Agency (EASA) AD, any incorporated-by-reference service information, the economic evaluation, any comments received, and other information. The address for Docket Operations (phone: 800–647–5527) is Docket Operations, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** George Schwab, Aviation Safety Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *george.schwab@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to remove AD 2016–25–19, Amendment 39–18745 (81 FR 95854, December 29, 2016) (AD 2016–25–19) and add a new AD. AD 2016–25–19 applied to Airbus Helicopters Model AS350B3 and EC130B4 helicopters with an ARRIEL 2B1 engine with the two-channel Full Authority Digital Engine Control (FADEC) and with new twist grip modification (MOD) 073254 (for the Model AS350B3 helicopter) or MOD 073773 (for the Model EC130B4 helicopter). AD 2016–25–19 required repetitively inspecting the wiring, performing an insulation test, inspecting the pilot and copilot throttle twist grip controls, and testing the pilot and copilot throttle twist grip controls for proper functioning. The actions required in AD 2016–25–19 were intended to prevent unintended touchdown to the ground at a flight-idle power setting during a practice autorotation, damage to the helicopter, and injury to occupants.

The NPRM published in the **Federal Register** on August 8, 2018 (83 FR 39007). The NPRM proposed to retain the requirements of AD 2016–25–19 and expand the applicability by adding Model AS350B3 helicopters with an ARRIEL 2D engine installed and Model EC130T2 helicopters with an ARRIEL 2D engine installed.

The NPRM was prompted by AD No. 2017–0059, dated April 6, 2017 (EASA AD 2017–0059), issued by EASA, which is the Technical Agent for the Member States of the European Union, for Airbus Helicopters Model AS 350 B3, EC 130 B4, and EC 130 T2 helicopters. EASA advises that Airbus Helicopters added clarifications to the operational procedure, introduced a modification to apply water-tight protection to the microswitch connectors, and extended the applicability to helicopters with a Turbomeca ARRIEL 2D engine installed. Accordingly, EASA AD 2017–0059 retains the required actions and corrects the applicability of the previous EASA AD.

### Comments

We gave the public the opportunity to participate in developing this AD, but we did not receive any comments on the NPRM.

### FAA's Determination

These helicopters have been approved by the aviation authority of France and are approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, its technical representative, has notified us of the unsafe condition described in its AD. We have reviewed the relevant information and determined that an unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs and that air

safety and the public interest require adopting the AD requirements as proposed.

**Interim Action**

We consider this AD to be an interim action. If final action is later identified, we might consider further rulemaking then.

**Differences Between This AD and the EASA AD**

The EASA AD requires the initial inspections within 10 flight hours or 7 days; this AD requires compliance before the next autorotation training flight or before 100 hours time-in-service, whichever occurs earlier, as the unsafe condition only occurs when transitioning the throttle in-flight from flight to idle and back to flight, such as during a practice autorotation.

Additionally, the EASA AD requires installing Airbus Helicopters MOD 074263; this AD does not as it does not correct the unsafe condition.

**Related Service Information Under 1 CFR Part 51**

We reviewed one document that co-publishes three Airbus Helicopters Emergency Alert Service Bulletin (EASB) identification numbers: No. 05.00.61, Revision 3, dated June 15, 2015, for Model AS350B3 helicopters; No. 05.00.41, Revision 2, dated June 15, 2015, for the non-FAA type certificated Model AS550C3 helicopter; and No. 05A009, Revision 3, dated June 15, 2015, for Model EC130B4 helicopters. EASB Nos. 05.00.61 and 05A009 are incorporated by reference in AD 2016–25–19 and are retained for the requirements of this AD. EASB No. 05.00.41 is not incorporated by reference in AD 2016–25–19 and is not incorporated by reference in this AD. This service information applies to helicopters with an ARRIEL 2B1 engine installed and describes procedures for a functional check and installation of protection for micro-contacts (microswitches) 53Ka, 53Kb, and 65K (IDLE/FLIGHT mode).

We also reviewed one document that co-publishes three Airbus Helicopters EASB identification numbers: No. 05.00.77, Revision 1, dated June 15, 2015, for Model AS350B3 helicopters; No. 05.00.52, Revision 1, dated June 15, 2015, for the non-FAA type certificated Model AS550C3 helicopter; and No. 05A014, Revision 1, dated June 15, 2015, for Model EC130T2 helicopters. EASB Nos. 05.00.77 and 05A014 are incorporated by reference in this AD. EASB No. 05.00.52 is not incorporated by reference in this AD. This service information applies to helicopters with an ARRIEL 2D engine installed and describes procedures for a check of the protection for micro-contacts (microswitches) 53Ka, 53Kb, and 65K (IDLE/FLIGHT mode).

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

**Costs of Compliance**

We estimate that this AD affects 692 helicopters of U.S. Registry. We estimate that operators may incur the following costs in order to comply with this AD.

At an average labor rate of $85 per work-hour, it takes about 4 work-hours for the inspections and any necessary maintenance, for a total cost of $340 per helicopter and $235,280 for the U.S. fleet per inspection cycle.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**Adoption of the Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2016–25–19, Amendment 39–18745 (81 FR 95854, December 29, 2016), and adding the following new AD:

**2018–26–02 Airbus Helicopters (Previously Eurocopter France):** Amendment 39–19532; Docket No. FAA–2018–0669; Product Identifier 2017–SW–041–AD.

**(a) Applicability**

This AD applies to the following helicopters, certificated in any category:

(1) Model AS350B3 helicopters with an ARRIEL 2B1 engine with the two-channel Full Authority Digital Engine Control (FADEC) and with new twist grip modification (MOD) 073254 or with an ARRIEL 2D engine installed;

(2) Model EC130B4 helicopters with an ARRIEL 2B1 engine with the two-channel FADEC and with new twist grip MOD 073773 installed; and

(3) Model EC130T2 helicopters with an ARRIEL 2D engine installed.

**(b) Unsafe Condition**

This AD defines the unsafe condition as failure of one of the two contactors, 53Ka or 53Kb, which can prevent switching from ''IDLE'' mode to ''FLIGHT'' mode during autorotation training making it impossible to recover from a practice autorotation and compelling the pilot to continue the autorotation to the ground. This condition could result in unintended touchdown to the ground at a flight-idle power setting during a practice autorotation, damage to the helicopter, and injury to occupants.

**(c) Affected ADs**

This AD replaces AD 2016–25–19, Amendment 39–18745 (81 FR 95854, December 29, 2016).

**(d) Effective Date**

This AD becomes effective January 30, 2019.

**(e) Compliance**

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

**(f) Required Actions**

(1) Before the next practice autorotation or within 100 hours time-in-service (TIS), whichever occurs first, inspect the wiring, perform an insulation test, inspect the pilot and copilot throttle twist grip controls, and test the pilot and copilot throttle twist grip controls for proper functioning by following the Accomplishment Instructions, paragraph 3.B.1 through 3.B.6, of Airbus Helicopters Emergency Alert Service Bulletin (EASB) No. 05.00.61, Revision 3, dated June 15, 2015, for Model AS350B3 helicopters with an ARRIEL 2B1 engine; EASB No. 05.00.77, Revision 1, dated June 15, 2015, for Model AS350B3 helicopters with an ARRIEL 2D engine; EASB No. 05A009, Revision 3, dated June 15, 2015, for Model EC130B4 helicopters; or EASB No. 05A014, Revision 1, dated June 15, 2015, for Model EC130T2 helicopters, as appropriate for your model helicopter.

(2) Repeat the inspections in paragraph (f)(1) of this AD at intervals not to exceed the following compliance times. For purposes of this AD, salt laden conditions exist when a helicopter performs a flight from a takeoff and landing area, heliport, or airport less than 0.5 statute mile from salt water or performs a flight within 0.5 statute mile from salt water below an altitude of 1,000 ft. above ground or sea level.

(i) For helicopters that have operated in salt laden conditions since the previous inspection required by this AD, at intervals not to exceed 330 hours TIS.

(ii) For helicopters that have not operated in salt laden conditions since the previous inspection required by this AD, at intervals not to exceed 660 hours TIS.

**(g) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Safety Management Section, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: George Schwab, Aviation Safety Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Parkway, Fort Worth, Texas 76177; telephone (817) 222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

**(h) Additional Information**

The subject of this AD is addressed in European Aviation Safety Agency (EASA) AD No. 2017–0059, dated April 6, 2017. You may view the EASA AD on the internet at *http://www.regulations.gov* in Docket No. FAA–2018–0669.

**(i) Subject**

Joint Aircraft Service Component (JASC) Code: 7697, Engine Control System Wiring.

**(j) Material Incorporated by Reference**

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

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

(3) The following service information was approved for IBR on January 30, 2019.

(i) Airbus Helicopters Emergency Alert Service Bulletin (EASB) No. 05.00.77, Revision 1, dated June 15, 2015.

(ii) Airbus Helicopters EASB No. 05A014, Revision 1, dated June 15, 2015.

Note 1 to paragraph (j)(3): Airbus Helicopters EASB Nos. 05.00.77 and 05A014, both Revision 1 and dated June 15, 2015, are co-published as one document along with Airbus Helicopters EASB No. 05.00.52, Revision 1, dated June 15, 2015, which is not incorporated by reference in this AD.

(4) The following service information was approved for IBR on February 2, 2017 (81 FR 95854, December 29, 2016).

(i) Airbus Helicopters EASB No. 05.00.61, Revision 3, dated June 15, 2015.

(ii) Airbus Helicopters EASB No. 05A009, Revision 3, dated June 15, 2015.

Note 2 to paragraph (j)(4): Airbus Helicopters EASB Nos. 05.00.61 and 05A009, both Revision 3 and dated June 15, 2015, are co-published as one document along with Airbus Helicopters EASB No. 05.00.41, Revision 2, dated June 15, 2015, which is not incorporated by reference in this AD.

(5) For Airbus Helicopters service information identified in this AD, contact Airbus Helicopters, 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.helicopters.airbus.com/website/en/ref/Technical-Support_73.html.*

(6) You may view this service information at FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued in Fort Worth, Texas, on December 13, 2018.

**Scott A. Horn,**

*Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2018–27715 Filed 12–21–18; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2018–0312; Airspace Docket No. 18–AGL–7]**

**RIN 2120–AA66**

## Establishment of Class E Airspace; Glen Ullin, ND

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule, correction.

**SUMMARY:** This action corrects a final rule published in the **Federal Register** of September 26, 2018, that established Class E airspace extending upward from 700 feet above the surface at Glen Ullin Regional Airport, Glen Ullin, ND. The state identifier ''WI'' was inadvertently, included in the header of the legal description instead of ''ND''.

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

**FOR FURTHER INFORMATION CONTACT:** Rebecca Shelby, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5857.

**SUPPLEMENTARY INFORMATION:**

### History

The FAA published a final rule in the **Federal Register** for Docket No. FAA–2018–0312 (83 FR 48530, September 26, 2018), establishing Class E airspace at Glen Ullin Regional Airport, Glen Ullin, ND. Subsequent to publication, the FAA identified a clerical error that the state identifier in the header of the legal description listed the airport as Glen Ullin Regional Airport, Glen Ullin, WI. This correction changes the state identifier in the legal description from ''WI'' to ''ND'' and to read ''Glen Ullin Regional Airport, ND''.

### Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, in the **Federal Register** of September 26, 2018 (83 FR 48530) FR Doc. 2018–20870, Establishment of Class E Airspace; Glen Ullin, WI, is corrected as follows:

**§ 71.1 [Amended]**

■ On page 48531, column 3, in instruction 2, following the heading ''AGL ND E5 Glen Ullin, ND [NEW]'',

remove ''Glen Ullin Regional Airport, WI'' and add in its place ''Glen Ullin Regional Airport, ND''.

Issued in Fort Worth, Texas, on December 13, 2018.

**John Witucki,**

*Acting Manager, Operations Support Group, Central Service Center.*

[FR Doc. 2018–27563 Filed 12–21–18; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 97

**[Docket No. 31226; Amdt. No. 3829]**

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

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

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

**DATES:** This rule is effective December 26, 2018. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 26, 2018.

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

### For Examination

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

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

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

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

### Availability

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

**FOR FURTHER INFORMATION CONTACT:** Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., Registry Bldg. 29, Room 104, Oklahoma City, OK 73125. Telephone: (405) 954–4164.

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

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

### Availability and Summary of Material Incorporated by Reference

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

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

### The Rule

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

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

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

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866;(2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26,1979) ; and (3)does not warrant preparation of a

regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 97:**

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

Issued in Washington, DC, on November 30, 2018.

**Rick Domingo,**

*Executive Director, Flight Standards Service.*

## Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me,

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

## PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

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

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

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

** * * Effective 3 January 2019*

La Verne, CA, Brackett Field, ILS RWY 26L, Amdt 4
La Verne, CA, Brackett Field, LOC RWY 26L, Amdt 1
La Verne, CA, Brackett Field, RNAV (GPS) RWY 26L, Amdt 1
La Verne, CA, Brackett Field, Takeoff Minimums and Obstacle DP, Amdt 6
Washington, DC, Manassas Rgnl/Harry P Davis Field, RNAV (GPS) RWY 34R, Amdt 3
Shenandoah, IA, Shenandoah Muni, Takeoff Minimums and Obstacle DP, Amdt 2
Chicago, IL, Chicago O'Hare Intl, ILS OR LOC RWY 27L, ILS RWY 27L SA CAT I, ILS RWY 27L CAT II, ILS RWY 27L CAT III, Amdt 31A
Chicago, IL, Chicago O'Hare Intl, ILS OR LOC RWY 28C, ILS RWY 28C SA CAT I, ILS RWY 28C CAT II, ILS RWY 28C CAT III, Amdt 2A
Chicago, IL, Chicago O'Hare Intl, ILS OR LOC RWY 28L, ILS RWY 28L SA CAT I, ILS RWY 28L CAT II, ILS RWY 28L CAT III, Orig-B
Chicago, IL, Chicago O'Hare Intl, ILS OR LOC RWY 28R, ILS RWY 28R SA CAT I, ILS RWY 28R CAT II, ILS RWY 28R CAT III, Amdt 18A
Chicago, IL, Chicago O'Hare Intl, ILS PRM RWY 28C (CLOSE PARALLEL), ILS PRM RWY 28C (CLOSE PARALLEL) SA CAT I, ILS PRM RWY 28C (CLOSE PARALLEL) CAT II, ILS PRM RWY 28C (CLOSE PARALLEL) CAT III, Amdt 1A
Chicago, IL, Chicago O'Hare Intl, Takeoff Minimums and Obstacle DP, Amdt 21
North Adams, MA, Harriman-And-West, RNAV (GPS)-B, Orig
Cheboygan, MI, Cheboygan County, RNAV (GPS) RWY 10, Amdt 3B
Detroit, MI, Detroit Metropolitan Wayne County, RNAV (GPS) Z RWY 4L, Orig
Detroit, MI, Detroit Metropolitan Wayne County, RNAV (GPS) Z RWY 22R, Orig
Lambertville, MI, Toledo Suburban, RNAV (GPS)-A, Orig-A
Grand Marais, MN, Grand Marais/Cook County, NDB RWY 28, Amdt 1A
Crystal Springs, MS, Copiah County, RNAV (GPS) RWY 18, Orig
Crystal Springs, MS, Copiah County, RNAV (GPS) RWY 36, Orig
Crystal Springs, MS, Copiah County, Takeoff Minimums and Obstacle DP, Orig
Fairmont, NE, Fairmont State Airfield, NDB RWY 17, Amdt 2
Fairmont, NE, Fairmont State Airfield, NDB RWY 35, Amdt 3
Fairmont, NE, Fairmont State Airfield, RNAV (GPS) RWY 17, Amdt 1A
Fairmont, NE, Fairmont State Airfield, RNAV (GPS) RWY 35, Amdt 1A
Fairmont, NE, Fairmont State Airfield, Takeoff Minimums and Obstacle DP, Amdt 1
Wayne, NE, Wayne Muni/Stan Morris Fld, RNAV (GPS) RWY 36, Amdt 2B
Wayne, NE, Wayne Muni/Stan Morris Fld, Takeoff Minimums and Obstacle DP, Amdt 5
Reno, NV, Reno/Tahoe Intl, TACAN–F, Orig
Montgomery, NY, Orange County, ILS OR LOC RWY 3, Amdt 3D, CANCELED
Montgomery, NY, Orange County, ILS OR LOC RWY 4, Orig
Montgomery, NY, Orange County, RNAV (GPS) RWY 3, Amdt 1A, CANCELED
Montgomery, NY, Orange County, RNAV (GPS) RWY 4, Orig
Montgomery, NY, Orange County, RNAV (GPS) 8, Amdt 1B
Montgomery, NY, Orange County, RNAV (GPS) RWY 21, Amdt 1A, CANCELED
Montgomery, NY, Orange County, RNAV (GPS) RWY 22, Orig
Montgomery, NY, Orange County, RNAV (GPS) RWY 26, Amdt 1C
Montgomery, NY, Orange County, VOR RWY 8, Amdt 9A
Stigler, OK, Stigler Rgnl, RNAV (GPS) RWY 35, Amdt 1B
Wagoner, OK, Hefner-Easley, Takeoff Minimums and Obstacle DP, Amdt 1
Columbia, SC, Jim Hamilton L B Owens, RNAV (GPS) RWY 31, Amdt 1
Moab, UT, Canyonlands Field, RNAV (GPS) RWY 3, Amdt 1
Moab, UT, Canyonlands Field, Takeoff Minimums and Obstacle DP, Amdt 4
Moab, UT, Canyonlands Field, VOR–A, Amdt 11
Spanish Fork, UT, Spanish Fork Arpt Springville-Woodhouse Field, RNAV GPS–A, Orig
Spanish Fork, UT, Spanish Fork Arpt Springville-Woodhouse Field, RNAV (GPS) Y RWY 12, Orig
Spanish Fork, UT, Spanish Fork Arpt Springville-Woodhouse Field, RNAV (GPS) Z RWY 12, Orig
Spanish Fork, UT, Spanish Fork Arpt Springville-Woodhouse Field, SPANISH FORK ONE,
Graphic DP
Spanish Fork, UT, Spanish Fork Arpt Springville-Woodhouse Field, Takeoff Minimums and Obstacle DP, Orig
Spokane, WA, Spokane Intl, ILS OR LOC RWY 3, ILS RWY 3 SA CAT I, ILS RWY 3 CAT II, ILS RWY 3 CAT III, Amdt 7
Spokane, WA, Spokane Intl, ILS OR LOC RWY 21, ILS RWY 21 SA CAT I, ILS RWY 21 CAT II, ILS RWY 21 CAT III, Amdt 24
Spokane, WA, Spokane Intl, RNAV (GPS) Y RWY 3, Amdt 2D
Spokane, WA, Spokane Intl, RNAV (GPS) Y RWY 8, Amdt 2B
Spokane, WA, Spokane Intl, RNAV (GPS) Y RWY 21, Amdt 2C
Spokane, WA, Spokane Intl, RNAV (GPS) Y RWY 26, Amdt 4B
Spokane, WA, Spokane Intl, RNAV (RNP) Z RWY 3, Amdt 1
Spokane, WA, Spokane Intl, RNAV (RNP) Z RWY 8, Amdt 1
Spokane, WA, Spokane Intl, RNAV (RNP) Z RWY 21, Amdt 1B
Spokane, WA, Spokane Intl, RNAV (RNP) Z RWY 26, Amdt 1B
Spokane, WA, Spokane Intl, Takeoff Minimums and Obstacle DP, Amdt 7
Spokane, WA, Spokane Intl, VOR RWY 3, Amdt 14

RESCINDED: On November 8, 2018 (83 FR 55821), the FAA published an Amendment in Docket No. 31220, Amdt No. 3823, to Part 97 of the Federal Aviation Regulations under section 97.33. The following entry for Brookneal, VA, effective January 3, 2019, is hereby rescinded in its entirety:

Brookneal, VA, Brookneal/Campbell County, RNAV (GPS) RWY 24, Amdt 1B

RESCINDED: On November 20, 2018 (83 FR 58475), the FAA published an Amendment in Docket No. 31222, Amdt No. 3825, to Part 97 of the Federal Aviation Regulations under section 97.33. The following entry for Pittsfield, IL, effective January 3, 2019, is hereby rescinded in its entirety:

Pittsfield, IL, Pittsfield Penstone Muni, RNAV (GPS) RWY 31, Orig-A

[FR Doc. 2018–27569 Filed 12–21–18; 8:45 am]

BILLING CODE 4910–13–P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 97**

**[Docket No. 31227; Amdt. No. 3830]**

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

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

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

**DATES:** This rule is effective December 26, 2018. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 26, 2018.

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

### For Examination

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

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

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

4. The National Archives and Records Administration (NARA).

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

### Availability

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

**FOR FURTHER INFORMATION CONTACT:** Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., Registry Bldg. 29 Room 104, Oklahoma City, OK 73125. Telephone: (405) 954–4164.

**SUPPLEMENTARY INFORMATION:** This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary.

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

### Availability and Summary of Material Incorporated by Reference

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

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

### The Rule

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

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

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

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

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

### List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on November 30, 2018.

**Rick Domingo,**

*Executive Director, Flight Standards Service.*

## Adoption of the Amendment

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

## PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

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

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

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

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

** * * Effective Upon Publication*

| AIRAC date | State | City | Airport | FDC No. | FDC date | Subject |
|---|---|---|---|---|---|---|
| 3–Jan–19 | MO | Fulton | Elton Hensley Memorial | 8/2539 | 11/7/18 | This NOTAM, published in TL 19–01, is hereby rescinded in its entirety. |
| 3–Jan–19 | MN | Hallock | Hallock Muni | 8/8364 | 11/7/18 | This NOTAM, published in TL 19–01, is hereby rescinded in its entirety. |
| 3–Jan–19 | MO | Kirksville | Kirksville Rgnl | 8/0394 | 11/20/18 | VOR–A, Amdt 15. |
| 3–Jan–19 | MO | Kirksville | Kirksville Rgnl | 8/0441 | 11/15/18 | ILS OR LOC/DME RWY 36, Amdt 1. |
| 3–Jan–19 | MO | Kirksville | Kirksville Rgnl | 8/0479 | 11/15/18 | RNAV (GPS) RWY 36, Amdt 2. |
| 3–Jan–19 | MO | Kirksville | Kirksville Rgnl | 8/0482 | 11/20/18 | RNAV (GPS) RWY 18, Amdt 2. |
| 3–Jan–19 | KS | Chanute | Chanute Martin Johnson | 8/0534 | 11/15/18 | VOR–A, Amdt 10. |
| 3–Jan–19 | NC | Rockingham | Richmond County | 8/1535 | 11/26/18 | RNAV (GPS) RWY 32, Orig-B. |
| 3–Jan–19 | MO | Fulton | Elton Hensley Memorial | 8/1555 | 11/27/18 | RNAV (GPS) RWY 24, Amdt 1A. |
| 3–Jan–19 | AK | Noatak | Noatak | 8/2273 | 11/15/18 | RNAV (GPS) RWY 1, Orig. |
| 3–Jan–19 | AK | Noatak | Noatak | 8/2274 | 11/15/18 | RNAV (GPS) RWY 19, Orig. |
| 3–Jan–19 | CO | Grand Junction | Grand Junction Regional | 8/3575 | 11/16/18 | RNAV (GPS) Y RWY 11, Amdt 1C. |
| 3–Jan–19 | CO | Grand Junction | Grand Junction Regional | 8/3577 | 11/16/18 | RNAV (GPS) RWY 29, Amdt 1B. |
| 3–Jan–19 | CO | Grand Junction | Grand Junction Regional | 8/3579 | 11/16/18 | LDA/DME RWY 29, Orig-C. |
| 3–Jan–19 | CO | Grand Junction | Grand Junction Regional | 8/3581 | 11/16/18 | ILS OR LOC RWY 11, Amdt 16C. |
| 3–Jan–19 | GA | Vidalia | Vidalia Rgnl | 8/3626 | 11/15/18 | ILS OR LOC RWY 25, Amdt 2. |
| 3–Jan–19 | CA | Colusa | Colusa County | 8/5707 | 11/15/18 | RNAV (GPS) RWY 31, Amdt 1. |
| 3–Jan–19 | CA | Colusa | Colusa County | 8/5714 | 11/15/18 | RNAV (GPS)-B, Orig. |
| 3–Jan–19 | CA | Colusa | Colusa County | 8/5722 | 11/15/18 | VOR–A, Amdt 5. |
| 3–Jan–19 | KY | Greenville | Muhlenberg County | 8/7653 | 11/20/18 | RNAV (GPS) RWY 6, Orig-A. |
| 3–Jan–19 | KY | Greenville | Muhlenberg County | 8/7654 | 11/20/18 | RNAV (GPS) RWY 24, Amdt 1C. |
| 3–Jan–19 | KY | Greenville | Muhlenberg County | 8/7656 | 11/20/18 | VOR/DME–A, Amdt 5B. |
| 3–Jan–19 | AR | Osceola | Osceola Muni | 8/7726 | 11/15/18 | RNAV (GPS) RWY 19, Orig. |
| 3–Jan–19 | IN | Elkhart | Elkhart Muni | 8/7752 | 11/15/18 | RNAV (GPS) RWY 27, Orig-A. |
| 3–Jan–19 | IN | Elkhart | Elkhart Muni | 8/7753 | 11/15/18 | RNAV (GPS) RWY 18, Orig-A. |
| 3–Jan–19 | IN | Elkhart | Elkhart Muni | 8/7754 | 11/15/18 | RNAV (GPS) RWY 9, Orig. |
| 3–Jan–19 | IN | Elkhart | Elkhart Muni | 8/7757 | 11/15/18 | RNAV (GPS) RWY 36, Orig-A. |
| 3–Jan–19 | IN | Elkhart | Elkhart Muni | 8/7775 | 11/15/18 | ILS OR LOC RWY 27, Amdt 2B. |
| 3–Jan–19 | MN | Grand Rapids | Grand Rapids/Itasca Co-Gordon Newstrom Fld. | 8/8447 | 11/20/18 | RNAV (GPS) RWY 16, Orig. |
| 3–Jan–19 | MN | Grand Rapids | Grand Rapids/Itasca Co-Gordon Newstrom Fld. | 8/8449 | 11/20/18 | VOR RWY 34, Amdt 11. |
| 3–Jan–19 | NJ | Pedricktown | Spitfire Aerodrome | 8/8450 | 11/20/18 | RNAV (GPS) RWY 25, Amdt 1. |
| 3–Jan–19 | CA | San Francisco | San Francisco Intl | 8/8877 | 11/21/18 | ILS OR LOC RWY 28R, ILS RWY 28R (SA CAT I), ILS RWY 28R (CAT II and III), Amdt 15. |
| 3–Jan–19 | CA | San Francisco | San Francisco Intl | 8/8880 | 11/21/18 | ILS OR LOC RWY 28L, ILS RWY 28L (SA CAT II), Amdt 27. |
| 3–Jan–19 | CO | Denver | Denver Intl | 8/9094 | 11/21/18 | RNAV (GPS) Y RWY 16R, Amdt 1C. |
| 3–Jan–19 | CO | Denver | Denver Intl | 8/9096 | 11/21/18 | RNAV (GPS) Y RWY 7, Amdt 1B. |
| 3–Jan–19 | CO | Denver | Denver Intl | 8/9100 | 11/21/18 | RNAV (GPS) Y RWY 26, Amdt 1B. |
| 3–Jan–19 | IN | Elkhart | Elkhart Muni | 8/9467 | 11/23/18 | VOR RWY 9, Amdt 6. |
| 3–Jan–19 | MN | Hallock | Hallock Muni | 8/9927 | 11/26/18 | VOR/DME RWY 31, Amdt 7. |

[FR Doc. 2018–27568 Filed 12–21–18; 8:45 am]

**BILLING CODE 4910–13–P**

## SECURITIES AND EXCHANGE COMMISSION

## 17 CFR Part 232

**[Release Nos. 33–10585; 34–84825; 39–2524; IC–33324]**

## Adoption of Updated EDGAR Filer Manual

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission (the ''Commission'') is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (''EDGAR'') Filer Manual and related rules. The EDGAR system is scheduled to be upgraded on December 17, 2018 and January 28, 2019.

**DATES:** Effective December 26, 2018. The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of December 26, 2018.

**FOR FURTHER INFORMATION CONTACT:** In the Division of Trading and Markets, for questions concerning Form ATS–N, contact Michael R. Broderick at (202) 551–5058. In the Office of Municipal Securities, for questions regarding Forms MA, MA–A and MA–I, contact Ahmed A. Abonamah at (202) 551–3887. In the Division of Corporation Finance, for questions concerning Forms 1–A and DOS, contact Heather Mackintosh at (202) 551–8111. In the Division of Economic and Risk Analysis, for questions concerning Inline XBRL submission requirements contact Mike Willis at (202) 551–6627.

**SUPPLEMENTARY INFORMATION:** We are adopting an updated EDGAR Filer Manual, Volume I and Volume II. The Filer Manual describes the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.[1] It also describes the requirements for filing using EDGARLink Online and the EDGAR Online Forms website.

The revisions to the Filer Manual reflect changes within Volume I, entitled EDGAR Filer Manual, Volume I: ''General Information,'' (Version 32) (December 2018), and Volume II, entitled EDGAR Filer Manual, Volume II: ''EDGAR Filing,'' (Version 49) (December 2018). The updated manual will be incorporated by reference into the Code of Federal Regulations.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[2] Filers should consult the Filer Manual in conjunction with our rules governing mandated electronic filings when preparing documents for electronic submission.

The EDGAR System and Filer Manual will be updated in Release 18.4 and reflect the changes described below.

EDGAR Release 18.4 will introduce changes associated with the adoption of amendments to Regulations ATS applicable to alternative trading systems that trade National Market System stocks (''NMS Stock ATSs'') and changes associated with new Form ATS–N.[3] The following new submission form types, which correspond to the various types of Form ATS–N filings permitted or required by the amendments to Regulation ATS and Form ATS–N, will be added to EDGAR Online Forms: ATS–N, for initial Form ATS–N filings; ATS–N/MA, for material amendments to Form ATS–N; ATS–N/UA, for updating amendments to Form ATS–N; ATS–N/CA for correcting amendments to Form ATS–N; ATS–N/OFA, for order display and fair access amendments to Form ATS–N; ATS–N–C, for notices of cessation filings; and ATS–N–W for withdrawals of Form ATS–N filings.[4] The new Form ATS–N submission form types will be accessible on the EDGAR Filing website. Filers have the option of completing a web-fillable form or may construct XML submissions for these submission form types by following the ''EDGAR Form ATS–N XML Technical Specification'' document available on the SEC's Public website (*https://www.sec.gov/info/edgar/tech-specs*). Please refer to Chapter 3 (Index to Forms), Chapter 5 (Constructing Attached Documents and Document Types), Chapter 7 (Preparing and Transmitting EDGARLink Online Submissions), Chapter 8 (Preparing and Transmitting Online Submissions), Appendix A (Messages Reported by EDGAR), and Appendix E (Automated Conformance Rules for EDGAR Data Fields) of the ''EDGAR Filer Manual, Volume II: EDGAR Filing.''

In a prior rulemaking, the Commission adopted amendments to, among other things, Form Funding Portal, Form MA and Form MA–I to remove the portions of such forms that requested filers furnish certain sensitive personally identifiable information or PII.[5] Release 18.4 will upgrade the EDGAR system by removing the fields on such forms that ask for PII. Please refer to Chapter 8 (Preparing and Transmitting Online Submissions) of the ''EDGAR Filer Manual, Volume II: EDGAR Filing.''

EDGAR Release 18.4 will update submission form types 1–A, 1–A/A, 1–A POS, DOS, and DOS/A to rename ''Income Statement Information'' to ''Statement of Comprehensive Income Information'' in Item 1: Issuer Information. Please refer to Chapter 8 (Preparing and Transmitting Online Submissions) of the ''EDGAR Filer Manual, Volume II: EDGAR Filing.'' These changes are consistent with the amendments the Commission recently adopted to accounting-related disclosure rules.[6]

EDGAR will permit the display of Schedule B data in submission form types MA–A and MA/A—provided that information for Schedule B was included in the filer's most recent Form MA, MA–A and MA/A filing. Corresponding changes will be reflected in the EDGAR Filer Manual. Please refer to Chapter 8 (Preparing and Transmitting Online Submissions) of the ''EDGAR Filer Manual, Volume II: EDGAR Filing.''

EDGAR will introduce changes associated with the adoption of Inline eXtensible Business Language (''Inline XBRL'') requirements for the submission of operating company financial information and fund risk/return summaries.[7] The EDGAR system will be updated to implement changes that will expand the submission form types that are permitted to include Inline XBRL submissions. Accordingly, the following submission form types will permit the primary document to be in iXBRL format: S–1, S–1/A, S–1MEF, S–3, S–3/A, S–3ASR, S–3D, S–3DPOS, S–3MEF, S–4, S–4/A, S–4EF, S–4MEF, S–4 POS, S–11, S–11/A, S–11MEF, F–1, F–1/A, F–1MEF, F–3, F–3/A, F–3ASR, F–3D, F–3DPOS, F–3MEF, F–4, F–4/A, F–4EF, F–

[1] We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33–6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on October 1, 2018. See Release No. 33–10566 (October 1, 2018) [83 FR 55264].

[2] *See* Rule 301 of Regulation S–T (17 CFR 232.301).

[3] *See* Release No. 34–83663 (July 18, 2018) [83 FR 38768].

[4] *See* Rule 304 of Regulation ATS (17 CFR 242.304) and Form ATS–N (specifying the requirements, *inter alia,* for filing on Form ATS–N).

[5] *See* Release 33–10486 (April 25, 2018) [83 FR 22190].

[6] See Release No. 33–10532 (August 17, 2018) [83 FR 50148].

[7] See Release No. 33–10514 (June 28, 2018) [83 FR 40486].

4MEF, F–4POS, F–10, F–10/A, F–10EF, F–10POS, 485BPOS, and 497. The EDGAR system also will be updated to allow more than one Inline XBRL file attachment per submission to be pre-validated, submitted, validated, accepted, rendered, and viewed. In addition, given the termination of the Voluntary XBRL program, the EDGAR Filer Manual and the EDGAR system will be updated to remove and will no longer permit submissions having EX–100 Voluntary XBRL attachments. In addition, the EDGAR Filer Manual will update instructions regarding the layout specifications for Risk Return Summary Information submissions tagged with Inline XBRL. Please refer to Chapter 5 (Constructing Attached Documents and Document Types), Chapter 6 (Interactive Data), and Appendix E (Automated Conformance Rules for EDGAR Data Fields) of the ''EDGAR Filer Manual, Volume II: EDGAR Filing.''

The EDGAR Filer Manual, Volumes I and II will be revised to incorporate updates aimed at clarifying and streamlining the EDGAR Filer Manual. Updates will include revisions to listed contact information, revised hyperlink information for accessing the EDGAR Filer Manual, clarification of instructions, clarification of chapter and subsection titles, updates to, and clarification of content in, Chapter 3 (Index to Forms), and a renaming of Section 5.6, ''Filing Fees.'' Additionally, references to the ''EDGAR Online Forms/XML website'' will be revised and renamed the ''EDGAR OnlineForms website''. See Chapter 2 (Quick Guide to EDGAR Filing), Chapter 3 (Index to Forms), Chapter 4 (Filing Fee Information), Chapter 5 (Constructing Attached Documents and Document Types), Chapter 6 (Interactive Data), Chapter 7 (Preparing and Transmitting EDGARLink Online Submissions), Chapter 8 (Preparing and Transmitting Online Submissions), Appendix B (Frequently Asked Questions), Appendix C (EDGAR Submission Types), Appendix D (Paper Forms), and Appendix F (Glossary of Commonly Used Terms, Acronyms and Abbreviations).

Along with the adoption of the Filer Manual, we are amending Rule 301 of Regulation S–T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

The updated EDGAR Filer Manual will be available for website viewing and printing; the address for the Filer Manual is *https://www.sec.gov/info/edgar/edmanuals.htm.* You may also obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m.

Since the Filer Manual and the corresponding rule and form amendments relate solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (''APA'').[8] It follows that the requirements of the Regulatory Flexibility Act[9] do not apply.

The effective date for the updated Filer Manual and the related rule and form amendments is December 26, 2018. In accordance with the APA,[10] we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with these system upgrades.

**Statutory Basis**

We are adopting the amendments to Regulation S–T under the authority in Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[11] Sections 3, 12, 13, 14, 15, 15B, 23, and 35A of the Securities Exchange Act of 1934,[12] Section 319 of the Trust Indenture Act of 1939,[13] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[14]

**List of Subjects in 17 CFR Part 232**

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

**Text of the Amendments**

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

## PART 232 REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The authority citation for part 232 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78*o*(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Section 232.301 is revised to read as follows:

**§ 232.301 EDGAR Filer Manual.**

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets forth the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the updated EDGAR Filer Manual, Volume I: ''General Information,'' Version 32 (December 2018). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: ''EDGAR Filing,'' Version 49 (December 2018). Additional provisions applicable to Form N–SAR filers are set forth in the EDGAR Filer Manual, Volume III: ''N–SAR Supplement,'' Version 6 (January 2017). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You must comply with these requirements in order for documents to be timely received and accepted. The EDGAR Filer Manual is available for website viewing and printing; the address for the Filer Manual is *https://www.sec.gov/info/edgar/edmanuals.htm.* You can obtain paper copies of the EDGAR Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. You can also inspect the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

By the Commission.

Dated: December 14, 2018.

**Eduardo A. Aleman,**

*Deputy Secretary.*

[FR Doc. 2018–27827 Filed 12–21–18; 8:45 am]

BILLING CODE 8011–01–P

[8] 5 U.S.C. 553(b)(A).

[9] 5 U.S.C. 601–612.

[10] 5 U.S.C. 553(d)(3).

[11] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[12] 15 U.S.C. 78c, 78*l,* 78m, 78n, 78*o,* 78o–4, 78w, and 78*ll.*

[13] 15 U.S.C. 77sss.

[14] 15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37.

**INTERNATIONAL TRADE COMMISSION**

**19 CFR Part 220**

## Rules Relating to the Submission and Consideration of Petitions for Duty Suspensions and Reductions

**AGENCY:** United States International Trade Commission.

**ACTION:** Final rule.

**SUMMARY:** The United States International Trade Commission (Commission) is adopting as a final rule the interim rule published on September 30, 2016. The rule concerns the submission and consideration of petitions for duty suspensions and reductions under the American Manufacturing and Competitiveness Act of 2016.

**DATES:** *Effective date:* December 26, 2018.

**FOR FURTHER INFORMATION CONTACT:** Lisa R. Barton, Secretary, telephone (202) 205–2000 or William Gearhart, Esquire, Office of the General Counsel, United States International Trade Commission, telephone (202) 205–3091. Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. Members of the public may obtain general information concerning the Commission by accessing its website at *https://www.usitc gov.*

**SUPPLEMENTARY INFORMATION:** The preamble below is designed to assist readers in understanding this final rule. This preamble provides background information and a regulatory analysis of the rule.

This rule is being promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 553) (APA), and will be codified in 19 CFR part 220.

### Background

Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) authorizes the Commission to adopt such reasonable procedures, rules and regulations as it deems necessary to carry out its functions and duties. In addition, section 3(b)(5) of the American Manufacturing Competitiveness Act of 2016 (19 U.S.C. 1332 note) (the Act) directs the Commission to prescribe and publish, in the **Federal Register** and on a publicly available internet website of the Commission, procedures to be complied with by members of the public in submitting petitions for duty suspensions and reductions under section 3(b)(1)(A) of the Act.

The Commission is adopting as a final rule, without change, the interim rule published in the **Federal Register** on September 30, 2016 (81 FR 67144) governing the submission and consideration of petitions for duty suspensions and reductions under the Act. In its notice announcing the interim rule, the Commission invited members of the public to file written comments on the rule. The Commission asked members of the public to file such comments no later than November 29, 2016; no written comments were filed.

The principal provisions of the Act relating to the submission and consideration of petitions for duty suspensions and reductions are set out in section 3 of the Act. Section 3 establishes a process for the submission and consideration of petitions for duty suspensions. It also lists the types of information that must be included in a petition, and requires that petitioners submit disclosure forms with respect to such duty suspensions and reductions. Section 3 requires the Commission to publish on its website all the petitions that contain the required information and the related disclosure forms. It also requires that the Commission provide opportunity for members of the public to submit comments to the Commission on the petitions published. Section 3 requires that the Commission submit preliminary and final reports on the petitions that meet the statutory requirements to the House Committee on Ways and Means and Senate Committee on Finance (the Committees), and it sets out the types of information to be included in those reports. Finally, section 3 sets out a timeline, in the form of specific dates or numbers of days, under which the Commission must complete each step in the process, beginning with the filing of petitions and ending with the submission of the Commission's final report.

The American Manufacturing Competitiveness Act provided for two periods during which the Commission would receive and consider petitions and submit reports to the Committees, with the first beginning no later than October 15, 2016, and the second beginning no later than October 15, 2019. The Commission submitted its report to the Committees on petitions received during this first period in August 2017. On September 13, 2018, the President signed the Miscellaneous Tariff Bill Act of 2018 (Pub. L. 115–239), that approved legislation implementing certain temporary duty suspensions and reductions based on the Commission's report. The duty suspensions and reductions became effective on October 13, 2018, and remain in effect through December 31, 2020.

The process under which the Commission received and considered petitions for duty suspensions and reductions was new with the American Manufacturing Competitiveness Act. Previously, the Commission had provided technical assistance to the Committees on duty suspension/reduction bills introduced by Members of Congress under procedures established by the Committees.

### Possible Additional Amendments to Part 220

The Commission gained considerable experience in applying the interim rule to petitions submitted and considered with respect to its first report. Based on that experience, the Commission may propose several amendments to this final rule in the near future, with the intent that the amendments be in place before October 15, 2019. Should the Commission propose changes to part 220, the Commission expects to do so by first issuing a notice of proposed rulemaking and request for comments, and after considering those comments, by adopting a final rule.

### Regulatory Analysis

The Commission has determined that this final rule does not meet the criteria described in section 3(f) of Executive Order 12866 (58 FR 51735, October 4, 1993) and thus does not constitute a ''significant regulatory action'' for purposes of the Executive Order.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is inapplicable to this rulemaking because it is not one for which a notice of proposed rulemaking is required under 5 U.S.C. 553 or any other statute.

This final rule does not contain federalism implications warranting the preparation of a federalism summary impact statement pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999).

No actions are necessary under title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1531–1538), because the final rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year (adjusted annually for inflation), and will not significantly or uniquely affect small governments.

This final rule does not constitute a ''major'' rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). Moreover, it is exempt from the reporting requirements of that Act because it contains rules of agency organization, procedure, or

practice that do not substantially affect the rights or obligations of non-agency parties.

The rule does not contain any information collection requirements subject to the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

## PART 220—PROCESS FOR CONSIDERATION OF PETITIONS FOR DUTY SUSPENSIONS AND REDUCTIONS

■ Accordingly, the interim rule that was published at 81 FR 67144 on September 30, 2016, is adopted as a final rule without change.

By order of the Commission.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2018–27768 Filed 12–21–18; 8:45 am]

BILLING CODE 7020–02–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 882

**[Docket No. FDA–2014–N–1210]**

## Neurological Devices; Reclassification of Electroconvulsive Therapy Devices; Effective Date of Requirement for Premarket Approval for Electroconvulsive Therapy Devices for Certain Specified Intended Uses

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final order.

**SUMMARY:** The Food and Drug Administration (FDA) is issuing a final order to reclassify the electroconvulsive therapy (ECT) device for use in treating catatonia or a severe major depressive episode (MDE) associated with major depressive disorder (MDD) or bipolar disorder (BPD) in patients age 13 years and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition, which is a preamendments class III device, into class II (special controls). FDA is also issuing this final order to require the filing of a premarket approval application (PMA) or a notice of completion of a product development protocol (PDP) for the preamendments class III ECT devices for all other uses that are not being reclassified to class II (product code GXC).

**DATES:** This order is effective on December 26, 2018. See further discussion in section V, Implementation Strategy.

**FOR FURTHER INFORMATION CONTACT:** Carlos Peña, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2680, Silver Spring, MD 20993, 301–796–6610, *carlos.pena@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

### Table of Contents

I. Table of Abbreviations/Commonly Used Acronyms in This Document
II. Background
A. Reclassification
B. Requirement for Premarket Approval
C. Valid Scientific Evidence
III. Public Comments in Responding to the Proposed Order
A. Comments in Support of Reclassifying ECT Into Class II
B. Comments on Reclassifying ECT Based on Safety and Effectiveness
C. Comments on Patient Concerns
D. Comments on Regulatory Process of the Proposed Order
E. Comments on Labeling Concerns
F. Comments Outside the Scope of This Final Order
IV. The Final Order
V. Implementation Strategy
A. Date To File a PMA
B. Compliance With Special Controls
VI. Codification of Orders
VII. Analysis of Environmental Impact
VIII. Paperwork Reduction Act of 1995
IX. References

## I. Table of Abbreviations/Commonly Used Acronyms in This Document

TABLE OF ABBREVIATIONS AND ACRONYMS

| Abbreviation or acronym | What it means |
|---|---|
| 510(k) | Premarket Notification. |
| 2011 Panel | 2011 Neurological Devices Panel Meeting. |
| AACAP | American Academy of Child and Adolescent Psychiatry. |
| APA | American Psychiatric Association. |
| BPD | Bipolar Disorder. |
| CANTAB | Cambridge Neuropsychological Test Automated Battery. |
| CFR | Code of Federal Regulations. |
| CGI–I | Clinical Global Impressions-Improvement scale. |
| ECT | Electroconvulsive Therapy Device. |
| FDA | Food and Drug Administration. |
| FDARA | FDA Reauthorization Act of 2017. |
| FDASIA | Food and Drug Administration Safety and Innovation Act. |
| FD&C Act | Federal Food, Drug, and Cosmetic Act. |
| FR | Federal Register. |
| IDE | Investigational Device Exemption. |
| MAUDE | Manufacturer and User Facility Device Experience. |
| MDD | Major Depressive Disorder. |
| MDE | Major Depressive Episode. |
| MDR | Medical Device Reporting. |
| M–ECT | Maintenance ECT. |
| MMSE | Mini Mental State Exam. |
| OMB | Office of Management and Budget. |
| PDP | Product Development Protocol. |
| PMA | Premarket Approval Application. |
| PRA | Paperwork Reduction Act of 1995. |
| Ref | Reference |

TABLE OF ABBREVIATIONS AND ACRONYMS—Continued

| Abbreviation or acronym | What it means |
|---|---|
| RWD | Real-World Data. |
| RWE | Real-World Evidence. |
| SE | Safety and Effectiveness. |
| U.S.C. | United States Code. |
| WFSBP | World Federation of Societies of Biological Psychiatry. |

## II. Background

The Federal Food, Drug, and Cosmetic Act (FD&C Act), establishes a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness (SE). The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513(d) of the FD&C Act, devices that were in commercial distribution before the enactment of the 1976 amendments, May 28, 1976 (generally referred to as preamendments devices) are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976 (generally referred to as postamendments devices) [1] are automatically classified by section 513(f) of the FD&C Act into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval unless, and until, the device is reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21

[1] ECT devices with intended uses outside the scope of those listed in paragraphs 21 CFR 882.5940(b)(1) and (2) are considered postamendments device, that are subject to classification under section 513(f)(1) of the FD&C Act or, if the relevant requirements are met, under section 513(f)(2) of the FD&C Act.

U.S.C. 360(k)) and part 807 (21 CFR part 807).

A preamendments device that has been classified into class III and devices found substantially equivalent by means of premarket notification (510(k)) procedures to such a preamendments device or to a device within that type (both the preamendments and substantially equivalent devices are referred to as preamendments class III devices) may be marketed without submission of a PMA until FDA issues a final order under section 515(b) of the FD&C Act (21 U.S.C. 360e(b)) requiring premarket approval.

On August 18, 2017, section 513(f) of the FD&C Act was amended by the FDA Reauthorization Act of 2017 (FDARA; Pub. L. 115–52). Under section 513(f)(6) of the FD&C Act, FDA has authority to issue an administrative order classifying an accessory based on the risks of the accessory when used as intended and the level of regulatory controls necessary to provide a reasonable assurance of SE of the accessory, notwithstanding the classification of any other device with which such accessory is intended to be used. FDA's ''Medical Device Accessories—Describing Accessories and Classification Pathways'' guidance describes the statutory mechanisms to request: (1) Classification for accessories that have been granted marketing authorization as part of a PMA, premarket notification (510(k)), or De Novo request for another device with which the accessory involved is intended to be used and (2) classification for accessories included in a PMA or 510(k) that FDA has not classified distinctly from another device under the FD&C Act (Ref. 1).

*A. Reclassification*

Under section 515(i)(2) of the FD&C Act, following publication of a proposed order, a meeting of a device classification panel, and consideration of the comments of a proposed order, FDA has the authority to issue an administrative order revising the classification of a device that FDA has classified as a class III device and for which no administrative order has been issued calling for PMAs under section 515(b) of the FD&C Act, so that the device is classified into class I or II. In determining whether to revise the classification of a device or to require a device to remain in class III, FDA applies the criteria set forth in section 513(a) of the FD&C Act. Section 513(a)(1)(B) of the FD&C Act defines class II devices as those devices for which the general controls in section 513(a)(1)(A) by themselves are insufficient to provide reasonable assurance of SE, but for which there is sufficient information to establish special controls to provide a reasonable assurance of SE of a device.

FDA published a proposed order in the **Federal Register** of December 29, 2015 (80 FR 81223), held a meeting of a device classification panel on January 27–28, 2011, as described in section 513(b) of the FD&C Act with respect to ECT devices, and considered comments from public dockets, and, therefore, has met the requirements under sections 515(i)(2) of the FD&C Act.

*B. Requirement for Premarket Approval*

Section 515(b)(1) of the FD&C Act sets forth the process for issuing a final order requiring PMAs. Specifically, prior to the issuance of a final order requiring premarket approval for a preamendments class III device, the following must occur: (1) Publication of a proposed order in the **Federal Register**; (2) a meeting of a device classification panel described in section 513(b) of the FD&C Act; and (3) consideration of comments from all affected stakeholders. As noted above, FDA has published a proposed order that would require PMAs for an electroconvulsive therapy device for certain uses other than a severe MDE associated with MDD or BPD, in the **Federal Register** of December 29, 2015. FDA has held a meeting of a device classification panel described in section 513(b) of the FD&C Act with respect to ECT devices. Finally, FDA has received and has considered over 3,400 comments on the proposed order, as discussed in section II. Therefore, FDA has met the requirements under section 515(b)(1) of the FD&C Act.

On July 9, 2012, the Food and Drug Administration Safety and Innovation Act (FDASIA) (Pub. L. 112–144) was enacted. Section 608(a) and (b) of FDASIA amended section 515(b) of the FD&C Act, changing the mechanism for requiring premarket approval for a preamendments device from rulemaking to an administrative order.

Although under the FD&C Act a manufacturer of a class III preamendments device may respond to the call for PMAs by filing a PMA or a notice of completion of a PDP, in practice, the option of filing a notice of completion of a PDP has not been used. While corresponding requirements for PDPs remain available to manufacturers in response to a final order under section 515(b) of the FD&C Act, for simplicity this document will refer only to the requirement for the filing and receiving approval of a PMA.

Under section 501(f) of the FD&C Act (21 U.S.C. 351(f)), a preamendments class III device may be commercially distributed without a PMA until 90 days after FDA issues a final order (or a final rule issued under section 515(b) of the FD&C Act prior to the enactment of FDASIA) requiring premarket approval for the device, or 30 months after final classification of the device under section 513 of the FD&C Act, whichever is later. Because ECT devices were classified in 1979, the 30-month period has expired (44 FR 51776, September 4, 1979), and the later of these two time periods is the 90-day period. Therefore, if a PMA is not filed for ECT devices for certain specified intended uses within 90 days after the issuance of a final order, the device will be deemed adulterated under section 501(f) of the FD&C Act.

Also, a preamendments device subject to the order process under section 515(b) of the FD&C Act is not required to have an approved investigational device exemption (IDE) (see part 812 (21 CFR part 812)) contemporaneous with its interstate distribution until the date identified by FDA in the final order requiring the filing of a PMA for the device. At that time, an IDE is required only if a PMA has not been filed. If the manufacturer, importer, or other sponsor of the device submits an IDE application and FDA approves it, the device may be distributed for investigational use. If a PMA is not filed within 90 days after the issuance of a final order, and the device is not distributed for investigational use under an IDE, the device is deemed to be adulterated within the meaning of section 501(f)(1)(A) of the FD&C Act, and subject to seizure and condemnation under section 304 of the FD&C Act (21 U.S.C. 334) if its distribution continues. Other enforcement actions include, but are not limited to, the following: Shipment of devices in interstate commerce will be subject to injunction under section 302 of the FD&C Act (21 U.S.C. 332), and the individuals responsible for such shipment will be subject to prosecution under section 303 of the FD&C Act (21 U.S.C. 333). FDA requests that manufacturers take action to prevent the further use of devices for which no PMA has been filed.

*C. Valid Scientific Evidence*

The evidentiary standard FDA relies on to determine the SE of a device is valid scientific evidence. Section 860.7(c)(2) (21 CFR 860.7(c)(2)) defines valid scientific evidence. As described in section III, in finalizing this order, FDA has assessed the totality of the

valid scientific evidence that was provided in response to the proposed order, including several comments that referenced additional clinical studies. Several of these studies included SE data for adult as well as adolescent patients. FDA also considered randomized controlled clinical studies, open-label observational trials, case series reports, systematic literature reviews, and practice guidelines that were submitted in the comments. Single case reports or opinion-based commentary were also submitted to the dockets for consideration; however, without well controlled empirical experimentation, these types of information are generally not considered valid scientific evidence and were not relied upon to support this reclassification.

FDA received many comments from healthcare professionals describing their practices, the length of time they have been practicing, and the utilization of ECT devices in treating patients with certain conditions. While FDA acknowledges receiving comments in support of the proposed reclassification, statements by individual healthcare professionals that they have used ECT devices to treat individual patients do not constitute valid scientific evidence to demonstrate reasonable assurance of SE (see valid scientific evidence discussion in 48 FR 56778 at 56786–56788, comments 16–21, December 23, 1983, Ref. 2). Such comments do not contain sufficient detail to capture the use of the device, exposures, and outcomes in the appropriate population and are not interpretable using informed clinical and scientific judgement.

FDA also received many comments from patients, or friends and family of patients, in support and against reclassification of ECT devices. These comments described the experience of the patient that received treatment from an ECT device. FDA acknowledges receiving comments from patients and other individuals about their experience with the device being considered for reclassification; however, FDA does not consider such comments to be valid scientific evidence. Because these comments did not contain sufficient detail to capture the use of the device, exposures, and outcomes in the appropriate population and are not interpretable using informed clinical and scientific judgement, such comments are not considered valid scientific evidence.

For medical devices, available evidence is traditionally comprised of clinical and non-clinical studies conducted and provided to FDA by the device manufacturer or sponsor. However, FDA recognizes that a wealth of data covering medical device experience is routinely collected in the course of treatment and management of patients. Under certain circumstances, these real-world data (RWD) may constitute real-world evidence (RWE), or clinical evidence regarding the usage and potential benefits or risks of a medical product derived from analysis of RWD, that may be of sufficient quality to help inform or augment FDA's understanding of the benefit-risk profile of devices at various points in their life cycle, and could potentially be valid scientific evidence used to aid FDA in regulatory decision making. See FDA's guidance, ''Use of Real-World Evidence to Support Regulatory Decision-Making for Medical Devices'' (82 FR 41418, August 31, 2017, Ref. 3), which clarifies how FDA evaluates RWD to determine whether it may be sufficiently relevant and reliable to generate the types of RWE that can be used in FDA regulatory decision making for medical devices, including potentially generating valid scientific evidence.

In identifying a device, the SE of which is questionable, § 860.7(c)(2) also explains random experience and reports lacking sufficient details to permit scientific evaluation may be considered valid scientific evidence. Such random experience and reports lacking sufficient details to permit scientific evaluation may be early and sometimes informal indications of the danger or ineffectiveness of a device (43 FR 32988 at 32990, July 28, 1978). Where FDA is considering the classification of a device, such random experience and reports are not considered valid scientific evidence.

## III. Public Comments in Response to the Proposed Order

On December 29, 2015, FDA published a proposed order to reclassify from class III to class II the ECT device for use in treating a severe MDE associated with MDD or BPD in patients 18 years of age and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition and to require the filing of a PMA for ECT devices for the intended uses of schizophrenia, bipolar manic states, schizoaffective disorder, schizophreniform disorder, and catatonia. The comment period on the proposed order closed on March 28, 2016.

In response to the December 29, 2015, proposed order, FDA received over 3,400 comments from industry, professional societies, trade organizations, and individual consumers by the close of the comment period, each containing one or more comments on one or more issues. We describe and respond to the comments in this section of the document. The over 3,400 comments are grouped based on the common themes listed below. We have grouped similar comments together under the same number and numbered them sequentially.

A. Comments in Support of Reclassifying ECT Into Class II (Comments 1–2)

B. Comments on Reclassifying ECT Based on Safety and Effectiveness (Comments 3–9)

C. Comments on Patient Concerns (Comments 10–16)

D. Comments on Regulatory Process of the Proposed Order (Comments 17–23)

E. Comments on Labeling Concerns (Comments 24–29)

F. Comments Outside the Scope of This Final Order (Comments 30–34)

Please note that in some cases we separated different issues discussed by the same commenter and designated them as distinct comments for purposes of our responses. The number assigned to each group is purely for organizational purposes and does not signify the comment's value or importance or the order in which comments were received.

In the proposed order we asked interested persons to submit comments on two specific questions. FDA sought comments on whether: (1) The term ''treatment resistant'' and the phrase ''require rapid response'' provide sufficient clarity to the population for which ECT benefits outweigh risks and (2) if 60 days is an appropriate time to allow existing manufacturers who do not intend to market their ECT device(s) for uses other than use in treating severe MDE associated with MDD and BPD in patients 18 years of age and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition to prepare and submit 510(k) amendments for ECT devices. FDA continues to believe the term ''treatment resistant'' and the phrase ''require rapid response'' provide sufficient clarity to the population for which ECT benefits outweigh risks. Because there were no comments submitted on the second question, FDA's discussion of when 510(k) holders should submit an amendment to a 510(k) is in section V.B., Compliance with Special Controls, of this final order.

*A. Comments in Support of Reclassifying ECT Into Class II*

(Comment 1) FDA received many comments generally supporting the proposed reclassification to class II. Comments included many literature references including references published since the 2011 Neurological Devices Classification Panel meeting (the 2011 Panel). Several comments noted that ECT had been used safely and effectively in their practice or on themselves as a patient or on a family member or a friend.

(Response 1) After examination of the totality of the scientific evidence, FDA continues to believe that there is sufficient evidence to establish special controls that, together with general controls, provide a reasonable assurance of SE to reclassify ECT to class II for use in treating a severe MDE associated with MDD or BPD, as initially specified in the proposed order. In addition, FDA has determined that there is adequate support for the reclassification of ECT into class II for the treatment of catatonia and expanding the adolescent age subpopulation from 18 to 13 years of age. FDA has made this determination based upon a reassessment of the following sources of information: (1) Published literature referenced in the Executive Summary to the 2011 Panel; (2) comments and literature received in public dockets including the call for SE information for all preamendments class III devices (74 FR 16214, April 9, 2009), the call for ECT SE information in a separate docket (74 FR 46607, September 10, 2009), the 2011 Panel (75 FR 72832, November 26, 2010), the ECT Draft Guidance (80 FR 81330, December 29, 2015) and the proposed order (December 29, 2015) (these five dockets are to be referred to as ''ECT public dockets'' in this document, discussed below in response 2); (3) clinical practice guidelines; and (4) review of medical device reports (MDRs) in the FDA Manufacturer and User Facility Device Experience (MAUDE) database. The reevaluation of the scientific evidence presented to and discussed at the 2011 Panel meeting, and the review of additional post-2011 scientific information that was provided to FDA in comments to the proposed order, further supports this finding.

(Comment 2) Several comments supported the reclassification of ECT to class II for a severe MDE associated with MDD or BPD, but said the reclassification was too restrictive in its scope. Several additional indications, many of which are outside the scope of this classification effort, were mentioned. Comments suggested that classification should be expanded to some or all of the following indications and populations (ordered alphabetically):

- Adolescents
- Adolescents and children
- Autism
- Catatonia
- Delirium
- Delusional disorders
- Developmental disability
- Maintenance or continuation ECT
- Mania in BPD
- Mania—refractory, intractable, acute
- Neuroleptic malignant syndrome
- Other psychiatric disorders and conditions for which ECT has been used
- Parkinson's disease
- Patients with contraindications to drug treatment including women who are pregnant/nursing, the elderly, or those who have comorbid conditions
- Psychosis—treatment resistant, puerperal
- Schizophrenia—clozapine resistant, refractory
- Schizoaffective disorder
- Severe self-injurious behavior
- Shy-Drager syndrome
- Status epilepticus
- Suicidal patients

(Response 2) As part of the review of the public comments received in response to the proposed order, FDA considered over 400 scientific articles cited in comments or attached to comments filed in the ECT public dockets. Many of the scientific articles included information not within the scope of this order; however, some of the articles included studies that investigated the SE of ECT for catatonia, mania, schizophrenia, and schizoaffective disorder, and use of ECT in children, adolescents, and adults, which are indications within the scope of this final order. Many of these articles also provided information on research published since 2010, after the literature review was conducted for the 2011 Panel on classification of ECT devices.

Of the information submitted in response to the proposed order, FDA reviewed many articles containing valid scientific evidence regarding the SE of ECT for certain intended uses, which are within the scope of this reclassification effect, including catatonia and severe MDE associated with MDD or BDP for the indicated populations. In addition, 29 articles referenced in the ECT public dockets contain valid scientific evidence on the SE of ECT in the adolescent subpopulation (patients age 13 years to less than 18 years). The sections below further discuss FDA's review of this evidence and conclusions.

Based on evaluation of this evidence, FDA is including in the final order to reclassify ECT the indication of catatonia for patients who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition in addition to treating a severe MDE (associated with MDD or BPD). FDA believes that the totality of evidence supports the determination that the special controls identified in this final order, along with general controls, are sufficient to provide a reasonable assurance of SE for these indications. For the other indications cited in the ECT public dockets that are within the scope of this classification effort, FDA has concluded that there was insufficient scientific evidence to support reclassification.

Several comments posted to the ECT public docket in response to the proposed order, including comments from professional societies and organizations, physicians, and other ECT practitioners, were supportive of a class II recommendation for catatonia or a severe MDE associated with MDD or BPD in adolescents, and in some cases, younger children. While ECT devices are historically cleared with no specific age indicated, the proposed order for ECT recommended that the indications for use be limited to use of the device in patients 18 and above. Consistent with the cleared indications, FDA's Executive Summary for the 2011 Panel to discuss reclassification did not include a review on the use of ECT in different age groups; however, substantive comments were provided during the open public hearing section both for and against the use of ECT in children and adolescents (Ref. 4). In response to the comments recommending expansion of the age range of adolescent patients, under section 515(i)(2) of the FD&C Act, FDA assessed the articles submitted in the ECT public dockets (sources of information listed in response to Comment 1 above) to evaluate the SE evidence supporting the use of ECT in younger populations (*i.e.,* children and adolescents).

FDA evaluated ECT use in treating a number of psychiatric or medical conditions (*e.g.,* a severe MDE associated with MDD or BPD, catatonia, schizophrenia, schizoaffective disorder, and mania) in these younger populations. Limited experience and only a few reports were available for patients less than and including 12 years of age (*i.e.,* children). The majority of studies focused on catatonia or a severe MDE associated with MDD or BPD in patients age 13 years and older.

For those studies that did report clinical outcomes in adolescent patients, results were generally favorable in treating catatonia or a severe MDE associated with MDD or BPD. Treatment approaches (*i.e.,* electrode placement, administration, and safeguards) were similar between adult and adolescent subpopulations. As such, the literature provided in the ECT public dockets supports a reclassification to class II for the use of ECT in treating catatonia or a severe MDE associated with MDD or BPD, for patients age 13 years and older who are treatment-resistant and who require a rapid response due to the severity of their psychiatric or medical condition, with the establishment of special controls (discussed in more detail below in section III.A.3). FDA's evaluation is based on a reassessment of the published literature referenced in the Executive Summary to the 2011 Panel, comments and literature received in the ECT public dockets, and review of the 2011 Panel meeting transcript.

Based upon FDA's review of the scientific literature submitted in the comments received in the ECT public dockets, and an assessment of the totality of the evidence, FDA is reclassifying ECT devices for a broader population than identified in the proposed order. The reassessment of evidence including scientific articles are organized into four subsections consisting of: (1) Safety of ECT in treating catatonia or a severe MDE associated with MDD or BPD; (2) effectiveness of ECT for catatonia; (3) effectiveness of ECT for patients 13 years and older; and (4) effectiveness of ECT for schizophrenia, schizoaffective disorder, and mania. The specific indications within the scope of this final order include only those for which FDA has cleared 510(k) submissions. In this summary, we do not include isolated case reports.

1. Safety of ECT in Treating Catatonia or a Severe MDE Associated With MDD or BPD

Overall, the published literature provided since 2010 in the comments received in the ECT public dockets and reviewed by FDA provided information on over 1,000 patients, and included information regarding ECT treatment outcomes in adults, adolescents, and children. The reviewed published literature included prospective and retrospective studies, randomized patient treatment schedules (*e.g.,* number of treatments per week), and either administered unilateral or bilateral stimulation. The majority of studies reported the safe use of ECT with minimal and reversible adverse events, and in some cases, patient memory and mood improved while treating catatonia or a severe MDE associated with MDD or BPD; positive results included outcomes in both adults and adolescent subpopulations. Six studies (Refs. 5–10) provided detailed safety data on patients (N=609) for review and further discussion below.

Fernie et al. (Ref. 5) conducted a retrospective study to evaluate the persistence of cognitive side effects of ECT in a retrospective case study of 126 patients treated with ECT between June 2010 and October 2012 at the Royal Cornhill Hospital, Aberdeen, Scotland. Results from validated longitudinal neuropsychological tests (the Cambridge Neuropsychological Test Automated Battery spatial recognition memory test (CANTAB)) and subjective reports of memory function showed that while the performance was poorer compared with baseline for tests administered up to 3 months following completion of ECT therapy, these effects were transient and improved at 6 months. In some cases, mood and subjective memory scores improved following ECT. The Mini Mental State Exam (MMSE) demonstrated improvement over baseline starting from 1 month following therapy. Overall, the application of ECT had reversible cognitive deficiencies compared to pre-ECT treatment scores, a measure of safety, and in some assessments (CANTAB, subjective reports of memory function, and MMSE) showed patient improvement.

Kirov et al. (Ref. 6) conducted a retrospective review of 10 years of cognitive performance data that included 199 patients and 500 assessments. Cognitive testing consisted of a battery of nine tests including backward digit span, word, shape, and face recognition, verbal fluency, complex figure immediate recall, and trail making. Not all subjects were capable of performing all tests and parts of the battery changed over time. Results (linear mixed regression analyses) demonstrated that age, severity of depression at the time of testing, and number of days since the last ECT session were the major factors affecting cognitive performance, but the total number of previous ECT sessions did not have a measurable impact on cognitive performance, which further supports the safety of ECT in not leading to cumulative cognitive deficits.

Maric et al. (Ref. 7) prospectively studied 30 patients with MDD at baseline, shortly after ECT treatment, and at 1 month post treatment using the learning and visual, spatial, and figural memory tests of CANTAB. Severity of depressive symptoms as measured by healthcare professional-rated and self-rated instruments was significantly reduced over time with treatment, as a measure of the effectiveness of ECT. At the same time, the neuropsychological tests did not detect any significant memory impairment and showed improvement on visual memory and learning at 1 month and in the immediate post-treatment period, indicating no prolonged or significant ECT-related memory deficits. These improvements correlated with improvement in depression while serious adverse events were not reported.

Spaans et al. (Ref. 8) compared unilateral brief pulse ECT with unilateral ultra-brief pulse ECT for the treatment of major depression. In this double-blind randomized study conducted in 3 tertiary psychiatric hospitals in the Netherlands, 116 patients entered the study and of those, 87 completed the study (until remission or 12 treatments). Seventy-six (n=76) patients were available with pre- and post-ECT assessments. Blinded cognitive assessment was done before ECT treatment was started and again within 2 days to a week after all treatments were completed. Patients on average received about eight treatments (average 7.1 in the brief pulse group vs. 9.2 in the ultra-brief pulse group). To assess cognitive function, several neuropsychological tests were administered including the Autobiographical Memory Interview and the Amsterdam Media Questionnaire, which is a public event questionnaire with questions grouped by decade about events from the decades of the 1970s through the 2000s. Other cognitive domain tests were also conducted. No significant difference was seen in retrograde amnesia between the two treatment groups. Change in recall performance and fluency tests were also similar between the two groups. There was not a significant difference in performance in the cognitive tests following ECT for any of the cognitive tests during the course of study. The authors also reported mitigating adverse effects on cognition by lengthening the time between treatments to provide patients with more time to recuperate, thereby further characterizing how ECT treatment can be applied safely.

Semkovska et al. (Ref. 9) prospectively studied 138 patients with major depressive episodes who were treated in a national ECT study in which patients were randomly assigned to receive bitemporal (69 patients) or right-side unilateral ECT (69 patients). This

study included 3-month and 6-month followup assessments. Adverse events were similar for the unilateral and bitemporal groups. Following treatment, headache was the most commonly reported adverse physical effect (approximately 27 percent of subjects). Nausea (approximately 14 percent), and muscle pain (approximately 10 percent) were also reported. Significant acute adverse events associated with treatment included six patients (4 unilateral, 2 bitemporal) who experienced ECT related hypertension. Also, one patient developed laryngospasm with temporary drop in oxygen saturation, one patient required treatment for sinus tachycardia, one patient developed bradyarrhythmia, and one patient developed a pulmonary embolus after the fifth treatment. No adverse events required patients to discontinue the study, thereby enabling patients to continue treatment. Positive responses to the treatments were seen in both treatment groups.

Ghaziuddin et al. (Ref. 10) conducted a retrospective study of 16 adolescents treated for depression with ECT. Cognitive tests before ECT treatment were compared to tests administered an average of 7 days following completion of the ECT treatment (immediate testing) and again at an average of 8.5 months following completion of ECT treatment. The comparison of pre-ECT and the immediate post-ECT testing demonstrated significant impairments of concentration and attention, verbal and visual-delayed recall, and verbal fluency. A complete recovery of these functions was noted in the cognitive testing conducted at 8.5 months. There was no deficit in the ability to problem solve during the initial or the subsequent testing. Cognitive parameters found to be impaired during the first few days of ECT were recovered over several months following the treatment. Therefore, there was no evidence of long-term damage to concentration, attention, verbal and visual memory, or verbal fluency. There were also no impairments of motor strength and executive processing, even during the early (within 7 to 10 days) post-ECT period.

Considering the studies summarized above as well as the additional literature referenced in the ECT public dockets and the deliberation of the 2011 Panel, there is sufficient scientific evidence demonstrating, with the establishment of special controls in combination with general controls, a reasonable assurance of the SE for the use of ECT in treating a severe MDE associated with MDD or BPD and safety for treating catatonia in patients who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition (see effectiveness of ECT for catatonia discussion in following subsection). ECT in the indicated populations provides a treatment option for serious diseases where other treatments are less or minimally effective. Based on the totality of available evidence, FDA has determined that the designated special controls mitigate the risks associated with use of ECT in this patient population and provide a reasonable assurance of SE.

2. Effectiveness of ECT for Catatonia

The 2011 Panel was evenly split regarding their recommendation for the reclassification of the use of ECT for catatonia. Several members of the 2011 Panel who recommended class II for catatonia pointed out that this psychiatric disorder is among the most severe and potentially life-threatening and requires a rapid response.

In the public comments in response to the proposed order, 24 published articles were submitted as attachments related to the use of ECT for catatonia. Of these, 14 were published after FDA's systematic literature review performed for the 2011 Panel meeting (Refs. 11–25). As was the case at the 2011 Panel, there remain no randomized controlled trials of ECT in catatonia. The articles published after the 2011 Panel are primarily case series reports, retrospective chart reviews, and systematic literature reviews. All the studies reported on patient outcomes, with the majority of studies reporting favorable SE data.

The systematic review from 2015 by Luchini et al. (Ref. 18) identified 8 retrospective or observational studies that included at least 10 or more subjects. Collectively, these 8 studies represented 346 catatonic patients who received ECT. Response rates ranged from 80 percent to 100 percent. Rates for adverse events were not provided, but with regard to safety, the authors cite the transient cardiovascular events that need to be monitored and managed, including parasympathetic mediated bradycardia or temporary asystole and post-seizure sympathetic stimulation that can lead to sinus tachycardia, bigeminy or trigeminy, or ventricular arrhythmia in as many as 80 percent of patients with known cardiovascular risk. Other risks are those associated with administration of anesthesia in a catatonic patient. These side effects are generally transient and resolve without adverse sequelae.

A noteworthy series of the case series reports (Refs. 19 and 20) all consistently found ECT to be very effective for the treatment of catatonia with relatively few adverse events reported in the treated patients. Given the clinical presentation of patients with catatonia, including the lack of verbal and motor response due to the etiology of the disease, the positive clinical outcome is unlikely to be susceptible to placebo effects; therefore, FDA believes the well-documented case series and open-label trials for the use of ECT in catatonia support the recommendation to include catatonia in class II.

The valid scientific evidence evaluated has enabled FDA to determine that ECT for catatonia can be classified as class II because general controls, in combination with special controls, are sufficient to provide a reasonable assurance of SE. Based on a review of the published literature to date, the recommendations from the 2011 Panel meeting, and comments received in the ECT public dockets, FDA has determined that sufficient evidence exists to establish special controls and support a revision of the proposed classification of ECT for the treatment of catatonia to class II. ECT for catatonia presents the same types of risks to health and would be subject to the same types of special controls identified for a severe MDE associated with MDD or BPD in patients who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition. Further, clinical guidelines for schizophrenia published in 2012 from the World Federation of Societies of Biological Psychiatry (WFSBP) (Ref. 26) recommend consideration of ECT for catatonia as an alternative when rapid resolution is necessary or when an initial trial of benzodiazepines has failed. Therefore, instead of calling for PMAs for ECT devices for the treatment of catatonia, FDA has satisfied the requirements under section 515(i)(2) of the FD&C Act for revising the proposed classification from class III to class II (special controls) following reassessment of the published literature referenced in the Executive Summary to the 2011 Panel, and comments and literature received in the ECT public dockets.

3. Age Limitations on Adolescent Subpopulation for Use of ECT

In the 2015 proposed order, FDA proposed that ECT devices should be classified as class II (special controls) when used for treating adults and adolescents 18 years and older with a severe MDE associated with MDD or BPD, who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical

condition. In response to the proposed order, public comments included submission of 29 articles regarding the use of ECT in children and adolescents. Some of these comments recommended the age for using ECT should be lower than 18 years of age. Half of these articles (Refs. 13–17, 21, 25 and 27–31) were published after the 2011 meeting. Articles published after the 2011 Panel meeting included children and adolescents with a variety of psychiatric conditions, including catatonia, a severe MDE associated with MDD or BPD and childhood schizophrenia.

Because the current labeling of legally marketed ECT devices does not include specific age limitations for any indication within the scope of this classification and FDA received public comments advocating expansion to include the adolescent age range, FDA believed it was important to reassess the evidence and conduct a systematic re-review of valid scientific evidence for the use of ECT in catatonia or a severe MDE associated with MDD or BPD in different age groups. Accordingly, similar to the treatment of catatonia, FDA conducted a reevaluation of the SE of ECT for use in the adolescent subpopulation by reassessing the published literature referenced in the Executive Summary to the 2011 Panel, and in comments and literature received in the ECT public dockets relating to the adolescent age range for using ECT under section 515(i)(2) of the FD&C Act. Unlike the evidence reported for the adolescent population, limited experience and only a few isolated reports were available for patients less than or including 12 years of age. Therefore, this age range was not re-evaluated.

With regard to safety of ECT in treating catatonia or a severe MDE associated with MDD or BPD, specifically in individuals under the age of 18, Jacob et al. (Ref. 17) conducted a 10-year retrospective chart review of all adolescents and children who had received at least one session of ECT therapy in the Child and Adolescent Psychiatry Centre, National Institute of Mental Health and Neurosciences. Twenty-two patients, most who were severely ill, received therapy in the 10-year window. In this group, the majority of patients had no adverse effects; four patients (18.4 percent) experienced headache immediately after the ECT procedure, and three of eight monitored patients had prolonged seizures (greater than 2 minutes). At discharge, approximately 80 percent were rated as ''much improved'' or ''very much improved'' based on the Clinical Global Impressions-Improvement (CGI–I) scale.

Cohen et al. (Ref. 32) investigated cognitive impairment at long-term followup in adolescents treated with ECT for severe mood disorders and compared the neuropsychological test results of the ECT-treated subjects with psychiatric comparison subjects matched for sex, age, and diagnosis. This study found that cognitive test scores of the subjects treated with ECT were similar to those subjects who did not receive ECT. In the ECT treated group 6 of the 10 subjects reported having had memory losses immediately after ECT treatment and 1 reported long-term subjective memory impairment. In the long-term followup study (3.5 years average), the cognitive tests of anterograde memory in the ECT treated group showed no measurable difference compared to the matched group.

A systematic review by Lima et al. (Ref. 28) published in 2013 found 212 published studies on the use of ECT in children and adolescents. Of these, 39 studies met the authors' criteria for inclusion in their systematic review. The reviewed studies specified indications of ECT use in adolescents, evaluated the effectiveness of this therapy in producing remission, and explored the potential risks and complications of the procedure. Overall, the results of this systematic review found that the use of ECT in adolescents is considered a highly effective option for treating several psychiatric disorders including MDE and catatonia, achieving high remission rates, and presenting few and relatively benign adverse effects. These authors conclude that the risks to adolescents can be mitigated by the correct use of the technique and are considered minimal when compared to the treatment benefit.

Consoli et al. (Ref. 33) investigated the use of ECT in adolescents with a primary diagnosis of catatonia. These authors reviewed the published literature (1985–2009) on the use of ECT in child and adolescent patients with catatonia. In their meta-analysis of studies that included 10 patients or more, only 1 study of 12 patients included subjects below the age of 13 (it included patients in the age range of 12 to 18). This review found that ECT is used as a second-line management after high-dose benzodiazepine trials and that ECT is an effective, safe, and useful procedure in the treatment of catatonic adolescents (n=59).

The largest systematic review of the use of ECT in young people was reported by Rey and Walter (Ref. 34). This 1997 review assessed 60 studies comprising nearly 400 patients, with the majority of patients between the ages of 13 and 18 years and found rates of improvement across studies, including 63 percent for depression and 80 percent for catatonia. Serious complications were very rare, whereas minor, transient side effects appeared common. These authors concluded that ECT in young people appears to be similar in SE to that found in adults, but note that these results are limited by the lack of controlled clinical trials.

FDA's review of other retrospective studies submitted as comments to the proposed order have found similar results. Walter and Rey (Ref. 35) studied 42 patients aged 14 to 18 with a variety of psychiatric diagnoses who received ECT therapy and observed marked improvement or resolution of symptoms in about half of the patients who completed the therapy. Ghaziuddin et al. (Ref. 36) observed clinically significant improvement in 11 of 11 adolescent patients in the 13- to 18-year range with major depressive episode. Of these 11 adolescents 7 achieved euthymia, which is defined as a Children Depression Rating Scale-Revised (CDRS–R) of 40 or less. Strober et al. (Ref. 37) reviewed the treatment of 10 adolescents (13–17 years) with major depression or BPDs and observed complete remission in 6 patients and partial remission in the other 4. Cohen et al. (Ref. 38) studied 21 adolescents (age 14–19) and observed 100 percent response in major depression and 75 percent response in bipolar-mania. In one of a few studies with a control arm, Kutcher and Robertson (Ref. 39) studied 32 bipolar patients and compared 16 subjects who received ECT to 16 (serving as controls) who were offered ECT but refused it. The ECT group improved significantly more than the group who did not receive ECT and the duration of their hospitalization was cut in half (74 vs. 176 days on average). Taken as a whole, these reports are consistent in reporting effectiveness of ECT in treating depressive episodes and catatonia in young adolescents.

In addition, the American Academy of Child and Adolescent Psychiatry (AACAP) has published guidelines for the use of ECT in adolescents and children. In the AACAP publication on practice parameters (Ref. 40), they reviewed selected publications since 1990. While the use of ECT in adolescents is uncommon within the age of 13 to 17 (representing about 1.5 percent (Ref. 40) of the total population of individuals who receive ECT), the benefits of therapy are acknowledged. This publication also indicates that while the use of ECT in patients 12 years of age or younger is rare and necessitates further study, the guidelines identify risk mitigations of

the technique. Overall the AACAP recommends that patients 13 years of age and older are appropriate for considering use of ECT in treating catatonia or a severe MDE associated with MDD or BPD.

While the discussion at the 2011 Panel meeting of ECT use in treating adolescents with catatonia or a severe MDE associated with MDD or BPD was limited, the 2011Panel did hear and discuss comments during the open public hearing both on adolescent age groups as well as considerations as it relates to ECT (Ref. 41). Although a primary emphasis was upon adult populations towards the conclusion of the 2011 Panel proceedings, sufficient and compelling discussion was heard regarding adolescent response to ECT, especially during the opening public hearing comments. In summary, there was the 2011 Panel discussion focused on adolescent patient use of ECT, as well as many comments including literature references addressing inclusion and exclusion on the basis of age for specific indications for use of ECT (*e.g.* schizophrenia, bipolar manic states, schizoaffective disorder, and schizophreniform disorder).

Additionally, FDA conducted a review of the MAUDE database from August 2016 to December 2017. The additional MDRs from the MAUDE database do not appear to be significantly different from those compiled for the 2011 Panel meeting and the small number of MDRs is consistent with the safety record reported in the literature for ECT.

As stated previously, FDA has reevaluated the valid scientific evidence for use of ECT in treating adolescents and, in the case of catatonia or a severe MDE associated with MDD or BPD, we believe the requirements under section 515(i)(2) of the FD&C Act for revising the classification of the age limitation for the adolescent subpopulation are satisfied. Based upon the assessment of the totality of evidence, FDA believes that special controls, along with general controls, can provide a reasonable assurance of SE of the use of ECT for all adolescent age groups (13–21 years) and, therefore, is modifying the designation for class II for the indications of catatonia or a severe MDE associated with MDD or BPD in the adolescent subpopulation to include individuals 13 years and older who are treatment resistant or require a rapid response.

4. Effectiveness of ECT for Schizophrenia, Schizoaffective Disorder, and Mania

During the 2011 Panel meeting, members expressed diverse opinions on the effectiveness of ECT for treatment of schizophrenia, schizoaffective disorders, and mania, but the majority of the 2011 Panel members supported class III designation for these indications. A number of published articles on the use of ECT to treat schizophrenia and schizoaffective disorder were submitted and reviewed as attachments to the ECT public dockets. Of these, approximately 15 were published after the 2011 Panel meeting. The majority of these articles published after the 2011 Panel meeting review were either isolated case reports or retrospective chart reviews. SE data, including clinical outcomes, for both adults and adolescents with a primary diagnosis of schizophrenia or schizoaffective disorder (Refs. 14, 23, 30, 42, and 43–47) resulted in variable patient outcomes, while mania had more positive outcomes. However, the available evidence across patients for these conditions was limited when compared to the available evidence for other conditions presented in this final order for which class II is designated.

There was one published practice guideline (Ref. 48) that provided updated treatment recommendations for the acute treatment of schizophrenia and the management of treatment resistance. This guideline concludes that there is limited evidence for general efficacy of ECT in treatment-resistant schizophrenia, but that in certain cases ECT as an adjunct to antipsychotic therapy may be appropriate. This is in contrast to the guideline recommendation for catatonia where ECT is considered an important therapeutic alternative (see above discussion in section III.A.2, Effectiveness of ECT for Catatonia).

Iancu et al. (Ref. 44) conducted a retrospective chart review of 20 consecutive patients with schizophrenia or schizoaffective disorder who were individually treated with at least 30 ECT sessions at the Tel Aviv University. All of these patients had been hospitalized for most or all of the previous 3 years. In this group of chronically hospitalized patients, the authors conclude that ECT treatment improves general function and reduces verbal aggression and self-harm. This patient group had a mean age of 65 and the average age at disease onset was 22 years. Patients were selected for treatment based on inadequate response to medications, history of a good response to ECT in the past, aggression, self-injury, and refusal to eat or drink. Improvement was seen on all assessed scales including the Global Assessment of Functioning, Clinical Global Impression-Severity and Overt Aggression Scale but most changes before and after ECT were not clinically meaningful or statistically significant.

Kristensen et al. (Ref. 45) reviewed the treatment of 72 consecutive hospitalized patients between 2003 and 2008 from two hospitals in the Copenhagen area. Fifty-five had a diagnosis of schizophrenia and 17 a diagnosis of schizoaffective disorder. All patients had been hospitalized for at least a week and the indication for ECT was an increase in acute episodes or symptom severity leading to hospitalization. The patient ages ranged from 18 to 79 and the disease duration ranged from 1 to 40 years. The duration of the patients' psychotic behavior ranged from a few weeks to over 5 years. ECT was effective in this severely ill population as reflected by a measure of relief from psychosis and disruptive behavior as described in the patient charts. Using information about the size of the catchment area for the involved hospitals, the authors were able to estimate that only about 1.5 percent of patients with schizophrenia received ECT over the 6-year study period in this area of Copenhagen. Because this represents a select and small fraction of the population with schizophrenia, it is not possible to generalize these results to the general population of schizophrenic individuals.

Petrides et al. (Ref. 47) studied patients with clozapine-resistant schizophrenia in a single-blind study where 20 clozapine-resistant patients received ECT as an adjunct to the clozapine treatment and 19 received usual (clozapine) care. Response was defined as a 40 percent or greater reduction in symptoms based on the psychotic symptom subscale of the Brief Psychotic Rating Scale, a Clinical Global Ratings-Severity (CGI–S) rating of less than 3, and a CGI improvement rating less than or equal to 2 following an 8-week course of treatment. Fifty percent of patients in the treatment group that received the ECT met the response criteria compared to none of the patients in the control group. FDA believes that these results, while promising, have significant limitations. The Denmark Study represents a population of hospitalized patients who may not be representative of the general population of schizophrenic individuals. The Petrides study was small and focused on the subpopulation of clozapine resistant patients and again cannot be

extrapolated to the general schizophrenic patient population. The available valid scientific data on the schizophrenic patient population are limited and insufficient to demonstrate that the use of ECT in schizophrenia patients can be safe and effective with the use of special controls.

Other studies have focused on the use of maintenance ECT in the treatment of patients with schizophrenia and schizoaffective disorders (Refs. 23, 27, and 46). In each of these studies, the patient populations are highly selected and represent a small minority of the schizophrenic or schizoaffective populations. Also, a number of additional therapies were given to patients, with limited use of ECT in some cases. While the results are promising in these selected patient populations, the evidence available is limited. Moreover, practice guidelines have not called out schizophrenia and schizoaffective disorders for treatment with ECT. With limited data on different select subpopulations, FDA believes that there is insufficient evidence, at this time, to establish special controls for the subpopulations that might benefit from the treatment. Therefore, FDA believes that the use of ECT to treat schizophrenia or schizoaffective disorder is appropriately currently regulated in class III.

Ten published articles were submitted to the ECT public dockets regarding the SE of ECT for mania. All the articles were published prior to the 2011 Panel meeting and no ''new information'' on the SE of mania was submitted to the ECT public dockets that were not available to the 2011 Panel. In reviewing the ECT public dockets, FDA did not identify additional scientific information since the 2011 Panel meeting supportive of reclassifying mania to class II. The published reports on using ECT for the treatment of mania are relatively few, have small numbers of patients, and acknowledge that there are viable alternative treatments in this population.

In one study, Black et al. (Ref. 49) systematically reviewed records of patients treated with ECT for mania or depression over a 12-year period at the University of Iowa Hospital Center. Patient outcome was divided into five categories based on patient discharge notes with the category ''marked improvement'' applied to patients where the discharge notes suggested there was complete resolution of depressive or manic symptoms. In this review, there was marked improvement in a substantial majority of the patients with depression and with mania. However, the total numbers of patients treated included 422 patients treated for depression but only 37 patients treated for mania. As a result of the differences in numbers of patients treated, there is greater uncertainty in the significance of this retrospective study in mania compared with depression.

Mukherjee et al. (Ref. 50) reviewed the treatment of 30 manic patients at a psychiatric institute in India treated for mania with ECT. They observed remission of mania in 26 of 30 patients. Results are confounded though by the concurrent prescription of neuroleptics at the time of admission for treatment.

Small et al. (Ref. 51) compared ECT with lithium maintenance therapy to lithium treatment in 34 patients hospitalized for mania. Although the patients who underwent ECT improved more than the lithium treatment patients during the first 8 weeks, the study found no differences in clinical ratings after 8 weeks and no differences in rates of relapse, recurrence, or re-hospitalization in the followup period, when compared to pharmacotherapy.

FDA concluded that based on the published literature referenced in the Executive Summary to the 2011 Panel, comments and literature received in the ECT public dockets, the small number of patients treated and limited outcomes reported, the existence of confounding factors in studies, and the availability of alternative therapies with similar reported effectiveness, that special controls cannot be established to provide a reasonable assurance of SE, and, therefore, it is appropriate to maintain ECT to treat mania in class III.

*B. Comments on Reclassifying ECT Based on Safety and Effectiveness*

In this section, comments regarding the SE of ECT are categorically grouped together so that FDA's responses could be addressed by topic instead of each comment considered independently.

(Comment 3) Several comments indicated that ECT was not safe and/or not effective, particularly in the long term. Several comments noted that ECT had not been used safely and/or effectively in their practice, or on themselves as a patient, or on a family member or a friend. Several comments stated ECT injures patients and is not therapy. Several comments also noted long-term memory, cognitive, or functional impairment following ECT administration. Instead of using ECT, several comments recommended alternative treatments, including acupuncture, transcranial magnetic stimulation, or nutritional or solar therapy.

(Response 3) Comment 3 reflects significant concern on the part of some patients and caregivers about the risks of ECT. Table 1 shows how FDA believes that the risks to health associated with ECT for treatment of catatonia or a severe MDE associated with MDD or BPD can be mitigated by the designated special controls.

TABLE 1—IDENTIFIED RISKS TO HEALTH AND MITIGATION MEASURES FOR ECT

| Identified risks to health | Mitigation measure(s) |
|---|---|
| Adverse reaction to anesthetic agents/neuromuscular blocking agents | Labeling |
| Adverse skin reactions | Biocompatibility Labeling |
| Cardiovascular complications | Labeling |
| Cognitive and memory impairment | Technical parameters, Non-clinical test data, Labeling |
| Death | Labeling |
| Dental/oral trauma | Labeling |
| Device malfunction | Performance data, Electromagnetic compatibility, Software verification, validation, and hazard analysis |
| Manic symptoms | Labeling |
| Pain/discomfort | Labeling |
| Physical trauma | Labeling |
| Prolonged or tardive seizures | Labeling |
| Pulmonary complications | Labeling |
| Skin burns | Performance data, Labeling |
| Worsening of psychiatric symptoms | Labeling |

FDA acknowledges that the individuals for whom ECT therapy may be prescribed are at significant risk for complications including death from their underlying conditions. Milstein *et al.* (Ref. 52) completed a retrospective study of 1,494 psychiatric subjects followed for 5 to 7 years following hospitalization for a psychiatric condition. They found 76 deaths in this group of patients with 16 of the deaths being by suicide. In this group, ECT was not protective but also did not increase the risk for death. Labeling will be required to explain the potential risks and benefits to ensure that patients, caregivers, and family members understand the magnitudes of the risks and the benefits of ECT. FDA acknowledges the important role of patient preference and patient choice in selecting treatments. Patient preference is important in balancing the individuals' assessment of risk and benefit, especially in the presence of serious and potentially life-threatening disorders. This classification is concerned with the use of ECT for certain specified uses and does not address the potential use of other treatments that patients may consider. FDA believes that for certain indications, special controls as established in this final order, along with general controls, provide a reasonable assurance of SE of ECT by mitigating the identified risks to health. As such, FDA disagrees with the comments that ECT should not be reclassified for any indications to class II.

FDA reclassifies devices under section 515(i)(2) of the FD&C Act in accordance with the criteria in section 513(a) of the FD&C Act. The primary purpose of reclassification is to apply the appropriate level of regulatory controls for a device based on the most current information regarding its SE. FDA notes that reclassification does not imply that ECT is a preferred form of treatment. FDA recommends that patients consult with their healthcare providers to determine if ECT is the best treatment option for them or if there are suitable alternative treatments. FDA notes that the patient labeling is required to list alternative treatments (see § 882.5940(b)(1)(ix)(E) (21 CFR 882.5940(b)(1)(ix)(E))).

(Comment 4) Some comments stated that FDA did not consider animal studies and death data in proposing to reclassify these devices.

(Response 4) FDA does not agree with these comments. Information about adverse events, including death, was carefully considered regarding the reclassification action. Section 4.8 of the safety review in the FDA Executive Summary prepared for the 2011 Panel meeting specifically addresses the risk of death. Data for deaths from MDR analyses was also considered and made part of the risks identified in the proposed order. FDA acknowledges that there is uncertainty in the estimate of risk of death from these sources of information and that the risks are likely changing as a result of evolution in the practice of medicine. In light of this risk, the labeling is required to include death (§ 882.5940(b)(1)(ix)(H)(*3*)(*viii*)) as a risk of the use of ECT. In some cases where human experience is limited, animal studies can be of significant value in predicting outcomes in humans.[2] However, in this case where there is a significant and substantive experience with the use of these devices to treat humans, FDA believes that the human study data are the primary sources for review and consideration.

(Comment 5) Several comments opposed the reclassification saying that ECT should remain in class III for all indications. Several comments indicated that current safety or effectiveness information was insufficient to ensure patient protection. Several comments indicated that proof of SE should be required before the device enters the market. Several comments indicated that the 510(k) clearance pathway was not sufficient for ECT devices.

(Response 5) FDA disagrees with these comments that ECT should not be reclassified to class II as specified in this final order for certain indications. As established in section 513(a)(1)(C) of the FD&C Act and 21 CFR 860.3(c)(3), a device is in class III if insufficient information exists to determine that general controls and/or special controls are sufficient to provide reasonable assurance of its SE. Based on FDA's independent review of the scientific evidence, FDA has determined that the special controls established in this final order, including performance data, technical parameters of the device, and extensive labeling requirements, along with general controls, can provide reasonable assurance of SE of ECT for the specified class II indications. ECT devices for indications in class II will require a 510(k) (or an amendment to a previously cleared 510(k) if already legally marketed) that demonstrates compliance with these special controls. ECT devices for indications other than those being classified into class II will require premarket approval as insufficient evidence currently exists to establish adequate special controls for these uses.

(Comment 6) Several comments indicated that ECT did not treat the biological basis of depression or other mental disorders. Several comments indicated that electricity did not treat the underlying cause(s) and could exacerbate mental disorders. Several comments indicated that there is no evidence that mental disorders are neurobiological. Several comments indicated that ECT may be used in patients who are misdiagnosed.

(Response 6) For a device to be determined to have a reasonable assurance of SE, FDA evaluates the device's performance outcomes relative to the indications for use and not necessarily the mechanism(s) of action of the device, which may not be well understood in some cases. For ECT, the clinical data reflecting the device's performance in relation to the indications for use have been discussed above in response to Comment 2. Additionally, knowledge of the underlying causes of mental disorders is not required to evaluate a reasonable assurance of the SE of a device type for a specified intended use. Therefore, the biological basis or cause of the underlying mental disorder is outside of the scope of this reclassification.

(Comment 7) Several comments suggested that reclassification would increase acceptance of ECT. Several comments indicated that ECT is not as safe or effective when compared to other available treatments. Several comments opposed the reclassification saying that reclassification indicated that ECT is a preferred method of treatment.

(Response 7) The primary purpose of reclassification is to apply the appropriate level of regulatory controls for a device type based on the ability to reasonably assure SE. FDA notes that reclassification does not imply that ECT is a preferred form of treatment. This order is neither a recommendation of ECT treatment nor a determinant of whether ECT is safer or more effective than alternative treatments. The purpose of the proposed and final order process is to identify the regulatory controls necessary to reasonably assure SE for ECT and to provide the evidence supporting this determination. Based upon FDA's assessment, special controls, in combination with general controls, are necessary and sufficient to provide a reasonable assurance of SE for the use of ECT in treating catatonia or

[2] FDA supports the principles of the ''3Rs,'' to reduce, refine, and replace animal use in testing when feasible. We encourage sponsors to consult with us if it they wish to use a non-animal testing method they believe is suitable, adequate, validated, and feasible. We will consider if such an alternative method could be assessed for equivalency to an animal test method.

a severe MDE associated with MDD or BPD in patients age 13 years and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition. ECT devices for indications other than those identified in the previous sentence, including schizophrenia, schizoaffective disorders, schizophreniform disorder, bipolar manic states, and catatonia or a severe MDE associated with MDD or BPD in patients under 13 years or patients 13 years or older who are not treatment-resistant or who do not require a rapid response due to the severity of their psychiatric or medical condition, will require premarket approval. FDA believes that insufficient evidence currently exists to establish special controls to mitigate the risks to health and provide a reasonable assurance of SE for those uses.

(Comment 8) Several comments indicated that ECT should be banned. Several comments characterized ECT as inhumane. Commenters indicated that the United Nations Special Rapporteur on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment February 16, 2013, defined ECT without consent as torture.

(Response 8) FDA disagrees that ECT should be banned. Section 516 of the FD&C Act (21 U.S.C. 360f) authorizes FDA to ban a device when, based on all available data and information, FDA finds that the device ''presents substantial deception or an unreasonable and substantial risk of illness or injury.'' During review of the scientific evidence, FDA did not identify sufficient evidence to ban ECT. FDA determined that special controls, in combination with general controls, can mitigate the identified risks of ECT for certain intended uses and mitigate risks associated with ECT use. FDA determined that there is a reasonable assurance of SE for ECT treatment for the identified indications for use and patient populations. Therefore, FDA has determined that ECT does not present substantial deception or an unreasonable and substantial risk of illness or injury.

As noted, we acknowledge the February 1, 2013, United Nations Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment by Juan E. Méndez does recommend banning the administration of non-consensual electrical stimulation against persons with disabilities (Ref. 53). Persons with disabilities include persons with long-term intellectual or sensory impairments. The report does not address the use of electrical stimulation to treat conditions such as a severe MDE associated with MDD or BPD, schizophrenia, bipolar manic states, schizoaffective disorder, schizophreniform disorder, or catatonia. As noted in the proposed order and adopted in this final order, appropriate directions for use and specific labeling special controls (§ 882.5940(b)(1)(viii) and (ix)) are required for the safe use of ECT.

(Comment 9) Several comments were concerned that reclassification would make it easier for either healthcare professionals or non-healthcare professionals to overly or inappropriately use ECT. Comments indicated that ECT may be used to shorten hospital stays without regard for patient outcomes. Comments indicated that ECT may be used to control patients or reduce unwanted behavior such as screaming rather than as treatment for a medical condition. Several comments questioned the regulation of ECT use in other indications not included in class II in the split classification.

(Response 9) FDA does not regulate the practice of medicine (see section 1006 of the FD&C Act (21 U.S.C. 396)). Diagnosis and treatment of patients are clinical decisions that fall within the practice of medicine. Rather, FDA regulates the use of a device as indicated by the person or entity offering the device for interstate commerce. The classification of indications for use for ECT devices are specified in the identification language in the codified classification regulation (see § 882.5940). Through the classification process, FDA has determined the level of regulatory control necessary to provide a reasonable assurance of SE of ECT devices for these indications. ECT is a prescription only device that is not safe for use except under the supervision of a practitioner licensed by law to direct the use of the device and for which prescription labeling requirements must be met (see 21 CFR 801.109). The labeled uses of the device must conform to the indications that have been cleared or approved by FDA through the premarket review process. FDA does not regulate off-label use of ECT by physicians.

*C. Comments on Patient Concerns*

In this subsection, comments on patient concerns with using ECT are categorically grouped together so that FDA's responses could be addressed by topic instead of each comment considered independently.

(Comment 10) Several comments state that FDA's call for PMA applications is disingenuous because PMA applications have not been required for ECT devices since they were originally classified. Comments indicate that because the proposed order states ECT devices for some indications will be in class II, device manufacturers will not have an incentive to apply for additional indications through the PMA process, because, under the practice of medicine, healthcare professionals can use class II ECT devices for indications beyond those cleared via 510(k) for indications that are in class III.

(Response 10) FDA disagrees with these comments. Finalizing the classification of ECT includes a requirement that PMA applications be submitted prior to marketing of ECT devices for indications other than those identified as class II within this final order, and it is the responsibility of the manufacturer to ensure that a PMA application is submitted in such circumstances. However, FDA is not permitted to limit or interfere with the authority of a healthcare professional to administer any legally marketed device to a patient for any condition or disease within a legitimate clinician-patient relationship.

(Comment 11) Several comments raised concerns about a split classification and the conditions under which devices could be used under either classification. Several comments indicated that a split classification could restrict the use of ECT for indications not included in class II and thereby limit treatment options for patients. Comments asked if there is evidence of patients not receiving treatment when ECT devices are in class III. Comments asked for guidance on whether class II ECT devices can be used on patients with a severe MDE associated with MDD accompanied by another condition. Comments also stated concern that class II ECT devices will be used as predicate devices for other devices with different current or voltage strength, or different pulse length, pattern or waveform, saying such differences could impact safety including cognitive side effects and/or effectiveness of ECT treatment.

(Response 11) FDA's reclassification of ECT to class II for the indications specified in the final order is an effort to make ECT available for the benefit of patients with conditions for which general and special controls can provide a reasonable assurance of SE. For these indications, sufficient scientific evidence exists for FDA to establish special controls that, in combination with general controls, provide reasonable assurance of SE of ECT. For other indications, sufficient scientific evidence does not currently exist to be

able to establish special controls to mitigate the risks to health at this time. The indications for which there is currently insufficient evidence to develop special controls will remain class III and require a PMA pursuant to section 513(a)(1)(C) of the FD&C Act. Because of the differing levels of scientific evidence currently available to establish special controls for the various uses of ECT, a split classification was warranted in this case. If warranted by new scientific evidence, FDA could reclassify ECT for other indications to class II in the future.

Under section 1006 of the FD&C Act, FDA is prohibited from interfering with the authority of a healthcare professional to prescribe or administer any legally marketed device to a patient within a legitimate clinician-patient relationship. As such, FDA does not regulate the practice of medicine. Rather, FDA regulates the use of a device as indicated by the person or entity offering the device for interstate commerce. The indications for which FDA has determined ECT devices have a reasonable assurance of SE based on the general controls and the identified special controls are in the codified classification regulation (see § 882.5940). Once a product is approved or cleared, a healthcare professional is able to prescribe the device based on a patient's condition. ECT is a prescription device and FDA relies on licensed practitioners to direct its use. Treatment of patients remains under the clinical discretion of their healthcare practitioner. While treatment of patients falls under the practice of medicine, healthcare professionals should carefully consider all ECT device labeling, including potential adverse events, warnings, and medical conditions that can increase patient risk when deciding if ECT is appropriate for their patients, including those with comorbid conditions. The healthcare professional is responsible for providing appropriate ongoing medical management to mitigate any patient specific risks associated with comorbid conditions.

If ECT devices are used as predicate devices for subsequent ECT devices, any differences in the technical parameters (*e.g.,* waveform, output mode, pulse duration, maximum charge, and energy as identified in § 882.5940(b)(1)(i)) between the predicate device and the new device must be characterized and will be considered as part of FDA's substantial equivalence determination to ensure that such differences do not raise different questions of SE.

(Comment 12) Several comments were concerned that adequate, well-informed consent may not take place prior to ECT treatment. Several comments indicated concern over the use of ECT without consent or without full disclosure of risks. Several comments were concerned with involuntary treatment and its outcomes. Comments indicated that conversations about potential benefits, potential risks, alternative treatments, and the typical experience and course of ECT treatment should occur over several sessions prior to ECT treatment. Comments asked that FDA provide additional guidance and recommendations to healthcare professionals on the procedures for informing patients and on obtaining written informed consent from patients or their legally authorized representatives prior to ECT treatment. Comments indicated that family members or other caregivers should be included in the informed consent process and should provide input on how the patient is responding to ECT treatment including any adverse events. Several comments indicated that ECT should only be used in settings of formal informed consent, such as with a documented checklist or when it is specified in a psychiatric advance directive. A comment suggests that FDA develop a patient decision aid related to ECT that considers key clinical variables and alternative therapeutic options as well as incorporating patient values, concerns, and preferences. Several comments indicated that the order should specify that consent is an ongoing process, that information should be provided throughout treatment, and that at any time during the course of ECT treatment, patients can request that treatment be stopped and can withdraw consent for further treatment. Several comments indicated that some patients may not be able to give consent due to their medical condition.

(Response 12) These comments are focused on how patients are informed about the risks, benefits, and alternatives to ECT. FDA agrees that ECT informational material, including information about benefits and risks, should be discussed with the patient and, if applicable, with a designated family member or other individual. In § 882.5940(b)(1)(ix), FDA requires that certain information be provided in the patient labeling for a class II ECT device. The appropriate treatments for a patient with catatonia or a severe MDE associated with MDD or BPD is a complex matter that requires the supervision of a practitioner licensed by law to direct the use of the device. In selecting the appropriate treatment, the practitioner should consider many factors, such as the patient's medical history and the severity of their psychiatric or medical condition. FDA believes that the device labeling required per the special controls will provide patients and healthcare professionals with information that will improve their understanding of the ECT device and assist in selecting the appropriate treatment for patients. ECT is a prescription device, and FDA and licensed practitioners are relied upon to direct its use.

Informed consent procedures may differ across each State agency, institution, hospital, clinic, and practice. For ECT treatment, FDA expects review boards and State agencies to have the appropriate requirements for medical professionals to provide the appropriate informed consent to patients and family members, and to take action when necessary. The patient labeling is required to include information on ECT use, potential benefits, warnings regarding risks of ECT, and alternative treatments. The information required in the patient labeling will help patients make an informed decision about ECT treatment. Patients may also discuss ECT and other treatment options with their healthcare professionals, family members, or other individuals. Patients, or their legally authorized representative, may withdraw consent and request that ECT treatment be stopped at any time.

According to the Surgeon General, involuntary ECT treatment is uncommon in the United States. In every State in the United States, the administration of ECT on an involuntary basis requires a judicial proceeding (Ref. 54). At this time, FDA declines to recommend the development of patient decision aids related to ECT that considers key clinical variables and alternative therapeutic options as well as incorporating patient values, concerns, and preferences. FDA is concerned that including such information may be more confusing than helpful given the complexity of treating a number of different psychiatric disorders. FDA also requires patients consult a practitioner licensed by law to administer or use the ECT device.

(Comment 13) Several comments indicated training or education should be required for healthcare professionals to be eligible to administer ECT. Several comments indicated that the order should specify what type of healthcare professional should be able to administer ECT. Several comments indicated that healthcare professionals

other than physicians should be able to administer ECT.

(Response 13) FDA is in agreement that there is a need for ongoing training for healthcare professionals who administer ECT. ECT is a complex procedure that requires specialty training for reasonably safe and effective administration. As stated in the proposed order and adopted in this final order, FDA is requiring device labeling to specify the clinical training that is needed by those using the ECT device to ensure appropriate use and appropriate ongoing medical management of the patient.

(Comment 14) Several comments indicated that those who administer and/or study ECT have conflicts of interest. Several commenters noted that the doctors recommending ECT treatment profit financially from administering ECT. Commenters asked if FDA considers possible conflict of interests for researchers when assessing the validity of ECT research used to support the reclassification.

(Response 14) The potential for conflict of interest of healthcare professionals administering ECT is outside the scope of this final order and does not bear upon FDA's careful evaluation of the valid scientific evidence on the SE of ECT. FDA's Federal conflict of interest provisions are directed toward the potential for conflict of interest on the part of FDA employees and outside experts used on FDA's advisory committees (see 5 CFR 2640 and 18 U.S.C. 208).

FDA defines valid scientific evidence in § 860.7(c)(2). Isolated case reports, random experience, and unsubstantiated opinions are not regarded as valid scientific evidence. In standard clinical practice as in ECT treatment, healthcare professionals are compensated for providing treatment to patients. Institutional review boards assess potential conflicts of interest for healthcare professionals conducting clinical research on ECT. Under 21 CFR part 54, FDA assesses potential financial conflicts of interest for healthcare professionals conducting clinical research on ECT. Scientific journals typically require disclosure of funding and potential conflicts of interest when publishing research findings.

(Comment 15) Several comments were concerned about the benefit-risk ratio for ECT treatment. Comments raised concerns that the risks of ECT may be higher in vulnerable populations, including the elderly, who could have hemorrhaging from increased intracranial pressure, pregnant women, and patients with multiple disorders, cancer, or multiple medications. Comments indicated that the risks of ECT are higher than acknowledged because adverse reactions are mischaracterized so that they are not associated with ECT. Comments also expressed concern that patient-reported outcomes differ from reported adverse events and study outcomes. Comments said some adverse effects of ECT, such as emotional trauma, have had limited scientific study but are evidenced by many subjective patient accounts and should be considered further. Comments noted that the benefit-risk ratio could change over the course of an ECT treatment. Comments said the benefit could decrease and the risks could increase because higher stimulation is needed for effectiveness over the course of treatment, leading to a higher risk of adverse events. In addition, comments said the repeated use of general anesthesia for ECT over a relatively short period of time could increase the risk of side effects.

(Response 15) FDA believes there is reasonable assurance that with the special controls codified in the final order, in combination with general controls, the benefit of ECT outweighs the risk for the indicated populations whose condition is treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition. The practitioner administering ECT is responsible for ongoing medical management and disclosure of changes in the risks for individual patients during a course of ECT treatment. In considering the benefits and risks, FDA took into consideration all available information, including the existing published scientific literature, practice guidelines published by major psychiatric and lay mental health organizations, input from the external classification panel, and reports of adverse events contained in the MAUDE database. Based upon all of this information, FDA has determined that the probable benefits to health from use of the device outweigh the probable risks for the class II indications and, furthermore, the risks associated with the use of ECT for the class II indications can be mitigated with the proposed special controls.

(Comment 16) Several comments indicated that the special controls were inadequate to properly mitigate severe risks such as the risk of cognitive impairment and death. Comments indicated that special controls cannot be developed for unknown risks. For example, it is not known whether ECT patients return to baseline memory functioning after 6 months. A comment asserts that FDA must use scientific evidence to evaluate risk to memory and it is not enough for FDA ''to believe'' the potential benefits of ECT outweigh the risk of memory impairment. The comment also indicates that FDA presents no evidence verifying that the special controls are effective at mitigating risk or that the special controls will ensure patients understand the benefits-risks of ECT.

(Response 16) FDA identified sufficient scientific information to establish special controls, including adequate instructions for use and appropriate precautionary language. The special controls along with general controls provide a reasonable assurance that ECT can be used safely and effectively for the indications being reclassified to class II. Regarding the use of the word, believe, by FDA in the proposed order, FDA's use is of the word believe is a term of art to indicate its current understanding of an issue in administrative orders. The term, believe, is also used in both the FD&C Act and FDA's regulations.

The risk of memory impairment following ECT treatment is addressed in the special controls. The risk of cognitive and memory impairment can be mitigated by establishing the technical parameters for the device along with non-clinical testing data to confirm the electrical characteristics of the output waveform. The existing clinical performance data for ECT in treating catatonia or a severe MDE associated with MDD or BPD provides evidence that the cognitive impairment and related effects are transient (Refs. 5 and 34) and supports a reasonable assurance of SE. This risk is further mitigated by providing information to both the user and patient, in the form of labeling, on the potential adverse effects of the device, alternative treatments, and a prominent warning that ECT device use may be associated with: disorientation, confusion, and memory problems and is limited in its long-term effectiveness (greater than 3 months). These risks can also be mitigated by providing instructions to the user that include recommendations on cognitive status monitoring prior to beginning ECT and during the course of treatment. Providing this information helps patients and healthcare professionals to make informed choices about how and when to use ECT to maximize benefits and minimize potential adverse effects.

*D. Comments on Regulatory Process of the Proposed Order*

In this section, comments on process concerns of the order are categorically grouped together so that the responses could be addressed by topic instead of

each comment considered independently.

(Comment 17) Several comments provided recommendations on additional sources of information that FDA should consider in regards to reclassification of ECT. Comments suggested that FDA should review State ECT registries for information on use and outcomes. Comments suggested FDA should require new clinical trials, additional postmarket surveillance, and/or establish patient registries for the purposes of: (1) Establishing long-term risks, such as the potential for shortened life; (2) monitoring and assessing memory and cognitive functioning over a period of a year or more to determine if memory loss is permanent; and (3) determining if patients experienced any long-term benefit. A comment indicates that MDR data should be used in the classification determination for ECT. The comment attaches an analysis of the FDA MDR database search showing that most patients report lasting memory and cognition impairment, and other side effects that affect work, education, and social relationships. The comment indicates that FDA's MDR database shows systematic discrepant reporting of ECT adverse events (*e.g.,* description of burns coded with event type, malfunction). Comments requested that FDA hold another public meeting about the classification of ECT that includes testimony from ECT patients because of the ''new information'' provided in the public comments.

(Response 17) FDA agrees that State or national registries may play a role in medical device surveillance to provide additional detailed information about patients, procedures, and devices not routinely collected by electronic health records and administrative or claims data. The State of Texas has for several years maintained a registry of all ECT treatments in the State in a given year. Data on these treatments are provided in an annual report to the governor (see *https://www.dshs.texas.gov/mhsa/bhmd/ect/,* Ref. 55). The most recent report provides data for fiscal year 2016. This report summarizes 17,006 treatments given to 2,675 patients. Severe complications included 0 fractures, 0 episodes of apnea, 0 cases of cardiac arrest without death, and 1 death within 14 days of treatment that was reported to be the result of a drug overdose. This report concludes that, overall, patients experienced less severe symptomology after ECT treatment, which demonstrates the overall effectiveness of treatment. These data are consistent with the published literature and do not provide ''new information'' that would change the recommendation in the final order.

FDA requires manufacturers to submit MDRs of adverse events when their device may have caused or contributed to a death, serious injury, or in certain situations when their device has malfunctioned. FDA acknowledges that there are limitations to the use of MDR reports for determining the cause and frequency of adverse events. Confirming whether a device caused a specific event can be difficult based solely on information provided in a given MDR report. Establishing a cause-and-effect relationship is especially difficult if circumstances surrounding the event have not been verified or if the device in question has not been directly evaluated. FDA does not typically have complete information on the number of times devices of a certain type are used from which to calculate adverse event rates. MDR data does not represent all known safety information for a medical device and should be interpreted in the context of other available information when making device-related or treatment decisions. Healthcare professionals, patients, caregivers, and consumers are encouraged to submit voluntary reports detailing treatment parameters and outcomes to MedWatch: The FDA Safety Information and Adverse Event Reporting Program, for serious adverse events that may be associated with a medical device, as well as use errors, product quality issues, and therapeutic failures (Ref. 56). Reports of adverse events are monitored by FDA for safety signals that may warrant changes to device regulation.

Despite the limitations of MDR data described above, as part of its review of the comments submitted to the ECT public dockets, FDA conducted an updated review of the MDR database covering the period from February 2011 through December 2017. This review identified an additional 27 reports, all of which are voluntary reports. No reports for individuals less than 18 years of age were reported to the MDR database. Similar to the reports included in the Executive Summary for the classification panel, the most commonly cited adverse event type was cognitive changes, notably memory loss (52 percent). Other commonly reported adverse events included general emotional/psychiatric (*e.g.,* anxiety, emotional changes), general motor (*e.g.,* shaking/tremors), and four reports of either tissue damage (not specified) or burns. Thus, FDA concluded that no new types of adverse events have been identified that would warrant changes to the proposed reclassification order.

(Comment 18) Several comments raised concern with how the ECT 2011 classification panel was conducted. Several comments indicated that the proposed reclassification was not supported by the panel, because the classification panel did not reach consensus regarding whether any of the indications should be class II. Comments said that FDA misrepresented the classification panel results regarding consensus on classification of ECT. Another comment alleges that FDA improperly influenced the makeup and deliberations of the classification panel.

(Response 18) FDA considers the deliberations as well as the recommendations by the classification panel meeting in determining the appropriate classification of a device under section 513(a) of the FD&C Act. The classification panel discussions and recommendations are considered as part of FDA's decision whether to revise classification of a device (see section 515(i)(2) of the FD&C Act). Although the panel provides recommendations with respect to the classification of devices, FDA is also not required to follow the classification panel recommendations. Regarding ECT, the panel did not reach a consensus on its classification for any of the proposed conditions for reclassification. There were a variety of opinions and judgments provided both in support of and in opposition to reclassification. The opinions expressed by the classification panel were carefully reviewed and considered along with other information including professional organization practice guidelines, MDR reports, and published scientific studies.

Based on this evidence from multiple sources, FDA has determined that special controls, in combination with general controls, establish a reasonable assurance of SE by mitigating the risks associated with ECT for the uses being reclassified (as discussed in section X, 80 FR 81223 at 81230, December 29, 2015). In accordance with section 515(i)(2) of the FD&C Act, based on valid scientific evidence with respect to the device and taking into account the public health benefit(s) of the use of the device and the nature and known incidence of the risk(s) of the device, FDA is also now revising the classification of ECT for treatment of catatonia or a severe MDE associated with MDD or BPD who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition in patients ages 13 years and older, from class III to class II (special controls) (see subsections A and B of this section).

FDA disagrees with the comment that FDA improperly influenced the 2011 classification panel. On January 27–28, 2011, FDA held a meeting of the Neurological Devices Classification Panel to discuss the classification of ECT devices for treatment of several disorders. FDA has standard procedures in place for establishing a classification panel meeting consistent with the requirements of the Federal Advisory Committee Act, other relevant statutes (*e.g.,* the FD&C Act), regulations (*e.g.,* 21 CFR 14.25 and 14.29), and Agency guidance. As required for all classification panel meetings, FDA conducted the proper screening and vetting of classification panel members for the 2011 Panel meeting. FDA ensured the classification panel included representatives with expertise in several relevant mental health disciplines. The ECT classification panel meeting meets the requirement under section 513(b)(1) of the FD&C Act for a device classification panel meeting.

The conduct of the 2011 Panel meeting is described in the transcript of the meeting and the 24 Hour Summary (Ref. 57). FDA presented the general regulatory background, brief clinical history of ECT use, and ECT-specific regulatory history. This was followed by an open public hearing. Then, FDA presented the FDA's safety analysis, which included a review of responses to a public docket on ECT reclassification, manufacturer docket responses, and an adverse event database review. In addition, FDA presented a focused review of specific adverse events, including cognitive and memory adverse events, neuropathological changes, and death. Following the safety review, FDA presented a review of the effectiveness of ECT. The classification panel then proceeded to their deliberations regarding the questions posed by FDA. The classification panel agreed that the list of risks provided by FDA were appropriate for inclusion with some minor modifications and deletions. The classification panel recommended physician labeling for pre-ECT assessment, including pertinent history, physical examination, other clinically relevant studies, appropriate procedure monitoring and administration, and appropriate clinical management. When presented with potential regulatory controls that FDA could apply to ECT to mitigate risks of adverse cognitive and memory effects, especially with respect to anterograde and retrograde memory functioning, the classification panel agreed that cognitive function should be monitored prior to ECT and throughout the course of treatment. The classification panel agreed that the existing clinical data do not provide evidence that ECT treatment is associated with neuropathological changes. Finally, the classification panel provided overall recommendations for the class II or III classification of ECT devices for specific indications for use, including depression (unipolar and bipolar), schizophrenia, bipolar manic (and mixed) states, schizoaffective disorder and schizophreniform disorder, and catatonia. There was classification panel consensus recommending class III for schizophrenia, bipolar manic states, and schizoaffective and schizophreniform disorder. The classification panel did not reach consensus on the classification of ECT for depression (unipolar and bipolar) and catatonia.

(Comment 19) Several comments related to the information used to support reclassification. Several comments indicated that the scientific evidence, medical studies, meta-analyses and literature reviews cited in the proposed order do not constitute new evidence or reinterpret previously published evidence and are insufficient to justify the reclassification. Comments say FDA ignored the 2010 meta-analysis from Read and Bentall that found, after reviewing hundreds of studies, no evidence that ECT treatment had any benefit for any population lasting beyond a few days and did not prevent suicide.

(Response 19) In accordance with section 515(i)(2) of the FD&C Act, FDA is reclassifying the ECT device from class III to II (special controls) for use in treating catatonia or a severe MDE associated with MDD or BPD in patients age 13 years and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition. FDA has made this reclassification decision based on FDA's evaluation of the following sources of information: (1) Published literature referenced in the Executive Summary to the 2011 Panel; (2) comments and literature received in the ECT public dockets, as discussed above; (3) clinical practice guidelines; (4) review of MDRs in the FDA MAUDE database); and (5) the additional post-2011 scientific information that was provided to FDA in comments to the 2015 proposed order. Based on FDA's evaluation of the totality of the evidence under the criteria set forth in section 513(a) of the FD&C Act, FDA believes that there is valid scientific evidence to support FDA's decision to reclassify the ECT device from class III to II (special controls) for the intended uses described previously.

FDA disagrees with the conclusions of the 2010 Read and Bentall analysis. Specifically, FDA conducted an independent review and several publications, as well as reviews of the published literature, support the use of ECT in treating catatonia or a severe MDE associated with MDD or BPD in patients age 13 years and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition (Ref. 33, 34 and 58–60). Observations from these individual studies, retrospective reviews, and meta-analyses consistently reported favorable SE clinical outcomes for the indications being reclassified by this final order. In addition, as part of the preparations for the 2011 Classification Panel Meeting, FDA conducted a systematic review of the scientific literature regarding the SE of ECT for a variety of psychiatric conditions. FDA conducted a meta-analysis of the data provided in all studies that met criteria for inclusion in this systematic review. Based upon this review and meta-analysis, and the totality of evidence, FDA determined that there was reasonable assurance of the SE of ECT for the class II indications in this final order.

(Comment 20) Several concerns were raised about the process for the proposed order. Comments indicated the guidance should not be used or issued prior to finalization of the final order. Comments indicated there was inadequate time to comment on the proposed order due to timing of the comment period coinciding with holidays at the end of the year, and weekends being included in the 90-day response time. Comments indicated that two dockets (one for the proposed order and one for the draft guidance) on ECT made commenting more difficult. Commenters objected to elimination of mass mail in campaigns and duplicative or near-duplicative letters.

(Response 20) FDA agrees with the comment that guidance should not be used or issued prior to finalization of the final order. Final guidance will not be issued prior to issuance of the final order. FDA believes the correct process was followed for the proposed order issued for ECT. FDA determined it was beneficial to publish the proposed order and draft guidance on ECT concurrently to ensure that all relevant information pertinent to the potential reclassification of ECT, along with a recommended strategy for demonstrating substantial equivalence for ECT devices subject to 510(k), was available to the public at the same time.

FDA believes that a 90-day comment period was ample time to allow the public to comment on the proposed order and concurrently released draft guidance and is consistent with the timeframes for other classification and reclassification efforts. Commenting on two dockets related to ECT rather than one docket does require additional effort by commenters. However, FDA had taken two different actions related to ECT (proposing a reclassification and issuing draft guidance), such that two dockets were made available to provide the option of commenting on one or both of these proposed actions. Documents that are in ''draft'' form are not implemented by FDA unless and until finalized.

Information submitted as part of a mass campaign was also reviewed. However, while the content of these letters is considered and responded to, FDA does not individually respond to the same information contained in mass campaign letters and duplicative letters. This allows FDA to efficiently utilize resources when reviewing comments. As noted previously, although over 3,400 comments were received, comments were categorically grouped together so that responses are addressed by topic instead of responding independently to each individual comment.

(Comment 21) Several comments argue that the terms ''treatment resistant'' and ''require rapid response'' are vague, particularly to non-clinicians. Several comments asked for clarification on the number and types of treatments, as well as the duration of treatment that should be tried prior to being labeled treatment-resistant. Several comments indicated that there was not consensus from the literature and professional organizations on the meaning of treatment-resistant. A comment indicates that defining treatment-resistant depression as the failure of two antidepressants is not appropriate because antidepressants are not effective for every patient and there are other treatments that may be effective that should be used prior to ECT. Several comments indicated that psychotherapy or other non-medical treatments should be tried prior to ECT. Several comments were concerned that the lack of clarity of these terms would lead to misuse of ECT. Several other comments indicated that the terms ''treatment-resistant'' and ''require rapid response'' were well understood and described in applicable medical literature and the Diagnostic and Statistical Manual of Mental Disorders (Ref. 61).

(Response 21) FDA identifies the intended population in which ECT is classified in class II as patients who are treatment-resistant because ECT is not a currently established first-line treatment, except when rapid response is needed due to the severity of the patient's psychiatric or medical condition. FDA acknowledges that these terms may not be entirely clear to patients. However, comments by healthcare professionals generally indicated that the terms are well understood by the staff who would be prescribing or using this therapy. The need for rapid response and the criteria for treatment-resistant can be based on clinical judgment. The information on the intended patient population that, as part of the special controls, must be listed on the device label (§ 882.5940(b)(1)(viii)(D)) is directed toward the practitioner licensed by law to administer or use the device.

(Comment 22) A comment asks FDA to delete the recommendation in § 882.5940(b)(1)(viii)(B)(7) for ''formal neuropsychological assessment'' from the labeling because it is not the norm and would create barriers to the availability and timeliness of care in that such assessments are costly and difficult to access.

(Response 22) FDA recognizes that not all ECT practitioners have access to neuropsychologists who conduct formal neuropsychological assessment. However, FDA believes that the known risk of cognitive adverse events can be mitigated by the special controls that require user instructions recommending cognitive status monitoring prior to beginning ECT and throughout the course of treatment via a formal neuropsychological assessment. If cognitive abilities decline during the course of treatment, steps can be taken to avoid further decline.

(Comment 23) A comment stated depression is sometimes associated with cognitive problems and urges FDA to require that all providers of ECT assess patients' cognitive and memory functioning when they first become patients before ECT begins, soon after ECT ends, and at longer term followup after ECT treatment.

(Response 23) FDA includes a special control (§ 882.5940(b)(1)(viii)(B)(7)) that requires user instructions that recommend cognitive status monitoring prior to beginning ECT and during the course of treatment via formal neuropsychological assessment for evaluating specific cognitive functions (*e.g.,* orientation, attention, memory, and executive function). FDA acknowledges that autobiographical memory loss following ECT treatment can occur, so this adverse event has been included in the labeling for ECT. FDA also acknowledges that the ''long-term safety and effectiveness of ECT treatment has not been demonstrated,'' and therefore has included this risk as a warning in the ECT device labeling that long-term followup may be needed.

*E. Comments on Labeling Concerns*

In this section, comments on labeling concerns in using ECT are categorically grouped together so that the responses could be addressed by topic instead of each comment considered independently.

(Comment 24) A comment requested that FDA delete the proposed warning in § 882.5940(b)(1)(viii)(J) and (ix)(G) (''When used as intended this device provides short-term relief of symptoms. The long-term safety and effectiveness of ECT treatment has not been demonstrated.'') because it is understood that cessation of active treatment will be associated with cessation of treatment benefits.

(Response 24) Based upon all available evidence and FDA's own analysis of the published scientific literature, FDA concluded that the long-term SE of ECT has not been demonstrated. However, FDA recognizes that ECT healthcare professionals often conduct longer term treatment strategies with ECT. The reclassification of ECT does not specifically address the issue of maintenance or continual ECT, which would be at the discretion of the healthcare professional. However, as described in the special controls, results from longer term performance data should be considered for inclusion in the healthcare professional and patient labeling, if warranted.

(Comment 25) A comment asks FDA to replace the word ''contraindications'' in proposed § 882.5940(b)(1)(ix)(A) with the phrase ''conditions associated with substantially increased risk'' because describing these conditions as contraindications is likely to restrict access to needed ECT in very rare but life-threatening situations.

(Response 25) The use of the word ''contraindications'' here refers specifically to medical conditions other than psychiatric disorders in which the use of ECT has been demonstrated to result in serious adverse events, some of which might be life-threatening. These include unstable cardiac and pulmonary conditions (*e.g.,* recent heart attack, asthma, pneumonia) and history of neurological conditions (*e.g.,* stroke, tumors, increased pressure in the brain). Contraindications are defined as situations in which the device should not be used because the risk of use clearly outweighs any benefit. (Ref. 62).

Therefore, FDA believes it is appropriate to keep the language as initially written in the proposed order.

(Comment 26) A comment disagrees with definitions of short-term and long-term memory in § 882.5940(b)(1)(ix)(H)(*1*). The comment says equating short-term to anterograde memory loss and long-term to autobiographical memory loss is unusual in the psychiatric field and confusing for patients. The comment says short-term could mean: (1) Lasting for a short period before returning; (2) affecting short-term memory, *i.e.,* the type of memory where information is held onto for a few seconds to a few minutes; or (3) anterograde memory, which is the ability to form new memories. The comment says this labeling does not clearly describe the range of deficits that patients might experience. The comment says there is a similar lack of clarity in the use of the term ''long-term''. The comment says long-term memory typically includes many different types of information storage, stored for an extended period of time that could range from more than a few minutes to years. The comment says many types of cognitive problems can occur following ECT in addition to anterograde verbal memory and retrograde autobiographical memory, including retrograde loss of non-personal, non-rote information (such as knowledge used in daily work tasks), and impairments in working memory, processing speed, attention, and executive function. The comment also indicates that there are discrepancies within the order on the definition of long-term, which is defined as 1 month in some instance and as 3 months in other instances.

(Response 26) FDA recognizes that there are a variety of terms used in the scientific literature with respect to memory function. The multiple descriptions and definitions of various memory functions such as ''short-term'' or ''long-term'' memory contributes to significant confusion both among healthcare professionals and lay persons. FDA will require the inclusion of the following in the labeling: ''ECT treatment may be associated with disorientation, confusion and memory loss, including short-term (anterograde) and long-term (autobiographical) memory loss following treatment. These side effects tend to go away within a few days to a few months after the last treatment with ECT. However, some patients have reported a permanent loss of memories of personal life events (*i.e.,* autobiographical memory).'' In addition, because of the complexity of memory loss, cognitive status monitoring prior to beginning ECT and during the course of treatment via formal neuropsychological assessment for evaluating specific cognitive functions (*e.g.,* orientation, attention, memory, executive function) is included as a special control.

(Comment 27) A comment asks FDA to change the proposed labeling by deleting from the list of known risks the phrase, ''a worsening of the psychiatric symptoms they are being treated for,'' in § 882.5940(b)(1)(ix)(H)(*2*). The comment notes symptoms may worsen if ECT is not effective but argues that this is not the same as saying that symptoms worsen as a known risk of ECT. The comment notes that the possibility of precipitating a manic episode with ECT treatment is documented in the scientific literature but is already included in the listing of potential risks.

(Response 27) FDA recognizes that worsening of an underlying medical condition can occur either by: (1) An ineffective treatment or (2) the treatment itself, particularly when it exacerbates the symptoms. Without additional scientific evidence to distinguish between these two causes for the use of ECT, this language is included as a potential risk.

(Comment 28) Several comments indicated that labeling was not a sufficient mitigation for the risks associated with ECT. Several comments indicated that labeling was not a sufficient mitigation because the label might not be read, understood, or followed.

(Response 28) FDA notes that regardless of the classification and the risk presented by medical devices, they have the potential to cause harm to patients if the labeling is not read, understood, or followed. FDA has purposefully included, per the special controls, specific mitigations in the required labeling to ensure patient protections and transparency related to the benefit-risk profile of ECT. Labeling directed to healthcare professionals and patients further help to mitigate the risks of ECT because it must include instructions for use and a description of the known risks.

(Comment 29) A comment asks FDA to delete in § 882.5940(b)(1)(ix)(H)(*3*)(*v*) the phrase ''insufficient, or lack of breathing'' as a pulmonary complication and add a new item ''prolonged action of anesthetic agents associated with insufficient or lack of breathing.'' The comment says the proposed text implies that insufficient or lack of breathing may be a long-term complication of ECT, whereas apnea is an expected effect of neuromuscular blocking agents. The comment notes insufficient or lack of breathing may be prolonged in some individuals but can be addressed through continued ventilation and oxygenation by an anesthesia provider.

(Response 29) FDA agrees that the warnings related to pulmonary risks were unclear and has revised § 882.5940(b)(1)(ix)(H)(*3*)(*v*) to identify these pulmonary risks associated with the use of general anesthesia and neuromuscular blocking agents.

### *F. Comments Outside of the Scope of This Final Order*

There were several comments submitted that were outside the scope of this Final Order and in this section we explain why. Also, in this section comments are categorically grouped together so that the responses are by topic.

(Comment 30) A number of comments recommended that FDA take action to not allow the American Psychiatric Association (APA) to use the phrase ''safe, effective treatment'' and to prevent the APA and the National Institute for Mental Health from explicitly using some of the claims on ECT treatment.

(Response 30) FDA generally does not have the authority to direct medical associations and other government agencies on how to phrase their scientific evaluation of medical devices. Therefore, the requests are outside the scope of this final order.

(Comment 31) Several comments raised concerns regarding insurance coverage with different indications in different regulatory classes. Several comments indicated that coverage issues may reduce patient options for treatment.

(Response 31) FDA has no authority over commercial health insurance carriers. Under section 513(e) of the FD&C Act, FDA has no authority to consider as part of a classification decision whether an indication or a device is covered by commercial health insurance companies. FDA recommends that patients check with their insurance company regarding coverage before receiving ECT treatment.

(Comment 32) Some comments claim that ECT devices for specific intended uses are being reclassified for financial reasons and the Agency was influenced by the pharmaceutical industry in making its determination. A comment also asked FDA to provide reparations for ECT patients.

(Response 32) As stated previously in this section, FDA based its determination of reclassification of ECT devices for use in treating catatonia or a severe MDE associated with MDD or BPD to class II (special controls) on valid scientific evidence, including the

classification panel recommendations, evaluation of scientific literature, clinical practice guidelines, and comments submitted to the ECT public dockets. These comments and the request for reparations are outside the scope of this final order.

(Comment 33) A comment claimed that there is discriminatory use of ECT including in women, people of color, elderly, and economically struggling patients. Another comment stated that many people are receiving ECT treatment out of desperation.

(Response 33) FDA understands the concerns of possible discriminatory actions by sub-populations in the treatment of ECT and possible treatment out of desperation; however, these comments are outside the scope of this final order in determining the classification of ECT devices.

(Comment 34) A comment stated that the advertising of ECT devices directed at consumers promotes ''risk-taking behavior.''

(Response 34) This is also outside the scope of this final order in determining the classification of ECT devices.

Under the FD&C Act, FDA has regulatory authority over the labeling of medical devices (21 CFR part 801). However, FDA's regulation of medical device advertising is limited to a subset of restricted medical devices, which ECT is not. The Federal Trade Commission regulates the advertising, as opposed to the labeling, of most medical devices under sections 12–15 of the Federal Trade Commission Act, which prohibit false or misleading advertising of certain products that FDA regulates (15 U.S.C. 52–55).

## IV. The Final Order

Under section 515(b) and (i) of the FD&C Act, FDA is adopting, in part, its findings as published in the preamble to the proposed order. For the reasons described previously in section II, FDA has made revisions in this final order in response to comments submitted in the ECT public dockets and information received on the proposed order. The revisions modify the ECT class II classification to also reclassify ECT devices used for the treatment of catatonia into class II. The revisions further modify the ECT class II classification by changing the requirement that the patient be ''18 years of age and older'' to the requirement that the patient be ''age 13 years and older.'' The revisions modify the ECT class III classification by removing the catatonia intended use.

In response to comments, FDA also made some changes to the patient labeling special control requirement that addresses statements on the physical risks of ECT and additional age-related precautions. The patient labeling provides a list of physical risks, including pulmonary (affecting lungs) complications. FDA removes ''insufficient or lack of breathing'' as a pulmonary complication and revised the complication list to include potential pulmonary complications of general anesthesia and neuromuscular blocking agents (muscle relaxants) given as part of ECT. FDA added language to clarify that the pulmonary risks of ECT include hypoxemia, hypoventilation, aspiration, and upper-airway obstruction (see § 882.5940(b)(1)(ix)(H)(*3*)(*v*)).

FDA separately considered the risk of the accessory electrodes as part of this classification (see § 882.5940(b)(1)(iii)). No other accessories are considered part of this classification.

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k), if FDA determines that premarket notification is not necessary to provide reasonable assurance of the SE of the device. For these ECT devices classified as class II, FDA has determined that premarket notification is necessary to provide reasonable assurance of the SE of the device. Therefore, this device type is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the device they intend to market.

Under section 515(i)(2) of the FD&C Act, FDA has the authority to issue an administrative order revising the classification of a device for which FDA has classified as a class III device and for which no administrative order has been issued calling for PMAs under section 515(b) of the FD&C Act, so that the device is classified into class I or class II, after issuance of a proposed order, a meeting of a device classification panel, and consideration of the comments on a proposed order.

FDA published a proposed order to require the reclassification of ECT devices for intended uses specified in the proposed order and to require the filing of a PMA for ECT devices for other intended uses specified in the proposed order in the **Federal Register** of December 29, 2015. Moreover, as explained in section II of the proposed order, on January 27–28, 2011, FDA held a classification meeting of the 2011 Panel to discuss classification of ECT devices for treatment of several disorders. FDA received and has considered all the comments received in response to all the ECT public dockets, including the proposed order, as discussed in section II. Therefore, FDA has met the requirements under sections 515(b)(1) and 515(i)(2) of the FD&C Act.

## V. Implementation Strategy

### *A. Date To File a PMA*

In accordance with section 515(b) of the FD&C Act, ECT devices indicated for schizophrenia, bipolar manic states, schizoaffective disorder, schizophreniform disorder, and catatonia or a severe MDE associated with MDD or BPD in patients under 13 years who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition must have a PMA or a notice of completion of a PDP filed with the Agency by March 26, 2019. An applicant whose device was legally in commercial distribution before May 28, 1976, or whose device has been found to be substantially equivalent to such a device, will be permitted to continue marketing such class III devices during FDA's review of the PMA provided that the PMA is timely filed. FDA intends to review any PMA for the device within 180 days of the date of filing. FDA cautions that under section 515(d)(1)(B)(i) of the FD&C Act, the Agency may not enter into an agreement to extend the review period for a PMA beyond 180 days unless the Agency finds that ''the continued availability of the device is necessary for the public health.''

Under § 812.2(d) (21 CFR 812.2(d)), the exemptions from the requirements of the IDE regulations for preamendments class III devices in § 812.2(c)(1) and (2) will cease to apply to ECT devices indicated for schizophrenia, bipolar manic states, schizoaffective disorder, schizophreniform disorder, and catatonia or a severe MDE associated with MDD or BPD in patients that are under 13 years, or patients of any age who are not treatment-resistant or who do not require a rapid response due to the severity of their psychiatric or medical condition that are: (1) Not legally on the market on or before March 26, 2019 or (2) legally on the market on or before March 26, 2019 but for which a PMA or notice of completion of a PDP is not filed by March 26, 2019, or for which PMA approval has been denied or withdrawn.

If a PMA for a class III device is not filed with FDA by March 26, 2019, the device will be deemed adulterated under section 501(f) of the FD&C Act. The device may be distributed for

investigational use only if the requirements of the IDE regulations are met. The requirements for significant risk devices include submitting an IDE application to FDA for its review and approval. An approved IDE is required to be in effect before an investigation of the device may be initiated or continued under § 812.30. FDA, therefore, cautions that IDE applications should be submitted to FDA at least 30 days before March 26, 2019 to avoid interrupting investigations.

*B. Compliance With Special Controls*

Following the effective date of this final order, ECT devices intended for use in treating catatonia or a severe MDE associated with MDD or BPD in patients age 13 years and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition must comply with the special controls. FDA notes that a firm whose ECT device was legally in commercial distribution before May 28, 1976, or whose device was found to be substantially equivalent to such a device and who does not intend to market such device for uses other than use in treating catatonia or a severe MDE associated with MDD or BPD in patients age 13 years and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition, may remove such intended uses from the device's labeling.

The special controls identified in this final order are effective as of the date of publication of this order, December 26, 2018. ECT devices intended for use in treating catatonia or a severe MDE associated with MDD or BPD in patients age 13 years and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition must comply with the special controls following the effective date of this order. Manufacturers who wish to continue to legally market an ECT device for treatment of catatonia or a severe MDE associated with MDD or BPD in patients age 13 years and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition must submit an amendment to their previously cleared 510(k) that demonstrates compliance with the special controls by June 24, 2019. Because FDA has modified the class II indications and the class II patient population from the proposed order, FDA is extending the time period for submitting an amendment to the 510(k), from 60 days to 180 days, to provide additional preparation time to submit a 510(k) amendment. Such amendment will be added to the 510(k) file but will not serve as a basis for a new substantial equivalence review. A submitted 510(k) amendment in this context will be used solely to demonstrate to FDA that an ECT device is in compliance with the special controls. If a 510(k) amendment is not submitted by June 24, 2019 or if FDA determines that the amendment does not demonstrate compliance with the special controls, the device may be considered adulterated under section 501(f)(1)(B) of the FD&C Act.

For ECT devices that are not in class III as designated in this final order, that have not been legally marketed prior to December 26, 2018, or models that have been legally marketed but are required to submit a new 510(k) under 21 CFR 807.81(a)(3) because the device is about to be significantly changed or modified, manufacturers must obtain 510(k) clearance, among other relevant requirements, and demonstrate compliance with the special controls included in this final order, before marketing the new or changed device.

## VI. Codification of Orders

Section 515(b), as amended by FDASIA, and 515(i)(2) of the FD&C Act require FDA to issue final orders rather than regulations to reclassify devices. Therefore, FDA will continue to codify reclassifications and requirements for approval of an application for premarket approval, resulting from changes issued in final orders, in the Code of Federal Regulations. Accordingly, under section 515(i)(2) of the FD&C Act, as amended by FDASIA, in this final order, we are codifying the reclassification of ECT devices for use in treating catatonia or a MDE associated with MDD or BPD in patients age 13 years and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition into class II by amending § 882.5940. Further, we are codifying the requirement for approval of an application for premarket approval for ECT devices for the intended uses of schizophrenia, bipolar manic states, schizoaffective disorder, schizophreniform, and catatonia or a severe major depressive episode associated with MDD or BPD in patients under 13 years, or patients 13 years and older who are not treatment-resistant or who do not require a rapid response due to the severity of their psychiatric or medical condition, by amending the language in § 882.5940.

## VII. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) 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.

## VIII. Paperwork Reduction Act of 1995

This final order refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520). The collections of information in part 807, subpart E, have been approved under OMB control number 0910–0120. The collections of information in part 812 have been approved under OMB control number 0910–0078. The collections of information in 21 CFR part 814 have been approved under OMB control number 0910–0231. The collections of information in 21 CFR part 801 have been approved under OMB control number 0910–0485.

The device and patient warning labeling provisions in this final order are not subject to review by OMB because they do not constitute a ''collection of information'' under the PRA. Rather, the recommended labeling is a ''public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public'' (5 CFR 1320.3(c)(2)).

## IX. References

The following references marked with an asterisk (*) are on display at the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they also are available electronically at *https://www.regulations.gov.* References without asterisks are not on public display at *https://www.regulations.gov* because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

* 1. FDA, ''Medical Device Accessories—Describing Accessories and Classification Pathways; Guidance for Industry and Food and Drug Administration Staff.'' December 20, 2017.

* 2. FDA, ''Reclassification of Daily Wear Spherical Contact Lenses Consisting of Rigid Gas Permeable Plastic Materials;

Withdrawal of Proposed Rule.'' 48 FR 56778.
* 3. FDA, ''Use of Real-World Evidence to Support Regulatory Decision-Making for Medical Devices; Guidance for Industry and Food and Druge Administration Staff.'' August 31, 2017.
* 4. FDA, ''FDA Executive Summary, Prepared for the January 27–28, 2011, meeting of the Neurological Devices Panel, Meeting to Discuss the Classification of Electroconvulsive Therapy Devices (ECT).'' 2011.
5. Fernie, G., et al., ''Detecting Objective and Subjective Cognitive Effects of Electroconvulsive Therapy: Intensity, Duration and Test Utility in a Large Clinical Sample.'' *Psychological Medicine,* 2014. 44(14): pp. 2985–2994.
6. Kirov, G.G., et al., ''Evaluation of Cumulative Cognitive Deficits from Electroconvulsive Therapy.'' *British Journal of Psychiatry,* 2016. 208(3): pp. 266–270.
7. Maric, N.P., et al., ''The Acute and Medium-Term Effects of Treatment with Electroconvulsive Therapy on Memory in Patients with Major Depressive Disorder.'' *Psychological Medicine,* 2016. 46(4): pp. 797–806.
8. Spaans, H.P., et al., ''Efficacy and Cognitive Side Effects After Brief Pulse and Ultrabrief Pulse Right Unilateral Electroconvulsive Therapy for Major Depression: A Randomized, Double-Blind, Controlled Study.'' *Journal of Clinical Psychiatry,* 2013. 74(11): pp. e1029–1036.
9. Semkovska, M., et al., ''Bitemporal Versus High-Dose Unilateral Twice-Weekly Electroconvulsive Therapy for Depression (EFFECT-Dep): A Pragmatic, Randomized, Non-Inferiority Trial.'' *American Journal of Psychiatry,* 2016. 173(4): pp. 408–417.
10. Ghaziuddin, N., et al., ''Cognitive Side Effects of Electroconvulsive Therapy in Adolescents.'' *Journal of Child Adolescent Psychopharmacology,* 2000. 10(4): pp. 269–276.
11. Dessens, F.M., et al., ''Electroconvulsive Therapy in the Intensive Care Unit for the Treatment of Catatonia: A Case Series and Review of the Literature.'' *General Hospital Psychiatry,* 2016. 38: pp. 37–41.
12. England, M.L., et al., ''Catatonia in Psychotic Patients: Clinical Features and Treatment Response.'' *Journal of Neuropsychiatry and Clinical Neurosciences,* 2011. 23(2): pp. 223–226.
13. Faedda, G.L., et al., ''Catatonia in an Adolescent with Velo-Cardio-Facial Syndrome.'' *American Journal of Medical Genetics Part A,* 2015. 167A(9): pp. 2150–2153.
14. Flamarique, I., et al., ''Long-Term Effectiveness of Electroconvulsive Therapy in Adolescents with Schizophrenia Spectrum Disorders.'' *European Child and Adolescent Psychiatry,* 2015. 24(5): pp. 517–524.
15. Ghaziuddin, N., et al., ''Retrospective Chart Review of Catatonia in Child and Adolescent Psychiatric Patients.'' *Acta Psychiatrica Scandinavia,* 2012. 125(1): pp. 33–38.
16. Haq, A.U. and N. Ghaziuddin, ''Maintenance Electroconvulsive Therapy for Aggression and Self-Injurious Behavior in Two Adolescents with Autism and Catatonia.'' *Journal of Neuropsychiatry and Clinical Neurosciences,* 2014. 26(1): pp. 64–72.
17. Jacob, P., et al., ''Review of Electroconvulsive Therapy Practice from a Tertiary Child and Adolescent Psychiatry Centre.'' *Asian Journal of Psychiatry,* 2014. 12: pp. 95–99.
18. Luchini, F., et al., ''Electroconvulsive Therapy in Catatonic Patients: Efficacy and Predictors of Response.'' *World Journal of Psychiatry,* 2015. 5(2): pp. 182–192.
19. Medda, P., et al., ''Catatonia in 26 Patients with Bipolar Disorder: Clinical Features and Response to Electroconvulsive Therapy.'' *Bipolar Disorders,* 2015. 17(8): pp. 892–901.
20. Medda, P., et al., ''Electroconvulsive Therapy in 197 Patients with a Severe, Drug-Resistant Bipolar Mixed State: Treatment Outcome and Predictors of Response.'' *Journal of Clinical Psychiatry,* 2015. 76(9): pp. 1168–1173.
21. Raffin, M., et al., ''Treatment Use in a Prospective Naturalistic Cohort of Children and Adolescents with Catatonia.'' *European Child and Adolescent Psychiatry,* 2015. 24(4): pp. 441–449.
22. Raveendranathan, D., et al., ''Response Rate of Catatonia to Electroconvulsive Therapy and its Clinical Correlates.'' *European Archives of Psychiatry and Clinical Neurosciences,* 2012. 262(5): pp. 425–430.
23. Shelef, A., et al., ''Acute Electroconvulsive Therapy Followed by Maintenance Electroconvulsive Therapy Decreases Hospital Re-Admission Rates of Older Patients with Severe Mental Illness.'' *Journal of ECT,* 2015. 31(2): pp. 125–128.
24. Sienaert, P., et al., ''A Clinical Review of the Treatment of Catatonia.'' *Frontiers in Psychiatry,* 2014. 5: p. 181.
25. Unal, A., et al., ''Effective Treatment of Catatonia by Combination of Benzodiazepine and Electroconvulsive Therapy.'' *Journal of ECT,* 2013. 29(3): pp. 206–269.
26. Hasan, A., et al., ''World Federation of Societies of Biological Psychiatry (WFSBP) Guidelines for Biological Treatment of Schizophrenia, Part 1: Update 2012 on the Acute Treatment of Schizophrenia and the Management of Treatment Resistance.'' *World Journal of Biologial Psychiatry,* 2012. 13(5): pp. 318–378.
27. Ghaziuddin, N., et al., ''Use of Continuation or Maintenance Electroconvulsive Therapy in Adolescents with Severe Treatment-Resistant Depression.'' *Journal of ECT,* 2011. 27(2): pp. 168–174.
28. Lima, N.N., et al., ''Electroconvulsive Therapy Use in Adolescents: A Systematic Review.'' *Annals of General Psychiatry,* 2013. 12(1): p. 17.
29. Puffer, C.C., et al., ''A 20 Year Practice Review of Electroconvulsive Therapy for Adolescents.'' *Journal of Child and Adolescent Psychopharmacology,* 2016. 26(7): pp. 632–636.
30. de la Serna, E., et al., ''Two-Year Follow-Up of Cognitive Functions in Schizophrenia Spectrum Disorders of Adolescent Patients Treated with Electroconvulsive Therapy.'' *Journal of Child and Adolescent Psychopharmacology,* 2011. 21(6): pp. 611–619.
31. Zhang, Z.J., et al., ''Electroconvulsive therapy improves antipsychotic and somnographic responses in adolescents with first-episode psychosis—a case-control study.'' *Schizophrenia Research,* 2012. 137(1–3): pp. 97–103.
32. Cohen, D., et al., ''Absence of Cognitive Impairment at Long-Term Follow-Up in Adolescents Treated with ECT for Severe Mood Disorder.'' *American Journal of Psychiatry,* 2000. 157(3): pp. 460–462.
33. Consoli, A., et al., ''Electroconvulsive Therapy in Adolescents with the Catatonia Syndrome: Efficacy and Ethics.'' *Journal of ECT,* 2010. 26(4): pp. 259–265.
34. Rey, J.M. and G. Walter, ''Half a Century of ECT Use in Young People.'' *American Journal of Psychiatry,* 1997. 154(5): pp. 595–602.
35. Walter, G. and J.M. Rey, ''An Epidemiological Study of the Use of ECT in Adolescents.'' *Journal of the American Academy of Child and Adolescent Psychiatry,* 1997. 36(6): p. 809–15.
36. Ghaziuddin, N., et al., ''Electroconvulsive Treatment in Adolescents with Pharmacotherapy-Refractory Depression.'' *Journal of Child and Adolescent Psychopharmacology,* 1996. 6(4): pp. 259–271.
37. Strober, M., et al., ''Effects of Electroconvulsive Therapy in Adolescents with Severe Endogenous Depression Resistant to Pharmacotherapy.'' *Biological Psychiatry,* 1998. 43(5): pp. 335–358.
38. Cohen, D., et al., ''Use of Electroconvulsive Therapy in Adolescents.'' *Convulsion Therapy,* 1997. 13(1): pp. 25–31.
39. Kutcher, S.R. and H.A. Robertson, ''Electroconvulsive Therapy in Treatment-Resistant Bipolar Youth.'' *Journal of Child and Adolescent Psychopharmacology,* 1995. 5: pp. 167–175.
40. Ghaziuddin, N., et al., ''Practice Parameter for Use of Electroconvulsive Therapy with Adolescents.'' *Journal of the American Academy of Child and Adolescent Psychiatry,* 2004. 43(12): pp. 1521–1539.
* 41. FDA, Transcript of January 27–28, 2011, Meeting of the Neurological Devices Panel, Meeting to Discuss the Classification of Electroconvulsive Therapy Devices (ECT). 2011.
42. Baeza, I., et al., ''Clinical Experience Using Electroconvulsive Therapy in Adolescents with Schizophrenia Spectrum Disorders.'' *Journal of Child and Adolescent Psychopharmacology,* 2010. 20(3): pp. 205–259.
43. Benzoni, O., et al., ''Treatment of Resistant Mood and Schizoaffective

Disorders With Electroconvulsive Therapy: A Case Series of 264 Patients.'' *Journal of Psychopathology,* 2015. 21: pp. 266–268.
44. Iancu, I., et al., ''Patients with Schizophrenia or Schizoaffective Disorder Who Receive Multiple Electroconvulsive Therapy Sessions: Characteristics, Indications, and Results.'' *Neuropsychiatric Disease and Treatment,* 2015. 11: pp. 853–862.
45. Kristensen, D., et al., ''Electroconvulsive Therapy for Treating Schizophrenia: A Chart Review of Patients from Two Catchment Areas.'' *European Archive of Psychiatry and Clinical Neurosciences,* 2011. 261(6): pp. 425–432.
46. Levy-Rueff, M., et al., ''Maintenance Electroconvulsive Therapy: An Alternative Treatment for Refractory Schizophrenia and Schizoaffective Disorders.'' *Psychiatry Research,* 2010. 175(3): pp. 280–283.
47. Petrides, G., et al., ''Electroconvulsive Therapy Augmentation in Clozapine-Resistant Schizophrenia: A Prospective, Randomized Study.'' *American Journal of Psychiatry,* 2015. 172(1): pp. 52–58.
48. Lehman, A.F., et al., ''Practice Guideline for the Treatment of Patients with Cchizophrenia,'' Second Edition. *American Journal of Psychiatry,* 2004. 161(2 Suppl): pp. 1–56.
49. Black, D.W., et al., ''ECT in Unipolar and Bipolar Disorders: A Naturalistic Evaluation of 460 Patients.'' *Convulsion Therapy,* 1986. 2(4): pp. 231–237.
50. Mukherjee, S., et al., ''Unmodified Electroconvulsive Therapy of Acute Mania: A Retrospective Naturalistic Study.'' *Convulsion Therapy,* 1992. 8(1): pp. 5–11.
51. Small, J.G., et al., ''Electroconvulsive Treatment Compared with Lithium in the Management of Manic States.'' *Archives of General Psychiatry,* 1988. 45(8): pp. 727–732.
52. Milstein, V., et al., ''Does Electroconvulsive Therapy Prevent Suicide?'' *Convulsion Therapy,* 1986. 2(1): pp. 3–6.
* 53. United Nations General Assembly, ''Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.'' 2008.
* 54. U.S. Department of Health and Human Services. ''Mental Health: A Report of the Surgeon General.'' Rockville, MD: U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Mental Health Services, National Institutes of Health, National Institute of Mental Health, 1999. (See *https://profiles.nlm.nih.gov/ps/access/NNBBHS.pdf*)
* 55. Texas Department of State Health Services, ''Electroconvulsive Therapy (ECT) Reports.'' 2018.
* 56. FDA, ''MedWatch: The FDA Safety Information and Adverse Event Reporting Program.''
** 57. FDA, ''Neurological Devices Panel—ECT,'' January 2011, 24 Hour Summary. 2011.
58. Brown, E.D., et al., ''Efficacy of Continuation/Maintenance Electroconvulsive Therapy for the Prevention of Recurrence of a Major Depressive Episode in Adults with Unipolar Depression: A Systematic Review.'' *Journal of ECT,* 2014. 30(3): pp. 195–202.
59. de Sousa, R.T., et al., ''Challenging Treatment-Resistant Major Depressive Disorder: A Roadmap for Improved Therapeutics.'' *Current Neuropharmacology,* 2015. 13(5): pp. 616–635.
60. Tor, P.C., et al., ''A Systematic Review and Meta-Analysis of Brief Versus Ultrabrief Right Unilateral Electroconvulsive Therapy for Depression.'' *Journal of Clinical Psychiatry,* 2015. 76(9): pp. e1092–1098.
61. American Psychiatric Association, ''Diagnostic and Statistical Manual of Mental Disorders,'' Fifth Edition, DSM–5. 2013.
** 62. FDA, ''Device Labeling Guidance #G91–1 (Blue Book Memo).'' 1991.

**List of Subjects in 21 CFR Part 882**

Medical devices, Neurological devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 882 is amended as follows:

## PART 882—NEUROLOGICAL DEVICES

■ 1. The authority citation for part 882 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 360*l,* 371.

■ 2. Revise § 882.5940 to read as follows:

### § 882.5940 Electroconvulsive therapy device.

(a) *Identification.* An electroconvulsive therapy device is a prescription device, including the pulse generator and its stimulation electrodes, used for treating severe psychiatric disturbances by inducing in the patient a major motor seizure by applying a brief intense electrical current to the patient's head.

(b) *Classification.* (1) Class II (special controls) when the device is intended to treat catatonia or a severe major depressive episode (MDE) associated with major depressive disorder (MDD) or bipolar disorder (BPD) in patients age 13 years and older who are treatment-resistant or who require a rapid response due to the severity of their psychiatric or medical condition. The special controls for this device are:

(i) The technical parameters of the device, including waveform, output mode, pulse duration, frequency, train delivery, maximum charge and energy, and the type of impedance monitoring system must be fully characterized to ensure that the device performance characteristics are consistent with existing clinical performance data.

(ii) Non-clinical testing data must confirm the electrical characteristics of the output waveform.

(iii) Components of the device that come into human contact must be demonstrated to be biocompatible.

(iv) Performance data must demonstrate electrical and mechanical safety and the functioning of all safety features built into the device including the static and dynamic impedance monitoring system.

(v) Appropriate analysis/testing must validate electromagnetic compatibility.

(vi) Appropriate software verification, validation, and hazard analysis must be performed.

(vii) Performance data must demonstrate electrical performance, adhesive integrity, and physical and chemical stability of the stimulation electrodes.

(viii) The labeling for the device must include the following:

(A) Information related to generic adverse events associated with electroconvulsive therapy device (ECT) treatment;

(B) Instructions must contain the following specific recommendations to the user of the device:

(*1*) Conduct of pre-ECT medical and psychiatric assessment (including pertinent medical and psychiatric history, physical examination, anesthesia assessment, dental assessment, and other studies as clinically appropriate);

(*2*) Use of patient monitoring during the procedure;

(*3*) Use of general anesthesia and neuromuscular blocking agents;

(*4*) Use of mouth/dental protection during the procedure;

(*5*) Use of EEG monitoring until seizure termination;

(*6*) Instructions on electrode placement, including adequate skin preparation and use of conductive gel; and

(*7*) Cognitive status monitoring prior to beginning ECT and during the course of treatment via formal neuropsychological assessment for evaluating specific cognitive functions (*e.g.,* orientation, attention, memory, executive function).

(C) Clinical training needed by users of the device;

(D) Information on the patient population in which the device is intended to be used;

(E) Information on how the device operates and the typical course of treatment;

(F) A detailed summary of the clinical testing, which includes the clinical outcomes associated with the use of the device, and a summary of adverse events and complications that occurred with the device;

(G) A detailed summary of the device technical parameters;

(H) Where appropriate, validated methods and instructions for reprocessing of any reusable components;

(I) The following statement, prominently placed: ''Warning: ECT device use may be associated with: disorientation, confusion, and memory problems''; and

(J) Absent performance data demonstrating a beneficial effect of longer term use, generally considered treatment in excess of 3 months, the following statement, prominently placed: ''Warning: When used as intended this device provides short-term relief of symptoms. The long-term safety and effectiveness of ECT treatment has not been demonstrated.''

(ix) Patient labeling must be provided and include:

(A) Relevant contraindications, warnings, precautions;

(B) A summation of the clinical testing, which includes the clinical outcomes associated with the use of the device, and a summary of adverse events and complications that occurred with the device;

(C) Information on how the device operates and the typical course of treatment;

(D) The potential benefits;

(E) Alternative treatments;

(F) The following statement, prominently placed: ''Warning: ECT device use may be associated with: Disorientation, confusion, and memory problems'';

(G) Absent performance data demonstrating a beneficial effect of longer term use, generally considered treatment in excess of 3 months, the following statement, prominently placed: ''Warning: When used as intended this device provides short-term relief of symptoms. The long-term safety and effectiveness of ECT treatment has not been demonstrated''; and

(H) The following statements on known risks of ECT, absent performance data demonstrating that these risks do not apply:

(*1*) ECT treatment may be associated with disorientation, confusion and memory loss, including short-term (anterograde) and long-term (autobiographical) memory loss following treatment. Based on the majority of clinical evidence, these side effects tend to go away within a few days to a few months after the last treatment with ECT. Although the incidence of permanent cognitive memory loss was not supported by the clinical literature, some patients have reported a permanent loss of memories of personal life events (*i.e.,* autobiographical memory);

(*2*) Patients treated with ECT may experience manic symptoms (including euphoria and/or irritability, impulsivity, racing thoughts, distractibility, grandiosity, increased activity, talkativeness, and decreased need for sleep) or a worsening of the psychiatric symptoms they are being treated for; and

(*3*) The physical risks of ECT may include the following (in order of frequency of occurrence):

(*i*) Pain/somatic discomfort (including headache, muscle soreness, and nausea);

(*ii*) Skin burns;

(*iii*) Physical trauma (including fractures, contusions, injury from falls, dental and oral injury);

(*iv*) Prolonged or delayed onset seizures;

(*v*) Pulmonary complications (hypoxemia, hypoventilation, aspiration, upper-airway obstruction);

(*vi*) Cardiovascular complications (cardiac arrhythmias, heart attack, high or low blood pressure, and stroke); and

(*vii*) Death.

(2) *Classification:* Class III (premarket approval) for the following intended uses: schizophrenia, bipolar manic states, schizoaffective disorder, schizophreniform disorder, and catatonia or a severe MDE associated with MDD or BPD in:

(i) Patients under 13 years or

(ii) Patients 13 years and older who are not treatment-resistant or who do not require a rapid response due to the severity of their psychiatric or medical condition.

(c) *Date premarket approval application (PMA) or notice of completion of product development protocol (PDP) is required.* A PMA or notice of completion of a PDP is required to be filed with FDA on or before March 26, 2019, for any electroconvulsive therapy device with an intended use described in paragraph (b)(2) of this section, that was in commercial distribution before May 28, 1976, or that has, on or before March 26, 2019, been found to be substantially equivalent to any electroconvulsive therapy device with an intended use described in paragraph (b)(2) of this section, that was in commercial distribution before May 28, 1976. Any other electroconvulsive therapy device with an intended use described in paragraph (b)(2) of this section shall have an approved PMA or declared completed PDP in effect before being placed in commercial distribution.

Dated: December 18, 2018.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2018–27809 Filed 12–21–18; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF JUSTICE

### 28 CFR Part 2

**[Docket No. USPC–2018–03]**

### Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes

**AGENCY:** United States Parole Commission, Justice.

**ACTION:** Final rule.

**SUMMARY:** The United States Parole Commission is revising a rule that authorizes the Chairman to delegate a Commissioner to conduct parole hearings. This procedural change will permit a Commissioner to conduct parole hearings and vote on the decision resulting from the proceeding, providing for a more efficient use of agency resources.

**DATES:** This regulation is effective December 26, 2018.

**FOR FURTHER INFORMATION CONTACT:** Helen H. Krapels, General Counsel, U.S. Parole Commission, 90 K Street NE, Third Floor, Washington, DC 20530, telephone (202) 346–7030. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

**SUPPLEMENTARY INFORMATION:** The U.S. Parole Commission is revising its rule at 28 CFR 2.59 that authorizes the Chairman to delegate a Commissioner to act as a Hearing Examiner, but disqualifies the Commissioner from voting in the case as a Commissioner during the proceeding. The authority of U.S. Parole Commissioners to conduct hearings and make decisions for offenders under the Commission's jurisdiction is inherent in the Commission's authority under 18 U.S.C. 4203. Moreover, 18 U.S.C. 4203(c)(1) specifically authorizes the Commission to delegate to any Commissioner or commissioners the powers to grant or deny parole, impose conditions on an order granting parole, modify or revoke parole, etc. With the potential winding-up of the agency in two years, having

Commissioners conduct parole hearings and also vote in the same proceeding is a more efficient use of resources to balance the agency's workload and promote continuity of the agency's business. This is a procedural change only, and will not implicate the merits of any prisoner's case for parole or affect the way in which hearings are conducted. Hence, notice and public comment is not required.

The revised rule will take effect on December 26, 2018.

**Executive Orders 12866 and 13563**

This regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulation Planning and Review,'' section 1(b), Principles of Regulation, and in accordance with Executive Order 13565, ''Improving Regulation and Regulatory Review,'' section 1(b), General Principles of Regulation. The Commission has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget.

**Executive Order 13132**

This rule 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. Under Executive Order 13132, this rule does not have sufficient federalism implications requiring a Federalism Assessment.

**Regulatory Flexibility Act**

This rule will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b).

**Unfunded Mandates Reform Act of 1995**

This rule will not cause State, local, or tribal governments, or the private sector, to spend $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

**Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E—Congressional Review Act)**

This rule is not a ''major rule'' as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 Subtitle E—Congressional Review Act, now codified at 5 U.S.C. 804(2). The rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies. Moreover, this is a rule of agency practice or procedure that does not substantially affect the rights or obligations of non-agency parties, and does not come within the meaning of the term ''rule'' as used in Section 804(3)(C), now codified at 5 U.S.C. 804(3)(C). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

**List of Subjects in 28 CFR Part 2**

Administrative practice and procedure, Prisoners, Probation and parole.

**The Final Rule**

Accordingly, the U. S. Parole Commission amends 28 CFR part 2 as follows:

## PART 2—[AMENDED]

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

**Authority:** 18 U.S.C. 4203(a)(1) and 4204(a)(6).

■ 2. Revise § 2.59 to read as follows:

**§ 2.59 Delegation to Commissioners.**

There is hereby delegated to Commissioners the authority to conduct hearings, with the Commissioner's consent, and the powers enumerated in 18 U.S.C. 4203(b) to grant or deny parole or mandatory release, impose reasonable conditions of parole or mandatory release, modify or revoke parole or mandatory release.

Dated: December 18, 2018.

**Patricia K. Cushwa,**

*Chairman (Acting), U.S. Parole Commission.*

[FR Doc. 2018–27803 Filed 12–21–18; 8:45 am]

BILLING CODE 4410–31–P

---

## DEPARTMENT OF JUSTICE

## 28 CFR Part 16

**[CPCLO Order No. 006–2018]**

## Privacy Act of 1974; Implementation

**AGENCY:** Office of the Inspector General, United States Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Inspector General (OIG), a component within the United States Department of Justice (DOJ or Department), is finalizing its Privacy Act exemption regulations for the system of records titled, ''Data Analytics Program Records System,'' JUSTICE/OIG–006, which were published as a Notice of Proposed Rulemaking (NPRM) on March 28, 2018. Specifically, the Department's regulations will exempt the records maintained in JUSTICE/OIG–006 from one or more provisions of the Privacy Act and implement other administrative changes. The exemptions are necessary to avoid interference with the law enforcement functions and responsibilities of OIG. The Department received 21 comments on the NPRM, none of which addressed the substance of the proposed Privacy Act exemption regulations for JUSTICE/OIG–006.

**DATES:** This final rule is effective January 25, 2019.

**FOR FURTHER INFORMATION CONTACT:** Jonathan M. Malis, General Counsel, Office of the Inspector General, Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, phone: (202) 514–3435.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Inspector General Act of 1978, as amended, Inspectors General, including the DOJ Inspector General, are responsible for conducting, supervising, and coordinating audits and investigations to recognize and mitigate fraud, waste, and abuse by programs and operations of the Federal agency for which their office is established. On March 28, 2018, OIG published a System of Records Notice (SORN) for its system of records titled, ''Data Analytics Program Records System,'' JUSTICE/OIG–006, 83 FR 13309 (March 28, 2018), for the records collected to implement its data analytics (DA) program. The DA program will assist with the performance of OIG audits, investigations, and reviews, and accommodate the requirements of the Digital Accountability and Transparency Act of 2014, Public Law 113–101, 128 Stat. 1146. Specifically, the DA program will provide OIG: timely insights from the data already stored in DOJ databases that OIG has legal authorization to access and maintain; the ability to monitor and analyze data for patterns and correlations that signal wasteful, fraudulent, or abusive activities impacting Department performance and operations; the ability to find, acquire, extract, manipulate, analyze, connect, and visualize data; the capability to manage vast amounts of data; the ability to identify significant information that can improve decision quality; and the ability to mitigate risk of waste, fraud, and abuse.

On the same day OIG published JUSTICE/OIG–006, OIG published a Notice of Proposed Rulemaking (NPRM), 83 FR 13208 (March 28, 2018), proposing to exempt records maintained in JUSTICE/OIG–006 from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(j) and (k). Additionally, as an administrative matter, OIG proposed replacing the current regulations promulgated in paragraphs (c) and (d) of 28 CFR 16.75 with the proposed regulations for JUSTICE/OIG–006. The current regulations promulgated in paragraphs (c) and (d) exempt from certain provisions of the Privacy Act a previously rescinded OIG SORN, ''Office of the Inspector General, Freedom of Information/Privacy Acts (FOI/PA) Records,'' JUSTICE/OIG–003, 66 FR 29994 (June 4, 2001), and are no longer needed. The Department invited public comment on the proposed regulations. The comment period was open through April 27, 2018. DOJ received 21 comments on the NPRM, none of which addressed the substance of the proposed Privacy Act exemption regulations for JUSTICE/OIG–006. Two of the comments mentioned concerns with ''data mining,'' but those concerns were expressed in the context of applications on web servers collecting information about shoppers' and users' habits, which is not relevant to the use or purpose of the DA program. The remaining comments touched on numerous other, unrelated topics such as the Environmental Protection Agency and environmental concerns, Russia's attempt to stop American oil and gas drilling, the commodities exchange, and the Consumer Financial Protection Bureau.

After consideration of these public comments, the Department will codify in this final rule the regulations proposed in the NPRM to protect the ability of the OIG to properly engage in its law enforcement functions. Three administrative changes have been made to the regulations proposed in the NPRM. First, in § 16.75(d)(1), the term ''interest'' in the second sentence is revised to read, ''interests.'' Second, in § 16.75(d)(3), the term ''his'' in the first sentence is revised to read, ''the subject's.'' Third, in § 16.75(d)(8), a duplicative use of the word ''could'' has been removed.

**Executive Orders 12866 and 13563—Regulatory Review**

This regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review'' section 1(b), Principles of Regulation, and Executive Order 13563 ''Improving Regulation and Regulatory Review'' section 1(b), General Principles of Regulation.

The Department of Justice has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this final rule has not been reviewed by the Office of Management and Budget, Office of Information and Regulatory Affairs, in accordance with Executive Order 12866.

**Regulatory Flexibility Act**

This regulation will only impact Privacy Act-protected records, which are personal and generally do not apply to an individual's entrepreneurial capacity, subject to limited exceptions. Accordingly, the Chief Privacy and Civil Liberties Officer, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

**Executive Order 13132—Federalism**

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

**Executive Order 12988—Civil Justice Reform**

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

**Executive Order 13175—Consultation and Coordination With Indian Tribal Governments**

This regulation will not impact Indian Tribal governments. More specifically, it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, the consultation requirements of Executive Order 13175 do not apply.

**Unfunded Mandates Reform Act of 1995**

This regulation will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000, as adjusted for inflation, or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Congressional Review Act**

This rule is not a major rule as defined by 5 U.S.C. 804 of the Congressional Review Act.

**Paperwork Reduction Act**

This rule imposes no information collection or recordkeeping requirements.

**List of Subjects in 28 CFR Part 16**

Administrative practices and procedures, Courts, Freedom of information, and the Privacy Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 2940–2008, the Department of Justice amends 28 CFR part 16 as follows:

## PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

■ 1. The authority citation for part 16 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

### Subpart E—Exemption of Records Systems Under the Privacy Act

■ 2. Amend § 16.75 by revising paragraphs (c) and (d) to read as follows:

**§ 16.75 Exemption of the Office of the Inspector General Systems/Limited Access.**

* * * * *

(c) The Data Analytics Program Records System (JUSTICE/OIG–006) system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (2), (3), (5) and (8); and (g) of the Privacy Act. These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j) and/or (k). Where compliance would not appear to interfere with or adversely affect the law enforcement process, and/or where it may be appropriate to permit individuals to contest the accuracy of the information collected, *e.g.,* public source materials, the applicable

exemption may be waived, either partially or totally, by OIG.

(d) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3), the requirement that an accounting be made available to the named subject of a record, because release of disclosure accounting could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of an investigation and the fact that the individual is the subject of the investigation. Such a disclosure could also reveal investigative interests by not only OIG, but also by the recipient agency or component. Since release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation, release could result in the destruction of documentary evidence, improper influencing of witnesses, endangerment of the physical safety of confidential sources, witnesses, and law enforcement personnel, the fabrication of testimony, flight of the subject from the area, and other activities that could impede or compromise the investigation. In addition, providing the individual an accounting for each disclosure could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy.

(2) From subsection (c)(4) notification requirements, for the same reasons that justify exempting this system from the access and amendment provisions of subsection (d), and similarly, from the accounting of disclosures provision of subsection (c)(3). The DOJ takes seriously its obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion, agrees to permit amendment or correction of DOJ records, it will share that information in appropriate cases.

(3) From subsection (d), the access and amendment provisions, because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, of the existence of the investigation; of the nature and scope of the information and evidence obtained as to the subject's activities; of the identity of confidential sources, witnesses, and law enforcement personnel, and of information that may enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law enforcement where they prevent the successful completion of the investigation, endanger the physical safety of confidential sources, witnesses, and law enforcement personnel, and/or lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. In addition, granting access to such information could disclose security-sensitive or confidential business information or information that would constitute an unwarranted invasion of the personal privacy of third parties. Finally, access to the records could result in the release of properly classified information that would compromise the national defense or disrupt foreign policy. Amendment of the records would interfere with ongoing investigations and law enforcement activities and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated.

(4) From subsection (e)(1), because the application of this provision could impair investigations and interfere with the law enforcement responsibilities of the OIG for the following reasons:

(i) It is not possible to determine the relevance or necessity of specific information in the early stages of a civil, criminal or other law enforcement investigation, case, or matter, including investigations in which use is made of properly classified information. Relevance and necessity are questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established.

(ii) During the course of any investigation, the OIG may obtain information concerning actual or potential violations of laws other than those within the scope of its jurisdiction. In the interest of effective law enforcement, the OIG should retain this information in accordance with applicable record retention procedures, as it may aid in establishing patterns of criminal activity, and can provide valuable leads for Federal and other law enforcement agencies.

(iii) In interviewing individuals or obtaining other forms of evidence during an investigation, information may be supplied to an investigator which relates to matters incidental to the primary purpose of the investigation but which may also relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated.

(5) From subsection (e)(2), because, in some instances, the application of this provision would present a serious impediment to law enforcement for the following reasons:

(i) The subject of an investigation would be placed on notice as to the existence of an investigation and would therefore be able to avoid detection or apprehension, to improperly influence witnesses, to destroy evidence, or to fabricate testimony.

(ii) In certain circumstances the subject of an investigation cannot be required to provide information to investigators, and information relating to a subject's illegal acts, violations of rules of conduct, or any other misconduct must be obtained from other sources.

(iii) In any investigation it is necessary to obtain evidence from a variety of sources other than the subject of the investigation in order to verify the evidence necessary for successful litigation.

(6) From subsection (e)(3), because the application of this provision would provide the subject of an investigation with substantial information which could impede or compromise the investigation. Providing such notice to a subject of an investigation could interfere with an undercover investigation by revealing its existence, and could endanger the physical safety of confidential sources, witnesses, and investigators by revealing their identities.

(7) From subsection (e)(5), because the application of this provision would prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the moment it is collected. In the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Material that may seem unrelated, irrelevant, or incomplete when collected may take on added meaning or significance as an investigation progresses. The restrictions of this provision could interfere with the preparation of a complete investigative report, and thereby impede effective law enforcement.

(8) From subsection (e)(8), because to require individual notice of disclosure of information due to compulsory legal process would pose an impossible administrative burden on OIG and may alert the subjects of law enforcement investigations, who might be otherwise unaware, to the fact of those investigations. Such notice could also reveal investigative techniques, procedures, or evidence.

(9) From subsection (g), to the extent that this system is exempt from the access and amendment provisions of subsection (d), pursuant to subsections

(j)(2), (k)(1), and (k)(2) of the Privacy Act.

Dated: December 18, 2018.

**Peter A. Winn,**

*Acting Chief Privacy and Civil Liberties Officer, United States Department of Justice.*

[FR Doc. 2018–27798 Filed 12–21–18; 8:45 am]

**BILLING CODE 4410–58–P**

---

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 100

**[Docket Number USCG–2018–0929]**

**RIN 1625–AA08**

## Special Local Regulations; Marine Events in the Coast Guard Sector Detroit Captain of the Port Zone

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is updating its recurring special local regulations in the Captain of the Port Detroit. This rule updates fifteen special local regulation locations, dates, and sizes, adds six special local regulations, removes six established special local regulations, and reformats the regulations into an easier to read table format. These amendments will ensure safety of life on navigable waters to be used for a various events immediately prior to, during, and immediately after these events.

**DATES:** This rule is effective January 25, 2019.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2018–0929 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Tracy Girard, Prevention Department, Sector Detroit, Coast Guard; telephone (313) 568–9564, email *Tracy.M.Girard@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

### I. Table of Abbreviations

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

### II. Background Information and Regulatory History

On October 17, 2018 the Coast Guard published an NPRM in the **Federal Register** (83 FR 52333) entitled ''Special Local Regulations; Marine Events in the Coast Guard Sector Detroit Captain of the Port Zone.'' The NPRM proposed to establish fifteen permanent special local regulations for annually recurring events in the Captain of the Port Detroit Zone under § 100.911. The NPRM was open for comment for 30 days. There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to these special local regulations. During the comment period that ended November 17, 2018, we received two comments.

### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1233. The Captain of the Port Detroit (COTP) has determined that the likely combination of recreation vessels, commercial vessels, and an unknown number of spectators in close proximity to these various special local regulations along the water pose extra and unusual hazards to public safety and property. Therefore, the COTP is establishing a Special Local Regulation around the event locations listed in table to help minimize risks to safety of life and property during this event.

### IV. Discussion of Comments, Changes, and the Rule

As noted above, we received two positive comments encouraging this rule on our NPRM published October 17, 2018. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule updates fifteen special local regulation locations, dates, and sizes, adds six special local regulations, removes six established special local regulations, and reformats the regulations into an easier to read table format. The exact duration and dates of the special local regulations will be determined annually. In light of the aforementioned hazards, the COTP has determined that a special local regulation is necessary to protect spectators, vessels, and participants. No vessel or person will be permitted to enter the special local regulation without obtaining permission from the COTP or a designated representative.

### V. Regulatory Analyses

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

#### *A. Regulatory Planning and Review*

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

This regulatory action determination is based on the size, location, duration, and time-of-day for each special local regulation. Vessel traffic will be able to safely transit most safety zones which will impact small designated areas within the COTP zone for short durations of time. Moreover, the Coast Guard will issue Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone and the rule allows vessels to seek permission to enter the zone.

#### *B. Impact on Small Entities*

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

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

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions

concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

*C. Collection of Information*

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

*D. Federalism and Indian Tribal Governments*

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order13132.

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

*E. Unfunded Mandates Reform Act*

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

*F. Environment*

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969(42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule updates fifteen special local regulation locations, dates, and sizes, adds six special local regulations, removes six established special local regulations, and reformats the regulations into an easier to read table format. It is categorically excluded from further review under paragraph L[60] of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

*G. Protest Activities*

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

**List of Subjects in 33 CFR Part 100**

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

## PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

**Authority:** 33 U.S.C. 1233; 33 CFR 1.05–1.

■ 2. Revise § 100.911 to read as follows:

### § 100.911 Special Local Regulations; Marine Events in the Coast Guard Sector Detroit Captain of the Port Zone.

(a) *General.* The regulations in this section apply to the marine events listed in Table 1 to § 100.911, along with the requirements of § 100.901. These regulations will be enforced for the duration of each event, on or about the dates indicated. Annual notice of the exact dates and times of the effective period of the regulations with respect to each event, the geographical area, and details concerning of the event will be made by publication in the **Federal Register** via a Notice of Enforcement, published in a Local Notices to Mariners, and broadcast over VHF–FM radio. Although listed in the Code of Federal Regulations, sponsors of events listed in the table to § 100.911 are still required to submit marine event applications in accordance with § 100.15.

(b) *Special local regulations.* (1) No vessel may enter, transit through, or anchor within the regulated area without the permission of the Coast Guard Patrol Commander.

(2) Vessel operators desiring to enter or operate within the regulated area shall contact the Coast Guard Patrol Commander to obtain permission to do so. Vessel operators given permission to enter or operate within the regulated area must comply with all directions given to them by the Coast Guard Patrol Commander.

(3) All geographic coordinates in Table 1 to § 100.911 are North American Datum of 1983 (NAD 83).

TABLE 1 TO § 100.911

[COTP Zone Detroit]

| Event | Sector Detroit special local regulations | Date |
|---|---|---|
| (1) *Hebda Cup Rowing Regatta* Rowing Event, Wyandotte, MI. | All waters of the Detroit River, Trenton Channel between the following two lines going from bank-to-bank: the first line is drawn directly across the channel from position 42°10.98′ N, 083°09.29′ W; the second line, to the north, is drawn directly across the channel from position 42°11.7′ N, 083°08.9′ W. | Two days in April or May. |
| (2) *Wy-Hi Rowing Regatta* Rowing Event, Wyandotte, MI. | All waters of the Detroit River, Trenton Channel between the following two lines going from bank-to-bank: the first line is drawn directly across the channel from position 42°10.98′ N, 083°09.29′ W; the second line, to the north, is drawn directly across the channel from position 42°11.7′ N, 083°08.9′ W. | Two days in April or May. |
| (3) *Wyandotte Rowing Regatta*, Wyandotte, MI. | All waters of the Detroit River, Trenton Channel between the following two lines going from bank-to-bank: the first line is drawn directly across the channel from position 42°10.98′ N, 083°09.29′ W; the second line, to the north, is drawn directly across the channel from position 42°11.7′ N, 083°08.9′ W. | Two days in April or May. |
| (4) *Motor City Mile* Swimming Event, Detroit, MI. | All waters of the Detroit River, Belle Isle Beach between the following two lines: the first line is drawn directly across the channel from position 42°20.517′ N, 082°59.159′ W to 42°20.705′ N, 082°59.233′ W; the second line, to the north, is drawn directly across the channel from position 42°20.754′ N, 082°58.681′ W to 42°20.843′ N, 082°58.792′ W. | One day in June or July. |
| (5) *Wyandotte Invites* Rowing Event, Wyandotte, MI. | All waters of the Detroit River, Trenton Channel between the following two lines going from bank-to-bank: the first line is drawn directly across the channel from position 42°10.98′ N, 083°09.29′ W; the second line, to the north, is drawn directly across the channel from position 42°11.7′ N, 083°08.9′ W. | One day in July or August. |
| (6) *Roar on the River* Powerboat Race, Trenton, MI. | All U.S. waters of the Trenton Channel bounded by an east/west line starting at a point on land at the northern end of Elizabeth park in Trenton, MI, located at position 42°8.2′ N; 083°10.6′ W, extending east to a point near the center of the Trenton Channel at position 42°8.2′ N; 083°10.4′ W, extending South to the Grosse Ile Parkway Bridge located at position 42°7.7′ N; 083°10.5′ W, west to the shore. | Three consecutive days in July or August. |
| (7) *St. Clair River Classic* Power Boat Race, St. Clair, MI. | All U.S. waters of the St. Clair River bounded by latitude 42°50.5′ N to the north and latitude 42°48.5′ N to the south; the shoreline of the St. Clair River on the west; and the international boundary line on the east. | One weekend in July or August. |
| (8) *Marine City Water Ski Show*, Marine City, MI. | All U.S. waters of the St. Clair River 200 feet seaward of latitude position 42°43.382′ N, and to the south by 2,000 feet to 200 feet seaward of latitude position 42°42.983′ N. | One day at the end of July or beginning of August. |
| (9) *Detroit Hydrofest* Power Boat Race, Detroit, MI. | All U.S. waters of the Detroit River in Scott Middle Ground, north of Belle Isle, Michigan, starting at positions 42°20.506′ N, 083°00.016′ W, on the Douglas MacArthur Bridge; extending east to the Belle Isle Crib Light at 42°21.205′ N, 082°57.996′ W. | Three consecutive days in August or September. |
| (10) *Bay City Grand Prix* Powerboat Races, Bay City, MI. | All waters of the Saginaw River bounded on the north by the Liberty Bridge, located at 43°36.3′ N, 083°53.4′ W, and bounded on the south by the Veterans Memorial Bridge, located at 43°35.8′ N, 083°53.6′ W. | One weekend at the end of June or beginning of July. |
| (11) *Tug Across the River*, Detroit, MI. | All U.S. waters of the Detroit River, Detroit, Michigan, bounded on the south by the International boundary, on the west by 083°03′ W, on the east by 083°02′ W, and on the north by the U.S. shoreline. This position is located on the Detroit River in front of Hart Plaza, Detroit, MI. | One day in June or July. |
| (12) *Michigan Championships* Swimming Event, Detroit, MI. | All waters of the Detroit River and Belle Isle Beach between the following two lines: the first line is drawn directly across the channel from position 42°20.517′ N, 082°59.159′ W to 42°20.705′ N, 082°59.233′ W; the second line, to the north, is drawn directly across the channel from position 42°20.754′ N, 082°58.681′ W to 42°20.997′ N, 082°58.846′ W. | One day in August or September. |
| (13) *Bay City Tall Ships* Parade of Sail, Bay City, MI. | All waters throughout the federal navigational channel of Saginaw Bay from Light Buoy 11 at position 43°43.90′ N, 083°46.87′ W and Light 12 at position 43°43.93′ N, 083°46.95′ W to the Saginaw River, and on all waters of the Saginaw River from its mouth to the Veterans Memorial Bridge in Bay City, MI at position 43°35.77′ N, 083°53.60′ W. | Tri-annually in July. |

| Event | Marine safety unit Toledo special local regulations | Date |
|---|---|---|
| (14) *Frogtown Race Regatta*, Toledo, OH. | All waters of the Maumee River, Toledo, OH, from the Martin Luther King Jr. Memorial Bridge at River Mile 4.30 to the Michael DiSalle Bridge at River Mile 6.73. | One day in September. |
| (15) *Dragon Boat Learning Festival*, Toledo, OH. | All waters of the Maumee River in Toledo, OH between the Martin Luther King Jr. Memorial Bridge at river mile 4.30 and a line extending from a point at position 41°38.78′ N, 083°31.84′ W at International Park straight across the river to shore near the mouth of Swan Creek at position 41°38.79′ N, 083°32.03′ W. | One day in June or July. |

**§§ 100.912 through 100.921, 100.927, and 100.928 [Removed]**

■ 3. Remove § 100.912, § 100.913, § 100.914, § 100.915, § 100.916, § 100.917, § 100.918, § 100.919, § 100.920, § 100.921, § 100.927, and § 100.928.

Dated: December 18, 2018.

**Jeffrey W. Novak,**

*Captain, U. S. Coast Guard, Captain of the Port Detroit.*

[FR Doc. 2018–27772 Filed 12–21–18; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 117

**[Docket No. USCG–2018–1054]**

## Drawbridge Operation Regulation; Duwamish Waterway, Seattle, WA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of deviation from drawbridge regulation.

**SUMMARY:** The Coast Guard has issued a temporary deviation from the operating schedule that governs the Southwest Spokane Street Bridge (Spokane Street Bridge), mile 0.3, across the Duwamish Waterway at Seattle, WA. The deviation is necessary to accommodate re-routed roadway traffic while the Alaskan Way Viaduct is closed. This deviation allows the subject bridge to remain in the closed-to-navigation position to allow congested roadway traffic to move easier.

**DATES:** This deviation is effective from 7 a.m. on January 11, 2019, to 7 p.m. on February 9, 2019.

**ADDRESSES:** The docket for this deviation, USCG–2018–1054 is available at *http://www.regulations.gov*. Type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this deviation.

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

**SUPPLEMENTARY INFORMATION:** Seattle Department of Transportation (SDOT), the owner of the impacted drawbridges, requested a temporary deviation from the operating schedule for the Spokane Street Bridge, mile 0.3, across the Duwamish Waterway at Seattle, WA, to facilitate morning and afternoon re-routed roadway traffic. Washington Department of Transportation is closing the Alaskan Way Viaduct forever, and have not finished building new ramp approaches to the new SR99 Tunnel into Seattle, WA. During the closure of the viaduct, SDOT will be re-routing roadway traffic into Seattle across the Duwamish Waterway, and requested to not open the subject bridge to marine vessels during morning and afternoon hours. The normal operating schedule for the Spokane Street Bridge is in 33 CFR 117.5; which is open on signal. The Spokane Street Bridge provides a vertical clearance of 55 feet for the center 130 feet in the closed-to-navigation position, and 44 feet in the closed-to-navigation position on both sides. Vertical clearances refer to the Mean High tide level.

During this deviation period, the Spokane Street Bridge draw need not open to vessels from 7 a.m. to 10 a.m., and from 2 p.m. to 5 p.m. from January 11, 2019 to February 9, 2019, for vessels less than 5000 gross tons. If a vessel has in tow a vessel of 5000, or more, gross tons, or is a vessel proceeding to pick up a tow vessel of 5000, or more, gross tons, the Spokane Street Bridge shall open on signal. Delta Marine will be conducting sea trials during this deviation period with a 174 foot, 900 ton vessel; SDOT has agreed to open the subject bridge, on signal, for the Delta Marine vessel during this deviation period. Waterway usage on the Duwamish Waterway range from large mega yachts, commercial tug and barge to small pleasure craft. Vessels able to pass through the subject bridge in the closed-to-navigation position may do so at any time. The Spokane Street Bridge will not be able to open for emergencies, and there is no immediate alternate route for vessels to pass. The Coast Guard will also inform the users of the waterways through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridges so that vessel operators can arrange their transits to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the Spokane Street Bridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: December 3, 2018.

**Steven M. Fischer,**

*Bridge Chief Administrator, Thirteenth Coast Guard District.*

[FR Doc. 2018–27831 Filed 12–21–18; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 165

**[Docket No. USCG–2018–1107]**

**RIN 1625–AA00**

## Safety Zone; Mathai Fireworks, Detroit River, Detroit, MI

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for navigable waters within a 420-foot radius of a portion of the Detroit River, Detroit, MI. This zone is necessary to protect spectators and vessels from potential hazards associated with the Mathai marriage proposal fireworks.

**DATES:** This temporary final rule is effective from 10 p.m. on December 27, 2018 through 10:30 p.m. on December 28, 2018.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2018–1107 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or email Tracy Girard, Prevention Department, Sector Detroit, Coast Guard; telephone 313–568–9564, or email *Tracy.M.Girard@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

## I. Table of Abbreviations

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

## II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. The Coast Guard did not receive the final details of this fireworks display in time to publish an NPRM. As such, it is impracticable to publish an NPRM because we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would inhibit the Coast Guard's ability to protect participants, mariners and vessels from the hazards associated with this event.

## III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Detroit (COTP) has determined that potential hazard associated with fireworks from 10 p.m. on December 27, 2018 through 10:30 p.m. on December 28, 2018 will be a safety concern to anyone within a 420-foot radius of the launch site. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the fireworks are being displayed.

## IV. Discussion of the Rule

This rule establishes a safety zone from 10 p.m. on December 27, 2018 through 10:30 p.m. on December 28, 2018. The safety zone will be enforced from 10 p.m. through 10:30 p.m. on December 27, 2018. In the case of inclement weather or other unforeseen delay on December 27, 2018, this safety zone will be enforced from 10 p.m. to 10:30 p.m. on December 28, 2018. The safety zone will encompass all U.S. navigable waters of the Detroit River, Detroit, MI, within a 420-foot radius of position 42°19.611′, 083°02.361′ (NAD 83). No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

## V. Regulatory Analyses

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

### *A. Regulatory Planning and Review*

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

This regulatory action determination is based on the size, location, duration, and time-of-year of the safety zone. Vessel traffic will be able to safely transit around this safety zone which will impact a small designated area of the Detroit River from 10 p.m. on December 27, 2018 through 10:30 p.m. on December 28, 2018. Moreover, the Coast Guard will issue Broadcast Notice to Mariners (BNM) via VHF–FM marine channel 16 about the zone and the rule allows vessels to seek permission to enter the zone.

### *B. Impact on Small Entities*

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

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

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

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

### *C. Collection of Information*

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

### *D. Federalism and Indian Tribal Governments*

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of

power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

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

*E. Unfunded Mandates Reform Act*

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

*F. Environment*

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting less than one hour that will prohibit entry into a designated area. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

*G. Protest Activities*

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

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T09–1107 to read as follows:

**§ 165.T09–1107 Safety Zone; Mathai Fireworks, Detroit River, Detroit, MI.**

(a) *Location.* A safety zone is established to include all U.S. navigable waters of the Detroit River, Detroit, MI, within a 420-foot radius of position 42°19.611′, 083°02.361′ (NAD 83).

(b) *Enforcement period.* The regulated area described in paragraph (a) of this section will be enforced from 10 p.m. through 10:30 p.m. on December 27, 2018. In the case of inclement weather or other unforeseen delay on December 27, 2018, this safety zone will be enforced from 10 p.m. to 10:30 p.m. on December 28, 2018.

(c) *Regulations.* (1) No vessel or person may enter, transit through, or anchor within the safety zone unless authorized by the Captain of the Port Detroit (COTP), or his on-scene representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or his on-scene representative.

(3) The ''on-scene representative'' of COTP is any Coast Guard commissioned, warrant or petty officer or a Federal, State, or local law enforcement officer designated by or assisting the Captain of the Port Detroit to act on his behalf.

(4) Vessel operators shall contact the COTP or his on-scene representative to obtain permission to enter or operate within the safety zone. The COTP or his on-scene representative may be contacted via VHF Channel 16 or at (313) 568–9464. Vessel operators given permission to enter or operate in the regulated area must comply with all directions given to them by the COTP or his on-scene representative.

Dated: December 18, 2018.

**Jeffrey W. Novak,**

*Captain, U.S. Coast Guard, Captain of the Port Detroit.*

[FR Doc. 2018–27790 Filed 12–21–18; 8:45 am]

BILLING CODE 9110–04–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R04–OAR–2018–0432; FRL–9988–25–Region 4]**

## Air Plan Approval; North Carolina: $NO_X$ Rule Revisions

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving portions of a State Implementation Plan (SIP) revision submitted by the State of North Carolina, through the North Carolina Division of Air Quality (NCDAQ) on June 5, 2017, as supplemented on June 28, 2018. This submittal seeks to revise the State's SIP-approved rules regarding nitrogen oxides ($NO_X$) emissions from large stationary combustion sources. This action is being taken pursuant to section 110 of the Clean Air Act (CAA or Act).

**DATES:** This rule will be effective January 25, 2019.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2018–0432. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information may not be publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's

official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Jane Spann, Air Regulatory Management Section, Air Planning and Implementation Branch, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. Ms. Spann can be reached by phone at (404) 562–9029 or via electronic mail at *spann.jane@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. This Action

Pursuant to section 110 of the CAA, EPA is approving changes to the North Carolina SIP. EPA has evaluated the relevant portions of North Carolina's June 5, 2017, SIP revision, as supplemented on June 28, 2018, and has determined that they meet the applicable requirements of the CAA and EPA regulations.[1] In this final rulemaking, EPA is also responding to comments received on the proposed rulemaking.

## II. Background

On September 18, 2001, North Carolina submitted rule sections regarding the control of $NO_X$ emissions from large stationary combustion sources to EPA for approval into its SIP.[2] North Carolina submitted rule changes under 15A North Carolina Administrative Code (NCAC) 02D .1400—''Nitrogen Oxides'' at the following Sections: .1401—''Definitions''; .1403—''Compliance Schedules''; .1413—''Sources Not Otherwise Listed in This Section''; .1414—''Tune-up Requirements''; and .1423—''Large Internal Combustion Engines'' as well as other rules not related to today's proposed action.[3] The submittal also included Section .1406—''Utility Boilers (Repealed)'' with no regulatory text. EPA approved the September 18, 2001, SIP revision on December 27, 2002, with the exception of Section .1406 and the addition of Sections .1413 and .1414, among others. EPA did not act on Section .1406 because the rule contained no regulatory text and because Section .1406 was not in the SIP, thus there was nothing to repeal. See 67 FR 78987 for further information.

On August 14, 2002, North Carolina submitted a SIP revision to EPA containing changes under Subchapter 2D to its Section .1400 $NO_X$ rules. The submission included changes to Sections .1401—''Definitions''; .1403—''Compliance Schedules''; .1413—''Sources Not Otherwise Listed in This Section''; .1414—''Tune-up Requirements''; and .1423—''Large Internal Combustion Engines'' as well as changes to other rules not related to today's proposed action. The submittal again included Section .1406—''Utility Boilers (Repealed)'' with no regulatory text. North Carolina took these rule changes to hearing on May 21, 2001, and June 5, 2001. EPA did not act on the August 14, 2002, submittal.

On June 5, 2017, North Carolina withdrew its August 14, 2002, SIP submittal and resubmitted the changes to Sections .1401, .1403, .1413, .1414, and .1423 contained in the 2002 submittal along with the repeal of Section .1406. The June 5, 2017, submittal relies on the hearing record associated with the August 14, 2002, submittal because the rule text is identical. On June 28, 2018, North Carolina supplemented its June 5, 2017, submittal to acknowledge that Sections .1413 and .1414 are not in the SIP.

In a notice of proposed rulemaking (NPRM) published on November 5, 2018, EPA proposed approval of the June 5, 2017, SIP submission, as supplemented June 28, 2018. *See* 83 FR 55335. Comments on the NPRM were due on or before November 26, 2018. EPA received supporting comments and adverse comments on the proposed rule. The Agency has summarized and responded to the potentially adverse comments below (the commenters are hereinafter collectively referred to as ''the Commenter'').

## III. Response to Comment

*Comment 1:* The Commenter states that the world has vastly changed since the enactment of the Clean Air Act and that the ''science used through the NC DAQ has changed along with it.'' The Commenter further states that the ''State Implementation Plan though the Clean Air Act has been untouched since 2001, and if this is the third of these attempts it is vital to comply with some of the requests. Climate change policy as matured in North Carolina, and this is another part of that development.''

*Response 1:* It is unclear how the comment relates to the proposal or how the Commenter would like EPA to change the proposed rule. EPA has modified the North Carolina SIP numerous times since 2001 in response to SIP revisions submitted by the State and is taking action to further modify the SIP as described in the NPRM. *See* 40 CFR 52.1770(c) and (e). Furthermore, the SIP revision at issue is focused on the control of $NO_X$ emissions and does not expressly address climate change.

*Comment 2:* The Commenter notes that North Carolina replaced the phrase ''optimization of'' with ''utilization'' in the definition of ''reasonable effort'' in Section .1401. According to the Commenter, ''it seems as though North Carolina is trying to avoid an efficient use of the abatement technology,'' ''avoiding the Clean Air Act's goal,'' and ''not putting in maximum effort to abate $NO_X$.''

*Response 2:* The criterion for EPA approval in this instance is whether, under CAA section 110(l), the SIP revision would interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable CAA requirement. As discussed in the NPRM, EPA does not believe that approval would violate section 110(l) given the limited applicability of the provision, the continued requirement to follow manufacturers' recommendations or other similar guidance, the fact that it was state effective in 2002, and the lack of nonattainment areas in the State for any criteria pollutant.

*Comment 3:* Regarding Section .1413—Sources Not Otherwise Listed in This Section, the Commenter states that it is important to specify RACT in the SIP ''as it shows the EPA is requiring all sources of $NO_X$ combustion to specify their usage of RACT.'' The Commenter states that the rule ''could go a step further and the EPA could mandate Best Available Control Technology [BACT]. This makes it seem like North Carolina is trying to slide around the rule and not implement the best-case scenario in terms of abatement.''

*Response 3:* EPA agrees that it should incorporate Section .1413 into the SIP as a strengthening measure. As a point of clarification, the rule does not require

[1] On June 5, 2017, NCDAQ submitted a SIP revision addressing regulations under 15A North Carolina Administrative Code (NCAC) 02D Sections .1407—''Boilers and Indirect-Fired Process Heaters'' and .1408—''Stationary Combustion Turbines'' that is separate from the SIP revision that EPA is finalizing today. On August 14, 2002, and again on November 19, 2008, NCDAQ submitted amendments to Sections .1407 and .1408 along with many other rule amendments. NCDAQ's intention, as outlined in its June 5, 2017, SIP submittal for Sections .1407 and .1408, was to withdraw the November 19, 2008, submittal related to these rules. However, EPA already approved the portion of the November 19, 2008, submittal related to Sections .1407 and .1408 on May 9, 2013. *See* 78 FR 27065. Therefore, no further action is needed on the June 5, 2017 SIP submittal containing Sections .1407 and .1408 as the latest version of these rules have been previously incorporated into the federally-approved SIP.

[2] See Section .1402—''Applicability'' and the definition of ''source'' in Section .1401 for the scope of this rule section.

[3] In the table of North Carolina regulations federally approved into the SIP at 40 CFR 52.1770(c), 15A NCAC 02D is referred to as ''Subchapter 2D Air Pollution Control Requirements.''

''all sources of $NO_X$ combustion to specify their usage of RACT.'' The rule requires certain sources of $NO_X$—other than boilers, indirect-fired process heaters, stationary combustion turbines, and stationary internal combustion engines—at facilities with a potential to emit of 100 tons per year or more of $NO_X$ or 560 pounds per calendar day or more from May 1 through September 30 to apply RACT.

Regarding the comments concerning BACT, EPA cannot mandate the use of this control technology under this circumstance. BACT is a CAA requirement for major new or modified stationary sources subject to the Prevention of Significant Deterioration (PSD) program under Title I, Part C of the Act. North Carolina did not submit Section .1413 to EPA to satisfy the State's PSD obligations under the CAA, and EPA has already approved North Carolina's PSD program at 15A NCAC 02D .0530, including its BACT provisions, as meeting CAA requirements and incorporated the program into the SIP. *See, e.g.,* 47 FR 7836 (February 23, 1982).

*Comment 4:* Regarding Section .1403—Compliance Schedules, the Commenter notes that EPA is not acting on this rule because it already approved a previous submission. The Commenter then states that EPA ''should look into this rule further, as the last effective revision for this rule was in 2002. Schedules change, and this could be another example of the EPA not being strict enough in implementing the Clean Air Act's statutes on North Carolina.''

*Response 4:* It is unclear how the Commenter would like EPA to change the proposed rule, and EPA does not agree that the last effective revision for Section .1403 was in 2002. North Carolina last modified Section .1403 on July 1, 2007, and EPA approved that version of the rule into the SIP on May 9, 2013. *See* 78 FR 27065. Because the 2007 version of the rule (approved by EPA in 2013) superseded the July 15, 2002, version contained in the June 5, 2017, SIP revision, EPA is not taking action on the portion of the submittal regarding Section .1403.

*Comment 5:* The Commenter states that the SIP revisions ''do a good job in creating a better understanding of North Carolina's abatement efforts, however the EPA could revisit rules of the previous submissions. They have chosen to not take action on several rules, but these rules .1403, .1406 and .1423 could better strengthen the SIP if they were updated and better evaluated.''

*Response 5:* It is unclear how the Commenter would like EPA to change the proposed rule or how Sections .1403, .1406, and .1423 could strengthen the SIP ''if they were updated and better evaluated.'' As discussed in Response 4, EPA has already incorporated the most recent state-effective version of Section .1403 into the SIP. EPA is not acting on Section .1406—Utility Boilers (Repealed) because the rule contains no regulatory text and because EPA never incorporated Section .1406 into the SIP. EPA is not acting on Section .1423 at this time. Any future action on that rule will occur in a separate rulemaking. To the extent that the Commenter wants EPA to revisit rules of previous SIP submissions, EPA notes that this action is limited to the June 5, 2017 SIP revision and that previous SIP submissions on these rules are no longer before the Agency for review.

## IV. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference North Carolina regulations under Subchapter 2D Air Pollution Control Requirements, Section .1401—''Definitions,'' modified to clarify which definitions outside of the rule apply to Section .1400, including definitions from the CFR, add a definition for ''combustion turbine,'' modify the definition of ''reasonable effort,'' ''emergency generator,'' ''emergency use internal combustion engines,'' ''fossil fuel fired,'' ''ozone season,'' ''seasonal energy input'' and ''seasonal energy output,'' and renumber the paragraphs within the rule, state effective on July 15, 2002; Section .1413—''Sources Not Otherwise Listed in This Section,'' which includes rules for $NO_X$ sources not otherwise listed in section .1400, state effective on July 18, 2002; and Section .1414—''Tune-Up Requirements,'' which includes tune-up requirements for certain boilers, indirect-fired process heaters and stationary internal combustion engines, state effective on July 18, 2002. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[4]

## V. Final Action

Pursuant to section 110 of the CAA, EPA is approving the aforementioned changes to the North Carolina SIP.

## VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. 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

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

appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 25, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

**List of Subjects in 40 CFR Part 52**

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

Dated: December 6, 2018.

**Mary S. Walker,**

*Acting Regional Administrator, Region 4.*

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 II—North Carolina

■ 2. In § 52.1770, the table in paragraph (c)(1) is amended by:

■ a. Revising the entry ''Section .1401''.

■ b. Adding the entries ''Section .1413'' and ''Section .1414'' in numerical order.

The additions and revision read as follows:

**§ 52.1770 Identification of plan.**

* * * * *

(c) * * *

(1) EPA-APPROVED NORTH CAROLINA REGULATIONS

| State citation | Title/subject | State effective date | EPA approval date | Explanation |
|---|---|---|---|---|
| **Subchapter 2D Air Pollution Control Requirements** | | | | |
| * | * | * | * | * |
| **Section .1400 Nitrogen Oxides** | | | | |
| Section .1401 | Definitions | 7/15/2002 | 12/26/2018, [insert **Federal Register** citation]. | |
| * | * | * | * | * |
| Section .1413 | Sources Not Otherwise Listed in This Section | 7/18/2002 | 12/26/2018, [insert **Federal Register** citation]. | |
| Section .1414 | Tune-Up Requirements | 7/18/2002 | 12/26/2018, [insert **Federal Register** citation]. | |
| * | * | * | * | * |

* * * * *

[FR Doc. 2018–27747 Filed 12–21–18; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R09–OAR–2018–0559; FRL–9987–78–Region 9]**

## Air Plan Approval; California; Feather River Air Quality Management District

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to approve a revision to the Feather River Air Quality Management District (FRAQMD) portion of the California State Implementation Plan (SIP). This revision concerns emissions of oxides of nitrogen ($NO_X$) from natural gas-fired water heaters, small boilers, and process heaters. We are approving a local rule that regulates these emission sources under the Clean Air Act (CAA or the Act).

**DATES:** This rule will be effective on January 25, 2019.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID

No. EPA–R09–OAR–2018–0559. 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:** Robert Schwartz, EPA Region IX, (415) 972–3286, *schwartz.robert@epa.gov.*

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

**Table of Contents**

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

## I. Proposed Action

On October 3, 2018 (83 FR 49870), the EPA proposed to approve the following rule into the California SIP.

| Local agency | Rule No. | Rule title | Adopted | Submitted |
|---|---|---|---|---|
| FRAQMD | 3.23 | Natural Gas-Fired Water Heaters, Small Boilers, And Process Heaters. | 10/03/2016 | 05/08/2017 |

We proposed to approve this rule because we determined that it complies with the relevant CAA requirements. Our proposed action contains more information on the rule and our evaluation.

## II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received five (5) comments supporting the limitation of $NO_X$ emissions. One commenter asked, ''If this is approved what kind of program will be provided to replace these systems to ones that follow code?'' In response, there is no EPA-sponsored program to replace currently installed natural-gas fired water heaters, small boilers or process heaters. The FRAQMD Rule 3.23 prohibits any person in the District to offer for sale, sell, or install applicable units that exceed the $NO_X$ emission limits established by the rule. Resellers or manufacturers of any unit subject to Rule 3.23 will be required to submit to the FRAQMD a report that demonstrates compliance with the $NO_X$ emission limits established by the rule. Alternatively, the reseller or manufacturer of any unit subject to Rule 3.23 will have the option to submit to the FRAQMD an approved South Coast Air Quality Management District (SCAQMD) certification, in accordance with SCAQMD Rule 1121 or Rule 1146.2.

## III. EPA Action

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

## IV. Incorporation by Reference

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

## V. Statutory and Executive Order Reviews

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

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

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 25, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

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

Dated: November 30, 2018.

**Deborah Jordan,**

*Acting Regional Administrator, Region IX.*

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

### Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(509)(i)(B) to read as follows:

**§ 52.220 Identification of plan-in part.**

* * * * *

(c) * * *

(509) * * *

(i) * * *

(B) Feather River Air Quality Management District.

(*1*) Rule 3.23, ''Natural Gas-Fired Water Heaters, Small Boilers, and Process Heaters'' adopted on October 3, 2016.

* * * * *

[FR Doc. 2018–27756 Filed 12–21–18; 8:45 am]

BILLING CODE 6560–50–P

---

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

**[EPA–HQ–OPP–2017–0063; FRL–9986–85]**

### Chlorate; Pesticide Exemptions From Tolerance

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an exemption from the requirement of a tolerance for residues of chlorate in or on cantaloupe and tomato under the Federal Food, Drug, and Cosmetic Act (FFDCA).

**DATES:** This regulation is effective December 26, 2018. Objections and requests for hearings must be received on or before February 25, 2019 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2017–0063, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** Anita Pease, Antimicrobials Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *ADFRNotices@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does this action apply to me?*

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

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

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

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2017–0063 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before February 25, 2019. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2017–0063, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online

instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

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

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

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

## II. Summary of Petitioned-For Exemptions

In the **Federal Register** of December 15, 2017 (82 FR 59604) (FRL–9970–50), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 4F8325) by ICA Trinova, Inc., 1 Beavers Street, Suite B, Newnan, GA 30263. The petition requested that EPA (1) establish a tolerance for residues of chlorate in or on cantaloupes at 1.5 parts per million (ppm), and (2) establish an exemption from the requirement of a tolerance for residues of chlorate in or on tomatoes. Chlorate is a by-product of chlorine dioxide, which is generated from the active ingredient, sodium chlorite, when it is applied via fumigation to tomatoes and cantaloupes post- harvest, during storage and shipment. The Agency reviewed submitted residue chemistry data for chlorine dioxide and chlorate. Given that residues for chlorine dioxide were not detected and only residues of chlorate were quantified, EPA has determined that tolerance exemptions are appropriate for chlorate on both tomatoes and cantaloupes.

A summary of the petition prepared by ICA Trinova Inc., the petitioner and registrant is available in the docket, *http://www.regulations.gov.* Comments were received on the notice of filing; the Agency's response to these comments is located in Unit IV.B. of this document. For reasons explained in Unit IV.C., EPA is establishing an exemption from the requirement of a tolerance for residues of chlorate in or on cantaloupe and tomato.

## III. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement of a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. In making this safety determination, EPA must take into consideration the factors laid out in section 408(b)(2)(C) and (D). Specifically, section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

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

### *A. Toxicological Profile*

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

Sodium chlorite is the active ingredient that is applied to the tomatoes and cantaloupe. Once applied, it is activated by a weak acid, creating gaseous chlorine dioxide. As chlorine dioxide is released, it also produces the byproduct, chlorate. Based on submitted residue data, the only residues of the pesticide with the potential for being present on food commodities are chlorate ions; therefore, the Agency assessed the safety of aggregate exposure to chlorate in support of this tolerance action.

Inorganic chlorates (also known as chlorate salts) encompass all chlorates including the most abundant salt, sodium chlorate. Toxicology data relevant to the human health risk assessment are summarized here and more information about the toxicology data and references can be found in the *Risk Assessment of Tomato and Cantaloupe Fumigation with Sodium Chlorite 3.2% (chlorine dioxide gas)* and *Inorganic Chlorates Human Health Assessment Scoping Document in Support of Registration Review* (Docket ID No. EPA–HQ–OPP–2016–0080–0008) both of which can be found in the docket for this action at *http://www.regulations.gov.*

The hazard database indicates that the thyroid is the primary target organ of chlorate. Effects observed in subchronic and chronic toxicity studies show increased thyroid gland weights, colloid depletion, decreases in triiodothyronine (T3) and thyroxine (T4) accompanied by increases in thyroid stimulating hormone (TSH), increased incidence of thyroid follicular cell hypertrophy, thyroid cell mineralization, follicular cell hyperplasia, and adenomas or carcinomas in rat studies. Other effects include hematological changes (hemoglobin concentration, hematocrit, decreased red blood counts (RBC), and increased reticulocyte counts in females), methemoglobin concentration changes, and pituitary vacuolization in subchronic studies starting at doses 10-fold higher than where thyroid effects are observed.

In a 2-year drinking water study, there was some evidence of thyroid gland follicular cell tumors in male rats; however, because chlorate is not mutagenic and these tumors were only seen at high doses, chlorate is not likely to be carcinogenic since the chronic reference dose is below the dose at which alteration of thyroid hormone homeostasis occurs. Moreover, although there was equivocal and marginal evidence of increased pancreatic islet carcinoma in female mice, the Agency has concluded that the selected chronic reference dose is protective of these potential cancer effects.

No increased qualitative or quantitative susceptibility in rats or rabbits was seen in reproduction and developmental studies with chlorate. Chlorate did not cause developmental effects in rats at doses up to the limit dose (1,000 mg/kg/day) or in rabbits up to half the limit dose. Although chlorate has not been evaluated for neurotoxic effects, acute and subchronic toxicity studies do not indicate any neurotoxic potential. In a 2-generation reproduction toxicity study, increased absolute and relative thyroid weight and increased incidence of slight to moderate hyperactivity of the thyroid glands were reported in parental and adult F1 males and females at doses 14x higher than the

thyroid effects identified in the adult rat subchronic and chronic studies.

The chronic oral toxicity of chlorate was examined in a study conducted by the National Toxicology Program (NTP). In this study, Fischer 344 rats (50/sex/group) were exposed to drinking water containing 0, 125, 1,000, or 2,000 mg/L chlorate for 2 years (equivalent to 5/5, 35/45, and 75/95 mg/kg/day (males/females)). T4 and T3 levels were significantly reduced at 35 and 75 mg/kg/day on day 4, and in 75 mg/kg/day males and females at week 3. TSH was significantly increased in 35 and 75 mg/kg/day males on day 4 and at week 3, in 35 and 75 mg/kg/day females on day 4, in 75 mg/kg/day females at week 3, and in 75 mg/kg/day males and females at week 13. At the high dose, increased incidences of thyroid gland follicular cell carcinoma were seen in male rats (incidence: 4/47) compared to none in controls, and of thyroid gland follicular cell adenoma or carcinoma (combined) in males (incidence: 6/47) and females (incidence: 4/46) compared to one animal in controls of both sexes. The incidences of thyroid gland follicular cell hypertrophy were significantly increased in mid- and high-dose groups of males (33/43 and 40/47 vs. 4/47 in control) and females (3/47, 7/47, 27/43, 42/46 vs. 3/47 in control).

In the Agency's 2006 risk assessment for inorganic chlorates, *Revised Inorganic Chlorates. HED Chapter of the Reregistration Eligibility Decision Document (RED)* (Docket ID No. EPA–HQ–OPP–2005–0507–0004) a lower 95% confidence limit of the benchmark dose (BMDL) of 0.9 mg/kg/day was derived, based on thyroid gland follicular cell hypertrophy at the 5 mg/kg/day dose from the rat chronic cancer study (NTP, 2005). EPA has reconsidered the data and determined that the original benchmark dose derived from the study was not sufficiently supported as an effect level at 5 mg/kg/day, and that the 5 mg/kg/day dose can be supported as a NOAEL for the study. The point of departure (POD) for chronic dietary (all populations) exposures is thus the 5 mg/kg/day dose, based on changes in thyroid hormones (decreased T3, decreased T4, and increased TSH), and increased incidence of thyroid follicular cell hypertrophy in male and female rats at the next highest dose of 35/45 mg/kg/day (males and females respectively). Mineralization of the thyroid at the 5 mg/kg/day dose level was not considered to be adverse.

Specific information on the studies received and the nature of the adverse effects caused by chlorate as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document titled ''*Risk Assessment of Tomato and Cantaloupe Fumigation with Sodium Chlorite 3.2% (chlorine dioxide gas)* in docket ID number EPA–HQ–OPP–2017–0063.

*B. Toxicological Points of Departure/Levels of Concern*

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

A summary of the toxicological endpoints from the documents referenced in section III, A, for chlorate used for human risk assessment is shown in Table 1.

TABLE 1—TOXICOLOGY ENDPOINTS FOR USE IN CHLORATE HUMAN HEALTH RISK ASSESSMENTS

| Exposure/scenario | Point of departure | Uncertainty/FQPA safety factors | RfD, PAD, level of concern for risk assessment | Study and toxicological effects |
|---|---|---|---|---|
| Acute dietary (All populations, including infants and children, and females 13—49 years of age). | N/A | N/A | N/A | None of the available studies provided an endpoint of toxicity attributable to a single exposure. |
| Chronic dietary (All populations) | RfD = cPAD = 0.17 mg/kg/day. | UF = 30x (10x intraspecies, 3x interspecies) FQPA SF = 1x. | NOAEL = 5 mg/kg/day. | 2 year NTP Study (2005)—rat.<br>MRID 49683134.<br>LOAEL = 35/45 mg/kg/day (male/female) based on changes in thyroid hormones after 3 weeks (decreased T4, T3, & increased TSH), increased incidence of thyroid gland follicular cell hypertrophy in males and females (after 3 weeks and 2 years). |
| Cancer (Oral, dermal, inhalation) | The chronic reference dose will be protective of potential carcinogenicity. | | | |

UF = uncertainty factor, FQPA SF = Special FQPA safety factor, NOAEL = no observed adverse effect level, LOAEL = lowest observed adverse effect level, PAD = population adjusted dose (a = acute, c = chronic) RfD = reference dose, MOE = margin of exposure, LOC = level of concern, N/A = not applicable

*C. Exposure Assessment*

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to chlorate, EPA considered exposure under the petitioned-for tolerance and exemption as well as existing exposures to chlorate. EPA assessed dietary exposures from chlorate in food as follows:

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

occurring as a result of a 1-day or single exposure.

No such effects were identified in the toxicological studies for chlorate; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA separately assessed the components of chronic dietary exposure and then aggregated them for assessing chronic risk. For existing food crop uses, EPA relied on the assessment of food crop exposures contained in the 2006 Inorganic Chlorates Reregistration Eligibility Document. For the petitioned-for use on cantaloupe, EPA based its assessment on the current version of Dietary Exposure Evaluation Model—Food Consumption Intake Database—DEEM–FCID™ (version 3.16), the food consumption data from the 2003–2008 U.S. Department of Agriculture's National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA), and assumed 100 percent of the cantaloupe crop treated. For the dietary exposure resulting from use in paper mills, EPA based its exposure assessment on standard operating procedure screening-level analyses reported in the registration review human health scoping document, *Inorganic Chlorates Human Health Assessment Scoping Document in Support of Registration Review.*

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

iv. *Anticipated residue and Percent Crop Treated (PCT) information.* EPA used anticipated residue information and PCT estimates in the dietary food assessment.

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

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only under the following conditions:

- *Condition a:* The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- *Condition b:* The exposure estimate does not underestimate exposure for any significant subpopulation group.
- *Condition c:* Data are available on pesticide use and food consumption in a particular area and the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency estimated the PCT for existing uses for the chronic dietary exposure assessment as follows: corn: <1%; cotton (seed treatment): 5%; dry beans/peas: <1%; flaxseed: <1%; peppers (chili peppers): <1%; potatoes; <1%; rice: 1%; safflower (seed treatment): 2%; sorghum: <1%; soybeans: 5%; soybeans (seed treatment): <1%; sunflower (seed treatment): <1%; sweet corn: <1%; wheat: 1%; and wheat seed (seed treatment): <1%. For crops not specified, 100% PCT was used.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and California Department of Pesticide Regulation (CalDPR) Pesticide Use Reporting (PUR) for the chemical/crop combination for the most recent 10 years. EPA uses an average PCT for chronic dietary risk analysis and a maximum PCT for acute dietary risk analysis. The average PCT figures for each existing use are derived by combining available public and private market survey data for that use, averaging across all observations, and rounding up to the nearest 5%, except for those situations in which the average PCT is less than 1% or less than 2.5%. In those cases, the Agency would use less than 1% or less than 2.5% as the average PCT value, respectively. The maximum PCT figure is the highest observed maximum value reported within the most recent 10 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%, except where the maximum PCT is less than 2.5%, in which case, the Agency uses less than 2.5% as the maximum PCT.

2. *Dietary exposure from drinking water.* The estimated drinking water concentration (EDWC) was obtained from monitoring data gathered between 2013–2015 and are contained in the Six-Year Review Technical Report for Chlorate. For purposes of this assessment, EPA used the median concentration of 120 micrograms/liter.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). At this time, there are no longer any registered uses of chlorate that result in non-occupational, residential exposures.

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

EPA has not found inorganic chlorates to share a common mechanism of toxicity with any other substances, and chlorate does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that chlorate does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides.*

### *D. Safety Factor for Infants and Children*

1. In general, section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10x, or uses a different

additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* No increased qualitative or quantitative susceptibility in rats or rabbits was seen in reproduction and developmental studies with chlorate. Chlorate did not cause developmental effects in rats at doses up to 1,000 mg/kg/day or in rabbits at doses up to 500 mg/kg/day. No pre- or postnatal susceptibility was observed in a reproduction study in rats.

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

i. The toxicity database for chlorate is adequate to characterize the potential for prenatal or postnatal risk for infants and children.

ii. There is no indication in the available database that chlorate is a neurotoxicant.

iii. There was no pre- or postnatal sensitivity or susceptibility observed in the submitted developmental studies in rats and rabbits and the 2-generation reproduction study in rats.

iv. There are no residual uncertainties identified in the exposure databases. The dietary assessment is based on a conservative estimate of dietary exposures and drinking water monitoring data. These assessments will not underestimate the exposure and risks posed by chlorate.

*E. Aggregate Risks and Determination of Safety*

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

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, chlorate is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to chlorate from food and water will utilize 8.4% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. There are no residential pesticide uses for chlorate.

3. *Short- and Intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account short- and intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

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

4. *Aggregate cancer risk for U.S. population.* A cancer aggregate assessment was not conducted separately, as the chronic aggregate assessment is protective of cancer for the general U.S. population. Based on the results of the assessment of chronic risk, the Agency concludes that exposure to chlorate will not result in a cancer risk of concern.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to chlorate residues.

## IV. Other Considerations

*A. Analytical Enforcement Methodology*

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

*B. Response to Comments*

Two comments were received in response to the Notice of Filing, neither of which raised issues related to the safety of the tolerances in this action. Because they raise issues outside the scope of this rulemaking, the Agency is not addressing them here.

*C. Revisions to Petitioned-For Tolerances*

The residue data indicate that following use of the pesticide, there were detectable chlorate residues on the cantaloupe rind, although none were detected in the edible portions of the cantaloupe, and that chlorate residues on tomato were indistinguishable from background levels of chlorate on tomato. Because EPA does not anticipate use on either commodity to contribute to dietary exposure, EPA is issuing an exemption from the requirement of tolerance residues on cantaloupe and tomato. This tolerance exemption covers potential residues in or on these commodities as a result of direct application and allows for the shipment of these commodities in interstate commerce.

## V. Conclusion

An exemption from the requirement of a tolerance is established for residues of chlorate in or on tomato and cantaloupe.

## VI. Statutory and Executive Order Reviews

This action establishes an exemption from the requirement of a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), nor is it considered a regulatory action under Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition

under FFDCA section 408(d) do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

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

### VII. Congressional Review Act

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

### List of Subjects in 40 CFR Part 180

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

Dated: November 30, 2018.

**Anita Pease,**

*Acting Director, Antimicrobial Division, Office of Pesticide Programs.*

Therefore, 40 CFR chapter I is amended as follows:

## PART 180—[AMENDED]

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

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

■ 2. Add § 180.1364 to subpart D to read as follows:

**§ 180.1364 Chlorate; exemption from the requirement of a tolerance.**

Residues of chlorate in or on tomato and cantaloupe are exempt from the requirement of a tolerance when resulting from the application of gaseous chlorine dioxide as a fungicide, bactericide, and antimicrobial pesticide.

[FR Doc. 2018–27908 Filed 12–21–18; 8:45 am]

BILLING CODE 6560–50–P

---

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 271

**[EPA–R06–RCRA–2018–0395; FRL–9987–30–Region 6]**

## Louisiana: Final Authorization of State Hazardous Waste Management Program Revision

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** On September 5, 2018, the Environmental Protection Agency (EPA) published a notice of proposed rulemaking to approve a revision to the State of Louisiana hazardous waste program under the Resource Conservation and Recovery Act (RCRA) and provided for a thirty-day public comment period. The public comment period closed on October 5, 2018, and EPA received fifteen comments. The EPA has reviewed and analyzed all submitted comments, and now issues this final rule. After consideration of all comments, EPA confirms that the program revisions to the State of Louisiana hazardous waste program satisfy all requirements needed to qualify for final authorization.

**DATES:** This final authorization is effective December 26, 2018.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R06–RCRA–2018–0395. All documents in the docket are listed in *www.regulation.gov* index. Although listed in the index, some of the information is not publicly available. *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically through *www.regulation.gov* or in hard copy. You can view and copy Louisiana's application and associated publicly available materials from 8:30 a.m. to 4:00 p.m., Monday through Friday, at the following locations: Louisiana Department of Environmental Quality, 602 N Fifth Street, Baton Rouge, Louisiana 70884–2178, phone number (225) 219–3559 and EPA, Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733, phone number (214) 665–8533.

**FOR FURTHER INFORMATION CONTACT:** Alima Patterson, Region 6, Regional Authorization/Codification Coordinator, Permit Section (6MM–RP), Multimedia Division, (214) 665–8533, EPA Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733, and Email address *patterson.alima@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. What revisions is EPA authorizing with this action?

On March 13, 2018, LDEQ submitted a final complete program revision application seeking authorization of its program revision in accordance with 40 CFR 271.21. EPA now makes a final decision that LDEQ's hazardous waste program revisions satisfy all the requirements necessary to qualify for final authorization. EPA will continue to implement and enforce Hazardous and Solid Waste Amendments of 1984 (HSWA) provisions for which the State is not authorized. For a list of rules that become effective with this Final Rule, please see the Proposed Rulemaking published in the September 5, 2018, **Federal Register** at 83 FR 45061.

### B. What were the comments and responses to EPA's proposal?

EPA received fifteen comments. Twelve comments were supportive of EPA to grant the State of Louisiana portions of the Subtitle C Hazardous Waste Management Program and two were irrelevant to the proposed rulemaking. EPA received a written adverse comment from TD*X Associates LP, Beaumont Texas, (TD*X) requesting that EPA not authorize the State of Louisiana to implement the regulatory provisions commonly known as the ''Verified Recycler Exemption,'' or ''VRE.'' EPA received only one adverse comment, from TD*X, opposing EPA's proposal to authorize revisions to Louisiana's hazardous waste regulations. The full set of comments can be found in the docket for this action. The commenter asserts that the

Louisiana program that employs both the VRE and the associated Verified Reclamation Facility (VRF) variance is not protective of human health and the environment, and does not implement the State's legally mandated requirement to enforce regulations for the management of designated hazardous waste materials that are at least as stringent as the RCRA regulations. TD*X's extensive comments address two issues related to (1) EPA's proposed authorization of the Louisiana Department of Environmental Quality (LDEQ) revised hazardous waste management program as published in the **Federal Register** on September 5, 2018, at 83 FR 45061, and (2) Louisiana's April 19, 2018, proposal to issue a site-specific feedstock variance from the classification as a solid waste to Thermaldyne LLC—Thermaldyne Port Allen Facility, in accordance with the Louisiana Administrative Code (LAC) 33:V.105.O.1.b and 105.O.2.b [analogs to 40 CFR 260.30(b) and 260.31(b)] (Further information about the LDEQ proposal to issue a site-specific variance to Thermaldyne LLC can be found at *http://www.deq.louisiana.gov/public-notices*). In accordance with the approval process found at 40 CFR part 271, EPA provides the following responses to comments regarding authorization of Louisiana's requested program revision:

1. The commenter stated that EPA Region 6 should either: Not authorize the LDEQ State program if it includes any of the court vacated VRE language and conditions; or issue a limited program authorization that excludes any reference to either the VRE or VRF variance process. Specifically, the commenter argued that if Louisiana is authorized, including any of the VRE language, then all references to LDEQ being allowed to issue a VRF variance should be struck and that a specific reference or condition should be included in the EPA authorization requiring that LDEQ not issue any VRF variance for a ''recycling'' facility that employs a treatment method that EPA has designated as requiring a specific RCRA permit. The commenter also requested EPA to eliminate the following statement in the **Federal Register** at 83 FR 45061 (September 5, 2018), on page 45066, Section G: ''*For the purposes of RCRA section 3009, the Agency has determined that the broader in scope provisions are more protective/stricter, thus being within the State's authority to maintain them as part of the State's RCRA program.*'' For the reasons set forth below, EPA does not agree with the commenter.

EPA did not propose to authorize Louisiana for the VRE requirements that were vacated by the Court of Appeals for the District of Columbia Circuit, *Am. Petroleum Inst.* v. *EPA,* 862 F.3d 50 (D.C. Cir. 2017) and *Am. Petroleum Inst.* v. *EPA,* 883F.3d 918 (D.C. Cir. 2018). On page 83 FR 45066, column 3 of the proposed rulemaking, EPA specified that the Agency considers the Louisiana VRE requirements broader in scope than EPA regulations. EPA further clarified that the LDEQ provisions that are broader in scope than the federal regulations are not part of the proposed program authorization because EPA cannot enforce requirements that are broader in scope, even if compliance with such provisions is required by Louisiana law. LDEQ may implement these state regulations because they are at least as stringent as federal law, but because they are broader in scope than federal law, they are not federally enforceable. EPA addressed this question in the Final Rule, ''Response to Vacatur of Certain Provisions of the Definition of Solid Waste Rule'' in the **Federal Register** at 83 FR 24664, 24666, May 30, 2018: ''For states that have adopted rules similar to the verified recycler exclusion and the 2015 definition of legitimate recycling, but have not yet been authorized for them, the vacatur of the federal rules will not change the authorization status of the state program. . . . The vacaturs and subsequent reinstatement of various provisions of the prior federal rules will result in state provisions that are broader in scope than the federal program as it pertains to the specific vacated provisions.''

With respect to the issuance of variances, if the material receives an exclusion or variance from being a solid waste, it is by definition not a hazardous waste and does not have to be treated as such, subject to any conditions in the exclusion or variance. The State of Louisiana has the authority to issue site-specific variances from classification as a solid waste under 40 CFR 260.30(a) through (c) and 260.31(a) through (c) in lieu of EPA since EPA first authorized the state for the initial Definition of Solid Waste (DSW) final rule (50 FR 614, January 4, 1985; as amended by the final rules published at 50 FR 14216, April 11, 1985; and 50 FR 33541, August 20, 1985). In accordance with 40 CFR 260.30 and 260.31, the granting of variances for reclaimed materials is site-specific and the variances are granted on a case-by-case basis. In granting variances, an authorized state must evaluate the particular waste material managed and types of processing operations conducted. Authorized states that implement hazardous waste programs have reasonable flexibility to evaluate case-by-case situations within their state.

Finally, RCRA 3009 states that nothing prohibits a state from imposing ANY requirements which are more stringent than our rules. Also, under 40 CFR 271.1(i), states are not precluded from having requirements that are more stringent or more extensive; or operating a program with a greater scope of coverage but the greater in scope coverage is not part of federally approved program. For the purposes of federal authorization and enforcement, the EPA RCRA hazardous waste regulations distinguish between these two kinds of allowable state requirements. While state requirements that are more stringent may be authorized as part of the state's RCRA program, broader in scope state provisions cannot be authorized. The preamble of the 2015 DSW rule (80 FR 1694; January 13, 2015) documented in detail the additional requirements that must be met to qualify for the state's verified recycler exclusion, compared to the transfer-based exclusion that was reinstated by the court. EPA stated in the preamble that the changes to the standards and criteria for variances from classification as a solid waste discussed in section IX (Revisions to Solid Waste Variances and Non-Waste Determinations) are more stringent than the existing federal hazardous waste program, including the transfer-based exclusion (see 80 FR 1732—1735; January 13, 2015). Based on the EPA guidance document, ''Determining Whether State Hazardous Waste Requirements are More Stringent or Broader in Scope than the Federal RCRA Program'' (December 23, 2014), as discussed in Section G.1 of the proposed rulemaking preamble, EPA affirms that the LDEQ provisions that are broader in scope than the federal regulations are not part of the program proposed to be authorized by the September 5, 2018, **Federal Register** document (83 FR 45061). EPA cannot enforce requirements that are broader in scope, although compliance with such provisions is required by Louisiana law.

2. The commenter presented an example involving LDEQ's proposal to issue a VRF variance to the Thermaldyne facility in Port Allen, Louisiana, as an example of why EPA should not authorize LDEQ for the VRE requirements. The commenter stated that the Thermaldyne facility uses a hazardous waste combustor to treat RCRA regulated listed and characteristic hazardous waste materials, and that

''the facility embodies all of the aspects of sham recycling that the 1989 Lowrance Memo [RO 11426], and both the 2008 and 2015 DSW rulemakings were intended to prohibit.'' EPA responds to this comment as follows:

Issues regarding individual facilities are beyond the scope of this rulemaking. The purpose of the proposed rulemaking published at 83 FR 45061, September 5, 2018, was not to evaluate recycling activities at particular facilities or VRF variance applications. The Louisiana proposed rulemaking addresses regulations that the state adopted and EPA reviewed. EPA concluded that the state regulations, except for the court vacated provisions, are equivalent and consistent with the federal RCRA Subtitle C program, as amended through April 17, 2015. EPA reiterates that the Agency determined the Louisiana VRE standard is broader in scope than the federal regulations and, accordingly, did not propose to authorize the State of Louisiana for the VRE standard.

### C. Final Action

Based on the comments received in response to the proposed authorization of the State of Louisiana hazardous waste program, EPA's responses to the comments, and consideration of the administrative record, EPA is granting final authorization of the state's program, except for the VRE and other state provisions which are broader in scope than federal rules and remain unaffected by the vacaturs ordered by the United States Court of Appeals for the District of Columbia Circuit, on July 7, 2017, as modified on March 6, 2018. EPA retains its authority under RCRA sections 3007, 3008, 3013 and 7003 which include, among others, authority to: (1) Take enforcement actions regardless of whether the state has taken its own action, (2) enforce RCRA requirements and suspend or revoke permits; and (3) perform inspections, and require monitoring, tests, analyses or reports.

### D. What is codification and is the EPA codifying Louisiana's hazardous waste program as authorized in this rule?

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized hazardous waste program into the CFR. We do this by referencing the authorized State rules in 40 CFR part 272. We reserve the amendment of 40 CFR part 272 subpart T for this authorization of Louisiana's program changes until a later date. In this authorization application, the EPA is not codifying the rules documented in this **Federal Register** notice.

### E. Administrative Requirements

This final authorization revises Louisiana's authorized hazardous waste management program pursuant to RCRA section 3006 and imposes no requirements other than those currently imposed by state law. For further information on how this authorization complies with applicable executive orders and statutory provisions, please see the proposed rulemaking published in the **Federal Register** (83 FR 45061, September 5, 2018).

### List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

**Authority:** This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: December 18, 2018.

**Anne Idsal,**

*Regional Administrator, Region 6.*

[FR Doc. 2018–27794 Filed 12–21–18; 8:45 am]

BILLING CODE 6560–50–P

---

## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 22

**[WT Docket Nos. 12–40 and 16–138; RM–11510, RM–11660; FCC 18–92]**

## Cellular Service, Including Changes in Licensing of Unserved Area

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; announcement of effective date.

**SUMMARY:** In this document, the Federal Communications Commission (Commission) announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection requirements associated with the Commission's *Third Report and Order,* WT Docket Nos. 12–40 and 16–138, RM Nos. 11510 and 11660, FCC 18–92. This notification is consistent with the *Third Report and Order,* which stated that the Commission would publish a document in the **Federal Register** announcing OMB approval and the effective date of the requirements.

**DATES:** The amendment to 47 CFR 22.303, published at 83 FR 37760 (Aug. 2, 2018), is effective on January 2, 2019.

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Cathy Williams, *Cathy.Williams@fcc.gov,* (202) 418–2918.

**SUPPLEMENTARY INFORMATION:** This document announces that, on November 27, 2018, OMB approved the revised information collection requirements contained in the Commission's *Third Report and Order,* FCC 18–92, published at 83 FR 37760, Aug. 2, 2018. The OMB Control Number is 3060–0508. The Commission publishes this document as an announcement of the effective date of the requirements. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street SW, Washington, DC 20554. Please include the OMB Control Number, 3060–0508, in your correspondence. The Commission will also accept your comments via email at *PRA@fcc.gov.*

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

### Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the Commission is notifying the public that it received OMB approval on November 27, 2018, for the revised information collection requirements contained in the Commission's rule at 47 CFR 22.303. Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–0508.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

*OMB Control Number:* 3060–0508.

*OMB Approval Date:* November 27, 2018.

*OMB Expiration Date:* November 30, 2021.

*Title:* Parts 1 and 22 Reporting and Recordkeeping Requirements.

*Form Number:* Not applicable.

*Respondents:* Business or other for-profit entities, Individuals or households, and State, Local or Tribal Governments.

*Number of Respondents and Responses:* 15,465 respondents; 16,183 responses.

*Frequency of Response:* Recordkeeping requirement; On occasion, quarterly, and semi-annual reporting requirements. Third-party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 154, 222, 303, 309 and 332.

*Total Annual Burden:* 2,606 hours.

*Annual Cost Burden:* $19,138,350.

*Privacy Act Impact Assessment:* Yes.

*Nature and Extent of Confidentiality:* There is no need for confidentiality with this collection of information. The information to be collected will be made available for public inspection. Applicants may request materials or information submitted to the Commission be given confidential treatment under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* Part 22 contains the technical and legal requirements for radio stations operating in the Public Mobile Services. The information collected is used to determine, on a case-by-case basis, whether or not to grant licenses authorizing construction and operation of wireless telecommunications facilities to common carriers. Further, this information is used to develop statistics about the demand for various wireless licenses and/or the licensing process itself, and occasionally for rule enforcement purposes.

The Federal Communications Commission (Commission) received approval for a revision of OMB Control No. 3060–0508 from the Office of Management and Budget (OMB). The revised information collection reflects deletion of a rule applicable to all licensees and applicants governed by part 22 of the Commission's rules, as adopted by the Commission in a *Third Report and Order* on July 12, 2018 (WT Docket Nos. 12–40 and 16–138; RM Nos. 11510 and 11660; FCC 19–82). The *Third Report and Order* deleted certain part 22 rules that either imposed administrative and recordkeeping burdens that are outdated and no longer serve the public interest, or that are largely duplicative of later-adopted rules and are thus no longer necessary. Among the rule deletions and of relevance to this information collection, the Commission deleted rule § 22.303, resulting in discontinued information collection for that rule section.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2018–27841 Filed 12–21–18; 8:45 am]

**BILLING CODE 6712–01–P**

---

## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 51

**[WC Docket No. 17–84; FCC 18–74]**

## Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; announcement of effective date.

**SUMMARY:** In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection associated with the Commission's discontinuance rules. This document is consistent with the *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Second Report and Order,* FCC 18–74, which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of those rules.

**DATES:** The amendments to 47 CFR 51.333(g)(l)(i) and (iii) and (g)(2), published at 83 FR 31659, July 9, 2018, are effective on December 26, 2018.

**FOR FURTHER INFORMATION CONTACT:** Michele Levy Berlove, Special Counsel, Wireline Competition Bureau, at (202) 418–1477, or by email at *Michele.Berlove@fcc.gov.*

For additional information concerning the Paperwork Reduction Act information collection requirements, contact Nicole Ongele at (202) 418–2991 or *nicole.ongele@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This document announces that, on December 6, 2018, OMB approved, for a period of three years, the information collection requirements relating to the network change disclosure rules contained in the Commission's *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Second Report and Order,* FCC 18–74, published at 83 FR 31659, July 9, 2018.

The OMB Control Number is 3060–0741. The Commission publishes this document as an announcement of the effective date of the rules. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Nicole Ongele, Federal Communications Commission, Room 1–A620, 445 12th Street SW, Washington, DC 20554. Please include the OMB Control Number, 3060–0741, in your correspondence. The Commission will also accept your comments via email at *PRA@fcc.gov.*

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

### Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received final OMB approval on December 6, 2018, for the information collection requirements contained in the modifications to the Commission's rules in 47 CFR part 51.

Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–0741.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

*OMB Control Number:* 3060–0741.

*OMB Approval Date:* December 6, 2018.

*OMB Expiration Date:* December 31, 2021.

*Title:* Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, GN Docket No. 17–84.

*Form Number:* N/A.

*Respondents:* Business or other for-profit entities.

*Number of Respondents and Responses:* 5,357 respondents; 573,928 responses.

*Estimated Time per Response:* 0.5–4.5 hours.

*Frequency of Response:* On occasion reporting requirements; recordkeeping; third party disclosure requirements.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority is contained in 47 U.S.C. 222 and 251.

*Total Annual Burden:* 575,448 hours.

*Total Annual Cost:* No cost(s).

*Privacy Act Impact Assessment:* No impact(s).

*Nature and Extent of Confidentiality:* The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* Section 251 of the Communications Act of 1934, as amended, 47 U.S.C. 251, is designed to accelerate private sector development and deployment of telecommunications technologies and services by spurring competition. Section 222(e) is also designed to spur competition by prescribing requirements for the sharing of subscriber list information. These information collection requirements are designed to help implement certain provisions of sections 222(e) and 251, and to eliminate operational barriers to competition in the telecommunications services market. Specifically, these information collection requirements will be used to implement (1) local exchange carriers' (''LECs'') obligations to provide their competitors with dialing parity and non-discriminatory access to certain services and functionalities; (2) incumbent local exchange carriers' (''ILECs'') duty to make network information disclosures; and (3) numbering administration. The revisions to this collection relate to changes in one of many components of the currently approved collection—specifically, certain reporting, recordkeeping and/or third-party disclosure requirements under section 251(c)(5). In November 2017, the Commission adopted new rules concerning certain information collection requirements implemented under section 251(c)(5) of the Act, pertaining to network change disclosures. Most of the changes to those rules applied specifically to a certain subset of network change disclosures, namely notices of planned copper retirements. In addition, the changes removed a rule that prohibits incumbent LECs from engaging in useful advanced coordination with entities affected by network changes. In June 2018, the Commission revised its network change disclosure rules to (1) revise the types of network changes that trigger an incumbent LEC's public notice obligation, and (2) extend the *force majeure* provisions applicable to copper retirements to all types of network changes. The changes are aimed at removing unnecessary regulatory barriers to the deployment of high-speed broadband networks. The Commission estimates that these revisions do not result in any change to the total annual burden hours or any additional outlays of funds for hiring outside contractors or procuring equipment as the changes eliminate notices that are subsumed by notice obligations that remain in force or simply codify procedures available to a small number of incumbent LECs by waiver orders.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2018–27834 Filed 12–21–18; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 63

**[WC Docket No. 17–84; FCC 18–74]**

### Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; announcement of effective date.

**SUMMARY:** In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection associated with the Commission's discontinuance rules. This document is consistent with the *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Second Report and Order,* FCC 18–74, which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of those rules.

**DATES:** The amendments to 47 CFR 63.71(f), (h), (k) introductory text, (k)(1) and (3), and (l), published at 83 FR 31659, July 9, 2018, are effective on December 26, 2018.

**FOR FURTHER INFORMATION CONTACT:** Michele Levy Berlove, Special Counsel, Wireline Competition Bureau, at (202) 418–1477, or by email at *Michele.Berlove@fcc.gov.*

For additional information concerning the Paperwork Reduction Act information collection requirements, contact Nicole Ongele at (202) 418–2991 or *nicole.ongele@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This document announces that, on December 6, 2018, OMB approved, for a period of three years, the information collection requirements relating to certain discontinuance rules contained in the Commission's *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Second Report and Order,* FCC 18–74, published at 83 FR 31659, July 9, 2018, as specified above.

The OMB Control Number is 3060–0149. The Commission publishes this document as an announcement of the effective date of the rules. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Nicole Ongele, Federal Communications Commission, Room 1–A620, 445 12th Street SW, Washington, DC 20554. Please include the OMB Control Number, 3060–0149, in your correspondence. The Commission will also accept your comments via email at *PRA@fcc.gov.*

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

### Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received final OMB approval on December 6, 2018, for the information collection requirements contained in the modifications to the Commission's rules in 47 CFR part 63.

Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control

Number. The OMB Control Number is 3060–0149.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

*OMB Control Number:* 3060–0149.

*OMB Approval Date:* December 6, 2018.

*OMB Expiration Date:* December 31, 2021.

*Title:* Part 63, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17–84, FCC 18–74.

*Form Number:* N/A.

*Respondents:* Business or other for-profit entities.

*Number of Respondents and Responses:* 80 respondents; 88 responses.

*Estimated Time per Response:* 6–63 hours.

*Frequency of Response:* One-time reporting requirement and third-party disclosure requirements.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C. Sections 214 and 402 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 1,086 hours.

*Total Annual Cost:* $27,900.

*Privacy Act Impact Assessment:* No impact(s).

*Nature and Extent of Confidentiality:* The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* The Commission is seeking Office of Management and Budget (OMB) approval for a revision of a currently approved collection to OMB. The Commission will submit this information collection after this 60-day comment period. Section 214 of the Communications Act of 1934, as amended, requires that a carrier must first obtain FCC authorization either to (1) construct, operate, or engage in transmission over a line of communications; or (2) discontinue, reduce or impair service over a line of communications. Part 63 of title 47 of the Code of Federal Regulations (CFR) implements Section 214. Part 63 also implements provisions of the Cable Communications Policy Act of 1984 pertaining to video which was approved under this OMB Control Number 3060–0149. In 2009, the Commission modified part 63 to extend to providers of interconnected Voice of internet Protocol (VoIP) service the discontinuance obligations that apply to domestic non-dominant telecommunications carriers under Section 214 of the Communications Act of 1934, as amended. In 2014, the Commission adopted improved administrative filing procedures for domestic transfers of control, domestic discontinuances and notices of network changes, and among other adjustments, modified part 63 to require electronic filing for applications for authorization to discontinue, reduce, or impair service under section 214(a) of the Act. In July 2016, the Commission concluded that applicants seeking to discontinue a legacy time division multiplexing (TDM)-based voice service as part of a transition to a new technology, whether internet Protocol (IP), wireless, or another type (technology transition discontinuance application) must demonstrate that an adequate replacement for the legacy service exists in order to be eligible for streamlined treatment and revised part 63 accordingly. The Commission concluded that an applicant for a technology transition discontinuance may demonstrate that a service is an adequate replacement for a legacy voice service by certifying or showing that one or more replacement service(s) offers all of the following: (i) Substantially similar levels of network infrastructure and service quality as the applicant service; (ii) compliance with existing federal and/or industry standards required to ensure that critical applications such as 911, network security, and applications for individuals with disabilities remain available; and (iii) interoperability and compatibility with an enumerated list of applications and functionalities determined to be key to consumers and competitors (the ''adequate replacement test'').

In June 2018, the Commission further modified the rules applicable to section 214(a) discontinuance applications. First, all carriers, whether dominant or non-dominant, that seek approval to grandfather data services below speeds of 25 Mbps download speed and 3 Mbps upload speed are now subject to a uniform reduced public comment period of 10 days and an automatic grant period of 25 days. Second, all carriers, whether dominant or non-dominant, seeking authorization to discontinue data services below speeds of 25 Mbps download speed and 3 Mbps upload speed that have previously been grandfathered for a period of at least 180 days are subject to a uniform reduced public comment period of 10 days and an automatic grant period of 31 days, provided they submit a statement as part of their discontinuance application that they have received Commission authority to grandfather the services at issue at least 180 days prior to the filing of the discontinuance application. This statement must reference the file number of the prior Commission authorization to grandfather the services the carrier now seeks to permanently discontinue. Third, carriers are no longer required to file an application to discontinue, reduce, or impair any service for which it has had no customers and no request for service for at least a 30-day period immediately preceding the discontinuance. Fourth, all carriers, whether dominant or non-dominant, that seek approval to discontinue legacy voice service can obtain further streamlined processing with a public comment period of 15 days and an automatic grant period of 31 days, provided (1) they offer a stand-alone interconnected VoIP service throughout the service area, and (2) at least one alternative stand-alone, facilities-based voice service is available from an unaffiliated provider throughout the affected service area (the ''alternative options test''). Finally, all carriers, whether dominant or non-dominant, that seek approval to grandfather legacy voice service are now subject to a uniform reduced public comment period of 10 days and an automatic grant period of 25 days. The Commission estimates that it will receive three fewer section 214(a) discontinuance applications annually in light of the Commission's forbearance from applying its section 214(a) discontinuance requirements to services for which the carrier has had no customers and no reasonable requests for service during the preceding 30-day period. The Commission also anticipates that the number of respondents and responses under the adequate replacement test will likely decrease from 5 and 25, respectively, to 2 and 10, respectively. The remaining 15 responses previously attributable to the adequate replacement test will likely proceed pursuant to the less rigorous alternative options test. The Commission estimates that the total annual burden of the entire collection, as revised, is reduced from 1,923 hours to 1,086 hours.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2018–27833 Filed 12–21–18; 8:45 am]

**BILLING CODE 6712–01–P**

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 76**

**[FCC 18–166]**

## Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (FCC or Commission) provides that certain written notices from MVPDs to subscribers may be provided electronically via verified email, so long as the MVPD complies with certain consumer safeguards. In addition, we authorize cable operators to respond to consumer requests and complaints via email in certain circumstances, and eliminate a portion of our rules because they are outdated. As set forth below, we conclude that these changes will help the environment and provide flexibility to MVPD operators while ensuring that consumers continue to receive required notices and other important information.

**DATES:** Effective January 25, 2019, except for new § 76.1600 and the amendments to §§ 76.1614 and 76.1619, which are delayed. We will publish a document in the **Federal Register** announcing the effective date of those amendments.

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Lyle Elder, *Lyle.Elder@fcc.gov,* of the Media Bureau, Policy Division (202) 418–2120. Direct press inquiries to Janice Wise at (202) 418–8165.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Report and Order,* FCC 18–166, adopted on November 15, 2018 and released on November 16, 2018, and the Erratum to that Order, adopted on November 30, 2018 and released on December 4, 2018. The full text of these documents is available electronically via the FCC's Electronic Document Management System (EDOCS) website at *http://fjallfoss.fcc.gov/edocs_public/* or via the FCC's Electronic Comment Filing System (ECFS) website at *http://fjallfoss.fcc.gov/ecfs2/.* (Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.) This document is also available for public inspection and copying during regular business hours in the FCC Reference Information Center, which is located in Room CY–A257 at FCC Headquarters, 445 12th Street SW, Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m. The complete text may be purchased from the Commission's copy contractor, 445 12th Street SW, Room CY–B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

### Synopsis

### I. Introduction

1. In this *Report and Order,* we modernize our rules regarding certain information that cable operators currently are required to provide to their subscribers on paper. As explained below, we will permit these notices to instead be provided electronically via verified email, so long as the cable operator complies with certain consumer safeguards.[1] We also permit electronic delivery of subscriber privacy information that cable operators and other multichannel video programming distributors (MVPDs) are required to provide. In addition, we authorize cable operators to respond to consumer requests and complaints via email in certain circumstances, and eliminate §§ 76.1621 and 76.1622 of our rules because they are outdated. Through this proceeding, the Commission continues its efforts to modernize its regulations and reduce unnecessary requirements that can impede competition and innovation in the media marketplace.[2]

### II. Background

2. The rules at issue in this proceeding are set forth in Subpart T of Part 76 and require cable operators to communicate certain information to their subscribers in writing.[3] The Subpart T rules were adopted to implement Congress's directive, in the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), that the Commission adopt customer service standards for cable operators.[4] In the 1992 Cable Act, Congress amended section 632 of the Communications Act of 1934 (Act) to require the Commission to ''establish standards by which cable operators may fulfill their customer service requirements'' and specified that ''[s]uch standards shall include, at a minimum, requirements governing . . . communications between the cable operator and the subscriber (including standards governing bills and refunds).'' [5]

3. In June 2017, the Commission issued a Declaratory Ruling that interpreted the written communication requirement of one section of Subpart T to be satisfied by electronic delivery of written material to subscribers.[6] Specifically, the Commission determined that cable operators may comply with § 76.1602(b) of the Commission's rules, which requires cable operators to provide annual notices containing a variety of information about their service offerings, by distributing notices via email to a verified email address so long as the operator provides a mechanism for customers to opt out of email delivery and continue to receive paper notices.[7] The Commission concluded that emails, ''by their very nature, convey information in writing'' and therefore it is reasonable to interpret the term ''written information'' in § 76.1602(b) to include information

[1] We will permit any notice sent by verified email to be provided to subscribers via a weblink contained in the text of the email. In addition, we will permit information about rates and channel line-ups contained in paper-delivered annual notices to contain the full text or list a website address that contains such information.

[2] *See Commission Launches Modernization of Media Regulation Initiative,* Public Notice, 32 FCC Rcd 4406 (MB 2017) (initiating a review of rules applicable to media entities to eliminate or modify regulations that are outdated, unnecessary, or unduly burdensome).

[3] 47 CFR 76.1601 *et seq.* The specific Subpart T rules at issue are discussed in more detail in the *Notice of Proposed Rulemaking (NPRM)* in this proceeding. *Electronic Delivery of MVPD Communications, Modernization of Media Regulation Initiative,* Notice of Proposed Rulemaking, 32 FCC Rcd 10755 at 10755–10757, para. 2 (2017) (addressing §§ 76.1601, 76.1602, 76.1603, 76.1604, 76.1618, 76.1620, 76.1621, and 76.1622) (*NPRM*).

[4] Public Law 102–385, 106 Stat. 1460 (1992) (*1992 Cable Act*).

[5] 47 U.S.C. 552(b)(3).

[6] *See National Cable & Telecommunications Association and American Cable Association, Petition for Declaratory Ruling,* Declaratory Ruling, 32 FCC Rcd 5269 (2017) (*2017 Declaratory Ruling*). The Declaratory Ruling granted a petition for declaratory ruling filed by NCTA—The Internet and Television Association (NCTA) and the American Cable Association (ACA). *See* Petition for Declaratory Ruling of National Cable & Telecommunications Association and American Cable Association, MB Docket No. 16–126 (filed Mar. 7, 2016) (requesting clarification that the written information that cable operators must provide to their subscribers pursuant to Section 76.1602(b) of the Commission's rules may be provided via electronic distribution).

[7] *See 2017 Declaratory Ruling,* 32 FCC Rcd at 5269, para. 6. *See* 47 CFR 76.1602(b) (requiring cable operators to provide certain written information about their service offerings to subscribers annually, at the time of installation, and at any time upon request).

delivered by email.[8] The Commission also found that the benefits of permitting email delivery include the positive environmental aspects of saving substantial amounts of paper annually, increased efficiency, and enabling customers to more readily access accurate information regarding their service options.[9] In addition, the Commission found that section 632(b) of the Act ''provides the Commission with broad authority to 'establish standards by which cable operators may fulfill their customer service requirements.' '' [10] In the wake of this Declaratory Ruling, a number of commenters in the Media Modernization proceeding asked the Commission to consider permitting electronic delivery of the information required to be provided to cable subscribers in other Subpart T rules, as well as to consider other changes to the rules in Subpart T.

4. In response to the proposals in the Media Modernization proceeding, the Commission adopted the Notice of Proposed Rulemaking (*NPRM*) in this proceeding in December 2017.[11] The *NPRM* proposed to allow additional types of Subpart T communications from cable operators to subscribers to be delivered electronically, if they are sent to a verified email address and the cable operator complies with other consumer safeguards.[12] These rules cover, among other things, information about channel deletions; service change notices; contact information for local franchise authorities; notice of charges for various services and service changes; and information about the basic service tier, broadcast signal availability, and consumer equipment compatibility.[13] In addition, the *NPRM* tentatively concluded that we should adopt a new rule permitting electronic delivery of certain statutorily required subscriber privacy notifications. Section 631 of the Act requires a cable operator to ''provide notice in the form of a separate, written statement to such subscriber which clearly and conspicuously informs the subscriber of'' certain privacy protections. Section 338(i) of the Act imposes the same requirement on satellite providers, and section 653(c)(1)(A) of the Act imposes this requirement on Open Video System (OVS) providers.[14] The *NPRM* sought comment on approaches for permitting electronic delivery of all of these written communications.[15] The Commission also proposed to permit cable operators to reply to consumer requests or complaints by email in certain circumstances.[16]

5. Finally, the *NPRM* proposed to eliminate § 76.1621 of the Commission's rules,[17] which requires cable operators to offer and provide upon request to subscribers equipment that will enable the simultaneous reception of multiple signals,[18] and sought comment on how best to modernize, and the extent to which we should eliminate, § 76.1622,[19] which requires cable operators to provide a consumer education program on equipment and signal compatibility matters to subscribers upon initial subscription and annually thereafter.[20]

## III. Discussion

6. We adopt the Commission's proposal to permit electronic delivery of all general subscriber notices required under Subpart T, if they are sent to a verified email address and the cable operator complies with other consumer safeguards. In order to harmonize our existing customer notice rules with the statutory privacy notice obligations noted above, we extend the same verified email delivery option to those privacy notices.[21] In addition, we adopt the proposal to allow cable operators to respond to consumer requests or billing dispute complaints by email, if the consumer used email to make the request or complaint or if the consumer specifies email as the preferred response method. Finally, we eliminate §§ 76.1621 and 76.1622.

### *A. Electronic Distribution of Notices to Subscribers*

7. We find verified email to be a reasonable means of delivering the general subscriber notices required under Subpart T,[22] and adopt a rule to permit such delivery. This approach will ensure that consumers continue to receive required notices while also providing more flexibility for cable operators and helping the environment.[23]

8. Every commenter addressing the issue agrees that cable operators ''should be allowed to use verified email'' [24] for all Subpart T general customer notifications because ''consumers increasingly prefer . . . communicating electronically with their service providers'' [25] and because it will ''reduce the economic and administrative burden'' of paper mailings.[26] The record also indicates that these reduced paper mailings will save ''substantial amounts of paper annually,'' an environmental benefit that the Commission found compelling in the *2017 Declaratory Ruling*.[27] Commenters also do not dispute the Commission's authority to permit electronic delivery of Subpart T subscriber notices.[28] NCTA argues that we should go beyond verified emails, and permit cable operators to communicate with subscribers using any ''reasonable'' electronic means.[29] NCTA argues that ''means of communicating with customers will continue to evolve over time just as customer preferences will evolve'' and that ''[c]able operators should not be locked into a single mode of electronic communications . . . when these changes are foreseeable.'' [30] NCTA suggests that any electronic method ''reasonably intended'' or ''reasonably

[8] *Id.*

[9] *Id.*

[10] *Id.* at para. 7 (citing 47 U.S.C. 552(b)(3)).

[11] *NPRM,* 32 FCC Rcd 10755.

[12] *Id.* at 10759–10764, paras. 6–18.

[13] The general notice rules in Subpart T of Part 76 are §§ 76.1601 (channel deletion/repositioning); 76.1602 (annual notices, which can already be sent via email pursuant to the *2017 Declaratory Ruling,* and signal quality complaint procedures/local franchise authority contact information); 76.1603 (rate and service change notices); 76.1604 (notice of charge for frequent change of service tiers); 76.1618 (basic tier information where applicable); 76.1620 (list of broadcast signals not available without a converter box); and 76.1621 and 76.1622 (dealing with equipment compatibility, *but see infra* Section III.D, eliminating these sections).

[14] 47 U.S.C. 551(a)(1), 338(i), 573(c)(1)(a).

[15] *NPRM,* 32 FCC Rcd at 10760, 10761–10764, paras. 8, 11–17.

[16] *Id.* at 10764–10765, paras. 19–21.

[17] *Id.* § 76.1621.

[18] *NPRM,* 32 FCC Rcd at 10765–10766, para. 22.

[19] 47 CFR 76.1622.

[20] *NPRM,* 32 FCC Rcd at 10766–10767, paras 23–24. The *NPRM* also sought comment on how to update the requirement in §§ 76.64 and 76.44 of the Commission's rules that requires broadcast television stations to send carriage election notices via certified mail. *Id.* at 10755, 10767–10769, paras. 1, 25–27. That issue is not addressed in this Report and Order and will be addressed in a subsequent Report and Order in this docket.

[21] *See* Appendix A, Final Rules (47 CFR 76.1600).

[22] *See supra* note 12.

[23] Verizon argues that ''LFAs should be barred from requiring paper delivery or imposing more stringent requirements for electronic delivery that are inconsistent with the regulations adopted by the Commission.'' Verizon Comments at 11–13. This proposal is outside the scope of this proceeding, and we decline to address it.

[24] NCTA Comments at 2; *See also* ACA Comments at 1–2, DISH Comments at 1, Verizon Comments at 1.

[25] AT&T Comments at 1.

[26] NCTA Comments at 1–2.

[27] *Id.* at 3–4, citing *2017 Declaratory Ruling,* 32 FCC Rcd at 5269, para. 6.

[28] *See, e.g.,* NCTA Comments at 5, AT&T Comments at 2.

[29] NCTA Comments at 7. *See also* NCTA April 30, 2018 Ex Parte at 1, n.1 (describing a meeting between NCTA, Comcast Corp., Charter Communications, Inc. (Charter), and FCC Media Bureau staff).

[30] NCTA Comments at 7 (internal citations omitted). *See also generally* NCTA April 30, 2018 Ex Parte.

calculated'' to reach subscribers should be permissible.[31]

9. We find it appropriate at this time to extend to all general Subpart T notices [32] the same level of flexibility adopted in the *2017 Declaratory Ruling* and will permit these notices to be provided to subscribers via email sent to a verified email address, so long as the cable operator complies with certain consumer safeguards. In the *2017 Declaratory Ruling,* the Commission rejected the ''reasonably calculated'' standard, and we do not find any reason to change that conclusion here. We therefore decline to adopt NCTA's suggestion that we adopt such a standard in this proceeding.[33]

10. We will apply the same approach to electronic delivery uniformly across all Subpart T general notice rules, with one minor exception described below.[34] The notice requirements contained in Subpart T stem from several different statutory provisions,[35] and in the *NPRM,* the Commission asked whether it should take different approaches to modernizing the rules based on the varying sources of statutory authority and the content of the notices required.[36] Several commenters contend that having varying standards would be problematic. Verizon notes that a ''mix-and-match-regime'' [37] ''would simply cause consumer confusion and undermine the Commission's efforts to streamline the notification procedures.'' [38] NCTA contends that ''different treatment'' for different types of notices ''would unnecessarily inject confusion and complications into what otherwise is intended to be an effort to simplify, streamline, and modernize the process.'' [39] We agree with these comments. After review of the record, we find that adopting a consistent approach, rather than requiring different approaches and decisions based on the content of the messages, is simpler and more intuitive for consumers, as well as more efficient for cable operators. To do otherwise risks confusing consumers who are understandably unlikely to be well versed in the variety of cable notices at issue. We also conclude that our approach satisfies the terms of each of the relevant statutory provisions.[40]

11. We find that the general pro-consumer approach adopted in the *2017 Declaratory Ruling* with respect to § 76.1602(b) electronic notices is appropriate for all general Subpart T notice rules.[41] First, cable operators must send notices to a verified email address. This email address may be: (1) One that the subscriber has provided to the cable operator (and not *vice versa*) for purposes of receiving communication, (2) one that the subscriber regularly uses to communicate with the cable operator, or (3) one that has been confirmed by the subscriber as an appropriate vehicle for the delivery of notices.[42]

12. Second, to enable subscribers to opt for paper delivery at any time, cable operators must ''include an opt-out telephone number that is clearly and prominently presented to customers in the body of the originating email that delivers the notices, so that it is readily identifiable as an opt-out option.'' [43] ACA advocates a ''uniform 'opt-out' approach,'' [44] and no commenter supports an ''opt-in'' regime for any notice type, arguing that the burden of an opt-in regime would ''defeat the purpose of the modernization effort'' [45] and is ''unnecessary for these types of routine notices.'' [46] As in the *2017 Declaratory Ruling,* we agree that an opt-in requirement is unnecessary. The information these notices provide is generic in nature and does not contain confidential information specific to an individual subscriber. Indeed, it is already publicly available in many cases on a cable operator's or local franchising authority's website.[47] Commenters support allowing subscribers to request paper copies of any notice, and none dispute the need for an opt-out, paper notice option.[48] Some commenters argue for greater flexibility with respect to the opt-out mechanism provided, claiming that they should not be required to offer an opt-out telephone number and should be permitted to offer subscribers other opt-out methods instead.[49] While the *NPRM* asked about the use of an opt-out electronic link as an alternative to a phone number, we conclude that there is no reason to deviate from the approach adopted in

[31] NCTA Comments at 2, 7.

[32] *See supra* note 12.

[33] While we reject NCTA's suggested standard, we seek comment in the attached Further Notice of Proposed Rulemaking on the feasibility of permitting additional means of electronic delivery of these notices to subscribers. *See supra* Section IV.

[34] *See infra* para. 13 (permitting paper-based weblinks for specific subparts of the annual notices required under Section 76.1602).

[35] 47 U.S.C. 552(b) (providing the Commission with broad authority to ''establish standards by which cable operators may fulfill their customer service requirements,'' including a requirement relating to ''communications between the cable operator and the subscriber''); 47 U.S.C. 552(c) (stating that ''[a] cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion''). The resulting Subpart T notice rules themselves are all very similar without being totally identical. For example, one requires that cable operators ''provide written notice'' (47 CFR 76.1601), while another requires that operators ''shall notify such subscribers'' (47 CFR 76.1620) and a third requires that ''[c]ustomers will be notified . . . in writing'' (47 CFR 76.1603).

[36] For instance, the *NPRM:* Tentatively concluded that we should allow broadcast signal deletion notices to be sent to a verified email unless a subscriber opts out (*Id.* at 10761–10762, para. 12, based on Section 76.1601's requirement that cable operators ''shall provide written notice''); sought comment on whether rate changes should be sent to a verified email address only after a subscriber opts in (*Id.* at 10762, para. 13, based on Section 76.1603's requirement that ''[c]ustomers will be notified . . . in writing''); and sought comment on whether basic tier information could be provided simply by being posted on the cable operator's website (*Id.* at 10762–10763, para. 15, based on Section 76.1618's requirement that cable operators ''provide written notification'').

[37] Verizon Comments at 6.

[38] Verizon Reply at 3–4.

[39] NCTA Comments at 4–5. *See also* ACA Comments at 6 (''subscribers benefit from a consistent approach to the delivery of electronic notices'').

[40] As discussed above, 47 U.S.C. 552(b) gives us broad authority to establish standards relating to ''communications between the cable operator and the subscriber,'' and Section § 552(c) gives an operator the choice of ''any reasonable written means at its sole discretion.'' We find that verified email is reasonable within this context. *See also 2017 Declaratory Ruling,* 32 FCC Rcd at 5272, para. 6.

[41] *NPRM,* 32 FCC Rcd at 10761–10762, paras. 11–12, 14. *See also* ACA Comments at 5. Although it supports the use of electronic delivery, ACA argues that any change to our rules must not ''increase the odds of customers not receiving notices,'' and therefore ''supports application of the consumer safeguards adopted in the 2017 Declaratory Ruling,'' including the strict definition of what constitutes a ''verified email,'' to additional Subpart T notice requirements.

[42] *Id.* at 10761, para. 11.

[43] *2017 Declaratory Ruling,* 32 FCC Rcd at 5275, para. 10.

[44] ACA Reply at 2.

[45] NCTA Comments at 4.

[46] Verizon Reply at 3.

[47] As AT&T notes, it is important to clarify that we are exempting all of the notices approved for electronic delivery in this Order from ''the consent requirements of the E-Sign Act.'' AT&T Comments at 5. Under the Electronic Signatures in Global and National Commerce Act (E-Sign Act), information that a statute or regulation requires be provided to a consumer in writing can be delivered electronically if the sender follows all of the E-Sign Act requirements, including the requirement that a consumer ''has affirmatively consented.'' 15 U.S.C. 7001(c)(1). However, the E-Sign Act preserves a federal regulatory agency's rulemaking authority, allows federal agencies to interpret the E-Sign Act with respect to a statute that it implements, and allows a federal agency to exempt a specified category or type of record from the consent requirements in the E-Sign Act ''if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.'' 15 U.S.C. 7004(b), (d). As discussed above, commenters argue persuasively that it would be impractical and unnecessary for MVPDs to attempt to receive permission from each individual customer prior to initiating electronic delivery of these general notices. Therefore, we exempt all the notices referenced in new § 76.1600 of our rules from the consent requirements of the E-Sign Act. See Appendix A, Final Rules (47 CFR 76.1600).

[48] NCTA Comments at 8; NCTA April 30, 2018 Ex Parte at 2; ACA Comments at 5.

[49] *See, e.g.,* AT&T Comments at 3; Verizon Comments at 7–8.

the *2017 Declaratory Ruling,* which found that providing an opt-out telephone number ''would be the means most universally accessible to customers that prefer not to receive their notices electronically.'' [50] Verizon argues that we should not ''limit the [opt-out] options available to MVPDs and subscribers,'' [51] and we agree. While providing an opt-out telephone number is a minimum requirement, we emphasize that cable operators may choose to offer *additional* choices to their customers that are clearly and prominently presented in the body of the originating email.[52]

13. For information delivered via verified email, cable operators may include either the notice itself or a weblink to the notice. Paper notifications must include the full text of the required notices, with the narrow exception discussed below. Commenters support the *NPRM's* tentative conclusion that it would be reasonable for cable operators to provide a website link to an electronic notice, rather than the notice itself, so long as the link remains active until superseded by a subsequent notice.[53] We adopt this approach. NCTA advocates that we provide additional flexibility, arguing that a website link to this information should be considered sufficient even if it were only printed on a paper bill or notice.[54] We find that, with respect to most Subpart T notices,[55] printing website addresses on paper communications, directing subscribers to the notice online, would not be a reasonable means of delivery. As stated in the *2017 Declaratory Ruling,* we continue to believe that this approach to providing notice ''could create an undue risk that subscribers will not receive the required notices.'' [56]

14. With respect to the rate and channel listing elements of the annual notice, however,[57] we will permit cable operators to provide a weblink to the subscriber, whether the notice is delivered by paper or in a verified email.[58] We allow cable operators more flexibility with regard to this particular information because it is more specific to the actual location of the subscriber and it changes more frequently than the more generally-applicable information required in other Subpart T rules.[59] As Charter explains, these portions of the annual notices are uniquely unsuited to paper delivery because ''the long lead-time involved in preparing, printing, and mailing . . . millions of copies'' means this information ''often becomes outdated before it even reaches the customer.'' [60] We believe that the benefits to subscribers in being able to access the most accurate and up-to-date information regarding their rates and channel line-ups outweighs the burden of requiring them to take an additional step to access this rapidly changing information.[61] To ensure that subscribers are aware of and have easy access to this information, we require any cable operator taking advantage of this flexibility to display prominently, on the front or first page of its printed annual notice, website links in a form that is short, simple, and easy to remember, such as ''*www.[homepage].com/Rates*'' or ''*www.[homepage].com/Channels.*'' In the same location, the cable operator must prominently display a single phone number to call to opt for a paper version of all information available via both weblinks, as proposed by Charter.[62]

15. We will not, however, permit notices to be simply placed online without any separate subscriber notifications. The *NPRM* sought comment on, but expressed concern about, permitting a narrow class of notices to be made available this way.[63] Under such an approach, subscribers would need to not only be independently aware of the existence of the notices, but also actively seek them out without any prompting from the cable operator. Although one commenter supports this approach,[64] we decline to approve it because we find that it creates an unacceptably high risk that subscribers will never see the required notices.

*B. Privacy Notifications*

16. We will also permit delivery via verified email of the privacy notices that MVPDs must send to subscribers. As noted above, the requirements on cable operators, satellite providers, and Open Video System providers to supply privacy notifications are statutory.[65] In order to harmonize our existing customer notice rules with the privacy notice obligations, our new Subpart T rule clarifies that such notices may be delivered by MVPDs via paper or verified email just like general Subpart

[50] *2017 Declaratory Ruling,* 32 FCC Rcd at 5276, para. 10.

[51] Verizon Comments at 7.

[52] *See 2017 Declaratory Ruling,* 32 FCC Rcd at 5276, para. 10.

[53] *NPRM,* 32 FCC Rcd at 10762, para. 14 (citing *2017 Declaratory Ruling,* 32 FCC Rcd at 5276, para. 11, n.46). For commenter support, *see e.g.,* NTCA Comments at 3; ACA Comments at 6.

[54] NCTA Comments at 8; NCTA April 30, 2018 Ex Parte at 2. *See also NPRM,* 32 FCC Rcd at 10763–4, para. 16 (discussing the possibility of placing a website link inside a paper bill).

[55] *See supra* note 12 and *infra* section III.B, *but see infra* para. 14 (discussing variable and cable system-specific information about channel lineups and rates).

[56] *NPRM,* 32 FCC Rcd at 10763–10764, para. 16 (citing *2017 Declaratory Ruling,* 32 FCC Rcd at 5276, para. 11).

[57] 47 CFR 76.1602(b)(2), (5), (7), and (8).

[58] *See generally* Charter October 25, 2018 Ex Parte and NCTA October 31, 2018 Ex Parte.

[59] *See, e.g.,* Charter October 25, 2018 Ex Parte (''For example, in Q1 of 2018, Charter had 84 programming changes, and, of those, 51 affected between 24%–100% of [its] channel line-ups'').

[60] *Id.* Charter maintains that allowing this information to be provided via a weblink to all customers would enable consumers to receive ''the most up-to-date and targeted information about their rates and channel line-ups.'' *Id.* Charter also claims that its customers already regularly obtain this information through its website. *Id.* Specifically, Charter explains that its customers can obtain up-to-date and targeted rate and channel lineup information through a Charter ''web page that asks for their zip code and address.'' *Id.*

[61] We find that there are not corresponding benefits to subscribers in making the less targeted Subpart T notices available in this manner. Furthermore, while Section 76.1602 requires the sending of a complete list of channels and specific rate information once per year, §§ 76.1601 and 76.1603 of our rules separately require that cable operators notify subscribers of any changes to this information. 47 CFR 76.1601 and 76.1603. Notices issued pursuant to these rules are distinct from those sent under Section 76.1602, because they are intended to provide targeted and immediate information about a single event rather than a comprehensive catalog of information. We note that the Commission intends to further address cable operators' obligations to notify subscribers of changes in channel positions, including deletions of channels, under §§ 76.1601 and/or 76.1603(b) in a later proceeding.

[62] Charter October 25, 2018 Ex Parte at 2. Any subscriber who opts for paper delivery of Section 76.1602 annual notices after receiving the entire notice electronically must be provided with the entire notice on paper. An operator would not be permitted to merely send printed rate and channel weblinks to such a subscriber, who has already demonstrated a clear preference for printed annual notice information. *See infra* Appendix A.

[63] *NPRM,* 32 FCC Rcd at 10762–10763, paras. 15–16. Specifically, the *NPRM* sought comment on whether information required under §§ 76.1602 (annual notice) and 76.1618 (basic tier information) could be provided to subscribers by posting online instead of providing such notice to subscribers via U.S. mail or electronic delivery to a verified email address. *Id.* Under this approach, no link, reminder, or other information would have been sent to subscribers to indicate that there were new notices available for their review. The weblink approach approved above, however, requires timely and active provision of notifications to subscribers either in a paper notice or through a verified email. Unlike the specific annual rate and channel information discussed above, *see infra,* para. 14, the record provides no compelling reason for treating the full annual notice or a subscriber's basic tier information any differently than other Subpart T notices.

[64] Verizon Comments at 8–10 (also arguing for the sufficiency of placing notices in an ''electronic message center'' that is accessible only via a subscriber's television screen). We find that the benefits Verizon ascribes to the online-only posting of this information, such as around-the-clock consumer accessibility and reduced costs for cable operators, also can be achieved by posting the notices online and emailing links to subscribers. *See supra,* para. 13; *see also* Verizon Comments at 8–9.

[65] 47 U.S.C. 551(a)(1), 338(i), 573(c)(1)(a).

T notices. Every commenter who addresses privacy notification issues agrees with the Commission's tentative conclusion that MVPDs should be allowed to send these notices electronically. AT&T ''urges the Commission to adopt its tentative conclusion that cable operators, DBS providers, and Open Video System (OVS) providers should be permitted to deliver privacy notifications to subscribers via verified email addresses,'' and that ''[n]othing in sections 631, 338 or 653 limits the Commission's authority to specify the manner by which these classes of providers may deliver such notices to their subscribers.'' [66] DISH also supports the tentative conclusion, arguing that ''[e]lectronic delivery of these notices is consistent with how certain other relevant customer communications are delivered and therefore would provide consumers convenient access to this information.'' [67] We agree that permitting verified email delivery of this information, just like we do for existing Subpart T cable consumer notifications, is beneficial for both consumers and MVPDs and will serve the public interest.[68]

*C. Responses to Consumer Requests or Complaints by Email*

17. We adopt the proposal in the *NPRM* to allow cable operators to respond to certain consumer requests or billing dispute complaints by email, if the consumer used email to make the request or complaint or if the consumer specifies email as the preferred delivery method in the request or complaint.[69] Sections 76.1614 and 76.1619 of Subpart T require written responses to requests or complaints.[70] Specifically, Section 76.1614 requires cable operators to respond in writing within 30 days to any written request by any person for the identification of the signals carried on its system in fulfillment of the must-carry requirements of § 76.56.[71] Section 76.1619 requires cable operators to respond to a written complaint from a subscriber within 30 days if there is a billing dispute.[72]

18. All commenters that address this proposal support it, expressing their belief that the Commission should permit ''MVPDs to communicate by email with subscribers who agree to the use of email for inquiries and complaints.'' [73] ACA agrees with the *NPRM* statement that adopting this proposal would ''allow cable operators to respond more efficiently to requests and complaints.'' [74] ACA also argues that doing so would enable consumers to receive these communications ''by their preferred method'' and ''extend many of the same benefits provided by the Commission's decision to allow electronic delivery of subscriber notices.'' [75] Verizon notes that today's ''consumers are accustomed to email as a routine form of communications[,]'' and adopting this proposal would allow the Commission's rules to ''reflect that reality.'' [76] Further supporting the proposal, Verizon also notes that ''[t]he Commission has already determined that use of email for communications about actions of regulated entities is permissible, for example, in formal complaint proceedings.'' [77] NCTA also suggests that adopting this proposal ''would be consistent with consumer expectations'' that ''contact[ing] cable operators by electronic means or provid[ing] an email address in such communications'' will result in ''a response via email.'' [78]

19. As we stated in the *NPRM,* we believe that permitting cable operators to respond electronically using the same method as the consumer or the method chosen by the consumer gives both parties the opportunity to communicate via their method of choice and will allow cable operators to respond more efficiently to requests and complaints. Therefore, we revise §§ 76.1614 and 76.1619 and will allow cable operators to respond to consumer requests or billing dispute complaints by email where the consumer either used email to make the request or complaint or specified email as the preferred method of response in the request or complaint.

*D. Other Subpart T Requirements*

20. We will eliminate §§ 76.1621 and 76.1622 of our rules. The *NPRM* proposed to delete § 76.1621,[79] which requires certain cable operators to offer subscribers ''special equipment that will enable the simultaneous reception of multiple signals.'' [80] We agree with the commenters that, given today's digital technologies, it is no longer necessary to promote the ''special equipment'' referred to in this rule. In addition, the *NPRM* sought comment on how to update § 76.1622 to reflect the current state of technology, and whether any part of the rule is ''no longer necessary given changes in technology and, therefore, should be eliminated.'' [81] Commenters make a convincing case that changes in technology and consumer awareness have rendered the entire rule ''no longer necessary,'' and that it should be eliminated in its entirety. We take these actions in light of changes in the television marketplace and consumer equipment technology since the rules were originally adopted and, in so doing, reduce burdens on cable operators.[82]

21. Section 76.1621 requires cable operators ''that use scrambling, encryption or similar technologies'' to offer and provide upon request to subscribers ''special equipment that will enable the simultaneous reception of multiple signals.'' [83] The offer of special equipment must be made to new subscribers at the time they subscribe and to all subscribers at least once each year.[84] This rule was adopted in 1994 pursuant to section 624A of the Act,[85] which Congress enacted to resolve ''compatibility problems that arise between the provision of cable service and current consumer electronics

[66] AT&T Comments at 2. *See also NPRM,* 32 FCC Rcd at 10764, para. 18.

[67] DISH Comments at 2–3. See also ACA Comments at 3–6, Verizon Comments at 4–5, NCTA Comments at 5.

[68] The privacy provisions require cable operators, satellite providers, and Open Video System providers to ''provide notice in the form of a separate, written statement.'' Notices that conform to the requirements established in this Order will also comply with these statutory requirements. *See supra* note 38, citing *2017 Declaratory Ruling,* 32 FCC Rcd at 5272, para. 6.

[69] *NPRM,* 32 FCC Rcd at 10764–10765, paras. 19–21. *See also* Appendix A, Final Rules.

[70] 47 CFR 76.1614, 76.1619.

[71] *Id.* § 76.1614.

[72] *Id.* § 76.1619.

[73] Verizon Reply Comments at 2; *see also* ACA Comments at 2; ACA Reply Comments at 6 (stating that ''[n]o commenters have objected'' to this proposal); AT&T Reply Comments at 1 (emphasizing that ''[n]o commenter opposes'' this proposal); NCTA Comments at 10; Verizon Comments at 2.

[74] ACA Comments at 7.

[75] ACA Comments at 7–8.

[76] Verizon Reply Comments at 5.

[77] Verizon Comments at 10 (citing 47 CFR 1.735(f)).

[78] NCTA Comments at 11. NCTA also suggests that the Commission expand the proposal in the *NPRM* to allow cable operators to respond via email to consumers that have ''provided an email address on complaint submissions via the Commission's Consumer Help Center website (unless the consumer expressly specifies a different preferred delivery method).'' NCTA Comments at 10. This proposal is outside the scope of the *NPRM,* and we therefore decline to address it in this proceeding.

[79] *NPRM,* 32 FCC Rcd at 10765–66, para. 22.

[80] 47 CFR 76.1621.

[81] *NPRM,* 32 FCC Rcd at 10766–67, para. 23.

[82] Charter also proposes ''clarifications'' to 47 CFR 76.1603(b) and the elimination of § 76.1603(c) and (d), a proposal which was opposed by Northwest Broadcasting Inc (Northwest). Charter Comments at 3, 6; Letter from Dennis P. Corbett and Jessica DeSimone Gyllstrom, Telecommunications Law Professionals PLLC, to the FCC, MB Docket No. 17–317, at 1 (filed Apr. 20, 2018) (Northwest Ex Parte). As Northwest points out, and Charter acknowledges, these proposals are beyond the scope of this proceeding. Therefore, we decline to address them. Northwest Ex Parte; Charter Comments at 1, n. 2.

[83] 47 CFR 76.1621. *See also supra* para. 5.

[84] *Id.* at § 76.1621(a).

[85] 47 U.S.C. 544a.

equipment.'' [86] These problems included ''difficulties in the use of VCRs to record programming and in the operation of special features of TV receivers such as 'Picture-in-Picture.' '' [87] The Commission adopted the requirement that cable operators offer subscribers special equipment with multiple tuners to address ''cases where cable systems use scrambling technology and set-top boxes that do not deliver all authorized signals 'in the clear''' such that subscribers need ''supplemental equipment to enable the operation of extended features and functions of TV receivers and VCRs that make simultaneous use of multiple signals.'' [88] As the Commission noted in the *NPRM,* consumers today widely use digital video recorders (DVRs), rather than VCRs or television receivers, for recording features, and ''picture-in-picture'' features in television receivers are not prevalent.[89] Accordingly, the Commission proposed to eliminate § 76.1621, tentatively concluding that, given today's digital technologies, it is no longer necessary to promote the ''special equipment that will enable the simultaneous reception of multiple signals'' referred to in the rule.[90]

22. Section 76.1622 of our rules requires cable operators to provide a consumer education program on equipment and signal compatibility matters to their subscribers in writing at the time they subscribe and at least once a year thereafter.[91] Specifically, it requires cable operators to educate their customers about compatibility issues that may arise with respect to TV receivers, VCRs, and remote controls. This provision was enacted pursuant to Congress's directive in section 624A that the Commission adopt rules requiring cable operators ''offering channels whose reception requires a converter box . . . to notify subscribers that they may be unable to benefit from the special functions of their television receivers and video cassette recorders.'' [92] As discussed in the *NPRM,* parties filing comments in the Media Modernization proceeding argued that a requirement to educate consumers on the interoperability of VCRs no longer makes sense as concerns about TV receiver and VCR compatibility are no longer relevant to consumers today.[93] Accordingly, we sought comment in the *NPRM* on whether there are parts of § 76.1622 that should be eliminated or modified in light of changes to technology since the rule was adopted.[94]

23. On March 23, 2018, after the *NPRM* was adopted, Congress revised section 624A to eliminate certain deadlines in that provision for Commission action, which have long since passed.[95] We conclude that Congress' recent revisions to section 624A do not limit the Commission's authority to eliminate these rules. Congress retained the language in section 624A(b)(1), providing that the Commission shall adopt regulations ''as are necessary'' to assure compatibility between television receivers and video cassette recorders and cable systems.[96] In addition, Congress did not revise section 624A(c)(2), which provides that the ''regulations prescribed by the Commission under this section shall include such regulations as are necessary'' to achieve certain objectives.[97] Finally, Congress did not revise section 624A(d), which provides that the ''Commission shall periodically review and, if necessary, modify the regulations issued pursuant to this section in light of any actions taken in response to such regulations and to reflect improvements and changes in cable systems, television receivers, video cassette recorders, and similar technology.'' [98] These provisions give the Commission ample authority to eliminate §§ 76.1621 and 76.1622 in light of the changes in technology since the rules were adopted.

24. All commenters that address the issue support eliminating § 76.1621, arguing generally that advances in technology since the VCR have made the rule unnecessary and irrelevant.[99] In fact, NCTA notes that VCRs are no longer being manufactured today.[100] ACA argues that, to the extent that consumers continue to use VCRs to record television programming, ''they are surely aware by now of any lingering compatibility issues and have long since obtained the equipment necessary to operate those devices to their satisfaction.'' [101] We agree with commenters that § 76.1621 is no longer necessary in light of changes in technology since that rule was adopted and, therefore, that it is appropriate to eliminate that rule as proposed in the *NPRM.*

25. Commenters make a similar argument with respect to § 76.1622. Specifically, ACA, Verizon, and NCTA argue that this section should also be eliminated because it requires cable operators to educate consumers about antiquated technology.[102] No commenters indicate that continued application of this rule is beneficial to consumers, or support its retention. NCTA argues that ''remote control'' is the only technology referenced in § 76.1622 that is still in ''widespread use,'' and that ''[c]able operators have every incentive in this competitive marketplace to provide their customers with the information they need to obtain service using a variety of different devices.'' [103] We agree with commenters that § 76.1622 is no longer necessary in light of changes in technology and the marketplace since that rule was adopted and, therefore, it is appropriate to eliminate the rule in its entirety. Although we recognize that remote control units are still widely used, we conclude that a notice requirement about the availability of third-party remotes is no longer necessary. Third-party remotes have become widely available in the 24 years since this rule was originally adopted and can be easily purchased from many retail outlets, including big box stores and online. Furthermore, now that they have been in existence for many years, consumers

[86] *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992; Compatibility Between Cable Systems and Consumer Electronics Equipment,* Notice of Proposed Rulemaking, 8 FCC Rcd 8495, 8495, para. 3 (1993).

[87] *Id.*

[88] *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992; Compatibility Between Cable Systems and Consumer Electronics Equipment,* First Report and Order, 9 FCC Rcd 1981, 1989–90, para. 47 (1994). *See also Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992; Compatibility Between Cable Systems and Consumer Electronics Equipment,* Memorandum Opinion and Order, 11 FCC Rcd 4121 (1996).

[89] *NPRM,* 32 FCC Rcd at 10765–66, para. 22.

[90] *Id.*

[91] 47 CFR 76.1622.

[92] 47 U.S.C. 544a(c)(2)(B).

[93] *NPRM,* 32 FCC Rcd at 10766–67, para. 23.

[94] *Id.*

[95] *See Consolidated Appropriations Act, 2018,* Public Law 115–141, at Division P, Title IV, § 402(i)(10), 132 Stat. 348 (2018). Congress removed the language in Section 624A(b)(1) that required the Commission to issue a report to Congress on compatibility within ''1 year after October 5, 1992'' and to adopt rules regarding compatibility ''within 180 days'' after the submission of the report to Congress.

[96] 47 U.S.C. 544A(b)(1).

[97] 47 U.S.C. 544A(c)(2) (emphasis added).

[98] 47 U.S.C. 544A(d).

[99] Verizon Comments at 10–11 (Section 76.1621 requires notices to subscribers regarding compatibility between cable systems and equipment that is ''prehistoric from the standpoint of 2018.''), ACA Comments at 9 (technical issues that gave rise to the requirements in Section 76.1621 ''have dissipated''), NCTA Comments at 11 (''the rule no longer serves any legitimate purpose and should be eliminated''). *See also* ACA Reply Comments at 7 and Verizon Reply comments at 4–5.

[100] NCTA Comments at 11.

[101] *Id.*

[102] ACA Comments at 9, Verizon Comments at 11, and NCTA Comments at 12. *See also* ACA Reply Comments at 7 and Verizon Reply Comments at 4–5.

[103] NCTA Comments at 12.

are generally aware that they may purchase such remotes. Finally, there is no evidence in the record that the lack of awareness about compatibility that spurred the original rule is an issue today, given the plethora of remote controls available in the marketplace.

26. *Final Regulatory Flexibility Analysis.*—As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[104] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in this proceeding.[105] The Federal Communications Commission (Commission) sought written public comment on the proposals in the NPRM, including comment on the IRFA. We received no comments specifically directed toward the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[106]

27. Need for, and Objectives of, the Report and Order

28. In this *Report and Order,* we modernize our rules regarding certain notices required to be provided by MVPDs in writing to their subscribers to permit the provision of these notifications via verified email, if the cable operator complies with certain consumer safeguards. Specifically, we extend this flexibility to §§ 76.1601, 76.1602, 76.1603, 76.1604, 76.1618, and 76.1620, as well as subscriber privacy notifications required pursuant to sections 631, 338(i), and 653 of the Communications Act of 1934, as amended. In addition, we eliminate §§ 76.1621 and 76.1622 of our rules to reflect the current state of technology and the market. Finally, we authorize cable operators to respond to consumer requests and complaints by email in certain circumstances. These steps further our continuing efforts to modernize our regulations and reduce unnecessary requirements that can impede competition and innovation in the media marketplace.[107]

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

30. No comments were filed in response to the IRFA.

31. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

32. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[108] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [109] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[110] A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[111] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

33. *Cable Companies and Systems (Rate Regulation Standard).* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide.[112] Industry data indicate that, of 1,076 cable operators nationwide, all but 11 are small under this size standard.[113] In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[114] Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000–19,999 subscribers.[115] Thus, under this second size standard, the Commission believes that most cable systems are small.

34. *Cable System Operators.* The Act also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [116] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[117] Industry data indicate that, of 1,076 cable operators nationwide, all but 10 are small under this size standard.[118] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[119] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

35. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.[120] The open video system framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local

[104] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

[105] *See In the Matter of Electronic Delivery of MVPD Communications, Modernization of Media Regulation Initiative,* Notice of Proposed Rulemaking, 32 FCC Rcd 10755 (2017) (*NPRM*).

[106] *See* 5 U.S.C. 604.

[107] *Commission Launches Modernization of Media Regulation Initiative,* MB Docket No. 17–105, Public Notice, 32 FCC Rcd 4406 (MB 2017) (initiating a review of rules applicable to media entities to eliminate or modify regulations that are outdated, unnecessary or unduly burdensome).

[108] 5 U.S.C. 603(b)(3).

[109] 5 U.S.C. 601(6).

[110] 5 U.S.C. 601(3) (cross-referencing the definition of ''small-business concern'' in 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' 5 U.S.C. 601(3).

[111] 15 U.S.C. 632.

[112] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[113] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006,* ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006,* ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[114] 47 CFR 76.901(c).

[115] Warren Communications News, *Television & Cable Factbook 2008,* ''U.S. Cable Systems by Subscriber Size,'' page F–2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

[116] 47 U.S.C. 543(m)(2); *see also* 47 CFR 76.901(f) & nn.1–3.

[117] 47 CFR 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator,* Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[118] These data are derived from R.R. Bowker, Broadcasting & Cable Yearbook 2006, ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, Television & Cable Factbook 2006, ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[119] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules.

[120] *See* 47 U.S.C. 573.

exchange carriers.[121] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[122] OVS falls within the SBA small business size standard covering cable services, which is ''Wired Telecommunications Carriers.'' [123] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[124] To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2012. According to that source, there were 3,117 firms that in 2012 were Wired Telecommunications Carriers. Of these, 3,059 operated with less than 1,000 employees. Based on this data, the majority of these firms can be considered small.[125] In addition, we note that the Commission has certified some OVS operators, with some now providing service.[126] Broadband service providers (''BSPs'') are currently the only significant holders of OVS certifications or local OVS franchises.[127] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 116 areas, and some of these are currently providing service.[128] Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

36. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, ''Wired Telecommunications Carriers,'' [129] which was developed for small wireline firms.[130] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[131] Census data for 2012 indicate that in that year there were 3,117 firms operating businesses as wired telecommunications carriers. Of that 3,117, 3,059 operated with 999 or fewer employees. Based on this data, we estimate that a majority of operators of SMATV/PCO companies were small under the applicable SBA size standard.[132]

37. *Direct Broadcast Satellite (DBS) Service.* DBS Service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic dish antenna at the subscriber's location. DBS is now included in SBA's economic census category ''Wired Telecommunications Carriers.'' The Wired Telecommunications Carriers industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution; and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.[133] The SBA determines that a wireline business is small if it has fewer than 1500 employees.[134] Census data for 2012 indicate that 3,117 wireline companies were operational during that year. Of that number, 3,083 operated with fewer than 1,000 employees.[135] Based on that data, we conclude that the majority of wireline firms are small under the applicable standard. However, currently only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV (owned by AT&T) and DISH Network.[136] DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Accordingly, we must conclude that internally developed FCC data are persuasive that in general DBS service is provided only by large firms.

38. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

39. The rule changes adopted in the *Report* and *Order* will reduce reporting, recordkeeping, and other compliance requirements for MVPDs which, prior to our action today, were required to provide certain notifications to subscribers in writing on paper. The *Report and Order* permits provision of these notifications electronically if the cable operator complies with certain consumer safeguards. This action will reduce the costs and burdens of providing such notices. In addition, the *Report and Order* eliminates §§ 76.1621 and 76.1622 of our rules to more closely reflect current technology and the state of the market. Finally, the *Report and Order* also authorizes cable operators to respond to consumer requests and

[121] 47 U.S.C. 571(a)(3)–(4). *See 13th Annual Report,* 24 FCC Rcd at 606, para. 135.

[122] *See* 47 U.S.C. 573.

[123] U.S. Census Bureau, 2012 NAICS Definitions, 517110 Wired Telecommunications Carriers, *http://www.census.gov/naics/2012/def/ND517110.HTM#N517110.*

[124] 13 CFR 201.121, NAICS code 517110 (2012).

[125] *See* U.S. Census Bureau, Table EC1251SSSZ5, *https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t#none.*

[126] A list of OVS certifications may be found at *http://www.fcc.gov/mb/ovs/csovscer.html.*

[127] *See 13th Annual Report,* 24 FCC Rcd at 606–07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[128] *See http://www.fcc.gov/encyclopedia/current-filings-certification-open-video-systems* (current as of July 2012).

[129] *See* 13 CFR 121.201, NAICS code 517110 (2012).

[130] Although SMATV systems often use DBS video programming as part of their service package to subscribers, they are not included in Section 340's definition of ''satellite carrier.'' *See* 47 U.S.C. 340(i)(1) and 338(k)(3); 17 U.S.C. 119(d)(6).

[131] 13 CFR 121.201, NAICS code 517110 (2012).

[132] U.S. Census Bureau, Table EC1251SSSZ5, *https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t#none.*

[133] *See* U.S. Census Bureau, 2012 NAICS Definitions, ''517110 Wired Telecommunications Carriers,'' *http://www.census.gov/cgi-bin/sssd/naics/naicsrch.*

[134] NAICS Code 517110; 13 CFR 121.201.

[135] *See* U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series—Estab & Firm Size: Employment Size of Firms for the U.S.: 2012; 2012 Economic Census of the United States, http://factfinder.census.gov/faces/tableservices.jasf/pages/productview.xhtml?pid+ECN_2012_US.51SSSZ4&prodType=table.*

[136] *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming,* MB Docket No. 12–203, Fifteenth Report, 28 FCC Rcd 10496, 10507, para. 27 (2013).

complaints by email in certain circumstances. The Commission anticipates that these changes will lead to a long-term reduction in reporting, recordkeeping, and other compliance requirements on all cable operators, including small entities.

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

41. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.'' [137]

42. The Commission has found that electronic delivery of notices will greatly ease the burden of complying with notification requirements for MVPDs, including small MVPDs. The *NPRM* proposed to allow written communications from cable operators (and in some case satellite carriers and OVS operators) to subscribers to be sent instead to a verified email address, subject to certain consumer protections, and the *Report and Order* adopts this proposal. This approach reduces the burdens associated with providing these notifications. Overall, we believe the *Report and Order* appropriately balances the interests of the public against the interests of the entities who are subject to the rules, including those that are small entities.

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

44. None.

45. *Paperwork Reduction Act Analysis.*—This Order contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. The requirements will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the information collection requirements contained in this proceeding. The Commission will publish a separate document in the **Federal Register** at a later date seeking these comments. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees. We have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA above.

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

47. Accordingly, *it is ordered* that, pursuant to the authority contained in sections 1, 4(i), 4(j), 325, 338, 624A, 631, 632, and 653 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 325, 338, 544A, 551, and 573, the Report and Order *is adopted* and *will become effective* 30 days after publication in the **Federal Register**.

48. *It is further ordered* that the Commission's rules *are hereby amended* and such rule amendments shall be effective January 25, 2019, except for § 76.1600 and amendments to §§ 76.1614 and 76.1619, which are delayed. We will publish a document in the **Federal Register** announcing the effective date of those amendments.

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

50. *It is further ordered* that the Commission will send a copy of the Report and Order in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA).

**List of Subjects in 47 CFR Part 76**

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

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

**Final Rules**

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

## PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

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

**§ 76.630 [Amended]**

■ 2. Section 76.630 is amended by removing Notes 1 and 2.

■ 3. Add § 76.1600 to subpart T to read as follows:

**§ 76.1600 Electronic delivery of notices.**

(a) Written information provided by cable operators to subscribers or customers pursuant to §§ 76.1601, 76.1602, 76.1603, 76.1604, 76.1618, and 76.1620 of this Subpart T, as well as subscriber privacy notifications required by cable operators, satellite providers, and open video systems pursuant to sections 631, 338(i), and 653 of the Communications Act, may be delivered electronically by email to any subscriber who has not opted out of electronic delivery under paragraph (a)(3) of this section if the entity:

(1) Sends the notice to the subscriber's or customer's verified email address;

(2) Provides either the entirety of the written information or a weblink to the written information in the notice; and

(3) Includes, in the body of the notice, a telephone number that is clearly and prominently presented to subscribers so that it is readily identifiable as an opt-out mechanism that will allow subscribers to continue to receive paper copies of the written material.

(b) For purposes of this section, a verified email address is defined as:

(1) An email address that the subscriber has provided to the cable operator (and not vice versa) for purposes of receiving communication;

(2) An email address that the subscriber regularly uses to communicate with the cable operator; or

(3) An email address that has been confirmed by the subscriber as an appropriate vehicle for the delivery of notices.

(c) Cable operators that provide written Subpart T notices via paper copy may provide certain portions of the § 76.1602 annual notices electronically, to any subscriber who has not opted out of electronic delivery under paragraphs (a)(3) or (c)(3) of this section, by prominently displaying the following on the front or first page of the printed annual notice:

[137] 5 U.S.C. 603(c)(1)–(c)(4).

(1) A weblink in a form that is short, simple, and easy to remember, leading to written information required to be provided pursuant to § 76.1602(b)(2), (7), and (8);

(2) A weblink in a form that is short, simple, and easy to remember, leading to written information required to be provided pursuant to § 76.1602(b)(5); and

(3) A telephone number that is readily identifiable as an opt-out mechanism that will allow subscribers to continue to receive paper copies of the entire annual notice.

(d) If the conditions for electronic delivery in paragraphs (a) and (b) of this section are not met, or if a subscriber opts out of electronic delivery, the written material must be delivered by paper copy to the subscriber's physical address.

■ 4. Revise § 76.1614 to read as follows:

**§ 76.1614 Identification of must-carry signals.**

A cable operator shall respond in writing within 30 days to any written request by any person for the identification of the signals carried on its system in fulfillment of the must-carry requirements of § 76.56. The required written response may be delivered by email, if the consumer used email to make the request or complaint directly to the cable operator, or if the consumer specifies email as the preferred delivery method in the request or complaint.

■ 5. Section 76.1619 is amended by revising paragraph (b) to read as follows:

**§ 76.1619 Information on subscriber bills.**

* * * * *

(b) In case of a billing dispute, the cable operator must respond to a written complaint from a subscriber within 30 days. The required response may be delivered by email, if the consumer used email to make the request or complaint directly to the cable operator, or if the consumer specifies email as the preferred delivery method in the request or complaint.

* * * * *

**§§ 76.1621 and 76.1622 [Removed and Reserved]**

■ 6. Remove and reserve §§ 76.1621 and 76.1622.

[FR Doc. 2018–27601 Filed 12–21–18; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### 49 CFR Part 555

**[Docket No. NHTSA–2018–0103]**

**RIN 2127–AL97**

## Temporary Exemption From Motor Vehicle Safety and Bumper Standards

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** This document amends NHTSA's regulation on temporary exemption from the Federal motor vehicle safety standards (FMVSS) and bumper standards to expedite the publishing of notices soliciting public comment on exemption petitions. It does so by eliminating the provision calling for the Agency to determine that a petition is complete before the Agency publishes a notice summarizing the petition and soliciting public comments on it. As amended, the regulation continues to provide that the Agency will, as it does now, determine whether a petition contains adequate justification in deciding whether to grant or deny the petition. The intended effect of these changes is to enable the Agency to solicit public comments more quickly.

**DATES:** This final rule is effective on January 25, 2019.

Petitions for reconsideration of this final rule must be received not later than February 11, 2019.

**ADDRESSES:** Petitions for reconsideration of this final rule must refer to the docket and notice number set forth above and be submitted to the Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning this final rule, contact Stephen Wood, NCC–200, Assistant Chief Counsel for Vehicle Rulemaking and Harmonization, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366–5240; email *Steve.Wood@dot.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background

The National Traffic and Motor Vehicle Safety Act, as amended, authorizes the Secretary of Transportation to exempt, on a temporary basis, under specified circumstances, and on terms the Secretary deems appropriate, motor vehicles from a FMVSS or bumper standard. This authority is set forth at 49 U.S.C. 30113. The Secretary has delegated the authority for implementing this section to NHTSA.[1]

The exercise of NHTSA's authority to grant, in whole or in part, a temporary exemption to a vehicle manufacturer is conditioned upon the Agency's making specified findings. The Agency must comprehensively evaluate the request for exemption and find that the exemption is consistent with the public interest and with the objectives of the Vehicle Safety Act.[2] In addition, the Agency must make one of the following more focused findings:

(i) compliance with the standard[s] [from which exemption is sought] would cause substantial economic hardship to a manufacturer that has tried to comply with the standard[s] in good faith;

(ii) the exemption would make easier the development or field evaluation of a new motor vehicle safety feature providing a safety level at least equal to the safety level of the standard;

(iii) the exemption would make the development or field evaluation of a low-emission motor vehicle easier and would not unreasonably lower the safety level of that vehicle; or

(iv) compliance with the standard would prevent the manufacturer from selling a motor vehicle with an overall safety level at least equal to the overall safety level of nonexempt vehicles.[3]

To provide procedures for implementing these statutory provisions concerning temporary exemptions, NHTSA established 49 CFR part 555, *Temporary Exemption from Motor Vehicle Safety and Bumper Standards.* The requirements in 49 CFR 555.5 state that a petitioner must set forth the basis of its petition by providing the information required under 49 CFR 555.6, and explaining why the exemption would be in the public interest and consistent with the objectives of the Safety Act. In addition, the petitioner must submit data and analysis supporting the making of one of the four findings specified above.

Section 555.7 describes the steps that NHTSA is to take after it receives an exemption petition. If the Agency determines that a petition is complete, it publishes a notice in the **Federal Register** summarizing the petition and inviting public comment on whether it should be granted or denied.[4] However, if NHTSA finds that a petition does not

[1] 49 CFR 1.94.

[2] 49 U.S.C. 30113(b)(3)(A).

[3] 49 U.S.C. 30113(b)(3)(B).

[4] 49 CFR 555.7(a).

contain some of types of the information required by part 555, it so informs the applicant, pointing out the areas of insufficiency and stating that the petition will not receive further consideration until the required information is submitted.[5] If the petitioner submits sufficient additional information and analysis to eliminate the ''areas of insufficiency,'' the Agency publishes the notice requesting public comment.

If, after considering the petition and the public comments, NHTSA determines that the petition does not contain ''adequate justification,'' the Administrator denies it and notifies the petitioner in writing.[6] The Administrator also publishes in the **Federal Register** a notice of the denial and the reasons for it. Alternatively, if the Administrator determines that the petition contains adequate justification, the Administrator grants it, and notifies the petitioner in writing.[7] The Administrator also publishes in the **Federal Register** a notice of the grant and the reasons for it.[8]

## II. Discussion of the Final Rule

This document amends NHTSA's regulation on temporary exemption from Federal motor vehicle safety standards (FMVSS) and bumper standards to expedite the publishing of notices soliciting public comment on exemption petitions. It does so by eliminating the provision calling for the Agency to determine that a petition is complete before publishing a notice soliciting public comments on the petition. Especially in the context of complex petitions, the difficulty in neatly separating ''areas of insufficiency'' from failures to provide ''adequate justification'' leads to delays in processing petitions. Further, while areas of insufficiency would be considered in deciding whether to grant or deny petitions, the Vehicle Safety Act does not require that determinations of insufficiency be made by the Agency before publishing notices of receipt. As amended, the regulation continues to provide that the Agency will, as it does now, determine whether a petition contains adequate justification in deciding whether to grant or deny the petition.

[5] Ibid.

[6] 49 CFR 555.7(d).

[7] 49 CFR 555.7(e).

[8] Ibid.

## III. Rulemaking Requirements

### *A. Executive Order 12866 (Regulatory Planning and Review)*

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

### *B. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)*

Executive Order 13771 titled ''Reducing Regulation and Controlling Regulatory Costs,'' directs that, unless prohibited by law, whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed. In addition, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs. Only those rules deemed significant under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review,'' are subject to these requirements.

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

### *C. Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), whenever an agency is required by 5 U.S.C. 553 (or any other law) to publish a notice of proposed rulemaking (NPRM), the agency must prepare and make available for public comment an Initial Regulatory Flexibility Analysis, unless the agency certifies under 5 U.S.C. 605(b) that the proposed rule, if implemented, will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 605.

As noted above, NHTSA is not required to publish an NPRM in this rulemaking. Further, the change made by this final rule will not have not result in a significant economic impact on a substantial number of small entities.

### *D. Executive Order 13132 (Federalism)*

NHTSA has analyzed this immediately adopted final rule under the principles and criteria of Executive Order 13132, ''Federalism.'' The Agency determined that this action will 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, does not have Federalism implications.

### *E. Congressional Review Act*

This rule is not a ''rule'' as defined in 5 U.S.C. 804(3), because it falls within the exclusion of ''any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.''

### *F. Unfunded Mandates Reform Act of 1995*

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 million in lieu of $100 million.

This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

### *G. National Technology Transfer and Advancement Act*

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions involving the use of technical standards.

### Good Cause for Immediate Adoption

Section 553(b)(3)(A) of the Administrative Procedure Act (APA) (5 U.S.C.) authorizes agencies to dispense with notice and comment procedures for rules of agency organization, procedure, or practice, except when notice or hearing is required by statute. Under this section, an agency may issue a final rule without seeking comment prior to the rulemaking.

Additionally, section 553(b)(3)(B) of the APA authorizes agencies to dispense with notice and comment procedures for rules when the agency for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to the rulemaking.

NHTSA finds that notice and public comment to this immediately adopted final rule are unnecessary because this rule meets the exception of section 553(b)(3)(A). The sole purpose of this rule is to eliminate the provision calling for the Agency to determine that a petition is complete before the Agency publishes a notice summarizing the petition and soliciting public comments

on it. This rule does not impose any additional requirements on exemption applicants or the public. Therefore, NHTSA has determined that notice and public comment are unnecessary.

In consideration of the foregoing, NHTSA amends 49 CFR chapter V as follows:

**List of Subjects in 49 CFR Part 555**

Motor vehicle safety, Motor vehicles.

## PART 555—TEMPORARY EXEMPTION FROM MOTOR VEHICLE SAFETY AND BUMPER STANDARDS

■ 1. The authority citation for part 555 continues to read as follows:

**Authority:** 49 U.S.C. 30113, 32502, Pub. L. 105–277; delegation of authority at 49 CFR 1.50.

■ 2. Paragraph (a) of § 555.7 is revised to read as follows:

**§ 555.7 Processing of applications.**

(a) The agency publishes a notice of the application in the **Federal Register**, affording opportunity for comment.

* * * * *

Issued in Washington, DC, under authority delegated in 49 CFR 1.95 and 501.5.

**Heidi Renate King,**

*Deputy Administrator.*

[FR Doc. 2018–27795 Filed 12–21–18; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 151215999–6960–02]**

**RIN 0648–XG691**

## Fisheries of the Northeastern United States; Atlantic Herring Fishery; 2018 River Herring and Shad Catch Cap Reached for Midwater Trawl Vessels in the Cape Cod Catch Cap Area

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is reducing the Atlantic herring possession limit for vessels fishing with midwater trawl gear in the Cape Cod Catch Cap Closure Area, based on a projection that the prescribed catch cap for that area has been reached. This action is necessary to comply with the regulations implementing the Atlantic Herring Fishery Management Plan and is intended to limit the harvest of river herring and shad in the Cape Cod Catch Cap Area.

**DATES:** Effective 00:01 hr local time, December 21, 2018, through December 31, 2018.

**FOR FURTHER INFORMATION CONTACT:** Daniel Luers, Fishery Management Specialist, (978) 282–8457.

**SUPPLEMENTARY INFORMATION:** Regulations governing the Atlantic herring fishery can be found at 50 CFR part 648, including requirements for setting annual catch cap allocations for river herring and shad. NMFS set the 2018 catch cap in the Cape Cod Catch Cap Area at 32.4 mt. NMFS established this value in the 2016 through 2018 herring specifications (81 FR 75731, November 1, 2016).

The NMFS Administrator of the Greater Atlantic Region (Regional Administrator) monitors the herring fishery in each of the catch cap areas based on vessel and dealer reports, state data, and other available information. The regulations at § 648.201 require that when the Regional Administrator projects that river herring and shad catch will reach 95 percent of a catch cap for vessels fishing with a specific gear type in a specified catch cap area, NMFS must prohibit, through notification in the **Federal Register**, vessels fishing with that gear type from fishing for, catching, possessing, transferring, receiving, or landing more than 2,000 lb (907.2 kg) of herring per trip or calendar day in or from that specified catch cap closure area for the remainder of the fishing year.

The Regional Administrator has determined, based on dealer reports and other available information, that herring midwater trawl vessels will have caught 95 percent of the river herring and shad catch cap allocated to that gear type in the Cape Cod Catch Cap Area by December 21, 2018. Therefore, effective 00:01 hr local time, December 21, 2018, through December 31, 2018, vessels fishing with midwater trawl gear may not fish for, catch, possess, transfer, or land more than 2,000 lb (907.2 kg) of herring per trip or calendar day, in or from the Cape Cod Catch Cap Closure Area. Midwater trawl vessels that have entered port before 00:01 hr local time, December 21, 2018, may land and sell more than 2,000 lb (907.2 kg) of herring from the Cape Cod Catch Cap Closure Area from that trip. Midwater trawl vessels may transit through the Cape Cod Catch Cap Closure Area with more than 2,000 lb (907.2 kg) of herring on board, provided all herring in excess of 2,000 lb (907.2 kg) was caught outside of this area and all fishing gear is stowed and not available for immediate use as defined by 50 CFR 648.2.

This action also prohibits federally permitted dealers from purchasing herring from federally permitted herring vessels that used midwater trawl gear to harvest more than 2,000 lb (907.2 kg) of herring from the Cape Cod Catch Cap Closure Area through 24:00 hr local time, December 31, 2018, unless the vessel enters port before 00:01 local time on December 21, 2018.

**Classification**

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

NMFS finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest and impracticable. Further, in accordance with 5 U.S.C. 553(d)(3), NMFS finds good cause to waive the 30-day delayed effectiveness. NMFS is required by Federal regulation to immediately put in place a 2,000-lb (907.2-kg) herring trip limit for Cape Cod Catch Cap Closure Area through December 31, 2018. This action restricts the catch of herring in the Cape Cod Catch Cap Closure Area for the remainder of the fishing year. Once data become available projecting 95 percent of the river herring/shad quota will be caught, regulations at § 648.201(a)(4)(ii) require NMFS to implement a 2,000-lb (907.2-kg) herring trip and calendar day possession limit to ensure that herring vessels fishing with midwater trawl gear do not exceed the quota allocated to that gear type in the Cape Cod Catch Cap Area. Federally permitted dealers are also prohibited from purchasing herring from vessels that used midwater trawl gear to harvest more than 2,000 lb (907.2 kg) of herring from the Cape Cod Catch Cap Closure Area. High-volume catch and landings in this fishery increase catch totals relative to catch caps quickly. If implementation of this closure is delayed to solicit prior public comment, the midwater trawl catch cap for the Cape Cod Catch Cap Closure Area for this fishing year will likely be exceeded, thereby undermining the conservation objectives of the Atlantic Herring Fishery Management Plan. The public expects these actions to occur in a timely way consistent with the fishery management plan's objectives.

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

Dated: December 19, 2018.

**Karen H. Abrams,**

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

[FR Doc. 2018–27845 Filed 12–19–18; 4:15 pm]

**BILLING CODE 3510–22–P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

**[Docket No. 160920861–8999–04]**

**RIN 0648–XE900**

## Fisheries of the Northeastern United States; Atlantic Deep-Sea Red Crab Fishery; 2019 Atlantic Deep-Sea Red Crab Specifications

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

**ACTION:** Final rule.

**SUMMARY:** We are finalizing specifications for the 2019 Atlantic deep-sea red crab fishery, including an annual catch limit and total allowable landings limit. This action is necessary to fully implement previously projected allowable red crab harvest levels that will prevent overfishing and allow harvesting of optimum yield. This action is intended to establish the allowable 2019 harvest levels, consistent with the Atlantic Deep-Sea Red Crab Fishery Management Plan.

**DATES:** The final specifications for the 2019 Atlantic deep-sea red crab fishery are effective March 1, 2019, through February 28, 2020.

**FOR FURTHER INFORMATION CONTACT:** Allison Murphy, Fishery Policy Analyst, (978) 281–9122.

**SUPPLEMENTARY INFORMATION:** The Atlantic deep-sea red crab fishery is managed by the New England Fishery Management Council. The Atlantic Deep-Sea Red Crab Fishery Management Plan includes a specification process that requires the New England Fishery Management Council to recommend, on a triennial basis, an acceptable biological catch, an annual catch limit, and total allowable landings. Collectively, these are the red crab specifications. Prior to the start of fishing year 2017, the Council recommended specifications for the 2017–2019 fishing years (Table 1).

TABLE 1—COUNCIL-APPROVED 2017–2019 RED CRAB SPECIFICATIONS

| | Metric ton | Million lb |
|---|---|---|
| Acceptable Biological Catch | 1,775 | 3.91 |
| Annual Catch Limit | 1,775 | 3.91 |
| Total Allowable Landings | 1,775 | 3.91 |

On February 22, 2017, we approved status quo specifications for the 2017 fishing year, effective through February 28, 2018, and we projected status quo quotas for 2018–2019 (82 FR 11322). At the end of each fishing year, we evaluate catch information and determine if the quota has been exceeded. If a quota is exceeded, the regulations at 50 CFR 648.262(b) require a pound-for-pound reduction in a subsequent fishing year. We have reviewed available 2018 fishery information against the projected 2019 specifications. There have been no annual catch limit or total allowable landings overages, nor is there any new biological information that would require altering the projected 2019 specifications published in 2017. Because no overages occurred in 2018, we are finalizing specifications for fishing year 2019, as projected in the 2017 specifications rule (82 FR 11322), and outlined above in Table 1. These specifications are not expected to result in overfishing and adequately account for scientific uncertainty. This is the final year of these specifications, and new specifications will be developed by the Council for 2020 and beyond.

### Classification

The NMFS Assistant Administrator has determined that this final rule is consistent with the Atlantic Deep-Sea Red Crab Fishery Management Plan, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable law.

This rule is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), we find good cause to waive prior public notice and opportunity for public comment on the catch limit and allocation adjustments, because allowing time for notice and comment is unnecessary. The proposed rule for the 2017–2019 specifications provided the public with the opportunity to comment on the specifications, including the projected 2018 and 2019 specifications (81 FR 86687, December 1, 2016). We received no comments on the proposed rule announcing the projected 2017–2019 specification and the process for announcing finalized interim year quotas. Further, this final rule contains no changes from the projected 2019 specifications that were included in both the December 1, 2016, proposed rule and the February 22, 2017, final rule. The public and industry participants expect this action, because previously, in both the proposed rule and the final rule, we alerted the public that we would conduct a review of the latest available catch information in each of the interim years of the multi-year specifications, and announce the final quota prior to the March 1 start of the fishing year. Thus, the proposed and final rules that contained the projected 2017–2019 specifications provided a full opportunity for the public to comment on the substance and process of this action.

The Chief Counsel for Regulation, Department of Commerce, previously certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that the 2017–2019 red crab specifications would not have a significant economic impact on a substantial number of small entities. Implementing the 2019 specifications will not change the conclusions drawn in that previous certification to the SBA. Because advance notice and the opportunity for public comment are not required for this action under the Administrative Procedure Act, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* do not apply to this rule. Therefore, no new regulatory flexibility analysis is required and none has been prepared.

This action does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act.

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

Dated: December 19, 2018.

**Donna S. Wieting,**

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

[FR Doc. 2018–27871 Filed 12–21–18; 8:45 am]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register
Vol. 83, No. 246
Wednesday, December 26, 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.

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### 2 CFR Part 3187

### 45 CFR Parts 1181, 1182 and 1184

**RIN 3137–AA25**

## Freedom of Information Act Regulations and Additional Incidental Technical Amendments to Other IMLS Regulations

**AGENCY:** Institute of Museum and Library Services (IMLS or Institute), National Foundation on the Arts and the Humanities, NFAH.

**ACTION:** Proposed rule.

**SUMMARY:** This rulemaking would revise the regulations that the Institute of Museum and Library Services (IMLS) follows in processing records under the Freedom of Information Act, in part to comply with the FOIA Improvement Act of 2016, and otherwise would revise all current IMLS regulations to reflect the agency's change of address, update outdated information and ensure consistency within each regulation and across all IMLS regulations. The revisions to IMLS FOIA regulations would clarify and update procedures for requesting information from IMLS and procedures that IMLS follows in responding to requests from the public. The revisions to other IMLS regulations would update the citation for the Age Discrimination Act of 1975, reflect the agency's change of address, and update outdated information and to ensure consistency within each regulation and across all IMLS regulations.

**DATES:** Comments are invited and must be received by no later than January 25, 2019.

**ADDRESSES:** Send comments to Susan B. Gerson, Associate General Counsel, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Submit electronic comments to *sgerson@imls.gov.* Telephone: (202) 653–4712. Facsimile: (202) 653–4610.

**FOR FURTHER INFORMATION CONTACT:** Susan B. Gerson, Associate General Counsel, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Submit electronic comments to *sgerson@imls.gov.* Telephone: (202) 653–4712. Facsimile: (202) 653–4610.

**SUPPLEMENTARY INFORMATION:**

### I. FOIA and Technical Amendments

The Institute proposes this rulemaking to revise its FOIA regulations in accordance with the FOIA Improvement Act of 2016 and otherwise reflect the agency's change of address and update outdated information. IMLS also proposes to make minor technical amendments to all other IMLS regulations to reflect the agency's change of physical address, update contact information, and otherwise facilitate readability. In the interests of economy of administration, and because all of the regulations proposed to be removed are outdated and the technical amendments are minor, they are included in this one rulemaking.

### II. Public Comment Procedures

Comments should be submitted in writing to the address indicated in the **ADDRESSES** section of this document. All comments received will be available upon request for public inspection at Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. All written comments received by the date indicated in the **DATES** section of this document and all other relevant information in the record will be carefully assessed and fully considered prior to implementation of the final rule. Any information considered to be confidential must be so identified and submitted in writing. We will not consider comments submitted anonymously. However, if you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment.

The regulatory amendments in this proposed rulemaking updates outdated information and makes technical amendments to improve the clarity and accuracy of the Institute's regulations. These changes will ensure that all regulations affected are consistent with current laws. The public is invited to make substantive comment on any of the changes in the proposed rule.

### III. Matters of Regulatory Procedure

*Regulatory Planning and Review (E.O. 12866)*

Under Executive Order 12866, the Institute must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines a ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The proposed rule updates outdated information and makes technical amendments to the Institute's regulations. As such, it does not impose a compliance burden on the economy generally or on any person or entity. Accordingly, this rule is not a ''significant regulatory action'' from an economic standpoint, and it does not otherwise create any inconsistences or budgetary impacts to any other agency or Federal Program.

*Regulatory Flexibility Act*

Because this proposed rule would amend outdated regulations and make certain technical amendments, the Institute has determined in Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) review that this proposed rule will not have a significant economic impact on a substantial number of small entities because it simply makes technical amendments and amends outdated regulations.

*Paperwork Reduction Act*

This proposed rule is exempt from the requirements of the Paperwork Reduction Act (44 U.S.C. 3501–3521), since it amends existing outdated regulations and makes only technical amendments. An OMB form 83–1 is not required.

*Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501–1571), this proposed rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, or tribal governments, or by the private sector, of $100 million or more as adjusted for inflation) in any one year.

*Small Business Regulatory Enforcement Fairness Act (SBREFA)*

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

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

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

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

*Takings (E.O. 12630)*

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. No rights, property or compensation has been, or will be, taken. A takings implication assessment is not required.

*Federalism (E.O. 13132)*

In accordance with Executive Order 13132, this proposed rule does not have federalism implications that warrant the preparation of a federalism assessment.

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

In accordance with Executive Order 12988, the Institute has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*Consultation and Coordination With Indian Tribes (E.O. 13175)*

In accordance with Executive Order 13175, the Institute has evaluated this proposed rule and determined that it has no potential negative effects on Federally recognized Indian tribes.

*National Environmental Policy Act*

This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment.

**List of Subjects**

*2 CFR Part 3187*

Federal awards, Nondiscrimination.

*45 CFR Part 1181*

Accessibility, Employment, Nondiscrimination.

*45 CFR Part 1182*

Privacy Act.

*45 CFR Part 1184*

Freedom of Information Act.

For the reasons stated in the preamble and under the authority of 20 U.S.C. 9101 *et seq.,* the Institute of Museum and Library Services proposes to amend 2 CFR part 3187 and 45 CFR parts 1181, 1182, and 1184 as follows:

**Title 2—Grants and Agreements**

## PART 3187—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 1. The authority citation for part 3187 continues to read as follows:

**Authority:** 20 U.S.C. 9101–9176, 9103(h); 20 U.S.C. 80r–5; 2 CFR part 200.

■ 2. In § 3187.12, in the table in paragraph (a), revise the entry for ''Discrimination on the basis of age'' to read as follows:

### § 3187.12 Federal statutes and regulations on nondiscrimination.

(a) * * *

| Subject | Statute |
|---|---|
| * * * * * * * | |
| Discrimination on the basis of age | The Age Discrimination Act of 1975 (42 U.S.C. 6101–6107). |

* * * * *

**Title 45—Public Welfare**

## PART 1181—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE INSTITUTE OF MUSEUM AND LIBRARY SERVICES

■ 3. The authority citation for part 1181 continues to read as follows:

**Authority:** 29 U.S.C. 794.

■ 4. Amend § 1181.170 by revising the second sentence of paragraph (c) to read as follows:

### § 1181.170 Compliance procedures.

* * * * *

(c) * * * Complaints may be sent to Director, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135.

* * * * *

## PART 1182—IMPLEMENTATION OF THE PRIVACY ACT OF 1974

■ 5. The authority citation for part 1182 continues to read as follows:

**Authority:** 5 U.S.C. 552a(f).

■ 6. Revise *§ 1182.3 to read as follows:*

### § 1182.3 Inquiries about the Institute's systems of records or implementation of the Privacy Act.

Inquiries about the Institute's systems of records or implementation of the Privacy Act should be sent to the following address: Institute of Museum and Library Services; Office of the General Counsel, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135.

### § 1182.5 [Amended]

■ 7. Amend *§ 1182.5 by removing* ''Committee on Government Reform of the House of Representatives'' and adding in its place ''United States House Committee on Oversight and Government Reform'' and by removing ''Committee on Governmental Affairs of the Senate'' and adding in its place ''United States Senate Committee on Homeland Security and Governmental Affairs.''

### § 1182.13 [Amended]

■ 8. Amend *§ 1182.13 by:*

■ a. *In paragraph (a) introductory text, adding* the word ''will'' between the words ''Institute'' and ''not;'' and

■ b. In paragraph (a)(2), removing ''45 CFR part 1100'' and adding in its place ''45 CFR part 1184''.

**§ 1182.15 [Amended]**

■ 6. In *§ 1182.15, amend paragraph (a)(3) by removing* ''1182.1'' and adding in its place ''1182.2''.

■ 7. Revise the heading for § 1182.16 to read as follows:

**§ 1182.16 Procedures to ensure that Institute employees involved with its systems of records are familiar with the requirements of the Privacy Act.**

## PART 1184—IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

■ 8. The authority citation for part 1184 continues to read as follows:

**Authority:** 5 U.S.C. 552.

■ 9. Revise § 1184.1 to read as follows:

**§ 1184.1 What are the purpose and scope of these regulations?**

(a) These regulations describe how the Institute of Museum and Library Services (IMLS) processes requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552 as amended. The regulations in this part apply only to records that are both:

(1) Created or obtained by IMLS; and

(2) Under the agency's control at the time of the FOIA request.

(b) The rules in this part should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Act Schedule and Guidelines published by the Office of Management and Budget (the ''OMB Guidelines''). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed under 45 CFR part 1182 as well as under this part.

■ 10. Amend § 1184.2 by revising paragraphs (a) and (b), paragraph (c) introductory text, paragraph (c)(10), the second sentence of paragraph (c)(11), and paragraph (c)(12) to read as follows:

**§ 1184.2 What are IMLS's general policies with respect to FOIA?**

(a) *Presumption of openness.* IMLS administers the FOIA with a presumption of openness. Under this presumption, IMLS makes discretionary disclosures of records whenever such disclosure would not foreseeably harm an interest protected by a FOIA exemption or otherwise be prohibited by law.

(b) *Records available at the IMLS FOIA Electronic Reading Room.* IMLS makes records available on its website Reading Room in accordance with 5 U.S.C. 552(a)(2), as amended, as well as other records that have been requested three or more times or that, because of the nature of their subject matter, are likely to be the subject of FOIA requests. IMLS establishes categories of records that can be disclosed regularly and proactively identifies and discloses additional records of interest to the public. To save time and money, and maximize efficiency, IMLS strongly urges individuals who seek information from IMLS to review documents available at the IMLS FOIA Electronic Reading Room before submitting a FOIA request.

(c) *Definitions.* For purposes of this part, IMLS adopts all of the terms defined in the Freedom of Information Act, and the OMB Guidelines, unless otherwise defined in this part.

* * * * *

(10) *Review.* The examination of a record located in response to a request to determine whether any portion of it is exempt from disclosure. Review time includes all of the processing that is necessary to prepare any record for disclosure, including, as applicable, redacting portions of the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential business information submitter under § 1184.9 but it does not include time spent resolving general legal or policy issues regarding the applicability of exemptions.

(11) * * * Search time includes page-by-page or line-by-line identification of information within records; and the reasonable efforts expended to locate and retrieve information from both hard copy and electronic records.

(12) *Working day.* A regular Federal work day constitutes a working day. It does not include Saturdays, Sundays, or Federal holidays.

■ 11. Amend § 1184.3 by revising paragraphs (a) and (b) to read as follows:

**§ 1184.3 How do I request records?**

(a) *Where to send a request.* You may make a FOIA request for IMLS records by completing the online prompts in the FOIA Online Portal via *FOIA.gov* or via *https://www.imls.gov/about/foia-request/form* or by sending an email to *foia@imls.gov* or by submitting a request in writing via regular U.S. Mail addressed directly to the FOIA Public Liaison, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Requests may also be sent in writing via facsimile to the FOIA Officer at (202) 653–4625.

(b) *Form of request.* Your FOIA request need not be in any particular format, but it must be in writing, include your name and mailing address, and should be clearly identified as a Freedom of Information Act or ''FOIA'' request. You must describe the records you seek with sufficient specificity to enable the agency to identify and locate the records, including, if possible, dates, subjects, titles, or authors of the records requested. Before submitting a request, you may contact IMLS's FOIA contact or FOIA Officer to discuss the records you seek and to receive assistance in describing the records. If upon receiving your request IMLS determines that it does not reasonably describe the requested records, IMLS will advise you what additional information is required to perfect your request, or why your request is otherwise insufficient. You should also indicate if you have a preferred form or format in which you would like to receive the requested records.

* * * * *

■ 12. Amend *§ 1184.4 by adding paragraph* (c) to read as follows:

**§ 1184.4 When will I receive a response to my request?**

* * * * *

(c) *Expedited processing.* (1) IMLS must process requests and appeals on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information.

(2) A request for expedited processing may be made at any time. When making a request for expedited processing of an administrative appeal, the request should be submitted as required by § 1184.6.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (c)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved

in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an ''urgency to inform'' the public on the topic. As a matter of administrative discretion, IMLS may waive the formal certification requirement.

(4) IMLS must notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, IMLS must act on any appeal of that decision expeditiously.

■ 13. Amend § 1184.5 by:

■ a. Redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f);

■ b. Adding a new paragraph (c); and

■ c. In newly redesignated paragraph (f):

■ i. Removing ''FOIA Officer'' and adding in its place ''FOIA Public Liaison;'' and

■ ii. Adding a sentence at the end of the paragraph.

The additions read as follows:

**§ 1184.5 How will my request be processed?**

* * * * *

(c) *Estimated dates of completion and interim responses.* Upon request, IMLS will provide an estimated date by which the agency expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, IMLS may provide interim responses, releasing the records on a rolling basis.

* * * * *

(f) * * * In addition, IMLS will provide information about the mediation services provided by the Office of Government Information Services of the National Archives and Records Administration.

■ 14. Amend § 1184.6 by:

■ a. Revising paragraph (a); and

■ b. In paragraph (b), removing the term ''Office of Government Services (OGIS)'' and adding in its place ''Office of Government Information Services.''

The revision reads as follows:

**§ 1184.6 How can I appeal a denial of my request?**

(a) *Submission of an appeal.* If your FOIA request has been denied in whole or in part, or if the agency has not found any records in response to your request, you may file an appeal no later than ninety (90) calendar days following the date of the notification of denial. Your appeal must include a description of the initial request, the reason for the appeal, and why you believe the agency's response was incorrect. Your appeal must be in writing, signed, and filed with the IMLS Director, c/o Office of the General Counsel, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Appeals may also be sent via email to *foia@imls.gov,* or via facsimile to (202) 653–4625.

* * * * *

■ 15. Amend § 1184.7 by revising paragraphs (f)(3)(ii) and (g) to read as follows:

**§ 1184.7 How will fees be charged?**

* * * * *

(f) * * *

(3) * * *

(ii) When IMLS requests an advance payment, the time limits described in section (a)(6) of the FOIA will begin only after IMLS has received advanced full payment in full.

(g) *Failure to comply.* In the absence of unusual or exceptional circumstances, IMLS will not assess fees if the agency fails to comply with any time limit set forth in these regulations, unless the agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request.

* * * * *

■ 16. Amend § 1184.8 by revising the second sentence of paragraph (b) to read as follows:

**§ 1184.8 How can I address concerns regarding my request?**

* * * * *

(b) * * * If you seek information regarding OGIS and/or the services it offers, please contact OGIS directly at Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740–6001, Email: *ogis@nara.gov,* Phone: (202) 741–5770 or toll free (877) 684–6448, Fax: (202) 741–5769. * * *

**§ 1184.9 [Amended]**

■ 16. Amend § 1184.9(b)(2) by adding a comma after ''local''.

Dated: December 12, 2018.

**Danette Hensley,**

*Staff Assistant.*

[FR Doc. 2018–27219 Filed 12–21–18; 8:45 am]

BILLING CODE 7036–01–P

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

### 12 CFR Part 3

**[Docket ID OCC–2018–0026]**

**RIN 1557–AE48**

## Regulatory Capital Treatment for High Volatility Commercial Real Estate (HVCRE) Exposures

**AGENCY:** Office of the Comptroller of the Currency, Treasury (OCC).

**ACTION:** Notice of proposed rulemaking; correction.

**SUMMARY:** This document corrects OCC's Regulatory Flexibility Act certification for the proposed rule that was published in the **Federal Register** on September 28, 2018, entitled ''Regulatory Capital Treatment for High Volatility Commercial Real Estate (HVCRE) Exposures.''

**DATES:** The proposed rule published on September 28, 2018 at 83 FR 48990 is corrected as of December 26, 2018. Comments must be received by January 25, 2019.

**FOR FURTHER INFORMATION CONTACT:** Carl Kaminski, Special Counsel, or Rima Kundnani, Attorney, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597.

**SUPPLEMENTARY INFORMATION:**

### I. Background

This document supplements the OCC's Regulatory Flexibility Act (RFA) certification for the notice of proposed rulemaking entitled ''Regulatory Capital Treatment for High Volatility Commercial Real Estate (HVCRE) Exposures'' (proposed rule) published on September 28, 2018, **Federal Register** Document 2018–20875 (83 FR 48990), by the OCC, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation. The sections of this correction document are effective as if they had been included in the **SUPPLEMENTARY INFORMATION** section of the proposed rule.

### II. Summary of Supplemental Language

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* requires an agency, in connection with a proposed rule, to prepare an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the SBA for purposes of the RFA to include commercial banks and savings institutions with total assets of $550 million or less and trust companies with

total assets of $38.5 million of less) or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities.

In the OCC's portion of the **SUPPLEMENTARY INFORMATION** section titled ''Regulatory Flexibility Act Analysis'' of the proposed rule, ''Regulatory Capital Treatment for High Volatility Commercial Real Estate (HVCRE) Exposures,'' the OCC stated that the proposal likely would impact a substantial number of small entities. However, the OCC determined that the impact of the proposal would not be economically significant. Therefore, the OCC certified, for the purpose of the RFA, that the proposed rule would not have a significant economic impact on a substantial number of OCC-supervised small entities.

The United States Small Business Administration, which monitors compliance with the RFA, has asked the OCC to provide additional detail to support its certification. Therefore, the OCC is revising the administrative record to include additional information.

**Correction**

In the third column on page 48996 and the first column on page 48997, revise the section following ''B. Regulatory Flexibility Act Analysis'' to read as follows:

''*OCC:* The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* (RFA), requires an agency, in connection with a notice of proposed rulemaking, to prepare a Final Regulatory Flexibility Analysis describing the impact of the proposed rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include banking entities with total assets of $550 million or less) or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities.

As of June 30, 2018, the OCC supervised 886 small entities.[1] Currently, 211 small OCC-supervised institutions hold high volatility commercial real estate (HVCRE) exposures and thus will be directly impacted by the proposed rule. Therefore, the proposed rule potentially affects a substantial number of small entities.

The proposed rule would impact two principal areas: (1) The impact associated with implementing revisions to the capital rule to make the definition of an HVCRE exposure consistent with the new statutory definition and, (2) the impact associated with the time required to update policies and procedures and to re-evaluate HVCRE loan portfolios.

As described in the **SUPPLEMENTARY INFORMATION** section in the preamble to this proposed rule, the OCC believes the change to the definition of HVCRE exposure would result in fewer loans being deemed HVCRE exposures. Therefore, the amount of capital required would decrease for impacted OCC-supervised entities.

Further, the OCC believes no currently reported non-HVCRE acquisition, development, or construction (ADC) exposures would be reclassified as HVCRE exposures, and thus there would be no additional compliance burden to OCC-supervised entities for the non-HVCRE component of their ADC portfolios. The proposed rule would not require OCC-supervised entities to amend previously filed reports as OCC-supervised entities adjust their estimates of existing HVCRE exposures. This would serve to minimize the compliance burden for OCC-supervised entities.

Compliance burdens that OCC-supervised entities may face could include: (1) Updating policies and procedures to classify newly issued HVCRE loans; and (2) time spent re-evaluating existing HVCRE exposures in order to determine if any are eligible to be reclassified and thus receive a lower risk-weight of 100 percent. Based on the OCC's supervisory experience, OCC staff estimates that it would take an OCC-supervised institution, on average, a one-time investment of one business week, or 40 hours, to update policies and procedures and to re-evaluate their HVCRE exposures for loans originated after January 1, 2015.

The OCC's threshold for a significant effect is whether cost increases associated with a proposed rule are greater than or equal to either 5 percent of a small bank's total annual salaries and benefits or 2.5 percent of a small bank's total non-interest expense. The estimated compliance costs of $4,680 per institution (40 hours × $117 per hour)[2] would not exceed either of these thresholds for a significant impact on any of the 886 OCC-supervised small entities.

For this reason, the OCC certifies that the proposed rule would not have a significant economic impact on a substantial number of OCC-supervised small entities.''

Dated: December 18, 2018.

**William A. Rowe,**

*Chief Risk Officer.*

[FR Doc. 2018–27786 Filed 12–21–18; 8:45 am]

**BILLING CODE 4810–33–P**

[1] The OCC calculated the number of small entities using the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are $550 million and $38.5 million, respectively. Consistent with the General Principles of Affiliation, 13 CFR 121.103(a), the OCC counted the assets of affiliated financial institutions when determining whether to classify a national bank or Federal savings association as a small entity.

[2] To estimate average hourly wages we review data from May 2017 for wages (by industry and occupation) from the U.S. Bureau of Labor Statistics (BLS) for depository credit intermediation (NAICS 522100). To estimate compensation costs associated with the rule, we use $117 per hour, which is based on the average of the 90th percentile for seven occupations adjusted for inflation, plus an additional 34.2 percent to cover private sector benefits.

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2016–8501; Product Identifier 2014–SW–042–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Sikorsky Aircraft Corporation Helicopters

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Supplemental notice of proposed rulemaking (SNPRM); reopening of comment period.

**SUMMARY:** We are revising an earlier proposal for Sikorsky Aircraft Corporation (Sikorsky) Model S–92A helicopters. This action revises the notice of proposed rulemaking (NPRM) by increasing the estimated costs of compliance and removing the daily inspection requirements. We are proposing this airworthiness directive (AD) to address the unsafe condition on these products. Since these actions would impose an additional economic burden over that proposed in the NPRM, we are reopening the comment period to allow the public the chance to comment on this change.

**DATES:** The comment period for the NPRM published in the **Federal Register** on July 15, 2016 (81 FR 46002), is reopened.

We must receive comments on this SNPRM by February 11, 2019.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this SNPRM, contact Sikorsky Aircraft Corporation, Customer Service Engineering, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–Winged–S or 203–416–4299; email: *wcs_cust_service_eng.gr-sik@lmco.com.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

## Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–8501; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this SNPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Kristopher Greer, Aviation Safety Engineer, Boston ACO Branch, Compliance and Airworthiness Division, 1200 District Avenue, Burlington, Massachusetts 01803; telephone (781) 238–7799; email *Kristopher.Greer@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–8501; Product Identifier 2014–SW–042–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this SNPRM. We will consider all comments received by the closing date and may amend this SNPRM because of those comments.

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

## Discussion

We issued an NPRM to amend 14 CFR part 39 by adding an AD that would apply to Sikorsky Model S–92A helicopters with certain part-numbered frame assemblies installed. The NPRM published in the **Federal Register** on July 15, 2016 (81 FR 46002). The NPRM was prompted by fatigue analysis indicating the possible development of stress concentrations at the steel doublers on the main transmission airframe support structure top deck, as well as the discovery of a helicopter with a crack in the STA 362 frame and skin. The NPRM proposed to require inspecting the main transmission forward and aft frame assemblies and adjacent skins for a crack and loose fasteners and replacing or repairing any cracked part or loose fastener. The NPRM also proposed to require establishing life limits for certain frame assemblies. The proposed requirements were intended to detect a crack in a frame assembly and prevent failure of a frame and subsequent loss of control of the helicopter.

## Actions Since the NPRM Was Issued

Since we issued the NPRM, we have revised the number of work-hours to replace the aircraft frames based upon the comments we received. This resulted in an overall increase in the cost of complying with the proposed AD. Since the economic burden is higher than that in the NPRM, we are reopening the comment period to allow the public the chance to comment on this new estimate.

## Comments

We gave the public the opportunity to comment on the NPRM. After our NPRM was published, we received the following comments from Sikorsky.

### Request To Require Modification of the Frame Assembly

Sikorsky requested that the AD require altering the transmission support frames in accordance with Sikorsky S–92 Alert Service Bulletin 92–53–012, Basic Issue, dated February 10, 2014 (ASB 92–53–012), and Sikorsky Special Service Instructions No. 92–074–E, Revision E, dated April 9, 2014 (SSI 92–074–E). In support of its request, Sikorsky stated this modification largely improves the fatigue capability of the transmission support frames. Sikorsky also requested updating language in the preamble to reflect requiring the modification.

We disagree. We determined that the alterations to the transmission support frames are not required to correct the unsafe condition.

### Request To Remove the Daily Inspection

Sikorsky requested that we remove the daily repetitive inspection requirement from the proposed AD. In support of this request, Sikorsky stated that the proposed AD's requirement to perform this same inspection every 150 hours time-in-service (TIS) would maintain the safety of the aircraft. Sikorsky further stated structural analysis reports substantiate the 150-hour inspection interval.

We agree that the daily inspection requirement is not necessary to maintain the fleet's airworthiness. After reviewing data from Sikorsky's organization designation authorization supporting its life limit and continuing airworthiness projects, we determined that repeating the inspections every 150 hours would be adequate to detect and prevent an unsafe condition.

### Request That the AD Reference the Maintenance Manual

Sikorsky requested that the proposed AD reference the main transmission support structure inspection task in the Sikorsky maintenance manual for the 150-hour repetitive inspection. In support of this request, Sikorsky stated this task provides a complete, detailed procedure for the inspection requirements.

We agree. We have revised the proposed AD to reference the task card as guidance for the 150-hour inspection.

### Request To Delay Issuance of the Proposed AD

Sikorsky requested that we delay issuing this proposed AD until after Sikorsky completes a project to increase the life limits of the forward STA 382 and aft STA 362 frame assemblies.

We disagree. Because this unsafe condition could exist or develop on Sikorsky Model S–92A helicopters, the proposed actions are necessary to ensure safety of the U.S. fleet. Issuance of an AD is the appropriate method to correct the unsafe condition. Should completion of Sikorsky's certification project result in a corrective action that removes the unsafe condition, we might consider further rulemaking action.

### Request To Correct Part Numbers

Sikorsky requested that we correct two part numbers in Table 4 of the Required Actions. Specifically, Sikorsky

stated part number ''92070–02108–042'' should be ''92209–02108–042'' and part number ''92080–02108–103'' should be ''92209–02108–103.''

We agree. We have revised the table accordingly.

**Request To Add Serial Numbers to the Applicability**

Sikorsky requested that the proposed life limits only apply to helicopters with serial numbers 920006 through 920243. In support of this request, Sikorsky advised that starting with serial number 920244, helicopters were manufactured with an upgraded titanium frame configuration that is not affected by the proposed AD.

We disagree. While production helicopters starting with serial number 920244 may not currently have the parts that are subject to the unsafe condition installed, operators are not required to maintain that configuration. Omitting the serial numbers allows the proposed AD to apply to any Model S–92A helicopter if a frame subject to the unsafe condition is later installed.

**Request To Clarify Language Regarding Life Limit of Altered Parts**

Sikorsky requested that we clarify the wording of the 28,500-hour life limit for parts that are altered and changed to a new part number. Specifically, Sikorsky requested that we change ''28,500 hours TIS total (regardless of P/N)'' to ''28,500 hours TIS total from the original frame part number initial service date.''

We disagree. The language in the proposed AD clearly states that this life limit applies regardless of whether the frame assembly part number changes.

**Request To Revise the Compliance Cost**

Sikorsky requested that we revise the estimated costs of complying with the proposed AD. Specifically, Sikorsky advised that the number of hours to replace a frame has increased from 3,360 to 5,000, while the number of affected helicopters on the U.S. registry has decreased from 80 to 50.

We agree. We have revised the Costs of Compliance section accordingly.

**Request To Revise Summary**

Sikorsky requested that we change the last sentence in **SUMMARY**, which identifies the unsafe condition, to be consistent with the language in the Unsafe Condition paragraph.

We agree that Sikorsky's proposal provides more consistency. However, due to Administrative Committee of the Federal Register publishing requirements, the specific unsafe condition is no longer stated in **SUMMARY**. Thus, no change to this SNPRM is necessary.

**Request To Update Contact Information**

Sikorsky requested that we update the email address for its Customer Service Engineering in both the preamble and the proposed AD.

We agree and have made the requested changes.

**Request To Clarify the Related Service Information Section**

Sikorsky requested that we revise the language in the Related Service Information section describing the actions in ASB 92–53–012 and SSI 92–074–E. Specifically, Sikorsky requests that we change ''replacing the fasteners'' to ''removing steel doublers, cold-working holes, oversizing holes, trimming skin panels and reassembly with interference fit fasteners.'' In support, Sikorsky stated the recommended language would provide clarification.

We agree. We have made the requested changes accordingly.

**Request To Clarify the Differences Section**

Sikorsky requested that we clarify the Differences Between This Proposed AD and the Service Information section. Specifically, Sikorsky recommended adding ''by this AD'' to the sentence: ''Contacting Sikorsky would not be required.''

We agree. We have revised the proposed AD accordingly.

**Related Service Information**

Sikorsky issued S–92 Alert Service Bulletin (ASB) 92–53–008, Basic Issue, dated June 13, 2012 (ASB 92–53–008); S–92 ASB 92–53–009, Basic Issue, dated December 6, 2012 (ASB 92–53–009); and ASB 92–53–012. ASB 92–53–008 provides procedures for a one-time inspection of the main transmission frames and beams for a crack, missing or loose fastener or collar, damage, deformation, and corrosion. ASB 92–53–009 specifies an inspection before the first flight of the day and a recurring 150-hour inspection of the interior and exterior surfaces of the upper flanges and beams. ASB 92–53–012 specifies altering the forward and aft transmission support frames by removing steel doublers, cold-working the holes, oversizing the holes, trimming skin panels and reassembling the parts with interference fit fasteners in accordance with SSI 92–074–E. After this alteration, the parts are re-identified with a new part number. Sikorsky refers to this alteration as a service life extension program modification.

**FAA's Determination**

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of these same type designs. Certain changes described above expand the scope of the NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

**Proposed Requirements of This SNPRM**

This SNPRM would establish a life limit for certain part-numbered frame assemblies by removing from service any part that has reached or exceeded its new life limit. Frame assemblies that are altered under Sikorsky's service life extension program and re-identified with a new part number must be removed from service upon accumulating the life limit of the old part-number or within certain hours TIS since the alteration, whichever occurs first.

This SNPRM also would require, within 150 hours TIS and thereafter at intervals not to exceed 150 hours TIS, inspecting STA 328 frame and STA 362 frame for a crack or loose fasteners. If there is a crack or loose fastener, this SNPRM would require repairing or replacing any cracked part and any loose fastener before further flight.

**Differences Between This SNPRM and the Service Information**

The service information requires providing certain information to Sikorsky, and this proposed AD would not. The service information specifies performing a fluorescent penetrant inspection if there is a suspected crack and contacting Sikorsky if there is a crack, while this proposed AD would only require repairing or replacing any cracked part. Contacting Sikorsky would not be required by this proposed AD.

**Costs of Compliance**

We estimate that this proposed AD would affect 50 helicopters of U.S. Registry. We estimate that operators may incur the following costs to comply with this proposed AD. Labor costs are estimated at $85 per work-hour. We estimate a minimal cost to establish and revise the life limit of the frame assembly. We estimate it would take 1 work-hour to inspect STA 328 and 362 frames. No parts would be needed for a total cost of $4,250 for the fleet for each inspection per inspection cycle. If a fastener is replaced, we estimate the cost to be minimal. If a frame is replaced, it would take 5,000 work-

hours and required parts would cost $296,000 for a total cost of $721,000 per helicopter.

## Authority for This Rulemaking

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

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

## Regulatory Findings

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

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

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

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

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

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

## List of Subjects in 14 CFR Part 39

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

## The Proposed Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

**Sikorsky Aircraft Corporation Helicopters:** Docket No. FAA–2016–8501; Product Identifier 2014–SW–042–AD.

**(a) Applicability**

This AD applies to Model S–92A helicopters, certificated in any category, with a forward station (STA) 328 or aft STA 362 frame assembly with a part number (P/N) as shown in Table 1 to paragraph (e)(1), Table 2 to paragraph (e)(1), Table 3 to paragraph (e)(2), or Table 4 to paragraph (e)(2) of this AD.

**(b) Unsafe Condition**

This AD defines the unsafe condition as a crack in a main transmission airframe support structure. This condition could result in failure of a main transmission frame and subsequent loss of control of the helicopter.

**(c) Comments Due Date**

We must receive comments by February 11, 2019.

**(d) Compliance**

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

**(e) Required Actions**

(1) For helicopters with a frame assembly with a P/N shown in Table 1 to paragraph (e)(1) or Table 2 to paragraph (e)(1) of this AD, before further flight, remove from service any part that has reached or exceeded its new life limit. Forward STA 328 frame assemblies that are altered and changed to P/N 92070–20124–064, 92070–20124–067, 92070–20127–045, 92070–20124–065, 92070–20124–047, or 92070–20127–046 must be removed from service upon accumulating 12,000 hours TIS from the alteration or 28,500 hours TIS total (regardless of P/N) from the total original frame part number initial service date, whichever occurs first.

| Forward STA 328 Frame Assembly P/N | Life Limit Hours TIS |
|---|---|
| 92070-20124-064 | 12,000 |
| 92070-20124-067 | 12,000 |
| 92070-20127-045 | 12,000 |
| 92070-20124-065 | 12,000 |
| 92070-20124-047 | 12,000 |
| 92070-20127-046 | 12,000 |
| 92070-20124-063 | 12,000 |
| 92070-20124-066 | 12,000 |
| 92070-20127-041 | 12,000 |

| Aft STA 362 Frame Assembly P/N | Life Limit Hours TIS |
|---|---|
| 92070-20124-041 | 10,400 |
| 92070-20124-044 | 10,400 |
| 92070-20127-042 | 10,400 |
| 92070-20124-042 | 10,400 |
| 92070-20124-045 | 10,400 |
| 92070-20127-049 | 10,400 |
| 92070-20124-043 | 10,400 |
| 92070-20124-046 | 10,400 |
| 92070-20127-050 | 10,400 |
| 92070-20141-050 | 17,000 |
| 92070-20141-051 | 17,000 |
| 92070-20141-052 | 17,000 |

Table 1 to Paragraph (e)(1)

| Forward STA 328 Frame Assembly P/N | Life Limit Hours TIS |
|---|---|
| 92070-20097-058 | 28,500 |
| 92080-20047-047 | 28,500 |
| 92070-20097-060 | 28,500 |
| 92080-20047-048 | 28,500 |

Table 2 to Paragraph (e)(1)

(2) For each frame assembly listed in Table 1 to paragraph (e)(1) or Table 4 to paragraph (e)(2) of this AD with 1,801 or more hours TIS, and for each frame assembly listed in Table 2 to paragraph (e)(1) or Table 3 to paragraph (e)(2) of this AD with 1,301 or more hours TIS, within 150 hours TIS and thereafter at intervals not to exceed 150 hours TIS, do the following inspections. For guidance on performing these inspections, refer to Sikorsky S–92A–AMM–000 Maintenance Manual Chapter 53–20–00, Task 53–20–00–210–003, dated January 31, 2018:

(i) Inspect the STA 328 frame and STA 362 frame between the left and right butt line (BL) 16.5 beams and inspect the area on the left and right BL 16.5 beams six inches on either side of the mounting pads for a crack and loose fasteners. If there is a loose fastener or a crack, repair or replace any cracked part and any loose fastener before further flight.

(ii) Inspect the STA 328 and STA 362 outboard frames, left and right sides, from the BL 16.5 beam to water line 252.25 for a crack and loose fasteners. If there is a loose fastener or a crack, repair or replace any cracked part and any loose fastener before further flight.

| Forward STA 328 Frame Assembly P/N | Aft STA 362 Frame Assembly P/N |
|---|---|
| 92209-02106-042 | 92070-20097-062 |
| 92209-02106-043 | 92080-20047-051 |
| 92070-20097-041 | 92209-02109-043 |
| 92080-20047-041 | 92209-02109-044 |
| | 92070-20097-042 |
| | 92080-20047-042 |
| | 92070-20097-064 |
| | 92080-20047-052 |

Table 3 to Paragraph (e)(2)

| Fwd STA 328 Frame Assembly P/N | Aft STA 362 Frame Assembly P/N |
|---|---|
| 92209-02107-042 | 92209-02108-042 |
| 92209-02107-103 | 92209-02108-103 |

Table 4 to Paragraph (e)(2)

**(f) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Boston ACO Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Kristopher Greer, Aviation Safety Engineer, Boston ACO Branch, Compliance and Airworthiness Division, 1200 District Avenue, Burlington, Massachusetts 01803; telephone (781) 238–7799; email *Kristopher.Greer@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

**(g) Additional Information**

Sikorsky S–92 Alert Service Bulletin (ASB) 92–53–008, Basic Issue, dated June 13, 2012; ASB 92–53–009, Basic Issue, dated December 6, 2012; ASB 92–53–012, Basic Issue, dated February 10, 2014, and Sikorsky Special Service Instructions No. 92–074–E, Revision E, dated April 9, 2014, and Sikorsky S–92A–AMM–000 Maintenance Manual, Chapter 53–20–00, Task 53–20–210–003, dated January 31, 2018, which are not incorporated by reference, contain additional information about the subject of this AD. For service information identified in this AD, contact Sikorsky Aircraft Corporation, Customer Service Engineering, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–Winged–S or 203–416–4299; email *wcs_cust_service_eng.gr-sik@lmco.com.* You may view this information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

**(h) Subject**

Joint Aircraft System Component (JASC) Code: 5311 Fuselage Main, Frame.

Issued in Fort Worth, Texas, on December 13, 2018.

**Lance T. Gant,**

*Director, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2018–27713 Filed 12–21–18; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2018–1011; Product Identifier 2018–NM–131–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for all The Boeing Company Model 767–200, –300, –300F, and –400ER series airplanes. This proposed AD was prompted by reports of uncommanded movements of the Captain's and First Officer's seats. This proposed AD would require an identification of the part number, and if applicable the serial number, of the Captain's and First Officer's seats, and applicable on-condition actions. This proposed AD would also require a one-time detailed inspection and repetitive checks of the horizontal movement system of the Captain's and First Officer's seats, and applicable on-condition actions. This proposed AD would also provide an optional terminating action for the repetitive checks of the horizontal movement system for certain airplanes. We are proposing this AD to address the unsafe condition on these products.

**DATES:** We must receive comments on this proposed AD by February 11, 2019.

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

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

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *http://www.regulations.gov* by searching

for and locating Docket No. FAA–2018–1011.

**Examining the AD Docket**

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1011; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Brandon Lucero, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3569; email: *Brandon.Lucero@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2018–1011; Product Identifier 2018–NM–131–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. We will consider all comments received by the closing date and may amend this NPRM because of those comments.

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

**Discussion**

We have received reports indicating that there have been uncommanded movements of the Captain's and First Officer's seats. A Model 747 operator reported that during a takeoff, the First Officer's seat unlocked from its seat tracks and moved aft. The First Officer was unable to control the airplane and the Captain took over the controls to avoid a rejected takeoff. The unlocking of the seat from the seat tracks was caused by actuator damage, which was a result of incorrect adjustment of the seat's manual release lever cable, which allowed the clutch mechanism to only partially engage. Captain's and First Officer's seats having the same part numbers are installed on both Model 747 and Model 767 airplanes. We are considering additional rulemaking to address the unsafe condition for Model 747 airplanes.

In addition, one operator reported that the Captain's seat could not be locked in position after the horizontal position of the seat was adjusted in flight. The seat became unlocked from the track and moved freely forward and aft. Control was given to the First Officer for approach and landing. An inspection found that the horizontal actuator output shaft had broken. When a horizontal actuator output shaft breaks, the pilot cannot prevent seat movement in a forward and aft direction and cannot lock the seat in position. A broken horizontal actuator output shaft is the result of high loads that exceed the design limits that are caused by a stalled motor that can occur due to high mechanical resistance to motion during powered operation of the seat. Foreign object debris (FOD) in the seat tracks is another condition that can result in a stalled motor and cause the horizontal actuator output shaft to break.

An un-commanded seat movement during a critical part of a flight, such as take-off or landing, could cause a flight control obstruction or unintended flight control input, which could result in the loss of the ability to control the airplane.

**Related Service Information Under 1 CFR Part 51**

We reviewed Boeing Special Attention Service Bulletin 767–25–0539, Revision 1, dated July 17, 2018 (''BSASB 767–25–0539, Revision 1''). The service information describes procedures for identification of the part number, and, if applicable, the serial number of the Captain's and First Officer's seats, and applicable on-condition actions. The on-condition actions include an inspection of each seat's fore/aft and vertical manual control levers for looseness, installation of serviceable seats, and a seat functional test after any cable adjustment.

We also reviewed Boeing Special Attention Service Bulletin 767–25–0549, Revision 1, dated August 10, 2018 (''BSASB 767–25–0549, Revision 1''). The service information describes procedures for a one-time detailed inspection and repetitive checks of the horizontal movement system of the Captain's and First Officer's seats for findings (*e.g.,* evidence of cracks, scores, corrosion, dents, deformation or visible wear); and incorrectly assembled components (*e.g.,* microswitch assemblies, actuators, and limit switches), and applicable on-condition actions. The on-condition actions include overhaul of the horizontal movement system, clearing the seat tracks of FOD, replacement of the horizontal actuator, and replacement of the horizontal movement system. The service information also describes procedures for an optional terminating action for the repetitive checks by installing a serviceable Captain's or First Officer's seat.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

**FAA's Determination**

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Proposed AD Requirements**

This proposed AD would require accomplishment of the actions identified in the Accomplishment Instructions of BSASB 767–25–0539, Revision 1, described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information,'' and except for any differences identified as exceptions in the regulatory text of this proposed AD.

This proposed AD would also require accomplishment of the actions identified as ''RC'' (required for compliance) in the Accomplishment Instructions of BSASB 767–25–0549, Revision 1, described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1011.

**Differences Between This Proposed AD and the Service Information**

The effectivity of BSASB 767–25–0539, Revision 1; and BSASB 767–25–0549, Revision 1, is limited to Model 767–200, –300, –300F, and –400ER series airplanes with Ipeco part number series 3A090 and 3A258 Captain's and First Officer's powered seats installed, line numbers 161 and on. However, the applicability of this proposed AD includes all Model 767–200, –300, –300F, and –400ER series airplanes. Because the affected Captain's and First Officer's seats are rotable parts, we have

determined that these seats could later be installed on airplanes that were initially delivered with acceptable seats, thereby subjecting those airplanes to the unsafe condition. The referenced service bulletins can be used on airplanes not included in the service bulletin effectivity. This difference has been coordinated with Boeing.

Where BSASB 767–25–0539, Revision 1, specifies to do the actions ''within 72 months after the Original Issue date of this service bulletin,'' this AD would require accomplishment of those actions ''within 36 months after the effective date of this AD.'' The 36-month compliance time corresponds with the compliance time in BSASB 767–25–0549, Revision 1. We have determined a 36-month compliance time is appropriate for doing the actions specified in this proposed AD. We have coordinated this difference with Boeing.

**Costs of Compliance**

We estimate that this proposed AD affects 90 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Identification, seat | 1 work-hour × $85 per hour = $85 | $0 | $85 | $7,650 per seat. |
| Detailed inspection, horizontal movement system. | 1 work-hour × $85 per hour = $85, per seat. | 0 | $85 per seat | $7,650 per seat. |
| Checks, horizontal movement system. | 2 work-hour × $85 per hour = $170 per seat, per check cycle. | 0 | $170 per seat, per check cycle. | $15,130 per seat, per check cycle. |

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS *

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Adjustment, control lever cable | 1 work-hour × $85 per hour = $85, per seat | $0 | $85 per seat. |
| Overhaul or replacement, horizontal movement system. | Up to 15 work-hours × $85 per hour = $1,275, per seat. | Up to $6,400 per seat | Up to $7,675 per seat. |
| Inspection of each seat's fore/aft and vertical manual control levers. | 1 work-hour × $85 per hour = $85, per seat | $0 | $85 per seat. |
| Installation of serviceable seats | 1 work-hour × $85 per hour = $85, per seat | $0 | $85 per seat. |
| Clearing FOD | 1 work-hour × $85 per hour = $85, per seat | $0 | $85 per seat. |
| Replacement of the horizontal actuator | 1 work-hour × $85 per hour = $85, per actuator. | $205 | $290, per actuator. |
| Functional test, adjusted control lever cable | 1 work-hour × $85 per hour = $85, per seat | $0 | $85, per seat. |

* The estimated cost for tooling to align an affected seat for adjustment of the control lever cable is up to $46,064.

We have received no definitive data that would enable us to provide cost estimates for the optional terminating action for the on-condition repetitive checks specified in this proposed AD.

**Authority for This Rulemaking**

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

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

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

**Regulatory Findings**

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

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

Accordingly, under the authority delegated to me by the Administrator,

the FAA proposes to amend 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

**The Boeing Company:** Docket No. FAA–2018–1011; Product Identifier 2018–NM–131–AD.

**(a) Comments Due Date**

We must receive comments by February 11, 2019.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to all The Boeing Company Model 767–200, –300, –300F, and –400ER series airplanes, certificated in any category.

**(d) Subject**

Air Transport Association (ATA) of America Code 25, Equipment/Furnishings.

**(e) Unsafe Condition**

This AD was prompted by reports of uncommanded movements of the Captain's and First Officer's seats. We are issuing this AD to address uncommanded movement of the Captain's and First Officer's seats. An uncommanded seat movement during a critical part of a flight, such as take-off or landing, could cause a flight control obstruction or unintended flight control input, which could result in the loss of the ability to control the airplane.

**(f) Compliance**

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

**(g) Seat Identification and On-Condition Actions**

Within 36 months after the effective date of this AD, do an inspection to determine the part number, and serial number as applicable, of the Captain's and First Officer's seats, and do all applicable on-condition actions, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 767–25–0539, Revision 1, dated July 17, 2018.

**(h) Detailed Inspection and Repetitive Checks of Horizontal Movement System and On-Condition Actions**

Except as specified in paragraph (i) of this AD: At the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 767–25–0549, Revision 1, dated August 10, 2018 (''BSASB 767–25–0549, Revision 1''), do all applicable actions identified as ''RC'' (required for compliance) in, and in accordance with, the Accomplishment Instructions of BSASB 767–25–0549, Revision 1.

**(i) Exceptions to Service Information Specifications**

For purposes of determining compliance with the requirements of this AD: Where BSASB 767–25–0549, Revision 1, uses the phrase ''the original issue date of this service bulletin,'' this AD requires using ''the effective date of this AD.''

**(j) Optional Terminating Action for Repetitive Checks**

(1) For Group 1, Configuration 2 and 4 airplanes identified in BSASB 767–25–0549, Revision 1: Installation of a serviceable Captain's seat, as specified in, and in accordance with, the Accomplishment Instructions of BSASB 767–25–0549, Revision 1, terminates the repetitive checks of the Captain's seat as required by paragraph (h) of this AD for that airplane only.

(2) For Group 1, Configuration 3 and 4 airplanes: Installation of a serviceable First Officer's seat BSASB 767–25–0549, Revision 1, as specified in, and in accordance with, the Accomplishment Instructions of BSASB 767–25–0549, Revision 1, terminates the repetitive checks of the First Officer's seat as required by paragraph (h) of this AD for that airplane only.

**(k) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (l)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (k)(4)(i) and (k)(4)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or substep is labeled ''RC Exempt,'' then the RC requirement is removed from that step or substep. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

**(l) Related Information**

(1) For more information about this AD, contact Brandon Lucero, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3569; email: *Brandon.Lucero@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued in Des Moines, Washington, on December 13, 2018.

**Michael Kaszycki,**

*Acting Director, System Oversight Division, Aircraft Certification Service.*

[FR Doc. 2018–27882 Filed 12–21–18; 8:45 am]

BILLING CODE 4910–13–P

---

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2018–1058; Product Identifier 2018–CE–051–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Pilatus Aircraft Ltd. Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for Pilatus Aircraft Ltd. Model PC–6, PC–6/350, PC–6/350–H1, PC–6/350–H2, PC–6/A, PC–6/A–H1, PC–6/A–H2, PC–6/B–H2, PC–6/B1–H2, PC–6/B2–H2, PC–6/B2–H4, PC–6/C–H2, PC–6/C1–H2, PC–6–H1, and PC–6–H2 airplanes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify

and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as sheared or missing rivets on the horizontal stabilizer hinge bracket assemblies. We are issuing this proposed AD to require actions to address the unsafe condition on these products.

**DATES:** We must receive comments on this proposed AD by February 11, 2019.

**ADDRESSES:** You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact PILATUS Aircraft Ltd., Customer Technical Support (MCC), P.O. Box 992, CH–6371 Stans, Switzerland; phone: +41 (0)41 619 67 74; fax: +41 (0)41 619 67 73; email: *techsupport@pilatus-aircraft.com*; internet: *http://www.pilatus-aircraft.com.* You may review this referenced service information at the FAA, Policy and Innovation Division, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

## Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1058; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Standards Branch, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090; email: *doug.rudolph@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2018–1058; Product Identifier 2018–CE–051–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

## Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued AD No. 2018–0217, dated October 10, 2018 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> During a routine inspection, the rivets of the hinge bracket assemblies on a Pilatus PC–6 were found to be sheared or missing. Investigation results identified that this was most likely due to application of too much force to the ends of the horizontal stabilizer during ground handling.
>
> This condition, if not detected and corrected, could lead to failure of the primary horizontal stabilizer load path and consequent separation of the horizontal stabilizer, possibly resulting in loss of control of the aeroplane.
>
> To address this potential unsafe condition, Pilatus Aircraft Ltd issued the SB [service bulletin] to provide applicable inspection instructions.
>
> For the reasons described above, this [EASA] AD requires a one-time inspection of the affected parts and the horizontal stabilizer front spar attachment area and, depending on findings, accomplishment of applicable corrective action(s). This [EASA] AD also requires, before installation, inspection of, and, depending on findings, corrective action(s) on, affected parts held as spare.

The amount of force to the ends of the horizontal stabilizer cannot be quantified; however, fleet experience shows that repetitive pushing or pulling on the horizontal stabilizer to move the airplane on the ground can overload the rivets. Although a root cause could not be determined, due to the severity of separation of a horizontal stabilizer, EASA determined that the corrective actions should be required for other airplanes of the same type design.

Pilatus Aircraft Ltd. had previously considered the small size of the original ''DO NOT PUSH'' markings and the significant chance of the markings being over-sprayed during a respray. As a result, Pilatus Aircraft Ltd. issued a service bulletin to specify replacing the smaller markings with new, larger placards. The FAA proposes to require these placards in the NPRM.

You may examine the MCAI on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1058.

## Related Service Information Under 1 CFR Part 51

Pilatus Aircraft Ltd. has issued PC–6 Service Bulletin No. 55–004, dated July 2, 2018. The service information contains procedures for inspecting the left-hand and right-hand horizontal stabilizer hinge bracket assemblies and, if any discrepancies are found, repairing or replacing any damaged rivets and screws. Pilatus Aircraft Ltd. has also issued PC–6 Service Bulletin No. 55–002, Revision. No. 1, dated February 18, 2016. This service information contains procedures for inspecting and repairing the horizontal stabilizer attachment hardware and installing four ''DO NOT PUSH'' placards. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

## FAA's Determination and Requirements of the Proposed AD

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

We have reviewed the MCAI and, in general, agree with the substance. The MCAI AD does not require installing ''DO NOT PUSH'' placards. We have added that requirement to this proposed AD.

## Costs of Compliance

We estimate that this proposed AD would affect 30 products of U.S. registry. We also estimate that it would take about 9 work-hours per product to

comply with the inspection and placard requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $200 per product.

Based on these figures, we estimate the cost of the proposed inspection and placard requirements on U.S. operators to be $28,950, or $965 per product.

In addition, we estimate the following to do any necessary follow-on actions: Each rivet replacement would take 2 work-hours, fastener replacement would take 3 work-hours, one hinge bracket assembly replacement would take 9 work-hours, and two hinge bracket assembly replacements would take 15 work-hours. The total estimated cost of parts would be $10,000. We have no way of determining the number of products that may need replacement.

## Authority for This Rulemaking

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

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

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to small airplanes, gliders, balloons, airships, domestic business jet transport airplanes, and associated appliances to the Director of the Policy and Innovation Division.

## Regulatory Findings

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

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

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

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

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

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

## List of Subjects in 14 CFR Part 39

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

## The Proposed Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

**Pilatus Aircraft Ltd.:** Docket No. FAA–2018–1058; Product Identifier 2018–CE–051–AD.

**(a) Comments Due Date**

We must receive comments by February 11, 2019.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Pilatus Aircraft Ltd. Model PC–6, PC–6/350, PC–6/350–H1, PC–6/350–H2, PC–6/A, PC–6/A–H1, PC–6/A–H2, PC–6/B–H2, PC–6/B1–H2, PC–6/B2–H2, PC–6/B2–H4, PC–6/C–H2, PC–6/C1–H2, PC–6–H1, PC–6–H2 airplanes, all serial numbers, certificated in any category.

**Note 1 to paragraph (c):** These airplanes may also be identified as Fairchild Republic Company airplanes, Fairchild Industries airplanes, Fairchild Heli Porter airplanes, or Fairchild-Hiller Corporation airplanes.

**(d) Subject**

Air Transport Association of America (ATA) Code 55: Stabilizers.

**(e) Reason**

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as sheared or missing rivets on the horizontal stabilizer hinge bracket assemblies. We are issuing this AD to prevent failure of the primary horizontal stabilizer load path, which could lead to separation of the horizontal stabilizer and result in loss of control of the airplane.

**(f) Actions and Compliance**

Unless already done, do the following actions in paragraphs (f)(1) and (2).

(1) Within the next 100 hours time-in-service after the effective date of this AD or within the next 12 months after the effective date of this AD, whichever occurs first:

(i) Inspect the left-hand and the right-hand horizontal stabilizer hinge bracket assemblies for cracks, loose screws and rivets, sheared rivets, missing rivets, and looseness of the electrical bonding strap, and inspect the top and bottom screws at each hinge bracket. Repair or replace any parts with discrepancies before further flight. You must do the actions required by this paragraph by following sections C through G of the Accomplishment Instructions—Part 1—On Aircraft in Pilatus Aircraft Ltd. PC–6 Service Bulletin No. 55–004, dated July 2, 2018.

(ii) Install four ''DO NOT PUSH'' placards, part number 110.71.06.847 or 110.71.06.848, on the horizontal stabilizer by following section G of the Accomplishment Instructions—Aircraft in Pilatus Aircraft Ltd. PC–6 Service Bulletin No. 55–002, Revision. No. 1, dated February 18, 2016.

(2) After the effective date of this AD, do not install a horizontal stabilizer on any airplane unless it has been inspected as specified in paragraph (f)(1)(i) of this AD and found to be free of discrepancies or all discrepancies have been repaired or replaced.

**(g) Other FAA AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Small Airplane Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Standards Branch, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090; email: *doug.rudolph@faa.gov.* Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must instead be accomplished using a method approved by the Manager, Small Airplane Standards Branch, FAA, or the European Aviation Safety Agency (EASA).

**(h) Related Information**

Refer to MCAI European Aviation Safety Agency AD No. 2018–0217, dated October 10, 2018, for related information. You may examine the MCAI on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1058. For service information related to this AD, contact PILATUS Aircraft Ltd., Customer Technical Support (MCC), P.O. Box 992, CH–6371 Stans, Switzerland; phone: +41 (0)41 619 67 74; fax: +41 (0)41 619 67 73; email: *techsupport@pilatus-aircraft.com*; internet: *http://www.pilatus-aircraft.com.* You may review this referenced service information at the FAA, Policy and Innovation Division, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Issued in Kansas City, Missouri, on December 17, 2018.

**Melvin J. Johnson,**

*Aircraft Certification Service, Deputy Director, Policy and Innovation Division, AIR–601.*

[FR Doc. 2018–27899 Filed 12–21–18; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2018–1012; Product Identifier 2018–NM–132–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for all The Boeing Company Model 777 airplanes. This proposed AD was prompted by reports of uncommanded movements of the Captain's and First Officer's seats. This proposed AD would require an identification of the part number, and if applicable the serial number, of the Captain's and First Officer's seats, and do applicable on-condition actions for affected seats. This proposed AD would also require a one-time detailed inspection and repetitive checks of the horizontal movement system of the Captain's and First Officer's seats and applicable on-condition actions. This proposed AD would also provide an optional terminating action for the repetitive checks of the horizontal movement system. We are proposing this AD to address the unsafe condition on these products.

**DATES:** We must receive comments on this proposed AD by February 11, 2019.

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

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

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1012.

### Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1012; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Brandon Lucero, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3569; email: *Brandon.Lucero@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2018–1012; Product Identifier 2018–NM–132–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. We will consider all comments received by the closing date and may amend this NPRM because of those comments.

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

### Discussion

We have received reports indicating that there have been uncommanded movements of the Captain's and First Officer's seats. A Model 747 operator reported that during a takeoff, the First Officer's seat unlocked from its seat tracks and moved aft. The First Officer was unable to control the airplane and the Captain took over the controls to avoid a rejected takeoff. The unlocking of the seat from the seat tracks was caused by actuator damage, which was a result of incorrect adjustment of the seat's manual release lever cable, which allowed the clutch mechanism to only partially engage. Captain's and First Officer's seats having the same part numbers are installed on both Model 747 and Model 777 airplanes. We are considering additional rulemaking to address the unsafe condition for Model 747 airplanes.

In addition, a Model 777 operator reported that the Captain's seat could not be locked in position after an adjustment to the horizontal seat position in flight. The seat became unlocked from the track and moved freely forward and aft. Control was given to the First Officer for approach and landing. The results of an inspection revealed that the horizontal actuator output shaft had broken. When a horizontal actuator output shaft breaks, the pilot cannot prevent seat movement in a forward and aft direction and cannot lock the seat in position. A broken horizontal actuator output shaft is the result of high loads, that exceed the design limits, caused by a stalled motor that can occur due to high mechanical resistance to motion during powered operation of the seat. Foreign object debris (FOD) in the seat tracks is another condition that can result in a stalled motor and cause the horizontal actuator output shaft to break.

An uncommanded seat movement during a critical part of a flight, such as takeoff or landing, could cause a flight

control obstruction or unintended flight control input, which could result in the loss of the ability to control the airplane.

**Related Service Information Under 1 CFR Part 51**

We reviewed Boeing Special Attention Service Bulletin 777–25–0607, Revision 1, dated July 17, 2018 (''BSASB 777–25–0607, Revision 1''). The service information describes procedures for identification of the part number, and if applicable the serial number, of the Captain's and First Officer's seats, and for applicable on-condition actions for affected seats. The on-condition actions include an inspection of each seat's fore/aft and vertical manual control levers for looseness, installation of serviceable seats, and a seat functional test after any cable adjustment.

We also reviewed Boeing Special Attention Service Bulletin 777–25–0619, Revision 1, dated August 8, 2018 (''BSASB 777–25–0619, Revision 1''). The service information describes procedures for a detailed inspection and repetitive checks of the horizontal movement system for the Captain's and First Officer's seats for findings (*e.g.,* evidence of cracks, scores, corrosion, dents, deformation or visible wear; and incorrectly assembled microswitch assemblies, actuators, and limit switches), and applicable on-condition actions. The on-condition actions include clearing the seat tracks of FOD, overhaul of the horizontal movement system and replacement of the horizontal actuator. The service information also describes procedures for an optional terminating action for the repetitive checks by installing a serviceable Captain's or First Officer's seat.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

**FAA's Determination**

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Proposed AD Requirements**

This proposed AD would require accomplishment of the actions identified in the Accomplishment Instructions of BSASB 777–25–0607, Revision 1, described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information,'' and except for any differences identified as exceptions in the regulatory text of this proposed AD.

This proposed AD would also require accomplishment of the actions identified as ''RC'' (required for compliance) in the Accomplishment Instructions of BSASB 777–25–0619, Revision 1, described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information,'' and except for any differences identified as exceptions in the regulatory text of this proposed AD.

For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1012.

**Differences Between This Proposed AD and the Service Information**

The effectivity of BSASB 777–25–0607, Revision 1; and BSASB 777–25–0619, Revision 1, is limited to Model 777–200, –200LR, –300, –300ER, and 777F airplanes with Ipeco part number series 3A201 and 3A258 Captain's and First Officer's powered seats installed, line numbers 1 and on. However, the applicability of this proposed AD includes all Model 777–200, –200LR, –300, –300ER, and 777F series airplanes. Because the affected Captain's and First Officer's seats are rotable parts, we have determined that these seats could later be installed on airplanes that were initially delivered with acceptable seats, thereby subjecting those airplanes to the unsafe condition. The referenced service bulletins can be used on airplanes not included in the service bulletin effectivity. This difference has been coordinated with Boeing.

Where BSASB 777–25–0607, Revision 1, specifies to do the actions within 72 months after the original issue date of the service bulletin, this proposed AD would require accomplishment of those actions within 36 months after the effective date of this AD. The 36-month compliance time corresponds with the compliance time in BSASB 777–25–0619, Revision 1. We have determined a 36-month compliance time is appropriate for doing the actions specified in this proposed AD. We have coordinated this difference with Boeing.

**Costs of Compliance**

We estimate that this proposed AD affects 190 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS PER SEAT

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Identification, seat | 1 work-hour × $85 per hour = $85 | $0 | $85 | $85. |
| Detailed inspection, horizontal movement system. | 1 work-hour × $85 per hour = $85 | 0 | $85 | $85. |
| Checks, horizontal movement system | 2 work-hour × $85 per hour = $170 per check cycle. | 0 | $170 per check cycle. | $170 per check cycle. |

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS PER SEAT *

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Adjustment, control lever cable | 1 work-hour × $85 per hour = $85 | $0 | $85. |
| Overhaul, horizontal movement system | 11 work-hours × $85 per hour = $935 | Up to $5,824 | Up to $6,759. |

ESTIMATED COSTS OF ON-CONDITION ACTIONS PER SEAT *—Continued

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Inspection of each seat's fore/aft and vertical manual control levers. | 1 work-hour × $85 per hour = $85 | $0 | $85. |
| Installation of serviceable seats | 1 work-hour × $85 per hour = $85 | $0 | $85. |
| Clearing FOD | 1 work-hour × $85 per hour = $85 | $0 | $85. |
| Replacement of the horizontal actuator | 1 work-hour × $85 per hour = $85, per actuator | $205 | $290. |
| Functional test, adjusted control lever cable | 1 work-hour × $85 per hour = $85 | $0 | $85. |

* The estimated cost for tooling to align an affected seat for adjustment of the control lever cable is up to $46,064.

We have received no definitive data that would enable us to provide cost estimates for the optional terminating action for the repetitive checks specified in this proposed AD.

## Authority for This Rulemaking

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

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

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

## Regulatory Findings

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

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

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

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

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

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

## List of Subjects in 14 CFR Part 39

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

## The Proposed Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

**The Boeing Company:** Docket No. FAA–2018–1012; Product Identifier 2018–NM–132–AD.

**(a) Comments Due Date**

The FAA must receive comments on this AD action by February 11, 2019.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to all The Boeing Company Model 777–200, –200LR, –300, –300ER, and 777F series airplanes, certificated in any category.

**(d) Subject**

Air Transport Association (ATA) of America Code 25, Equipment/Furnishings.

**(e) Unsafe Condition**

This AD was prompted by reports of uncommanded movements of the Captain's and First Officer's seats. We are issuing this AD to address uncommanded movement of the Captain's and First Officer's seats. An uncommanded seat movement during a critical part of a flight, such as takeoff or landing, could cause a flight control obstruction or unintended flight control input, which could result in the loss of the ability to control the airplane.

**(f) Compliance**

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

**(g) Seat Part Number Identification and On-Condition Actions**

Within 36 months after the effective date of this AD, do an inspection to determine the part number, and serial number as applicable, of the Captain's and First Officer's seats, and do all applicable on-condition actions, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–25–0607, Revision 1, dated July 17, 2018.

**(h) Detailed Inspection and Repetitive Checks of Horizontal Movement System and On-Condition Actions**

Except as specified in paragraph (i) of this AD: At the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 777–25–0619, Revision 1, dated August 8, 2018 (''BSASB 777–25–0619, Revision 1''), do all applicable actions identified as ''RC'' (required for compliance) in, and in accordance with, the Accomplishment Instructions of BSASB 777–25–0619, Revision 1.

**(i) Exception to Service Information Specifications**

For purposes of determining compliance with the requirements of this AD: Where BSASB 777–25–0619, Revision 1, uses the phrase ''the original issue date of this service bulletin,'' this AD requires using ''the effective date of this AD.''

**(j) Optional Terminating Action for Repetitive Checks**

Installation of a serviceable Captain's or First Officer's seat as specified in, and in

accordance with, the Accomplishment Instructions of BSASB 777–25–0619, Revision 1, terminates the repetitive checks required by paragraph (h) of this AD for that seat only.

**(k) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (l)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (k)(4)(i) and (k)(4)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or substep is labeled ''RC Exempt,'' then the RC requirement is removed from that step or substep. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

**(l) Related Information**

(1) For more information about this AD, contact Brandon Lucero, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3569; email: *Brandon.Lucero@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued in Des Moines, Washington, on December 14, 2018.

**Michael Kaszycki,**

*Acting Director, System Oversight Division, Aircraft Certification Service.*

[FR Doc. 2018–27901 Filed 12–21–18; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF EDUCATION

### 34 CFR Chapter VI

**[Docket ID ED–2018–OPE–0076]**

**RIN 1840–AD36, 1840–AD37, 1840–AD38, 1840–AD40, and 1840–AD44**

### Negotiated Rulemaking Committee; Location of Negotiations and Subcommittee Meetings—Accreditation and Innovation

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Notice of location of negotiations and subcommittee meetings.

**SUMMARY:** On October 15, 2018, we announced our intention to establish a negotiated rulemaking committee to prepare proposed regulations for the Federal Student Aid programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA). In this notice, we announce the locations of each committee and subcommittee meeting.

**DATES:** Please see the **SUPPLEMENTARY INFORMATION** section for meeting dates.

**ADDRESSES:** Please see the **SUPPLEMENTARY INFORMATION** section for meeting locations.

**FOR FURTHER INFORMATION CONTACT:** Aaron Washington, U.S. Department of Education, 400 Maryland Ave. SW, Room 294–12, Washington, DC 20202. Telephone (202) 453–7241. Email: *Aaron.Washington@ed.gov.*

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

**SUPPLEMENTARY INFORMATION:**

### Locations for Negotiations and Subcommittee Meetings

The Accreditation and Innovation Committee will meet for three sessions on the following dates:

Session 1: January 14–16, 2019
Session 2: February 19–22, 2019
Session 3: March 25–28, 2019

Sessions will run from 9:00 a.m. to 5:00 p.m.

The January committee meeting will be held at the U.S. Department of Education at: Lyndon Baines Johnson (LBJ) Building Barnard Auditorium, 400 Maryland Avenue SW, Washington, DC 20202.

The February committee meeting will be held at the U.S. Department of Education at: Potomac Center Plaza (PCP) Auditorium, 550 12th Street SW, Washington, DC 20202.

The March committee meeting will be held at the U.S. Department of Education at: LBJ Building Barnard Auditorium, 400 Maryland Avenue SW, Washington, DC 20202.

The committee meetings are open to the public to attend in person. The committee meetings will also be made available to the public through a Department-provided livestream.

The Distance Learning and Educational Innovation Subcommittee will meet for three meetings on the following dates:

Meeting 1: January 17–18, 2019
Meeting 2: February 12–13, 2019
Meeting 3: March 11–12, 2019

Meetings will run from 9:00 a.m. to 5:00 p.m.

The subcommittee meetings will be held at the U.S. Department of Education at: LBJ Building, 400 Maryland Ave. SW, Washington, DC 20202.

The January meeting will be held in room 1W113. The February meeting will be held in room 1W103. The March meeting will be held in room 1W126.

The Faith-Based Entities Subcommittee will meet for three meetings on the following dates:

Meeting 1: January 17–18, 2019
Meeting 2: February 12–13, 2019
Meeting 3: March 11–12, 2019

Meetings will run from 9:00 a.m. to 5:00 p.m.

The subcommittee meetings will be held at the U.S. Department of Education at: LBJ Building, 400 Maryland Ave. SW, Washington, DC 20202.

The January meeting will be held in room 297–05. The February meeting will be held in room 297–05. The March meeting will be held in room 1W113.

The TEACH Grant Subcommittee will meet for three meetings on the following dates:

Meeting 1: January 17–18, 2019
Meeting 2: February 12–13, 2019
Meeting 3: March 11–12, 2019

Meetings will run from 9:00 a.m. to 5:00 p.m.

The subcommittee meetings will be held at the U.S. Department of

Education at: LBJ Building, 400 Maryland Ave. SW, Washington, DC 20202.

The January meeting will be held in room 288–04. The February meeting will be held in room 288–04. The March meeting will be held in room 288–04.

Subcommittee meetings are not open to the public. The subcommittee meetings will be made available to the public through a Department-provided livestream.

*Accessible Format:* Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) by contacting Aaron Washington, U.S. Department of Education, 400 Maryland Ave. SW, Room 294–12, Washington, DC 20202. Telephone (202) 453–7241. Email: *Aaron.Washington@ed.gov.*

*Electronic Access to this Document:* The official version of this document is the document published in the **Federal Register**. Free internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available 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 the site. You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**Program Authority:** 20 U.S.C. 1098a.

Dated: November 17, 2018.

**Diane Auer Jones,**

*Principal Deputy Under Secretary Delegated to Perform the Duties of Under Secretary and Assistant Secretary, Office of Postsecondary Education.*

[FR Doc. 2018–27761 Filed 12–21–18; 8:45 am]

**BILLING CODE 4000–01–P**

## LIBRARY OF CONGRESS

## U.S. Copyright Office

## 37 CFR Part 202

**[Docket No. 2018–13]**

## Simplifying Copyright Registration for Architectural Works

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Copyright Office is proposing to amend its regulations pertaining to the registration of architectural works. To improve the efficiency of this process, applicants will be required to submit their claims through the online application process, rather than a paper application, and they will be encouraged to upload a digital copy of their works through the electronic registration system, instead of submitting a physical copy. The proposed rule also clarifies that a date of construction is needed only if the architectural work was embodied in unpublished plans or drawings on or before December 1, 1990 and if the work was constructed before January 1, 2003. The Office invites public comment on the proposed changes.

**DATES:** Comments on the proposed rule must be made in writing and must be received in the U.S. Copyright Office no later than February 11, 2019.

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions for submitting comments are available on the Copyright Office website at *http://www.copyright.gov/rulemaking/architecturalworks/.* If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice; Erik Bertin, Deputy Director of Registration Policy and Practice; Jordana Rubel, Assistant General Counsel by telephone at 202–707–8040 or by email at *rkas@copyright.gov, ebertin@copyright.gov,* and *jrubel@copyright.gov.*

**SUPPLEMENTARY INFORMATION:** As part of the U.S. Copyright Office's ongoing effort to improve the quality and readability of its regulations, the Office is proposing to amend the rules governing the registration of architectural works, which have remained essentially unchanged since 1992. 57 FR 45307 (Oct. 1, 1992); 68 FR 38630 (June 30, 2003). The regulation pertaining to the registration and application requirements is set forth in 37 CFR 202.11, the regulation governing the deposit requirements for registration is set forth in 37 CFR 202.20(c)(2)(xviii). The regulation governing the mandatory deposit requirements, set forth in 37 CFR 202.19(d)(2)(viii), will remain unchanged. The Office welcomes comments on these proposed changes.

### Application Requirements

The current regulation states that applicants must use a paper application to register an architectural work and that the claim must be submitted on Form VA. 37 CFR 202.11(c)(3). This does not reflect the Office's current practices. Since 2008, the Office has accepted claims submitted through the Office's electronic registration system (''eCO''), and in fact, many architecture claims are filed in this manner.

Under the proposed rule, applicants will be required to submit their claims through the eCO system using the Standard Application. The Office will no longer accept architectural works submitted for registration on a paper application using Form VA. If a paper application is received after the effective date of this rule, the Office will refuse registration and instruct the applicant to resubmit the claim on the Standard Application.[1]

A substantial majority of the U.S. population has access to the internet, and the Office expects that most architects will be able to use the electronic system. *See* 81 FR 86643, 86648 & nn. 15–16 (Dec. 1, 2016). Architects typically use sophisticated computer software to create their works, and thus, should be capable of using the Standard Application to register their claims.[2]

The Office believes that requiring applicants to use the Standard Application, rather than Form VA, is necessary to improve the overall efficiency of the registration process. Most claims submitted on Form VA require correspondence or other action from the Office. Applicants often fail to provide information expressly requested on the form, or add extraneous information that is not requested. In

[1] The Office recently issued a notice of proposed rulemaking clarifying that the Single Application may not be used to register an architectural work. The Single Application is an electronic application designed ''for those authors who file the simplest kind of [claim].'' 78 FR 38843, 38845 (June 28, 2013). Architecture claims are not a good fit for this application because they tend to be very complex. 83 FR 5227, 5228 (Feb. 6, 2017). To avoid potential confusion, the proposed rule removes the word ''single'' wherever it appears in the regulation on architectural works.

[2] As with other rules recently promulgated by the Office, the proposed rule would allow the Office to waive the online filing requirement in exceptional cases. Applicants who do not have internet access and are unable to use the Standard Application may request a waiver in writing. The Office will review each request and will make accommodations for applicants who receive a waiver, such as making staff available to assist with filling out the application.

each case, the Office must scan these paper applications into the registration system and input the relevant information by hand. This is a cumbersome, labor-intensive process. Addressing these issues imposes significant burdens on the Office's limited resources, and has had an adverse effect on the examination of other types of works within the Visual Arts Division.

The regulation also states that applicants should provide ''[t]he date of construction of the building,'' and ''[i]f the building has not yet been constructed'' the application should include a statement to that effect. The proposed rule clarifies that this information is only needed if the architectural work was embodied in unpublished plans or drawings on or before December 1, 1990 and if the building was constructed before January 1, 2003. *See* 37 CFR 202.12(d)(3)(i) (buildings constructed before December 1, 1990 not eligible for copyright protection); *id.* at 202.12(d)(3)(ii) (unconstructed buildings embodied in unpublished drawings or plans as of December 1, 1990 not eligible for copyright protection unless the building was constructed by December 31, 2002). In all other cases, a date of construction is not needed.

**Deposit Requirements for Registration**

Under the current rule, to register an architectural work with the Copyright Office, applicants must submit ''one complete copy of an architectural drawing or blueprint in visually perceptible form showing the overall form of the building and any interior arrangements of spaces and/or design elements'' being registered. If the building has been constructed, applicants also must submit photographs of the work. 37 CFR 202.20(c)(2)(xviii)(A), (B). The proposed rule clarifies that the ''overall form of the building'' refers to exterior elevations of the building when viewed from the front, rear, and sides, while ''interior arrangements of spaces and/or design elements'' refers to walls or other permanent structures that divide the interior into separate rooms and spaces.

In addition, the proposed rule would amend the deposit requirement by allowing applicants to submit drawings, and photographs of an architectural work in any form that allows the Office to access, perceive, and examine the entire copyrightable content of the work, including by being uploaded through the electronic registration system in an acceptable file format.[3] In doing so, the proposed rule removes language listing an order of preference for drawings and photographs that are submitted in a physical format.

The Office routinely accepts digital copies of architectural works instead of requiring physical copies as stated in the current regulation, and in fact, it prefers to receive digital—rather than physical—copies. The Office does not need physical drawings, or photographs to examine an architectural work for copyrightable authorship, or to determine whether the applicant satisfied the formal and legal requirements for registration. *See* 17 U.S.C. 410(a) (providing that the Register of Copyrights must determine whether ''material deposited [for registration] constitutes copyrightable subject matter''). Electronic submissions take less time to process and are easier to handle than physical copies, in part, because a registration specialist can examine a digital copy as soon as it has been uploaded to the electronic registration system. By contrast, when an applicant files an online application and mails a physical copy to the Office, it takes added time to connect the application with the correct deposit.

Digital uploads may also provide architects with more prompt legal benefits. When the Office registers an architectural work and issues a certificate of registration, the effective date of registration is the date on which the Office received the application, filing fee, and deposit in proper form. When an applicant uploads a digital copy to the electronic system, the Office typically receives the application, filing fee, and deposit on the same date. But when an applicant sends physical drawings, or photographs, the deposit may arrive long after the date that the application and filing fee were received—thereby establishing a later effective date of registration. Moreover, digital copies are easier to store and retrieve than physical copies, including if the copyright owner or other interested parties need to obtain a copy of a particular work for use in litigation or another legitimate purpose.

Finally, the proposed rule explicitly identifies architectural works as one of the types of work for which only a single copy is required to be deposited under section 202.20(c)(2)(i). This is a technical edit because the current rule already states that only one deposit copy is required. *See* 37 CFR 202.20(c)(2)(xviii).

[3] The list of acceptable file formats is posted on the Office's website at *https://www.copyright.gov/eco/help-file-types.html.*

**Mandatory Deposit Requirements**

To be clear, the proposed rule only applies to copies that are submitted for purposes of registering an architectural work under section 408 of the Copyright Act and sections 202.11 and 202.20 of the Office's regulations. It makes no amendment to the rules regarding copies submitted for the purpose of complying with the mandatory deposit requirement under section 407 of the statute or section 202.19 of the regulations. 37 CFR 202.20(a) (''The provisions of this section are not applicable to the deposit of copies and phonorecords for the Library of Congress under section 407 of title 17, except as expressly adopted in § 202.19.'').

Section 407 states that if a work is published in the United States, the copyright owner or the owner of the exclusive right of publication should deposit two copies of the ''best edition'' of that work with the Library of Congress within three months after publication. 17 U.S.C. 407(a)–(b). Under the current regulations, architects may satisfy this requirement by registering their works with the Office, or by sending copies directly to the Copyright Office's Copyright Acquisitions Division for use or disposition by the Library without seeking a registration. Because the same copies can potentially be used for both registration and mandatory deposit, the deposit requirements for architectural works currently set forth in sections 202.19 and 202.20, are essentially identical and they both refer to physical drawing submissions.

As noted above, the proposed rule would let architects register their works by providing an electronic copy of their drawings, and photographs instead of a physical copy. But to be clear, a digital copy submitted for purposes of registration does not satisfy the mandatory deposit requirement under section 407, which is outlined in 37 CFR 202.19(d)(2)(viii). To satisfy this requirement, architects submitting electronic registration deposits are expected to deposit a physical copy of the most finished form of presentation drawings, as defined in 37 CFR 202.19(d)(2)(viii), within three months after the work has been published in the United States, and if an appropriate deposit is not received within that time frame, the Copyright Acquisitions Division may issue a written demand for that material under section 202.19 of the regulations.

**Technical Amendments**

Finally, the proposed rule codifies the Office's longstanding view that

architectural works are considered ''works of the visual arts'' for purposes of registration, and as such, they may be registered in Class VA. It also improves the organization and readability of the regulation by removing superfluous references and moving the text of two footnotes into the main body of the regulation. *See* 37 CFR 202.11(a), (b)(1).

**List of Subjects in 37 CFR Part 202**

Copyright.

**Proposed Regulations**

For the reasons set forth in the preamble, the Copyright Office is proposing to amend 37 CFR part 202 as follows:

## PART 202—PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT

■ 1. The authority citation for part 202 continues to read as follows:

**Authority:** 17 U.S.C. 408(f), 702.

■ 2. In § 202.3, add a sentence at the end of paragraph (b)(1)(iii) to read as follows:

**§ 202.3 Registration of copyright.**

* * * * *

(b) * * *

(1) * * *

(iii) * * * This class also includes published and unpublished architectural works.

* * * * *

■ 3. Amend § 202.11 as follows:

■ a. Revise paragraph (a).

■ b. Revise paragraphs (b)(1) and (2).

■ c. Remove paragraph (c)(2) and redesignate paragraph (c)(5) as (c)(2).

■ d. Revise paragraphs (c)(3) and (c)(4).

■ e. Add new paragraph (c)(5).

The revisions and additions read as follows:

**§ 202.11 Architectural works.**

(a) *General.* This section prescribes rules pertaining to the registration of architectural works.

(b) *Definitions.* (1) For the purposes of this section, the term *building* means humanly habitable structures that are intended to be both permanent and stationary, such as houses and office buildings, and other permanent and stationary structures designed for human occupancy, including but not limited to churches, museums, gazebos, and garden pavilions.

(2) Unless otherwise specified, all other terms have the meanings set forth in §§ 202.3 and 202.20.

(c) * * *

(3) *Registration limited to one architectural work.* For published and unpublished architectural works, an application may cover only one architectural work. Multiple architectural works may not be registered using one application. For works such as tract housing, one house model constitutes one work, including all accompanying floor plan options, elevations, and styles that are applicable to that particular model. Where dual copyright claims exist in technical drawings and the architectural work depicted in the drawings, any claims with respect to the technical drawings and architectural work must be registered separately.

(4) *Online application.* (i) The applicant must complete and submit the Standard Application. The application should identify the title of the building. If the architectural work was embodied in unpublished plans or drawings on or before December 1, 1990, and if the building was constructed before January 1, 2003, the application should also provide the date that the construction was completed.

(ii) In an exceptional case, the Copyright Office may waive the online filing requirement set forth in paragraph (c)(4)(i) of this section, subject to such conditions as the Associate Register and Director of the Office of Registration Policy and Practice may impose on the applicant.

(5) *Deposit requirements.* (i) For designs of constructed or unconstructed buildings, the applicant must submit one complete copy in a visually perceptible format of the most finished form of an architectural drawing showing the overall form of the building (*i.e.,* exterior elevations of the building when viewed from the front, rear, and sides), and any interior arrangements of spaces and/or design elements in which copyright is claimed (*i.e.,* walls or other permanent structures that divide the interior into separate rooms and spaces). The deposit should disclose the name(s) of the architect(s) and draftsperson(s) and the building site, if known. For designs of constructed buildings, the applicant also must submit identifying material in the form of photographs complying with § 202.21, which clearly show several exterior and interior views of the architectural work being registered.

(ii) The deposit may be submitted in any form that allows the Copyright Office to access, perceive, and examine the entire copyrightable content of the work being registered, including by uploading the complete copy and identifying material in an acceptable file format to the Office's electronic registration system. Deposits uploaded to the electronic registration system will be considered solely for the purpose of registration under section 408 of title 17 of the United States Code, and will not satisfy the mandatory deposit requirement under section 407 of title 17 of the United States Code.

* * * * *

■ 4. Amend § 202.20 as follows:

■ a. Add paragraph (c)(2)(i)(M).

■ b. Remove and reserve paragraph (c)(2)(xviii).

The addition reads as follows:

**§ 202.20 Deposit of copies and phonorecords for copyright registration.**

* * * * *

(c) * * *

(2) * * *

(i) * * *

(M) Architectural works, for which the deposit must comply with the requirements set forth in § 202.11.

* * * * *

Dated: December 19, 2018.

**Regan A. Smith,**

*General Counsel and Associate Register of Copyrights.*

[FR Doc. 2018–27866 Filed 12–21–18; 8:45 am]

BILLING CODE 1410–30–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R01–OAR–2018–0637; FRL–9987–95–Region 1]**

## Air Plan Approval; Maine; Infrastructure State Implementation Plan Requirements for the 2010 Sulfur Dioxide NAAQS

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve elements of the State Implementation Plan (SIP) submission from Maine that addresses the infrastructure and interstate transport requirements of the Clean Air Act (CAA or Act) for the 2010 sulfur dioxide ($SO_2$) National Ambient Air Quality Standards (NAAQS). The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA. This action is being taken under the Clean Air Act.

**DATES:** Written comments must be received on or before January 25, 2019.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R01–OAR–2018–0637 at *https://www.regulations.gov,* or via email to

*dahl.donald@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* Publicly available docket materials are available at *https://www.regulations.gov* or at the U.S. Environmental Protection Agency, EPA Region 1, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Donald Dahl, Air Permits, Toxics, and Indoor Programs Unit, U.S. Environmental Protection Agency, EPA Region 1, 5 Post Office Square—Suite 100, (Mail Code OEP05–2), Boston, MA 02109—3912, tel. (617) 918–1657, email *dahl.donald@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

## Table of Contents

I. Background and Purpose
II. What guidance is EPA using to evaluate this SIP submission?
III. State Submission and EPA's Analysis
A. Section 110(a)(2)(A)—Emission Limits and Other Control Measures
B. Section 110(a)(2)(B)—Ambient Air Quality Monitoring/Data System
C. Section 110(a)(2)(C)—Program for Enforcement of Control Measures and for Construction or Modification of Stationary Sources
1. Sub-Element 1: Enforcement of SIP Measures
2. Sub-Element 2: PSD Program for Major Sources and Major Modifications
3. Sub-Element 3: Preconstruction Permitting for Minor Sources and Minor Modifications
D. Section 110(a)(2)(D)—Interstate Transport
1. Sub-Element 1: Section 110(A)(2)(D)(I)(I)—Contribute to Nonattainment (Prong 1) and Interfere With Maintenance of the NAAQS (Prong 2)
a. State's Analysis
b. EPA's Prong 1 Evaluation
c. EPA's Prong 2 Evaluation
2. Sub-Element 2: Section 110(a)(2)(D)(i)(II)—PSD (prong 3)
3. Sub-Element 3: Section 110(a)(2)(D)(i)(II)—Visibility Protection (Prong 4)
4. Sub-Element 4: Section 110(a)(2)(D)(ii)—Interstate Pollution Abatement
5. Sub-Element 5: Section 110(a)(2)(D)(ii)—International Pollution Abatement
E. Section 110(a)(2)(E)—Adequate Resources
1. Sub-Element 1: Adequate Personnel, Funding, and Legal Authority Under State Law To Carry Out Its SIP, and Related Issues
2. Sub-Element 2: State Board Requirements Under Section 128 of the CAA
F. Section 110(a)(2)(F)—Stationary Source Monitoring System
G. Section 110(a)(2)(G)—Emergency Powers
H. Section 110(a)(2)(H)—Future SIP Revisions
I. Section 110(a)(2)(I)—Nonattainment Area Plan or Plan Revisions Under Part D
J. Section 110(a)(2)(J)—Consultation With Government Officials; Public Notifications; Prevention of Significant Deterioration; Visibility Protection
1. Sub-Element 1: Consultation With Government Officials
2. Sub-Element 2: Public Notification
3. Sub-Element 3: PSD
4. Sub-Element 4: Visibility Protection
K. Section 110(a)(2)(K)—Air Quality Modeling/Data
L. Section 110(a)(2)(L)—Permitting Fees
M. Section 110(a)(2)(M)—Consultation/Participation by Affected Local Entities
IV. Proposed Action
V. Statutory and Executive Order Reviews

## I. Background and Purpose

On April 19, 2017, the Maine Department of Environmental Protection (ME DEP) submitted its infrastructure SIP for the 2010 $SO_2$ NAAQS. Under sections 110(a)(1) and (2) of the CAA, states are required to submit infrastructure SIPs to ensure that SIPs provide for implementation, maintenance, and enforcement of the NAAQS, including the 2010 $SO_2$ NAAQS.

The requirement for states to make a SIP submission of this type arises out of CAA sections 110(a)(1) and 110(a)(2). Pursuant to these sections, each state must submit a SIP that provides for the implementation, maintenance, and enforcement of each primary or secondary NAAQS. States must make such SIP submission ''within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a new or revised NAAQS.'' This requirement is triggered by the promulgation of a new or revised NAAQS and is not conditioned upon EPA's taking any other action. Section 110(a)(2) includes the specific elements that ''each such plan'' must address.

EPA commonly refers to such SIP submissions made for the purpose of satisfying the requirements of CAA sections 110(a)(1) and 110(a)(2) as ''infrastructure SIP'' submissions. Although the term ''infrastructure SIP'' does not appear in the CAA, EPA uses the term to distinguish this particular type of SIP submission from submissions that are intended to satisfy other SIP requirements under the CAA, such as ''nonattainment SIP'' or ''attainment plan SIP'' submissions to address the nonattainment planning requirements of part D of title I of the CAA.

This rulemaking will not cover three substantive areas that are not integral to acting on a state's infrastructure SIP submission: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources (''SSM'' emissions) that may be contrary to the CAA and EPA's policies addressing such excess emissions; (ii) existing provisions related to ''director's variance'' or ''director's discretion'' that purport to permit revisions to SIP-approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (''director's discretion''); and, (iii) existing provisions for Prevention of Significant Deterioration (PSD) programs that may be inconsistent with current requirements of EPA's ''Final New Source Review (NSR) Improvement Rule,'' 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (''NSR Reform''). Instead, EPA has the authority to address each one of these substantive areas separately. A detailed history, interpretation, and rationale for EPA's approach to infrastructure SIP requirements can be found in EPA's May 13, 2014, proposed rule entitled, ''Infrastructure SIP Requirements for the 2008 Lead NAAQS'' in the section, ''What is the

scope of this rulemaking?'' *See* 79 FR 27241 at 27242–45.

## II. What guidance is EPA using to evaluate this SIP submission?

EPA highlighted the statutory requirement to submit infrastructure SIPs within 3 years of promulgation of a new NAAQS in an October 2, 2007, guidance document entitled ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards'' (2007 guidance). EPA has issued additional guidance documents and memoranda, including a September 13, 2013, guidance document entitled ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under CAA Sections 110(a)(1) and 110(a)(2)'' (2013 guidance).[1]

With respect to Section 110(a)(2)(D)(i), sometimes referred to as the Good Neighbor provision, EPA notes that although $SO_2$ is emitted from a similar universe of point and nonpoint sources, interstate transport of $SO_2$ is unlike the transport of fine particulate matter ($PM_{2.5}$) or ozone in that $SO_2$ is not a regional pollutant and does not commonly contribute to widespread nonattainment over a large (and often multi-state) area. The transport of $SO_2$ is more analogous to the transport of lead (Pb) because its physical properties result in localized pollutant impacts very near the emissions source. However, ambient concentrations of $SO_2$ do not decrease as quickly with distance from the source as Pb, because of the physical properties and typical release heights of $SO_2$. Emissions of $SO_2$ travel farther and have wider ranging impacts than emissions of Pb, but do not travel far enough to be treated in a manner similar to ozone or $PM_{2.5}$. The approaches that EPA has adopted for ozone or $PM_{2.5}$ transport are too regionally focused and the approach for Pb transport is too tightly circumscribed to the source. $SO_2$ transport is therefore a unique case and requires a different approach. Given the physical properties of $SO_2$, EPA selected the ''urban scale''—a spatial scale with dimensions from 4 to 50 kilometers (km) from point sources—to evaluate these SIP submissions for $SO_2$ transport.[2] As such, EPA utilized an assessment up to 50 km from point sources when considering possible transport of $SO_2$ from Maine to downwind states.

As discussed in Section III.D of this document, EPA first reviewed ME DEP's analysis to assess how Maine evaluated the transport of $SO_2$ to other states, the types of information used in the analysis and the conclusions drawn by the ME DEP. EPA then conducted a weight of evidence analysis, including ME DEP's submission and other available information, including air quality, emission sources, and emission trends within the state and in neighboring states to which $SO_2$ emission sources in Maine could potentially contribute or interfere.[3]

## III. State Submission and EPA's Analysis

EPA is soliciting comment on our evaluation of ME DEP's infrastructure SIP submission in this notice of proposed rulemaking (NPRM). In ME DEP's submission, a detailed list of Maine Laws and previously SIP-approved Air Quality Regulations show precisely how the various components of its EPA-approved SIP meet each of the requirements of section 110(a)(2) of the CAA for the 2010 $SO_2$ NAAQS. The following review evaluates the state's submissions in light of section 110(a)(2) requirements and relevant EPA guidance.

### *A. Section 110(a)(2)(A)—Emission Limits and Other Control Measures*

This section (also referred to in this action as an element, *e.g.,* Element A) of the Act requires SIPs to include enforceable emission limits and other control measures, means or techniques, schedules for compliance, and other related matters. However, EPA has long interpreted emission limits and control measures for attaining the standards as being due when nonattainment planning requirements are due.[4] In the context of an infrastructure SIP, EPA is not evaluating the existing SIP provisions for this purpose. Instead, EPA is only evaluating whether the state's SIP has basic structural provisions for the implementation of the NAAQS.

ME DEP statutory authority with respect to air quality is set out in 38 Maine Revised Statutes Annotated (''MRSA'') Chapter 4, ''Protection and Improvement of Air.''[5] Statutory authority to establish emission standards and regulations implementing ambient air quality standards is contained in 38 MRSA Chapter 4, sections 585 and 585–A. Maine's infrastructure submittal for this element cites Maine laws and regulations that include enforceable emissions limitations and other control measures, means or techniques, as well as schedules and timetables for compliance to meet the applicable requirements of the CAA. For instance, ME DEP cites 38 MRSA § 603–A, a state law that establishes a statewide sulfur limit of 15 parts per million (ppm) for distillate oil and 0.5% by weight for residual oil. On April 24, 2012, EPA incorporated these statutory limits into Maine's SIP. *See* 77 FR 24385. In addition, ME DEP cited its SIP approved new source review permitting regulation 06–096 CMR Chapter 115, ''Emission License Regulations'' last amended on August 1, 2016. *See* 81 FR 50353.

EPA proposes that Maine meets the infrastructure SIP requirements of section 110(a)(2)(A) with respect to the 2010 $SO_2$ NAAQS. As previously noted, EPA is not proposing to approve or disapprove any existing state provisions or rules related to SSM or director's discretion in the context of section 110(a)(2)(A).

### *B. Section 110(a)(2)(B)—Ambient Air Quality Monitoring/Data System*

This section requires SIPs to provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor, compile, and analyze ambient air quality data, and make such data available to EPA upon request. Each year, states submit annual air monitoring network plans to EPA for review and approval. EPA's review of these annual monitoring plans includes our evaluation of whether the state: (i) Monitors air quality at appropriate locations throughout the state using

[1] This memorandum and other referenced guidance documents and memoranda are included in the docket for today's action.

[2] For the definition of spatial scales for $SO_2$, please see 40 CFR part 58, appendix D, section 4.4 (''Sulfur Dioxide ($SO_2$) Design Criteria''). For further discussion on how EPA is applying these definitions with respect to interstate transport of $SO_2$, see EPA's proposal on Connecticut's $SO_2$ transport SIP. 82 FR 21351, 21352, 21354 (May 8, 2017).

[3] This proposed approval action is based on the information contained in the administrative record for this action, and does not prejudge any other future EPA action that may make other determinations regarding any of the subject states' air quality status. Any such future actions, such as area designations under any NAAQS, will be based on their own administrative records and EPA's analyses of information that has become available at those times. Future available information may include, and is not limited to, monitoring data and modeling analyses conducted pursuant to EPA's $SO_2$ Data Requirements Rule (80 FR 51052, August 21, 2015) and information submitted to EPA by states, air agencies, and third-party stakeholders such as citizen groups and industry representatives.

[4] See, *e.g.,* EPA's final rule on ''National Ambient Air Quality Standards for Lead.'' 73 FR 66964, 67034 (November 12, 2008).

[5] ME DEP consists of the Board of Environmental Protection (''Board'') and a Commissioner. 38 MRSA § 341–A(2). In general, the Board is authorized to promulgate ''major substantive rules'' and the Commissioner has rulemaking authority with respect to rules that are ''not designated as major substantive rules.'' *Id.* § 341–H.

EPA-approved Federal Reference Methods or Federal Equivalent Method monitors; (ii) submits data to EPA's Air Quality System (AQS) in a timely manner; and (iii) provides EPA Regional Offices with prior notification of any planned changes to monitoring sites or the network plan.

Pursuant to authority granted to it by 38 MRSA §§ 341–A(1) and 584–A, ME DEP operates an air quality monitoring network, and EPA approved the state's most recent Annual Air Monitoring Network Plan for $SO_2$ on October 25, 2018.[6] Furthermore, ME DEP populates AQS with air quality monitoring data in a timely manner, and provides EPA with prior notification when considering a change to its monitoring network or plan. EPA proposes that ME DEP meets the infrastructure SIP requirements of section 110(a)(2)(B) with respect to the 2010 $SO_2$ NAAQS.

*C. Section 110(a)(2)(C)—Program for Enforcement of Control Measures and for Construction or Modification of Stationary Sources*

States are required to include a program providing for enforcement of all SIP measures and the regulation of construction of new or modified stationary sources to meet NSR requirements under PSD and nonattainment new source review (NNSR) programs. Part C of the CAA (sections 160–169B) addresses PSD, while part D of the CAA (sections 171–193) addresses NNSR requirements.

The evaluation of each state's submission addressing the infrastructure SIP requirements of section 110(a)(2)(C) covers the following: (i) Enforcement of SIP measures; (ii) PSD program for major sources and major modifications; and (iii) a permit program for minor sources and minor modifications.

1. Sub-Element 1: Enforcement of SIP Measures

ME DEP identifies the sources of its authority to enforce the measures it cites to satisfy Element A as 38 MRSA Section 347–A, ''Violations,'' 38 MRSA Section 347–C, ''Right of inspection and entry,'' 38 MRSA Section 348, ''Judicial Enforcement,'' and 38 MRSA Section 349, ''Penalties,'' which include processes for both civil and criminal enforcement actions. Construction of new or modified stationary sources in Maine is regulated by 06–096 CMR Chapter 115 ''Major and Minor Source Air Emission License Regulations,'' which requires best available control technology (BACT) controls for PSD sources, including for $SO_2$. EPA proposes to find that Maine meets the enforcement requirement of section 110(a)(2)(C) with respect to the 2010 $SO_2$ NAAQS.

2. Sub-Element 2: PSD Program for Major Sources and Major Modifications

PSD applies to new major sources or modifications made to major sources for pollutants where the area in which the source is located is in attainment of, or unclassifiable with regard to the relevant NAAQS. ME DEP's EPA-approved PSD rules, contained at 06–906 CMR Chapter 100 ''Definitions Regulations'' and 06–096 CMR Chapter 115 ''Major and Minor Source Air Emission License Regulations,'' contain provisions that address applicable requirements for all regulated NSR pollutants.

In our proposal on March 26, 2018 regarding the submittal of infrastructure SIPS for the 2008 Pb, 2008 ozone, and 2010 $NO_2$ NAAQS by the ME DEP, we explained how Maine's SIP meets this sub-element for PSD. *See* 83 FR 12905. On June 18, 2018, we took final action approving those multi-pollutant infrastructure SIP submissions, including finding that Maine's SIP satisfies this sub-element. *See* 83 FR 28157. Maine's PSD SIP has not changed since our June 18, 2018 approval, and no new PSD requirements have arisen; therefore, based on our rationale contained in the March 26, 2018 document, EPA proposes to find that Maine has met the PSD requirement of section 110(a)(2)(C) with respect to the 2010 $SO_2$ NAAQS. For the purposes of today's rulemaking on Maine's infrastructure SIP, EPA reiterates that NSR Reform is not in the scope of this action.

3. Sub-Element 3: Preconstruction Permitting for Minor Sources and Minor Modifications

To address the pre-construction regulation of the modification and construction of minor stationary sources and minor modifications of major stationary sources (minor NSR), an infrastructure SIP submission should identify the existing EPA-approved SIP provisions and/or include new provisions that govern the minor source pre-construction program that regulate emissions of the relevant NAAQS pollutants. Maine's minor NSR program is contained within 06–096 CMR Chapter 115, ''Major and Minor Source Air Emission License Regulations.'' EPA last approved revisions to Chapter 115 on August 1, 2016 (81 FR 50353). ME DEP and EPA rely on Chapter 115 to ensure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the 2010 $SO_2$ NAAQS.

We are proposing to find that Maine has met the requirement to have a SIP-approved minor new source review permit program as required under Section 110(a)(2)(C) for the 2010 $SO_2$ NAAQS.

*D. Section 110(a)(2)(D)—Interstate Transport*

Section 110(a)(2)(D) of the CAA contains a comprehensive set of air quality management elements pertaining to the transport of air pollution with which states must comply. It covers the following five topics, categorized as sub-elements: Sub-element 1, Significant contribution to nonattainment and interference with maintenance of a NAAQS; Sub-element 2, PSD; Sub-element 3, Visibility protection; Sub-element 4, Interstate pollution abatement; and Sub-element 5, International pollution abatement. Sub-elements 1 through 3 above are found under section 110(a)(2)(D)(i) of the Act, and these items are further categorized into the four prongs discussed in the following sections, two of which are found within sub-element 1. Sub-elements 4 and 5 are found under section 110(a)(2)(D)(ii) of the Act and include provisions insuring compliance with sections 115 and 126 of the Act relating to interstate and international pollution abatement.

1. Sub-Element 1: Section 110(a)(2)(D)(i)(I)—Contribute to Nonattainment (Prong 1) and Interfere With Maintenance of the NAAQS (Prong 2)

In this section, we provide an overview of Maine's 2010 $SO_2$ transport analysis, as well as EPA's evaluation of prongs 1 and 2. Table 1 shows emission trends for Maine and its neighboring state New Hampshire.[7] The table will be referenced as part of EPA's analysis.[8]

[6] See EPA approval letter located in the docket for this action.

[7] EPA also analyzed potential impacts from Maine sources on Massachusetts, which is on the other side of NH and is approximately 24 km from Maine. There are no sources in Massachusetts within 50 km of Maine that emitted over 100 tons per year of $SO_2$. The closest source in Maine that is over 100 tons per year of $SO_2$ is approximately 95 km away from Massachusetts. Maine sources are not expected to contribute to a nonattainment area within Massachusetts, and we do not foresee any interference with maintenance of the 2010 $SO_2$ NAAQS.

[8] This emissions trends information was derived from EPA's web page *https://www.epa.gov/air-emissions-inventories/air-pollutant-emissions-trends-data,* accessed on November 1, 2018.

TABLE 1—STATEWIDE $SO_2$ DATA FOR MAINE AND NEW HAMPSHIRE

[Tons per year]

| State | 2000 | 2005 | 2010 | 2017 | $SO_2$ reduction, 2000–2017 (%) |
|---|---|---|---|---|---|
| Maine | 57,906 | 32,397 | 17,020 | 10,447 | 82.0 |
| New Hampshire | 68,768 | 63,634 | 35,716 | 6,401 | 90.7 |

a. State's Analysis

In Maine's April 19, 2017 infrastructure SIP submission addressing the 2010 $SO_2$ NAAQS, the state explicitly refers to the interstate transport provision of CAA Section 110(a)(2)(D)(i). In its April 19, 2017 SIP submittal, the ME DEP stated that sources within Maine do not significantly contribute to any monitored $SO_2$ violations in another state. Maine based its assertion on EPA's air quality designations for the 2010 $SO_2$ NAAQS and included a reference to EPA's Round 1 designations. *See* ''*https://www.gpo.gov/fdsys/pkg/FR-2013-08-05/pdf/2013-18835.pdf*'' 78 FR 47191, August 5, 2013. Maine also referenced its PSD permit program, which assists the State in controlling future emissions from new or modified major sources.

The SIP submission addresses prong 1 of Section 110(a)(2)(D)(i) by stating that ''Maine sources do not significantly contribute to any monitored sulfur dioxide violations in other states. . . .'' However, the SIP submission does not appear to specifically address whether Maine interferes with maintenance of the NAAQS in a nearby state (prong 2). On October 29, 2018, Maine submitted a letter to EPA clarifying the State intended to demonstrate in its April 19, 2017 SIP submittal that it does not interfere with maintenance of the NAAQS in other states (prong 2). Therefore, EPA concludes that Maine's submission was intended to address both prongs of the interstate transport provision given that the submission refers to the entirety of CAA section 110(a)(2)(D)(i)(I).

b. EPA's Prong 1 Evaluation

EPA proposes to find that Maine's SIP submittal meets the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I), prong 1 for the 2010 $SO_2$ NAAQS, as discussed below. As described below, we have analyzed the air quality, emission sources and emission trends in Maine and New Hampshire. Based on that analysis, we propose to find that Maine will not significantly contribute to nonattainment of the 2010 $SO_2$ NAAQS in any other state.

We reviewed 2015–2017 $SO_2$ concentrations design values at monitors with data sufficient to produce valid 1-hour $SO_2$ design values for Maine and neighboring states.[9] In Table 2 below, we have included monitoring data satisfying any of the following selection criteria: (1) All of the monitor data from Maine; (2) the monitor with the highest $SO_2$ level in New Hampshire; (3) the monitor in New Hampshire closest to the Maine border; and (4) all monitors in New Hampshire within approximately 50 km of the border. EPA reviewed these ambient air quality data in Maine and New Hampshire to see whether there were any monitoring sites, particularly near the Maine border, with elevated $SO_2$ concentrations that might warrant further investigation with respect to interstate transport of $SO_2$ from emission sources near any given monitor. As shown, there are no violating design values in Maine or New Hampshire.

TABLE 2—$SO_2$ MONITOR VALUES FOR MAINE AND NEW HAMPSHIRE

| State/area | Scenario | Site ID | Approximate distance to Maine/New Hampshire border (km) | 2013–2015 Design value (ppb) | 2014–2016 Design value (ppb) | 2015–2017 Design value (ppb) |
|---|---|---|---|---|---|---|
| Maine/Portland | 1 | 230050029 | 57 | 12 | 11 | 9 |
| Maine/Hancock County | 1 | 230090103 | 219 | 2 | 1 | 1 |
| Maine/Eliot [a] | 1 | 230310009 | ..... | [b] NA | [b] NA | [b] NA |
| New Hampshire/Merrimack County | 4 | 330131006 | 46 | 20 | 20 | 15 |
| New Hampshire/Rockingham County-Pierce Island | 2, 3 | 330150014 | <1 | 29 | 22 | 16 |

a. The Sawgrass Lane monitor collected $SO_2$ concentration data from October 24, 2014 to April 1, 2016. The maximum 1-hour $SO_2$ concentration observed from this monitor was 37.7 parts per billion (ppb) on January 8, 2015, when winds came from the direction of Schiller Station in New Hampshire.

b. The DV for this site is invalid due to incomplete data for this period and is not for use in comparison to the NAAQS.

The data presented in Table 2 show that Maine's network of $SO_2$ monitors with data sufficient to produce valid 1-hour $SO_2$ design values indicates that monitored 1-hour $SO_2$ levels in Maine are between 1% and 12% of the 75 parts per billion (ppb) level of the NAAQS. As shown, there are no Maine monitors located within 50 km of a neighboring state's border. The nearest monitor is approximately 57 km from New Hampshire. Two monitors in New Hampshire are located within 50 km of the Maine border, and these monitors recorded $SO_2$ design values ranging between 20% and 21% of the 2010 $SO_2$ NAAQS. Thus, these air quality data do not, by themselves, indicate any

[9] Data retrieved from *https://www.epa.gov/air-trends/air-quality-design-values#report,* accessed on November 1, 2018.

particular location that would warrant further investigation with respect to $SO_2$ emission sources in Maine that might significantly contribute to nonattainment in the neighboring states. However, because the monitoring network is not necessarily designed to find all locations of high $SO_2$ concentrations, this observation indicates an absence of evidence of impact at these locations but is not sufficient evidence by itself of an absence of impact at all locations in the neighboring states. We have therefore also conducted a source-oriented analysis. As noted, EPA finds that it is appropriate to examine the impacts of emissions from stationary sources in Maine in distances ranging from 0 km to 50 km from the facility, based on the ''urban scale'' definition contained in appendix D to 40 CFR part 58, Section 4.4. The list of Maine sources of 100 tons per year (tpy) or greater of $SO_2$ within 50 km from state borders is shown in Table 3 below.

TABLE 3—MAINE $SO_2$ SOURCES NEAR NEIGHBORING STATES

| Maine source | 2016 $SO_2$ emissions (tons) [a] | Nearest distance to Maine/New Hampshire border | Distance to nearest neighboring state major $SO_2$ source [b] (km) | Nearest neighboring state major source $SO_2$ emissions [c] (tons) |
|---|---|---|---|---|
| Catalyst Paper Operations, Inc. in Rumford. | 846 | 38 | 168 (Dartmouth College in Hanover, NH). | 246 (Dartmouth College). |
| S.D. Warren Company in Westbrook. | 198 | 50 | 74 (Newington Station and Schiller Station in Newington and Portsmouth, NH, respectively). | 304 total (Newington Station (41) and Schiller Station (263)). |

a. *See https://www.maine.gov/dep/ftp/AIR/DATA/CAP_SUMMARIES/,* accessed on November 1, 2018.
b. A source emitting 100 tons per year (tpy) or greater of $SO_2$ emissions.
c. Emission data from Dartmouth College are for the year 2014. Emission data for Schiller and Newington Station are for the year 2017.

Table 3 identifies the nearest out-of-state source emitting above 100 tpy of $SO_2$, because elevated levels of $SO_2$, to which $SO_2$ emitted in Maine may have a downwind impact, are most likely to be found near such sources. The distances to these sources are listed because the impact of the sources in Maine decreases with distance. In the case of Catalyst Paper, the distance between this source and the Maine/New Hampshire state border is 38 km and the nearest major $SO_2$ source in neighboring state New Hampshire is 168 km. With regards to S.D. Warren, the distance between this source and the Maine/New Hampshire state border is 50 km and the nearest major $SO_2$ sources in neighboring state New Hampshire is 74 km. This information indicates that emissions from Maine are very unlikely to contribute significantly to problems with attainment of the 2010 $SO_2$ NAAQS in New Hampshire.

EPA also reviewed the location of sources in New Hampshire emitting more than 100 tpy of $SO_2$ and located within 50 km of the Maine border and found that the only sources that meet these criteria are Schiller and Newington Stations. The interaction between these sources and sources in Maine has been addressed in the discussion of Table 3.

In addition to analyzing the distances between sources emitting 100 tons per year of $SO_2$, EPA acknowledges that New Hampshire, as required by the 40 CFR part 51, subpart BB ($SO_2$ Data Requirements Rule), provided air quality modeling information. The New Hampshire modeling indicated that emissions allowed under new, federally-enforceable emissions limits included in state air permits for Newington and Schiller Stations and emissions from some other sources that were explicitly represented in the modeling, combined with a representative background concentration that reflects the impact of sources that were not explicitly represented in the modeling, would not result in a violation of the NAAQS in the portions of New Hampshire, Maine, and Massachusetts that were included in the modeling domain.[10] Given that there are no NAAQS violations within the modeling domain, we conclude that sources in Maine are not significantly contributing to NAAQS violations in the New Hampshire or Massachusetts portion of the domain. In addition, the modeling provided no suggestion that violations are occurring beyond the edge of the modeling domain.

EPA also analyzed whether any sources within Maine are significantly contributing to violations in the Central New Hampshire nonattainment area. The Central New Hampshire nonattainment area is approximately 20 km from the Maine state border. The nearest Maine source with $SO_2$ emissions greater than 100 tpy is in Westbrook Maine, approximately 82 km away. In its attainment plan for the Central New Hampshire nonattainment area, New Hampshire included air dispersion modeling to establish federally enforceable $SO_2$ emission limits for Merrimack Station in Bow, New Hampshire, the main contributor to the nonattainment area. New Hampshire demonstrated that with these emission limits in place there will be no NAAQS violations within the nonattainment area. *See* 82 FR 45242 (September 28, 2017).[11] As already noted, recent monitoring data from 2013–2017 indicates no NAAQS violations within the nonattainment area. Thus, we propose to conclude that sources in Maine are not significantly contributing to NAAQS violations in the nonattainment area.

Given the localized range of potential 1-hour $SO_2$ impacts and the analysis of sources emitting at least 100 tpy of $SO_2$, along with modeling analysis provided to EPA for other CAA purposes, EPA proposes to conclude that $SO_2$ emissions from Maine will not will not contribute significantly to nonattainment of the $SO_2$ NAAQS in New Hampshire and Massachusetts.

c. EPA's Prong 2 Evaluation

Prong 2 of the good neighbor provision requires state plans to

[10] A detailed description of EPA's assessment of the modeling, and associated visualizations, are available in Chapter 27 of the Technical Support Document for EPA's Intended Round 3 Area Designations for the 2010 1-Hour $SO_2$ Primary National Ambient Air Quality Standard for New Hampshire, included in this docket, number EPA–R01–OAR–2018–0637. *See* 82 FR 41903 (September 5, 2017). In referencing EPA's Intended Round 3 Area Designations, EPA is not reopening the $SO_2$ area designations action. A notice of the final rule for these designations was published on January 9, 2018. *See* 83 FR 1098.

[11] In referencing EPA's approval of New Hampshire's plan and attainment demonstration for the Central New Hampshire Nonattainment Area, EPA is not reopening the nonattainment area plan approval action. A notice of the final rule for the plan approval was published on June 5, 2018. *See* 83 FR 25922.

prohibit emissions that will interfere with maintenance of a NAAQS in another state. Given the trend of decreased emissions from sources within Maine to date, as shown in Table 1, and our conclusion that there are no current violations of the $SO_2$ NAAQS in the portions of the neighboring states that are near Maine, EPA believes that a reasonable analysis of whether sources or other emissions activity originating within Maine interfere with its neighboring states' ability to maintain the NAAQS consists of evaluating whether these decreases in emissions can be maintained over time.

As shown in Table 4, the combined $SO_2$ emissions from the two largest categories, Fuel Combustion: Other category (home heating oil) and Fuel Combustion: Industrial, was 79% of total $SO_2$ state-wide emissions.

TABLE 4—SUMMARY OF 2014 NATIONAL EMISSIONS INVENTORY (NEI) $SO_2$ DATA FOR MAINE

| Category | Emissions (tons per year) |
|---|---|
| Fuel Combustion: Electric Utilities | 928 |
| Fuel Combustion: Industrial | 4,042 |
| Fuel Combustion: Other | 4,842 |
| Waste Disposal and Recycling | 627 |
| Other Industrial Process | 433 |
| Highway Vehicles | 152 |
| Off-Highway | 197 |
| Miscellaneous | 40 |
| Petroleum & Related Industries | 19 |
| Total | 11,280 |

When compared to the year 2014, the $SO_2$ emissions from both households and industrial sources are expected to be significantly reduced [12] due to 38 MRSA Chapter 603–A, which established, effective as of January 1, 2018, statewide sulfur limits of 15 parts per million (ppm) for distillate oil and 0.5% by weight for residual oil. As stated earlier, EPA incorporated this statute into Maine's SIP on April 24, 2012. *See* 77 FR 24385.

As shown in Table 1, statewide $SO_2$ emissions in Maine have decreased over time. A number of factors are involved that caused this decrease in emissions, including the State's adoption of 38 MRSA Chapter 603–A and the change in capacity factors at EGUs in Maine over time due to increased usage of natural gas to generate electricity in the region. Actual $SO_2$ emissions from the facilities currently operating in Maine have decreased between 2000 and 2017, and EPA concludes based on this trend that emissions originating in Maine are not expected to interfere with the neighboring states' ability to maintain the 2010 $SO_2$ NAAQS.

Lastly, any new or modified major sources of $SO_2$ emissions will be addressed by Maine's SIP-approved Prevention of Significant Deterioration (PSD) program, last amended on August 1, 2016. *See* 81 FR 50353. Future minor sources of $SO_2$ emissions will be addressed by the State's minor new source review permit program, last amended on March 23, 1993. *See* 58 FR 15430. The permitting regulations contained within these programs, along with the other factors already discussed, are expected to help ensure that ambient concentrations of $SO_2$ in neighboring states will not exceed the NAAQS as a result of new facility construction or modification occurring in Maine.

It is also worth noting air quality trends for concentrations of $SO_2$ in the Northeastern United States.[13] This region has experienced an 84% decrease in the annual 99th percentile of daily maximum 1-hour averages between 2000 and 2017 based on 40 monitoring sites, and the most recently available data for 2017 indicates that the mean value at these sites was 12.9 ppb, which is less than 18% of the NAAQS. When this trend is evaluated alongside the monitored $SO_2$ concentrations within Maine as well as the $SO_2$ concentrations recorded at monitors in New Hampshire, EPA does not believe that sources or emissions activity from within Maine are significantly different than the overall decreasing monitored $SO_2$ concentration trend in the Northeast region. As a result, EPA finds it unlikely that sources or emissions activity from within Maine will interfere with other states' ability to maintain the 2010 primary $SO_2$ NAAQS.

Based on each of factors contained in the prong 2 maintenance analysis above, EPA proposes to find that sources or other emissions activity within Maine will not interfere with maintenance of the 2010 primary $SO_2$ NAAQS in any other state.

2. Sub-Element 2: Section 110(a)(2)(D)(i)(II)—PSD (Prong 3)

To prevent significant deterioration of air quality, this sub-element requires SIPs to include provisions that prohibit any source or other type of emissions activity in one state from interfering with measures that are required in any other state's SIP under Part C of the CAA. One way for a state to meet this requirement, specifically with respect to in-state sources and pollutants that are subject to PSD permitting, is through a comprehensive PSD permitting program that applies to all regulated NSR pollutants and that satisfies the requirements of EPA's PSD implementation rules. For in-state sources not subject to PSD, this requirement can be satisfied through a fully-approved NNSR program with respect to any previous NAAQS. EPA last approved revisions to Maine's NNSR regulations on February 14, 1996 (61 FR 5690).

To meet the requirements of Prong 3, ME DEP cites to its PSD permitting programs under 06–096 CMR Chapter 115, ''Major and Minor Source Air Emission License Regulations,'' to ensure that new and modified major sources of emissions do not contribute significantly to nonattainment, or interfere with maintenance, of any NAAQS. As noted above in our discussion of Element C, Maine's PSD program fully satisfies the requirements of EPA's PSD implementation rules. Consequently, we propose to approve Maine's infrastructure SIP submission for the 2010 $SO_2$ NAAQS related to section 110(a)(2)(D)(i)(II) Prong 3 for the reasons cited under Element C.

3. Sub-Element 3: Section 110(a)(2)(D)(i)(II)—Visibility Protection (Prong 4)

Prong 4 requires a state's SIP to have adequate provisions prohibiting emissions in amounts that will interfere with measures in other states' SIPs to protect visibility. The prong 4 requirement is closely connected to the regional haze program under part C of the CAA, in which states work together in a regional planning process to determine each state's contribution to the visibility impairment in that region and agree to emission reduction measures to improve visibility. Maine is a member of the Mid-Atlantic/North East Visibility Union. EPA regulations require that a state participating in a regional planning process include in its regional haze SIP all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process. *See, e.g.,* 40 CFR 51.308(d)(3). Thus, a fully approved regional haze SIP meeting the requirements of 40 CFR 51.308 will ensure that emissions from sources under an air agency's jurisdiction are not interfering with measures required to be included in other air agencies'

[12] The State statute required that most industrial sources that combust fuel oil to lower the sulfur content from 2% to 0.5%, a 75% reduction. The statute requires distillate oil, mainly used in homes, to be reduced from home heating oil went from 5,000 ppm to 15 ppm by weight, a 99% reduction.

[13] *See https://www.epa.gov/air-trends/sulfur-dioxide-trends,* accessed on November 1, 2018.

plans to protect visibility and will, therefore, satisfy Prong 4. EPA approved Maine's Regional Haze SIP on April 24, 2012 (77 FR 24385). Accordingly, EPA proposes that Maine meets the visibility protection requirements of 110(a)(2)(D)(i)(II) for the 2010 $SO_2$ NAAQS.

4. Sub-Element 4: Section 110(a)(2)(D)(ii)—Interstate Pollution Abatement

This sub-element requires each SIP to contain provisions requiring compliance with requirements of section 126 relating to interstate pollution abatement. Section 126(a) requires new or modified sources to notify neighboring states of potential impacts from the source. The statute does not specify the method by which the source should provide the notification. States with SIP-approved PSD programs must have a provision requiring such notification by new or modified sources.

EPA-approved regulations require the ME DEP to provide pre-construction notice of new or modified sources to, among others, ''any State . . . whose lands may be affected by emissions from the source or modification.'' *See* 06–096 CMR Chapter 115, § IX(E)(3), approved March 23, 1993 (58 FR 15422). These provisions are consistent with EPA's PSD regulations and require notice to affected states of a determination to issue a draft PSD permit. Regarding section 126(b), no source or sources within the state are the subject of an active finding with respect to the 2010 $SO_2$ NAAQS. Consequently, EPA proposes to approve Maine's infrastructure SIP submittals for this sub-element with respect to the 2010 $SO_2$ NAAQS.

5. Sub-Element 5: Section 110(a)(2)(D)(ii)—International Pollution Abatement

This sub-element requires each SIP to contain provisions requiring compliance with the applicable requirements of CAA section 115 relating to international pollution abatement. There are no final findings under section 115 against Maine with respect to the 2010 $SO_2$ NAAQS. Therefore, EPA proposes to find that Maine meets the applicable infrastructure SIP requirements of section 110(a)(2)(D)(ii) related to section 115 for the 2010 $SO_2$ NAAQS.

*E. Section 110(a)(2)(E)—Adequate Resources*

This section requires each state to provide for personnel, funding, and legal authority under state law to carry out its SIP and related issues. In addition, Section 110(a)(2)(E)(ii) requires each state to comply with the requirements with respect to state boards under section 128. Finally, section 110(a)(2)(E)(iii) requires that, where a state relies upon local or regional governments or agencies for the implementation of its SIP provisions, the state retain responsibility for ensuring implementation of SIP obligations with respect to relevant NAAQS. This last sub-element, however, is inapplicable to this action, because Maine does not rely upon local or regional governments or agencies for the implementation of its SIP provisions.

1. Sub-Element 1: Adequate Personnel, Funding, and Legal Authority Under State Law to Carry out its Sip, And Related Issues

Maine, through its infrastructure SIP submittal, has documented that its air agency has authority and resources to carry out its SIP obligations. Maine cites to 38 MRSA § 341–A, ''Department of Environmental Protection,'' 38 MRSA § 341–D, ''Board responsibilities and duties,'' 38 MRSA § 341–H, ''Departmental rulemaking,'' 38 MRSA § 342, ''Commissioner, duties,'' and 38 MRSA § 581, ''Declaration of findings and intent.'' These statutes provide the ME DEP with the legal authority to enforce air pollution control requirements and carry out SIP obligations with respect to the 2010 $SO_2$ NAAQS. Additionally, state law provides ME DEP with the authority to assess preconstruction permit fees and annual operating permit fees from air emissions sources and establishes a general revenue reserve account within the general fund to finance the state clean air programs. Maine also receives CAA sections 103 and 105 grant funds through Performance Partnership Grants along with required state-matching funds to provide funding necessary to carry out SIP requirements. The ME DEP states that these funding sources provide it with adequate resources to carry out the SIP. Therefore, EPA proposes to find that Maine meets the infrastructure SIP requirements of this portion of section 110(a)(2)(E) with respect to the 2010 $SO_2$ NAAQS.

2. Sub-Element 2: State Board Requirements Under Section 128 of the CAA

Section 110(a)(2)(E) also requires each SIP to contain provisions that comply with the state board requirements of section 128 of the CAA. Section 128(a) contains two explicit requirements: (1) That any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits and enforcement orders under this chapter, and (2) that any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.

As mentioned earlier, the ME DEP consists of a Commissioner and a Board of Environmental Protection (''BEP'' or ''Board''), which is an independent authority under state law that reviews certain permit applications in the first instance and also renders final decisions on appeals of permitting actions taken by the Commissioner as well as some enforcement decisions by the Commissioner. Because the Board has authority under state law to hear appeals of some CAA permits and enforcement orders, EPA considers that the Board has authority to ''approve'' those permits or enforcement orders, as recommended in the 2013 Guidance. For this reason, and because the Board also issues some permits directly, the requirement of CAA section 128(a)(1) applies to Maine—that is, that ''any board or body which approves permits or enforcement orders members who represent the public interest and do not derive any significant portion of their income from persons subject to permits and enforcement orders under this chapter.''

Pursuant to state law, the BEP consists of seven members appointed by the Governor, subject to confirmation by the State Legislature. *See* 38 MRSA § 341–C(1). The purpose of the Board ''is to provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws relating to environmental protection and to provide for credible, fair and responsible public participation in department decisions.'' *Id.* § 341–B. State law further provides that Board members ''must be chosen to represent the broadest possible interest and experience that can be brought to bear on the administration and implementation of'' Maine's environmental laws and that ''[a]t least 3 members must have technical or scientific backgrounds in environmental issues and no more than 4 members may be residents of the same congressional district.'' *Id.* § 341–C(2). EPA proposes to find that these provisions fulfill the requirement that at least a majority of Board members represent the public interest, but do not address the requirement that at least a majority ''not derive any significant portion of their

income from persons subject to'' air permits and enforcement orders. Furthermore, section 341–C is not currently in Maine's SIP. In a letter dated March 1, 2018 (extended to pertain to the 2012 $SO_2$ NAAQS in a letter dated October 29, 2018), the ME DEP committed to revise section 341–C to address the CAA section 128(a)(1) requirement that at least a majority of Board members ''not derive a significant portion of their income from persons subject to'' air permits or enforcement orders and to submit, for inclusion in the SIP, the necessary provisions to EPA within one year of EPA final action on its infrastructure SIPs for the 2008 lead (Pb), 2008 ozone, and 2010 nitrogen dioxide ($NO_2$) NAAQS. Final action on these SIPs was published on June 18, 2018 (83 FR 28157). Consequently, EPA proposes to conditionally approve Maine's infrastructure SIP submittal for this requirement of CAA section 128(a)(1) for the 2010 $SO_2$ NAAQS.

As noted above, section 128(a)(2) of the Act provides that ''any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.'' As EPA has explained in other infrastructure SIP actions, the purpose of section 128(a)(2) is to assure that conflicts of interest are disclosed by the ultimate decision maker in permit or enforcement order decisions. *See, e.g.,* 80 FR 42446, 42454 (July 17, 2015). Although the Board is the ultimate decision maker on air permitting decisions in Maine, certain air enforcement orders of the DEP Commissioner are not reviewable by the Board, but rather may be appealed directly to Maine Superior Court. For this reason, EPA interprets the conflict of interest requirement of CAA section 128(a)(2) to be applicable in Maine to both Board members and the DEP Commissioner.

In a recent infrastructure SIP action for the 2008 Pb, 2008 ozone, and 2010 $NO_2$ NAAQS, EPA determined that Maine's conflict of interest statute, 5 MRSA § 18, and a provision explicitly making it applicable to Board members, 38 MRSA § 341–C(7), together satisfy the CAA section 128(a)(2) requirement for Maine with respect to Board members, and EPA approved both statutes into the Maine SIP. *See* 83 FR 28157 (June 18, 2018). For more information, *see* 83 FR 12905, 12912 (March 26, 2018). EPA proposes to find that Maine's SIP also satisfies CAA section 128(a)(2) with respect to Board members for the 2010 $SO_2$ NAAQS for the same reasons.

Regarding the DEP Commissioner, state law at 38 MRSA § 341–A(3)(D) also explicitly makes that official subject to 5 MRSA § 18, the same conflict-of-interest statute to which the Board is subject. In the above-referenced multi pollutant infrastructure SIP action, EPA determined that 5 MRSA § 18, which is in the Maine SIP, and 38 MRSA § 341–A(3)(D), which is not currently in the SIP, together satisfy the conflict of interest requirement with respect to the DEP Commissioner. *See* 83 FR 28157 (June 18, 2018); 83 FR 12905, 12912 (March 26, 2018). While 38 MRSA § 341–A(3)(D) is not currently in the SIP, ME DEP has already committed to submitting it to EPA for inclusion within one year of EPA's final action on Maine's infrastructure SIP submissions for the 2008 Pb, 2008 ozone, and 2010 $NO_2$ NAAQS. *See* 83 FR 28157 (June 18, 2018). Consequently, EPA proposes to conditionally approve Maine's infrastructure SIP submissions for the conflict of interest requirement of CAA section 128(a)(2) with respect to the DEP Commissioner for the 2010 $SO_2$ NAAQS.

*F. Section 110(a)(2)(F)—Stationary Source Monitoring System*

States must establish a system to monitor emissions from stationary sources and submit periodic emissions reports. Each plan shall also require the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources. The state plan shall also require periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and correlation of such reports by each state agency with any emission limitations or standards. Lastly, the reports shall be available at reasonable times for public inspection.

Maine's infrastructure submittal references existing state regulations previously approved by EPA that require sources to monitor emissions and submit reports. First, Maine references 06–096 CMR Chapter 115, ''Major and Minor Source Air Emission License Regulations.'' This regulation contains compliance assurance requirements regarding emissions monitoring and reporting for licensed sources.

Maine also references 06–096 CMR Chapter 117, ''Source Surveillance,'' which specifies air emission sources required to install, calibrate, maintain, and operate continuous emission monitoring systems (CEMS) and to submit periodic reports to EPA. Chapter 137 was approved into the SIP by EPA on March 21, 1989 (54 FR 11524).

In addition, Maine's emission statement rule, at 06–096 CMR Chapter 137, requires certain facilities to report emissions of air pollutants on an annual basis. EPA most recently approved revisions to Chapter 137 into the SIP on November 21, 2007. *See* 73 FR 65462. We further note that 38 MRSA § 347–C, ''Right of inspection and entry,'' (referenced in ME DEP's submission with respect to enforcement under element C) authorizes ME DEP to inspect facilities, take samples, inspect records, and conduct tests as appropriate to determine compliance with permits, orders, regulations, and laws. Finally, by letter dated March 1, 2018 (extended to pertain to the 2010 $SO_2$ NAAQS in a letter dated October 29, 2018), ME DEP also certified that there are no provisions in Maine law that would prevent the use of any credible evidence of noncompliance, as required by 40 CFR 51.212.

Regarding the section 110(a)(2)(F)(iii) requirements that the SIP provide for the correlation and public availability of emission reports, the ME DEP uses a web-based electronic reporting system, the Maine Air Emissions Inventory Reporting System (''MAIRIS''), for this purpose that allows it to package and electronically submit reported emissions data to EPA under the national emission inventory (NEI) program. NEI data are available to the public.[14] The MAIRIS system is structured to electronically correlate reported emissions with permit conditions and other applicable standards and identify all inconsistencies and potential compliance concerns.

Pursuant to ME DEP's EPA-approved regulations, ''Except as expressly made confidential by law; the commissioner shall make all documents available to the public for inspection and copying including the following: 1. All applications or other forms and documents submitted in support of any license application: 2. All correspondence, into or out of the Department, and any attachments thereto. . . .'' *See* 06–096 CMR Chapter 1, § 6(A). Furthermore, ''The Commissioner shall keep confidential only those documents which may remain confidential pursuant to 1 MRSA Section 402.'' *Id.* § 6(B). We also note that the Maine Freedom of Access Law does not expressly make emissions statements confidential, 1 MRSA § 402, and that, pursuant to ME DEP's EPA-approved regulations, ''[i]nformation concerning the nature and extent of the

[14] *See www.epa.gov/air-emissions-inventories/national-emissions-inventory-nei.*

emissions of any air contaminant by a source''—which includes emission reports—''shall not be confidential.'' *See* 06–096 CMR Chapter 115, § IX(B)(1). By letter dated March 1, 2018, extended to pertain to the 2010 $SO_2$ NAAQS in a letter dated October 29, 2018, Maine further certified that Maine's Freedom of Access law does not include any exceptions that apply to stationary source emissions.

For the above reasons, EPA proposes to approve Maine's submittals for the requirements of section 110(a)(2)(F) for the 2010 $SO_2$ NAAQS.

*G. Section 110(a)(2)(G)—Emergency Powers*

This section requires that a plan provide for state authority comparable to that provided to the EPA Administrator in section 303 of the CAA, and adequate contingency plans to implement such authority. Section 303 of the CAA provides authority to the EPA Administrator to seek a court order to restrain any source from causing or contributing to emissions that present an ''imminent and substantial endangerment to public health or welfare, or the environment.'' Section 303 further authorizes the Administrator to issue ''such orders as may be necessary to protect public health or welfare or the environment'' in the event that ''it is not practicable to assure prompt protection . . . by commencement of such civil action.''

We propose to find that a combination of state statutes and regulations discussed in ME DEP's April 19, 2017 submittal and a March 1, 2018 letter (extended to apply to the 2010 $SO_2$ NAAQS in a letter dated October 29, 2018) provides for authority comparable to that in CAA section 303. The statutes and regulations are: 38 MRSA § 347–A, ''Emergency Orders,'' 38 MRSA § 348, ''Judicial Enforcement,'' 37–B MRSA § 742, ''Emergency Proclamation,'' 38 MRSA § 591, ''Prohibitions,'' and 06–096 CMR Chapter 109, ''Emergency Episode Regulations.'' In our proposal to approve this requirement for Maine's 2012 $PM_{2.5}$ infrastructure SIP submission, we explained how this combination of authorities provides ME DEP with authority comparable to that in CAA section 303. *See* 83 FR 39957, 39966–39967 (August 13, 2018). These statutes and the regulation apply in the same manner to $SO_2$ emissions as they do to particulate matter emissions. Accordingly, for the reasons contained in our proposal to approve this element for the 2012 $PM_{2.5}$ infrastructure SIP, we propose to find that this combination of state statutes and regulations provide for authority comparable to that in CAA section 303 for the 2010 $SO_2$ infrastructure SIP.

Section 110(a)(2)(G) also requires that, for any NAAQS, states have an approved contingency plan for any Air Quality Control Region (AQCR) within the state that is classified as Priority I, IA, or II. *See* 40 CFR 51.152(c). As relevant to this proposed rulemaking action, three of the five AQCRs in Maine are classified as IA or II for sulfur oxides ($SO_X$). *See* 40 CFR 52.1021. Consequently, Maine's SIP must contain an emergency contingency plan meeting the specific requirements of 40 CFR 51.151 and 51.152 with respect to $SO_X$.

Maine's submittal cites to 06–096 CMR Chapter 109, ''Emergency Episode Regulations,'' which specifies episode criteria for, and emission control measures to be implemented during, air pollution alerts, warnings, and emergencies to prevent ambient pollution concentrations from reaching significant harm levels (*see* 40 CFR 51.152(a)(1), (3)), and is very closely modeled on EPA's example regulations for contingency plans at 40 CFR part 51, appendix L. EPA last approved C06–096 CMR Chapter 109 into Maine's SIP in 1995. *See* 60 FR 2885 (January 12, 1995). As stated in Maine's infrastructure SIP submittal under the discussion of public notification (Element J), Maine also, as a matter of practice, posts on the internet daily air quality forecasts to the public levels through the EPA AirNow and EPA EnviroFlash systems. Information regarding these two systems is available on EPA's website at *www.airnow.gov.* Maine's participation in the AirNow and EnviroFlash programs addresses several of the public announcement and communications procedures and coordination with the National Weather Service included in the discussion of contingency plans in subpart H. *See* 40 CFR 51.152(a)(2), (b)(1), (b)(3).

In addition, 38 MRSA § 347–C, ''Right of inspection and entry,'' which ME DEP cites under Element C of its infrastructure SIP submittal, provides employees and agents of the ME DEP the authority to inspect sources of air pollution to determine compliance with laws administered by ME DEP. Thus, this authority allows the ME DEP to conduct the inspection of sources to ascertain compliance with any required emission control actions in accordance with 40 CFR 51.152(b)(2).

Therefore, EPA proposes that Maine, through the combination of statutes and regulations discussed above and participation in EPA's AirNow program, meets the applicable infrastructure SIP requirements of section 110(a)(2)(G) with respect to the 2010 $SO_2$ NAAQS.

*H. Section 110(a)(2)(H)—Future SIP Revisions*

This section requires that a state's SIP provide for revision from time to time as may be necessary to take into account changes in the NAAQS or availability of improved methods for attaining the NAAQS and whenever EPA finds that the SIP is substantially inadequate.

To address this requirement, Maine's infrastructure submittal references 38 MRSA § 581, ''Declaration of findings and intent,'' which characterizes the state's laws regarding the Protection and Improvement of Air as an exercise of ''the police power of the State in a coordinated state-wide program to control present and future sources of emission of air contaminants to the end that air polluting activities of every type shall be regulated in a manner that reasonably insures the continued health, safety and general welfare of all of the citizens of the State; protects property values and protects plant and animal life.'' In addition, we note that ME DEP is required by statute to ''prevent, abate and control the pollution of the air [, to] preserve, improve and prevent diminution of the natural environment of the State [, and to] protect and enhance the public's right to use and enjoy the State's natural resources.'' *See* 38 MRSA § 341–A(1). Furthermore, ME DEP is authorized to ''adopt, amend or repeal rules and emergency rules necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering.'' *Id.* § 341–H(2); *see also id.* § 585–A (recognizing DEP's rulemaking authority to propose SIP revisions). These general authorizing statutes give ME DEP the power to revise the Maine SIP from time to time as may be necessary to take account of changes in the NAAQS or availability of improved methods for attaining the NAAQS and whenever EPA finds that the SIP is substantially inadequate.

Consequently, EPA proposes to find that Maine meets the infrastructure SIP requirements of CAA section 110(a)(2)(H) for the 2010 $SO_2$ NAAQS.

*I. Section 110(a)(2)(I)—Nonattainment Area Plan or Plan Revisions Under Part D*

The CAA requires that each plan or plan revision for an area designated as a nonattainment area meet the applicable requirements of part D of the CAA. Part D relates to nonattainment areas. EPA has determined that section 110(a)(2)(I) is not applicable to the infrastructure SIP process. Instead, EPA

takes action on part D attainment plans through separate processes.

*J. Section 110(a)(2)(J)—Consultation With Government Officials; Public Notifications; Prevention of Significant Deterioration; Visibility Protection*

The evaluation of the submission from Maine with respect to the requirements of CAA Section 110(a)(2)(J) is described in the following sections.

1. Sub-Element 1: Consultation With Government Officials

States must provide a process for consultation with local governments and Federal Land Managers (FLMs) in carrying out NAAQS implementation requirements.

In a March 26, 2018, NPRM regarding infrastructure SIPs for the 2008 Pb, 2008 ozone, and 2010 $NO_2$ NAAQS, we explained how Maine satisfies this requirement. *See* 83 FR 12905. On June 18, 2018, we took final action approving those multi-pollutant infrastructure SIP submissions, including finding that Maine's SIP satisfies this sub-element. *See* 83 FR 28157. Based on the rationale contained in the March 26, 2018 document, EPA proposes that Maine meets this infrastructure SIP requirement with respect to the 2010 $SO_2$ NAAQS.

2. Sub-Element 2: Public Notification

Section 110(a)(2)(J) also requires states to notify the public if NAAQS are exceeded in an area, advise the public of health hazards associated with exceedances, and enhance public awareness of measures that can be taken to prevent exceedances and of ways in which the public can participate in regulatory and other efforts to improve air quality.

As mentioned elsewhere in this document, state law directs ME DEP to, among other things, ''prevent, abate and control the pollution of the air . . . improve and prevent diminution of the natural environment of the State[, and] protect and enhance the public's right to use and enjoy the State's natural resources.'' *See* 38 MRSA § 341–A(1). State law also authorizes ME DEP to ''educate the public on natural resource use, requirements and issues.'' *Id.* To that end, ME DEP makes real-time and historical air quality information available on its website.

Maine also provides extended-range air-quality forecasts, which give the public advanced notice of air quality events. This advance NPRM allows the public to limit their exposure to unhealthy air and enact a plan to reduce pollution at home and at work. The ME DEP forecasts daily ozone and particle levels and issues these forecasts to the media and to the public via its website, telephone hotline, and email. Alerts include information about the health implications of elevated pollutant levels and list actions to reduce emissions and to reduce the public's exposure. In addition, Air Quality Data Summaries of the year's air-quality monitoring results are issued annually and posted on the ME DEP Bureau of Air Quality website. Maine is also an active partner in EPA's AirNow and EnviroFlash air quality alert programs.

EPA proposes that Maine meets the infrastructure SIP requirements of this portion of section 110(a)(2)(J) with respect to the 2010 $SO_2$ NAAQS.

3. Sub-Element 3: PSD

State plans must meet the applicable requirements of part C of the CAA related to PSD. Maine's PSD program in the context of infrastructure SIPs has already been discussed in sections 110(a)(2)(C) and 110(a)(2)(D)(i)(II) and, as we have noted, fully satisfies the requirements of EPA's PSD implementation rules. Consequently, we propose to approve the PSD sub-element of section 110(a)(2)(J) for the 2010 $SO_2$ NAAQS, consistent with the actions we are proposing for sections 110(a)(2)(C) and 110(a)(2)(D)(i)(II).

4. Sub-Element 4: Visibility Protection

With regard to the applicable requirements for visibility protection, states are subject to visibility and regional haze program requirements under part C of the CAA, which includes sections 169A and 169B. In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus, as noted in EPA's 2013 Guidance, we find that there is no new visibility obligation ''triggered'' under section 110(a)(2)(J) when a new NAAQS becomes effective. In other words, the visibility protection requirements of section 110(a)(2)(J) are not germane to infrastructure SIP submissions.

*K. Section 110(a)(2)(K)—Air Quality Modeling/Data*

Section 110(a)(2)(K) of the Act requires that a SIP provide for the performance of such air quality modeling as the EPA Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which EPA has established a NAAQS, and the submission, upon request, of data related to such air quality modeling. EPA has published modeling guidelines at 40 CFR part 51, appendix W, for predicting the effects of emissions of criteria pollutants on ambient air quality. EPA has interpreted section 110(a)(2)(K) to require a state to submit or reference the statutory or regulatory provisions that provide the air agency with the authority to conduct such air quality modeling and to provide such modeling data to EPA upon request. *See* 2013 Guidance at 55.

Maine state law implicitly authorizes ME DEP to perform air quality modeling and provide such modeling data to EPA upon request. *See* 38 MRSA §§ 341–A(1), 581, 591–B. In addition, Maine cites 06–096 CMR Chapters 115 and 140, which provide that any modeling required for pre-construction permits and operating permits for minor and major sources be performed consistent with EPA-prescribed modeling guidelines at 40 CFR part 51, appendix W. Chapter 115 also requires that applicants submit data related to modeling to ME DEP. *See* 06–096 CMR chapter 115, section VII.E. Consequently, the SIP provides for such air quality modeling as the Administrator has prescribed and for the submission, upon request, of data related to such modeling.

EPA proposes to find that Maine meets the infrastructure SIP requirements of section 110(a)(2)(K) with respect to the 2010 $SO_2$ NAAQS.

*L. Section 110(a)(2)(L)—Permitting Fees*

This section requires SIPs to mandate that each major stationary source pay permitting fees sufficient to cover the reasonable cost of reviewing, approving, implementing, and enforcing a permit.

Maine implements and operates a Title V permit program (*see* 38 MRSA § 353–A; 06–096 CMR Chapter 140) which was approved by EPA on October 18, 2001. *See* 66 FR 52874. To gain this approval, Maine demonstrated the ability to collect sufficient fees to run the program. *See* 61 FR 49289, 49291 (September 19, 1996). Maine state law provides for the assessment of application fees from air emissions sources for permits for the construction or modification of air contaminant sources and sets permit fees. *See* 38 MRSA §§ 353–A (establishing annual air emissions license fees) and 352(2)(E) (providing that such fees ''must be assessed to support activities for air quality control including licensing, compliance, enforcement, monitoring, data acquisition and administration'').

EPA proposes to find that Maine meets the infrastructure SIP requirements of section 110(a)(2)(L) for the 2010 $SO_2$ NAAQS.

*M. Section 110(a)(2)(M)—Consultation/Participation by Affected Local Entities*

To satisfy Element M, states must provide for consultation with, and participation by, local political subdivisions affected by the SIP. Maine's infrastructure submittal references the Maine Administrative Procedure Act, 5 MRSA Chapter 375, and explains that it requires public notice of all SIP revisions prior to their adoption, which allows for comment by the public, including local political subdivisions. In addition, Maine cites 38 MRSA § 597, ''Municipal air pollution control,'' which provides that municipalities are not preempted from studying air pollution and adopting and enforcing ''air pollution control and abatement ordinances'' that are more stringent than those adopted by DEP or that ''touch on matters not dealt with'' by state law. Finally, Maine cites Chapter 9 of Maine's initial SIP, which was approved on May 31, 1972 (37 FR 10842), and contains intergovernmental cooperation provisions.

EPA proposes to find that Maine meets the infrastructure SIP requirements of section 110(a)(2)(M) with respect to the 2010 $SO_2$ NAAQS.

## IV. Proposed Action

EPA proposes to approve Maine's April 19, 2017 infrastructure SIP submission certifying that its current SIP is sufficient to meet the required infrastructure elements under sections 110(a)(1) and (2) for the 2010 $SO_2$ NAAQS, with the exception of CAA section 110(a)(2)(E)(ii) regarding State Boards and Conflicts of Interest, which we propose to conditionally approve, as described in more detail above. EPA's proposed actions regarding these infrastructure SIP requirements are contained in Table 5.

TABLE 5—PROPOSED ACTION ON MAINE'S INFRASTRUCTURE SIP SUBMITTALS

| Element | 2010 $SO_2$ |
|---|---|
| (A): Emission limits and other control measures | A |
| (B): Ambient air quality monitoring and data system | A |
| (C)1: Enforcement of SIP measures | A |
| (C)2: PSD program for major sources and major modifications | A |
| (C)3: PSD program for minor sources and minor modifications | A |
| (D)1: Contribute to nonattainment/interfere with maintenance of NAAQS | A |
| (D)2: PSD | A |
| (D)3: Visibility Protection | A |
| (D)4: Interstate Pollution Abatement | A |
| (D)5: International Pollution Abatement | A |
| (E)1: Adequate resources | A |
| (E)2: State boards | CA |
| (E)3: Necessary assurances with respect to local agencies | NA |
| (F): Stationary source monitoring system | A |
| (G): Emergency power | A |
| (H): Future SIP revisions | A |
| (I): Nonattainment area plan or plan revisions under part D | NG |
| (J)1: Consultation with government officials | A |
| (J)2: Public notification | A |
| (J)3: PSD | A |
| (J)4: Visibility protection | NG |
| (K): Air quality modeling and data | A |
| (L): Permitting fees | A |
| (M): Consultation and participation by affected local entities | A |

In the above table, the key is as follows:

| | |
|---|---|
| A | Approve |
| CA | Approve but conditionally approve |
| NG | Not germane to infrastructure SIPs |
| NA | Not applicable |

EPA is soliciting public comments on the issues discussed in this proposal or on other relevant matters. These comments will be considered before EPA takes final action. Interested parties may participate in the Federal rulemaking procedure by submitting comments to this proposed rule by following the instructions listed in the **ADDRESSES** section of this **Federal Register**. As noted in Table 5 of this document, EPA is proposing to conditionally approve one portion of Maine's April 19, 2017 infrastructure SIP for the 2010 $SO_2$ NAAQS. The outstanding issue with this SIP revision pertains to element (E)(2) regarding State Boards and Conflicts of Interest.

Under section 110(k)(4) of the Act, EPA may conditionally approve a plan based on a commitment from the State to adopt specific enforceable measures by a date certain, but not later than 1 year from the date of approval. If EPA conditionally approves the commitment in a final rulemaking action, the State must meet its commitment to submit an update to its State Board rules that fully remedies the deficiency mentioned above under Element E. If the State fails to do so, this action will become a disapproval on (list the date if under a statutory requirement) or one year from the date of final approval. EPA will notify the State by letter that this action has occurred. At that time, this commitment will no longer be a part of the approved Maine SIP. EPA subsequently will publish a document in the **Federal Register** notifying the public that the conditional approval automatically converted to a disapproval. If the State meets its commitment, within the applicable time frame, the conditionally approved submission will remain a part of the SIP until EPA takes final action approving or disapproving the submission. If EPA disapproves the new submittal, the conditionally approved infrastructure SIP element will also be disapproved at that time. If EPA approves the submittal, the infrastructure SIP element will be fully approved in its entirety and replace the conditionally approved program in the SIP.

If the conditional approval is converted to a disapproval, the final disapproval triggers the Federal implementation plan (FIP) requirement under section 110(c).

## V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed 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 proposed action:

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

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

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: December 17, 2018.

**Alexandra Dunn,**

*Regional Administrator, EPA Region 1.*

[FR Doc. 2018–27773 Filed 12–21–18; 8:45 am]

BILLING CODE 6560–50–P

---

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R05–OAR–2018–0103; FRL–9988–24–Region 5]**

## Air Plan Approval; Ohio; Removal of Obsolete Gasoline Volatility Regulations

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve a request submitted by the Ohio Environmental Protection Agency (Ohio EPA) on February 5, 2018, to revise the Ohio State Implementation Plan (SIP) under the Clean Air Act (CAA). Ohio EPA is requesting to remove from the SIP the remaining provisions of the Ohio Administrative Code concerning the State's former 7.8 pounds per square inch (psi) Reid vapor pressure (RVP) fuel requirements for the Cincinnati and Dayton areas. In a previous action, EPA approved the removal of the 7.8 psi RVP fuel applicability requirements in the Cincinnati and Dayton areas as a component of the Ohio SIP, including the approval of a demonstration under section 110(l) of the Clean Air Act (CAA) that addressed emissions impacts associated with the removal of the program.

**DATES:** Comments must be received on or before January 25, 2019.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R05–OAR–2018–0103 at *http://www.regulations.gov,* or via email to *blakley.pamela@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

**FOR FURTHER INFORMATION CONTACT:** Francisco J. Acevedo, Mobile Source Program Manager, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6061, *acevedo.francisco@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What is the background for this action?
II. What is EPA proposing to approve?
III. What is EPA's analysis of the state's submittal?
IV. What action is EPA proposing to take?
V. Statutory and Executive Order Reviews

## I. What is the background for this action?

On April 15, 2004, EPA designated Hamilton, Butler, Clinton, Warren and Clermont counties (Cincinnati area) and Clark, Greene, Miami, and Montgomery counties (Dayton area) as nonattainment for the 8-hour ozone standard. As part of Ohio's efforts to bring these areas into attainment of the ozone standard, the State adopted and implemented a broad range of ozone control measures for the areas including the implementation of a 7.8 psi RVP fuel program that was more stringent than the Federal 9.0 psi RVP requirement. The Ohio EPA originally submitted a SIP revision to EPA (on

February 14, 2006 and October 6, 2006) establishing a gasoline RVP limit of 7.8 psi for gasoline sold in the Cincinnati and Dayton areas. The revision specifically applied to the Cincinnati and Dayton areas in Ohio. EPA approved Ohio's 7.8 psi RVP program on May 25, 2007 (72 FR 29269), including the program's legal authority and administrative requirements found in the Ohio Administrative Code (OAC) rules 3745–72–1 to 8.

On December 19, 2016, Ohio EPA submitted a SIP revision requesting that EPA approve the removal of the 7.8 psi RVP fuel applicability requirements from the Ohio SIP before the beginning of the 2017 ozone control period. The revision also included a section 110(l) demonstration addressing the emissions impacts associated with the removal of the program. On April 7, 2017 (82 FR 16932) EPA approved the removal of the 7.8 psi RVP fuel applicability requirements in the Cincinnati and Dayton areas from the Ohio SIP. In that action EPA determined that that removal of the 7.8 psi RVP fuel requirements would not interfere with attainment or maintenance of any of the National Ambient Air Quality Standards in the Cincinnati and Dayton areas and would not interfere with any other applicable requirement of the CAA, and thus, were approvable under CAA section 110(l).

## II. What is EPA proposing to approve?

On February 5, 2018, Ohio EPA submitted to EPA a revision to the Ohio SIP for approval. In this action EPA is proposing to approve the removal of all OAC Chapter 3745–72 provisions from the Ohio SIP, as requested. Ohio EPA conducted a public hearing on this matter in Columbus, Ohio on December 7, 2017.

## III. What is EPA's analysis of the state's submittal?

On January 20, 2018, Ohio EPA rescinded rules in OAC 3745–72 that formerly established low RVP fuel requirements for the Cincinnati and Dayton areas. These rules were rescinded by Ohio EPA as they are no longer necessary since on April 7, 2017 (82 FR 16932) EPA approved the removal of the 7.8 psi RVP fuel applicability requirements in the Cincinnati and Dayton areas from the Ohio ozone SIP. In that action EPA determined that that removal of the 7.8 psi RVP fuel requirements would not interfere with attainment or maintenance of any of the National Ambient Air Quality Standards in the Cincinnati and Dayton areas and would not interfere with any other applicable requirement of the CAA, and thus, were approvable under CAA section 110(l). The removal of the remaining provisions in OAC Chapter 3745–72 from the SIP is only administrative in nature and does not have any negative impact on air quality in the Cincinnati and Dayton areas. No emissions increases will result from the removal of the OAC Chapter 3745–72 provisions from the Ohio SIP.

## IV. What action is EPA proposing to take?

EPA is proposing to approve the revision to the Ohio SIP submitted by the Ohio EPA on February 5, 2018, because the removal of remaining low RVP requirements in OAC Chapter 3745–72 from the SIP meets all applicable requirements and it would not interfere with reasonable further progress or attainment of any of the national ambient air quality standards.

## V. Statutory and Executive Order Reviews

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

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

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

## List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Volatile organic compounds.

Dated: December 6, 2018.

**Cathy Stepp,**

*Regional Administrator, Region 5.*

[FR Doc. 2018–27905 Filed 12–21–18; 8:45 am]

BILLING CODE 6560–50–P

---

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R05–OAR–2018–0393; FRL–9988–23–Region 5]**

## Air Plan Approval; Ohio; Open Burning Rules

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve revisions to the open burning standards in the Ohio State Implementation Plan (SIP) under the Clean Air Act (CAA). On June 4, 2018, Ohio Environmental Protection Agency (Ohio) requested the approval of its revised open burning rules, which include adding requirements for air curtain burners,

allowing law enforcement to burn seized drugs, further restricting the materials that may burned, and updating definitions and references.

**DATES:** Comments must be received on or before January 25, 2019.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R05–OAR–2018–0393 at *http://www.regulations.gov,* or via email to *blakley.pamela@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the ''For Further Information Contact'' section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

**FOR FURTHER INFORMATION CONTACT:** Matt Rau, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6524, *rau.matthew@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What is EPA proposing to approve?
II. Why did Ohio request this SIP revision?
III. What is EPA's analysis of the revisions?
IV. What action is EPA taking?
V. Incorporation by Reference
VI. Statutory and Executive Order Reviews

## I. What is EPA proposing to approve?

EPA is proposing to approve revisions to Ohio's open burning rules submitted on June 4, 2018. The state submitted revisions to Ohio Administrative Code (OAC) Chapter 3745–19, ''Open Burning Standards.'' EPA proposes approving the revised OAC rules 3745–19–01, 3745–19–03, 3745–19–04, and 3745–19–05 into the Ohio SIP.

## II. Why did Ohio request this SIP revision?

Ohio reviewed and revised its open burning rules to satisfy a state requirement to review its rules every five years. Ohio's submission includes additional revisions that the state made since the last EPA approval of OAC 3745–19 into the Ohio SIP on March 21, 2008 (73 FR 15081).

## III. What is EPA's analysis of the revisions?

EPA evaluated the revisions to Ohio's open burning standards under the CAA. The rules as effective at the state level on April 30, 2018, were compared to rules approved into the Ohio SIP. The rules OAC 3745–19–01, OAC 3745–19–03, OAC 3745–19–04, and OAC 3745–19–05 have changed. EPA evaluated the revisions within those rules.

Ohio made minor revisions to rules OAC 3745–19–01, OAC 3745–19–03, OAC 3745–19–04, and OAC 3745–19–05 that update citations, renumber sections, and standardize formatting. EPA reviewed these minor revisions, found them acceptable, and is proposing their approval.

*OAC 3745–19–01, ''Definitions''*

Ohio made additions to the definitions of agricultural waste and residential waste that are more restrictive than those contained in the current Ohio SIP. Ohio added definitions for air curtain burner, air curtain destructor, building materials, and inhabited building. Other open burning standards use these new definitions. OAC 3745–19–04(C)(6) uses air curtain burner and air curtain destructor. OAC 3745–19–03(C)(3)(e) and 3745–19–04(B)(3)(e) use building material. OAC 3745–19–03 and 3745–19–04 use inhabited building. Ohio also updated the incorporation by references. Ohio further updated the paragraphs to keep the definitions in alphabetical order and made other clerical revisions to OAC 3745–19–01. EPA finds that the additions and revisions to OAC 3745–19–01, ''Definitions'' support Ohio's open burning standards. EPA is proposing to approve the revisions.

*OAC 3745–19–03, ''Open burning in restricted areas''*

The addition of OAC 3745–19–03 (B)(5) allows law enforcement agencies to burn seized drugs without notifying Ohio EPA. Ohio previously allowed this under the ''similar purposes'' provision of OAC 3745–19–03 (B)(2). Ohio EPA concluded that adding OAC 3745–19–03 (B)(5) does not affect the scope of the rule and will not interfere with the attainment and maintenance of any National Ambient Air Quality Standard (NAAQS) and meets CAA section 110(l) requirements.

Ohio moved OAC 3745–19–03 (D)(4) to (C)(4). Moving this paragraph on prescribed burns, such as horticultural, silvicultural, and prairie burns, alters the notification requirements. Events meeting the definition and conditions in the rule will require prior notification to Ohio EPA instead of the previous requirement of prior written permission from Ohio EPA. Ohio added conditions at OAC 3745–19–03 (C)(4)(a) to (f). The party must meet the six conditions to burn that are more restrictive than the previous requirement. The conditions enhance notifications for the local fire department and public along with recordkeeping requirements.

Ohio extended authorization for governmental agencies to burn for controlling disease and pests, subject to requirements specified in OAC 3745–19–03 (C)(1), to two additional health agencies, Ohio Department of Health and the Centers for Disease Control and Prevention. Ohio also revised OAC 3745–19–03 (C)(3)(b) and (e) to prohibit smoke from creating a visibility hazard and adding plastic and building materials to materials prohibited from being burned as agricultural waste.

Ohio's revisions to OAC 3745–19–03 adds, restricts, or rearrange, existing standards such that it is reasonable to expect emissions from open burning will not increase. Thus, EPA concurs that the revisions to OAC 3745–19–03 will not interfere with the attainment or maintenance of air quality standards. EPA finds that the revisions to ''Open burning in restricted areas'' are acceptable and therefore proposes approval into the Ohio SIP.

*OAC 3745–19–04, ''Open burning in unrestricted areas''*

Ohio added a size limit, 20 feet diameter and 10 feet height, for residential and agricultural waste burning in OAC 3745–19–04 (B)(3)(f). Waste piles larger than that size require prior notification to Ohio EPA with this revision. In such a situation, Ohio EPA will have an opportunity to review the burning plans and work with the regulated entity such that human health and the environment remain protected.

Ohio added requirements for operating an air curtain burner at OAC 3745–19–04(C)(6). The owner or operator must obtain permit-to-install and title V permits. OAC 3745–19–04(C)(6)(b) to (g) gives the restrictions

on the location of the air curtain burner along with operating conditions. Ohio EPA deems that adding OAC 3745–19–04(C)(6) does not affect the scope of the rule and will not interfere with the attainment and maintenance of any NAAQS and meets CAA section 110(l) requirements. EPA found that air curtain burners are a potential means of reducing waste volume while minimizing potentially harmful emissions, criteria and hazardous air pollutants, in its ''Managing Debris after a Natural Disaster'' report.[1]. Under CAA sections 111 and 129, operators of subject solid waste incinerators must obtain a title V permit. Air curtain burners regulated by 40 CFR 60.2974 or 60.3069 must obtain a title V permit. Ohio's rule ensures sources meet this permitting requirement.

The other revisions to OAC 3745–19–04 are similar to the revisions made in OAC 3745–19–03. Ohio added OAC 3745–19–04(B)(6) that allows law enforcement to burn seized drugs without notifying Ohio EPA. Ohio moved its prescribed burning rule from OAC 3745–19–04(C)(5) to (D)(2) while adding conditions like those in OAC 3745–19–03(C)(4). Ohio revised OAC 3745–19–04(D), now (D)(1) with the addition of (D)(2), to include two additional agencies, Ohio Department of Health and the Centers for Disease Control and Prevention, into the requirements for health agencies to burn for controlling disease and pests. This is analogous to the revision of OAC 3745–19–03(C)(1). Further, Ohio revised the residential and agricultural waste burning requirements of OAC 3745–19–04(B)(3) to prohibit smoke from creating a visibility hazard and adding plastic and building materials as prohibited materials. This revision is comparable to revisions to OAC 3745–19–03(C)(3)(b) and (e).

Revisions that Ohio made to OAC 3745–19–04 that are similar to revisions made to OAC 3745–19–03 are acceptable for the same reasons. Namely, these revisions are to OAC 3745–19–04(B)(6), OAC 3745–19–04(C)(6), OAC 3745–19–04(D)(1) and (2), plus the deletion of OAC 3745–19–04(C)(5). It is reasonable to expect emissions from open burning will not increase from those revisions. The change to OAC 3745–19–04(B)(3)(f) adds a restriction. The addition of OAC 3745–19–04(C)(6) regulates air curtain burners in a manner consistent with federal rules. EPA finds the revisions to OAC 3745–19–04 acceptable and thus is proposing the approval of this rule into the Ohio SIP.

*OAC 3745–19–05, ''Permission to Individuals and Notification to the Ohio EPA''*

Ohio revised OAC 3745–19–05(A)(1) to clarify that applicants must submit the application to burn at least 10 business days prior to the burn. The revision also clarifies that open burning permissions are effective on the date of issuance. At OAC 3745–19–05(A)(2)(b), Ohio added fire size, quantity or acreage, as one of the required elements of the open burning application. Ohio revised OAC 3745–19–05(A)(3) to add ''when atmospheric conditions are appropriate'' to the elements the applicant must demonstrate it will satisfy for Ohio to grant permission to open burn.

EPA finds that the revisions to OAC 3745–19–05 improve clarity. Adding the fire size will help Ohio evaluate the impacts from the fire while reviewing the application. Burning during favorable atmospheric conditions will avoid unnecessary impact on the public. EPA expects the revised rule to continue to protect air quality and therefore is proposing to approve OAC 3745–19–05.

## IV. What action is EPA taking?

EPA is proposing to approve revisions to the open burning standards in the Ohio SIP. EPA proposes approval of OAC 3745–19–01, OAC 3745–19–03, OAC 3745–19–04, and OAC 3745–19–05, as submitted by Ohio on June 4, 2018.

## V. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference Ohio Administrative Code Chapter 3745–19–01 ''Definitions,'' 3745–19–03 ''Open burning in restricted areas,'' 3745–19–04 ''Open burning in unrestricted areas,'' and 3745–19–05 ''Permission to individuals and notifications to the Ohio EPA'', effective April 30, 2018. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

## VI. Statutory and Executive Order Reviews

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

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

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a

[1] U.S. EPA. Managing Debris after a Natural Disaster: Evaluation of the Combustion of Storm-Generated Vegetative and C&D Debris in an Air Curtain Burner: Source Emissions Measurement Results. U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–16/353, 2016.

tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

**List of Subjects in 40 CFR Part 52**

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

Dated: December 6, 2018.

**Cathy Stepp,**

*Regional Administrator, Region 5.*

[FR Doc. 2018–27777 Filed 12–21–18; 8:45 am]

**BILLING CODE 6560–50–P**

---

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 52 and 81

**[EPA–R05–OAR–2018–0572; FRL–9988–22–Region 5]**

## Air Plan Approval; Ohio; Redesignation of the Cleveland Area to Attainment of the 2012 Annual Standard for Fine Particulate Matter

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** On July 24, 2018, the Ohio Environmental Protection Agency (Ohio) submitted a request for the Environmental Protection Agency (EPA) to redesignate the Cleveland area to attainment of the 2012 annual national ambient air quality standards (NAAQS or standards) for fine particulate matter ($PM_{2.5}$) under the Clean Air Act (CAA). EPA is proposing to grant Ohio's request. EPA is proposing to determine that the Cleveland area has attained the 2012 annual $PM_{2.5}$ standard, based on the most recent three years of certified air quality data. EPA is proposing to approve a revision to the Ohio state implementation plan (SIP) that the Cleveland area meets the requirements for redesignation under the CAA and for the state's maintenance plan for the 2012 annual $PM_{2.5}$ NAAQS through 2030. Ohio's maintenance plan submission includes motor vehicle emission budgets (MVEBs) for the mobile source contribution of $PM_{2.5}$ and nitrogen oxides ($NO_X$) to the Cleveland area for transportation conformity purposes; EPA is proposing to approve the MVEBs for 2022 and 2030 into the Ohio SIP. EPA is taking these actions in accordance with the CAA and EPA's implementation regulations regarding the 2012 annual $PM_{2.5}$ NAAQS.

**DATES:** Comments must be received on or before January 25, 2019.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R05–OAR–2018–0572 at *http://www.regulations.gov,* or via email to *blakley.pamela@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the ''For Further Information Contact'' section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

**FOR FURTHER INFORMATION CONTACT:** Michael Leslie, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–6680, *leslie.michael@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What actions are EPA taking?
II. What is the background for these actions?
III. What are the criteria for redesignation to attainment?
IV. What is EPA's analysis of the state's request?
1. Attainment Determination (Section 107(d)(3)(E)(i))
2. Section 110 and Part D Requirements, and Approval SIP under Section 110(k) (Section 107(d)(3)(E)(ii) and (v))
3. Permanent and Enforceable Reductions in Emissions (Section 107(d)(3)(E)(iii))
4. Maintenance Plan Pursuant to Section 175A of the CAA (Section 107(d)(3)(E)(iv))
5. Motor Vehicle Emissions Budget (MVEBs) for $PM_{2.5}$ and $NO_X$, and Safety Margin for the Cleveland Area
V. What are the effects of EPA's actions?
VI. Statutory and Executive Order Reviews

### I. What actions are EPA taking?

EPA is taking several actions related to the redesignation of the Cleveland area to attainment of the 2012 annual $PM_{2.5}$ NAAQS. EPA is proposing that the Cleveland moderate nonattainment area is attaining the 2012 annual $PM_{2.5}$ NAAQS. EPA is proposing to approve Ohio's 2012 annual $PM_{2.5}$ maintenance plan for the Cleveland area as a revision to the Ohio SIP.

EPA is proposing to find that Ohio meets the requirements for redesignation of the Cleveland area to attainment of the 2012 annual $PM_{2.5}$ NAAQS under section 107(d)(3)(E) of the CAA. EPA is thus proposing to grant Ohio's request to change the designation of the Cleveland area from nonattainment to attainment of the 2012 annual $PM_{2.5}$ NAAQS. EPA's analysis of these actions are discussed in Section IV of today's rulemaking.

### II. What is the background for these actions?

On December 14, 2012, EPA promulgated a revised primary annual $PM_{2.5}$ NAAQS to provide increased protection of public health from fine particle pollution (78 FR 3086; January 15, 2013). In that action, EPA strengthened the primary annual $PM_{2.5}$ standard from 15.0 micrograms per cubic meter ($\mu g/m^3$) to 12.0 $\mu g/m^3$, which is attained when the 3-year average of the annual arithmetic means does not exceed 12.0 $\mu g/m^3$. On December 18, 2014, the EPA Administrator signed a final action promulgating initial designations for the 2012 primary $PM_{2.5}$ NAAQS based on 2011–2013 air quality monitoring data for the majority of the United States. The Cleveland nonattainment area is in northeastern Ohio and includes Cuyahoga and Lorain counties. Ohio's main $PM_{2.5}$ components are primary particles (organic particles, crustal material, and elemental carbon) and $NO_X$, which were included in the attainment demonstration analysis. Volatile organic compounds (VOCs), sulfur dioxide ($SO_2$) and ammonia ($NH_3$) were determined to be insignificant for attainment and New Source Review (NSR) purposes (83 FR 45193), based on a concentration-based contribution analysis and a sensitivity-based analysis conducted in accordance with the

August 26, 2016 Implementation Rule (81 FR 58010).

## III. What are the criteria for redesignation to attainment?

The CAA sets forth criteria for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA allows for redesignation provided that: (1) The Administrator determines that the area has attained the applicable NAAQS based on current air quality data; (2) the Administrator has fully approved an applicable SIP for the area under section 110(k) of the CAA; (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable emission reductions resulting from implementation of the applicable SIP, Federal air pollution control regulations, or other permanent and enforceable emission reductions; (4) the Administrator has fully approved a maintenance plan for the area meeting the requirements of section 175A of the CAA; and (5) the state containing the area has met all requirements applicable to the area for purposes of redesignation under section 110 and part D of the CAA.

## IV. What is EPA's analysis of the state's request?

EPA is proposing to redesignate the Cleveland area to attainment of the 2012 annual $PM_{2.5}$ NAAQS and to approve Ohio's maintenance plan. The basis for EPA's action are as follows:

1. Attainment Determination (Section 107(d)(3)(E)(i))

To redesignate an area from nonattainment to attainment, the CAA requires EPA to determine that the area has attained the applicable NAAQS (CAA section 107(d)(3)(E)(i)). For $PM_{2.5}$, an area is attaining the 2012 annual $PM_{2.5}$ NAAQS if it meets the standard, as determined in accordance with 40 CFR 50.13 and appendix N of part 50, based on three complete, consecutive calendar years of quality-assured air quality monitoring data. To attain the 2012 annual $PM_{2.5}$ NAAQS, the 3-year average of the annual arithmetic mean concentration, as determined in accordance with 40 CFR part 50, appendix N, must be less than or equal to 12.0 μg/m³ at all relevant monitoring sites in the subject area over a 3-year period. The relevant data must be collected and quality-assured in accordance with 40 CFR part 58 and recorded in the EPA Air Quality System (AQS) database. The monitors generally should have remained at the same location for the duration of the monitoring period required for demonstrating attainment.

EPA reviewed the certified, quality assured/quality controlled $PM_{2.5}$ monitoring data from the Cleveland area for the 2012 annual $PM_{2.5}$ NAAQS from 2015–2017 and determined that the design value for the area is less than the standard of 12.0 μg/m³ for that period. The $PM_{2.5}$ design values for monitors with complete data are summarized in Table 1:

TABLE 1—MONITORING DATA FOR THE CLEVELAND AREA FOR 2015–2017

[2012 annual $PM_{2.5}$ standard (μg/m³)]

| | | Year | | | Average |
|---|---|---|---|---|---|
| Site | County | 2015 | 2016 | 2017 | 2015–2017 |
| 39–035–0034 | Cuyahoga | 9.2 | 7.8 | 7.8 | 8.2 |
| 39–035–0038 | | 11.8 | 10.0 | 9.9 | 10.6 |
| 39–035–0045 | | 11.0 | 9.4 | 9.7 | 10.1 |
| 39–035–0060 | | *11.7 | 9.6 | 9.7 | 10.0 |
| 39–035–0065 | | 13.3 | 10.7 | 11.2 | 11.7 |
| 39–035–0073 | | (**) | (**) | 7.3 | |
| 39–035–1002 | | 9.1 | 7.8 | 8.1 | 8.3 |
| 39–093–3002 | Lorain | 8.2 | 7.0 | 7.6 | 7.6 |

* Data completeness requirements met by substituting data from a secondary monitor resulting in a valid design value.
** New monitor started April 1, 2017.

EPA is proposing to determine that the Cleveland area is attaining the 2012 annual $PM_{2.5}$ NAAQS. This proposed determination is based upon complete, quality-assured, and certified ambient air monitoring data for the 2015–2017 monitoring period that show the area has monitored attainment of 2012 annual $PM_{2.5}$ NAAQS.

Pursuant to section 179(c) of the CAA, EPA is also proposing to determine that, based on air quality monitoring data for 2015–2017, the Cleveland area is attaining the 2012 annual $PM_{2.5}$ NAAQS. EPA assessed whether the Cleveland area has attained the 2012 annual $PM_{2.5}$ NAAQS, based on the most recent three years of complete, certified and quality-assured data, and whether the Cleveland area attained the 2012 annual $PM_{2.5}$ NAAQS by the applicable attainment date of December 31, 2021, based on monitored data from 2015–2017. Under EPA's regulations at 40 CFR 50.7, the annual primary and secondary $PM_{2.5}$ standards are met when the annual arithmetic mean concentration, as determined in accordance with 40 CFR part 50, appendix N, is less than or equal to 12.0 mg/m³ at all relevant monitoring sites in the area.

EPA has reviewed the ambient air quality monitoring data in the Cleveland area, consistent with the requirements contained at 40 CFR part 50. EPA's review focused on data recorded in the EPA AQS database, for the Cleveland area for $PM_{2.5}$ nonattainment area from 2015 to 2017. EPA also considered preliminary data for 2018, which have not been certified, but which are consistent with the area's continued attainment.

All monitors in the Cleveland area recorded complete data in accordance with criteria set forth by EPA in 40 CFR part 50, appendix N, where a complete year of air quality data comprises four calendar quarters, with each quarter containing data from at least 75 percent (%) capture of the scheduled sampling days. Available data are sufficient for comparison to the NAAQS if three consecutive complete years of data exist.

2. Section 110 and Part D Requirements, and Approval SIP Under Section 110(k) (Section 107(d)(3)(E)(ii) and (v))

EPA has determined that Ohio has met all currently applicable SIP requirements for purposes of redesignation for the Cleveland area under section 110 of the CAA (general SIP requirements), and Part D planning requirements. Ohio's 2016 emissions inventory was approved as meeting the

section 172(c)(3) comprehensive emissions inventory requirement on September 6, 2018 (83 FR 45193). Ohio's reasonably available control technology (RACT)/reasonable available control measure (RACM) analysis was submitted as part of the October 14, 2016 attainment demonstration. In its RACT/RACM analysis, Ohio found that existing measures for $PM_{2.5}$, and $NO_X$ for area sources, mobile sources and stationary sources constitute RACT/RACM, and Ohio found that no new additional measures or controls are economically or technically feasible. Ohio's attainment demonstration also included a demonstration that the $PM_{2.5}$ precursors VOC, $SO_2$ and $NH_3$ are insignificant for the purpose of attainment planning (including RACT/RACM). Ohio's RACT/RACM analysis was approved on September 6, 2018 (83 FR 45193).

The reasonable further progress (RFP) as required under section 172(c)(2) is defined as progress that must be made toward attainment. This requirement is not relevant for purposes of redesignation because the Cleveland area has monitored attainment of the 2012 annual $PM_{2.5}$ NAAQS. (''General Preamble for the Interpretation of Title I of the CAA Amendments of 1990''; (57 FR 13498, 13564, April 16, 1992)).

Thus, we are determining that the Ohio submittal meets all SIP requirements currently applicable for purposes of redesignation under part D of title I of the CAA, in accordance with sections 107(d)(3)(E)(ii) and 107(d)(3)(E)(v).

In making these determinations, we have ascertained which SIP requirements are applicable for the purposes of the redesignation, and concluded that the Ohio SIP includes measures meeting those requirements and that they are fully approved under section 110(k) of the CAA.

a. Ohio Has Met All Applicable Requirements for Purposes of Redesignation of the Cleveland Area Under Section 110 and Part D of the CAA

i. Section 110 General SIP Requirements

Section 110(a) of title I of the CAA contains the general requirements for a SIP. Section 110(a)(2) provides that the implementation plan submitted by a state must have been adopted by the state after reasonable public notice and hearing, and, among other things, must include enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the CAA; provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor ambient air quality; provide for implementation of a source permit program to regulate the modification and construction of any stationary source within the areas covered by the plan; include provisions for the implementation of part C, Prevention of Significant Deterioration (PSD) and part D, New Source Review (NSR) permit programs; include criteria for stationary source emission control measures, monitoring, and reporting; include provisions for air quality modeling; and provide for public and local agency participation in planning and emission control rule development. Section 110(a)(2)(D) of the CAA requires that SIPs contain measures to prevent sources in a state from significantly contributing to air quality problems in another state.

EPA interprets the ''applicable'' requirements for an area's redesignation to be those requirements linked with that area's nonattainment designation. Therefore, we believe that the section 110 elements described above that are not connected with nonattainment plan submissions and not linked with an area's attainment status, such as the ''infrastructure SIP'' elements of section 110(a)(2), are not applicable requirements for purposes of the redesignation. A state remains subject to these requirements after an area is redesignated to attainment, and thus EPA does not interpret such requirements to be relevant applicable requirements to evaluate in a redesignation. For example, the requirement to submit state plans addressing interstate transport obligations under section 110(a)(2)(D)(i)(I) continue to apply to a state regardless of the designation of any particular area in the state, and thus are not applicable requirements to be evaluated in the redesignation context.

EPA has applied this interpretation consistently in many redesignations for decades. *See e.g.,* 81 FR 44210 (July 7, 2016) (final redesignation for the Sullivan County, Tennessee area); 79 FR 43655 (July 28, 2014) (final redesignation for Bellefontaine, Ohio lead nonattainment area); 61 FR 53174–53176 (October 10, 1996) and 62 FR 24826 (May 7, 1997) (proposed and final redesignation for Reading, Pennsylvania ozone nonattainment area); 61 FR 20458 (May 7, 1996) (final redesignation for Cleveland-Akron-Lorain, Ohio ozone nonattainment area); and 60 FR 62748 (December 7, 1995) (final redesignation of Tampa, Florida ozone nonattainment area). *See* also 65 FR 37879, 37890 (June 19, 2000) (discussing this issue in final redesignation of Cincinnati, Ohio 1-hour ozone nonattainment area); and 66 FR 50399 (October 19, 2001) (final redesignation of Pittsburgh, Pennsylvania 1-hour ozone nonattainment area).

We have reviewed the Ohio SIP and determined that it meets the general SIP requirements under section 110 of the CAA to the extent they are applicable for purposes of redesignation. EPA has previously approved provisions of Ohio's SIP addressing section 110 requirements, at 40 CFR 52.1870.

On December 4, 2015, Ohio made a submittal which addressed the ''infrastructure SIP'' elements of the 2012 annual $PM_{2.5}$ NAAQS required under CAA section 110(a)(2). EPA approved the 2012 annual $PM_{2.5}$ infrastructure SIPs on February 2, 2018 (83 FR 4845), however, as noted above, the requirements of section 110(a)(2) are statewide requirements that are not linked to the $PM_{2.5}$ nonattainment status of the Cleveland area. Therefore, these SIP elements are not applicable requirements for purposes of review of the state's 2012 annual $PM_{2.5}$ redesignation request.

ii. Part D Requirements

EPA has determined that with the approval of the base year emissions inventory and RACM provisions as discussed in rulemaking dated September 6, 2018, the Ohio SIP has met the requirements applicable for purposes of redesignation under part D of the CAA for the Cleveland 2012 annual $PM_{2.5}$ nonattainment area. Subpart 1 of part D sets forth the general nonattainment requirements applicable to all nonattainment areas.

(1) Section 172 Requirements

Section 172(c) sets out general nonattainment plan requirements. A thorough discussion of these requirements can be found in the General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992) (''General Preamble''). EPA's longstanding interpretation of the nonattainment planning requirements of section 172 is that once an area is attaining the NAAQS, those requirements are not ''applicable'' for purposes of CAA section 107(d)(3)(E)(ii) and therefore need not be approved into the SIP before EPA can redesignate the area. In the General Preamble, EPA set forth its interpretation of applicable requirements for purposes of evaluating redesignation requests when an area is attaining a standard. *See* 57 FR 13564. EPA noted that the requirements for reasonable further progress and other

measures designed to provide for an area's attainment do not apply in evaluating redesignation requests because those nonattainment planning requirements ''have no meaning'' for an area that has already attained the standard. *Id.* This interpretation was also set forth in the Calcagni Memorandum.[1]

EPA's long-standing interpretation regarding the applicability of section 172(c)'s attainment planning requirements for an area that is attaining a NAAQS applies in this redesignation of the Cleveland 2012 annual $PM_{2.5}$ nonattainment area as well, except for the applicability of the requirement to implement all RACM under section 172(c)(1). On July 14, 2015, the United States Court of Appeals for the Sixth Circuit (6th Circuit) ruled that, to meet the requirement of section 107(d)(3)(E)(ii), states are required to submit plans addressing RACM/RACT under section 172(c)(1) and EPA is required to approve those plans prior to redesignating the area, regardless of whether the area is attaining the standard. *Sierra Club* v. *EPA,* 793 F.3d 656 (6th Cir. 2015). Because Ohio is within the jurisdiction of the 6th Circuit, EPA is acting in accordance with the *Sierra Club* decision in this redesignation action.[2] However, in this case, this issue is moot because EPA has already concluded that Ohio has met RACT/RACM requirements for $PM_{2.5}$ in action published September 6, 2018 (83 FR 45193).

Section 172(c)(1) requires the plans for all nonattainment areas to provide for the implementation of all RACM as expeditiously as practicable and to provide for attainment of the primary NAAQS. Under this requirement, a state must consider all available control measures, including reductions that are available from adopting RACT on existing sources, for a nonattainment area and adopt and implement such measures as are reasonably available in the area as components of the area's attainment demonstration. As discussed above, EPA approved Ohio's RACM submission on September 6, 2018 (83 FR 45193). Therefore, Ohio has met its requirements under CAA section 172(c)(1) and section 107(d)(3)(E)(v).

As noted above, the remaining section 172(c) ''attainment planning'' requirements are not applicable for purposes of evaluating the state's redesignation request. Specifically, the RFP requirement under section 172(c)(2), which is defined as progress that must be made toward attainment, the requirement to submit section 172(c)(9) contingency measures, which are measures to be taken if the area fails to make reasonable further progress to attainment, and section 172(c)(6)'s requirement that the SIP contain control measures necessary to provide for attainment of the standard, are not applicable requirements that Ohio must meet here because the Cleveland area has monitored attainment of the 2012 annual $PM_{2.5}$ NAAQS.

Section 172(c)(3) requires submission and approval of a comprehensive, accurate and current inventory of actual emissions. Ohio submitted a 2011 base year emissions inventory as part of their $PM_{2.5}$ attainment Demonstration on October 14, 2016, and requested that the 2011 inventories be used as the most accurate and current inventory. Ohio's 2011 emissions inventory was approved as meeting the section 172(c)(3) comprehensive emissions inventory requirement on September 6, 2018 (83 FR 45193). Section 172(c)(4) requires the identification and quantification of allowable emissions for major new and modified stationary sources in an area, and section 172(c)(5) and 189(a)(1)(A) requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA approved Ohio's current NSR program for $PM_{2.5}$ on June 25, 2015 (80 FR 36477). In addition, the state's maintenance plan does not rely on nonattainment NSR, therefore having a fully approved NSR program is not an applicable requirement; nonetheless, we have approved the state's program.[3]

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted above, we find that the Ohio SIP meets the section 110(a)(2) applicable requirements for purposes of redesignation.

(2) Section 176 Conformity Requirements

Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that federally-supported or funded activities, including highway and transit projects, conform to the air quality planning goals in the applicable SIPs. The requirement to determine conformity applies to transportation plans, programs and projects developed, funded or approved under title 23 of the U.S. Code and the Federal Transit Act (transportation conformity) as well as to all other federally-supported or funded projects (general conformity). *See* 73 FR 66964, 67043 n.120. EPA approved Ohio's transportation conformity SIP on March 2, 2015 (80 FR 11133) and the general conformity SIP on May 26, 2015 (80 FR 29968).

b. Ohio Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

EPA has fully approved the Ohio SIP for the Cleveland area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation, in accordance with section 107(d)(3)(E)(ii). EPA may rely on prior SIP approvals in approving a redesignation request. See Calcagni Memorandum at 3); *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984, 989–990 (6th Cir. 1998); *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001). EPA also relies on measures approved in conjunction with a redesignation action. *See, e.g.,* 68 FR 25413 (May 12, 2003) (approving I/M program for St. Louis) and 68 FR 25426 (May 12, 2003) (approving redesignation relying in part on I/M program approval). As discussed in the prior section, Ohio has adopted and submitted (and EPA has fully approved) a number of required SIP provisions addressing the 2012 annual $PM_{2.5}$ standards.

EPA has approved Ohio's 2011 emissions inventories for the Cleveland area as meeting the requirement of section 172(c)(3) of the CAA, and approved RACM provisions meeting the requirement of 172(c)(1). No Cleveland area SIP provisions are currently disapproved, conditionally approved, or partially approved. Therefore, the Administrator has fully approved the applicable requirements for the Cleveland area under section 110(k) in accordance with section 107(d)(3)(E)(ii).

3. Permanent and Enforceable Reductions in Emissions (Section 107(d)(3)(E)(iii))

EPA finds that Ohio has demonstrated that the observed air quality improvement in the Cleveland area is due to permanent and enforceable reductions from Federal measures. In making this demonstration, Ohio has calculated the change in emissions

[1] September 4, 1992 Memorandum from John Calcagni, Director, Air Quality Management Division (EPA), entitled, ''Procedures for Processing Requests to Redesignate Areas to Attainment.''

[2] Although the approach being implemented here is inconsistent with the Agency's longstanding national policy, such deviation is required in order to act in accordance with a Circuit Court decision. Consistent with 40 CFR 56.5(b), the Region does not need to seek concurrence from EPA Headquarters for such deviation in these circumstances. *See also* 81 FR 51102 (August 3, 2016).

[3] A detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.''

between 2011, one of the years the Cleveland area was monitoring nonattainment, and 2016, one of the years the Cleveland area monitored attainment. The reduction in emissions and the corresponding improvement in air quality over this period can be attributed to a number of regulatory control measures that the Cleveland and contributing areas have implemented in recent years.

a. Permanent and Enforceable Controls Implemented

The following is a discussion of permanent and enforceable measures that have been implemented in the area:

i. Federal Emission Control Measures

Reductions in directly emitted fine particles and fine particle precursor emissions have occurred statewide and in upwind areas because of Federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include the following.

*Tier 2 Emission Standards for Vehicles and Gasoline Sulfur Standards.* These emission control requirements result in lower $NO_X$ and $SO_2$ emissions from new cars and light duty trucks, including sport utility vehicles. The Federal rules were phased in between 2004 and 2009. EPA has estimated that, by the end of the phase-in period, new vehicles will emit less $NO_X$ with the following percentage decreases: Passenger cars (light duty vehicles)—77%; light duty trucks, minivans and sports utility vehicles—86%; and, larger sports utility vehicles, vans and heavier trucks—69% to 95%. EPA expects fleet-wide average emissions to decline by similar percentages as new vehicles replace older vehicles. The Tier 2 standards also reduced the sulfur content of gasoline to 30 parts per million (ppm) beginning in January 2006, reducing both directly emitted sulfates and the precursor $SO_2$. Most gasoline sold in Ohio prior to January 2006 had a sulfur content of about 500 ppm.

*Heavy-Duty Diesel Engine Rule.* EPA issued this rule in July 2000. This rule includes standards limiting the sulfur content of diesel fuel, which went into effect in 2004. A second phase took effect in 2007 which reduced fine particle emissions from heavy-duty highway engines and further reduced the highway diesel fuel sulfur content to 15 ppm. The total program is estimated to achieve a 90% reduction in direct $PM_{2.5}$ emissions and a 95% reduction in $NO_X$ emissions for these new engines using low sulfur diesel, compared to existing engines using higher sulfur content diesel. The reduction in fuel sulfur content also yielded an immediate reduction in sulfate particle emissions from all diesel vehicles.

*Nonroad Diesel Rule.* In May 2004, EPA promulgated a new rule for large nonroad diesel engines, such as those used in construction, agriculture and mining equipment, to be phased in between 2008 and 2014. The rule also reduces the sulfur content in nonroad diesel fuel by over 99%. Prior to 2006, nonroad diesel fuel averaged approximately 3,400 ppm sulfur. This rule limited nonroad diesel sulfur content to 500 ppm by 2006, with a further reduction to 15 ppm by 2010. The combined engine and fuel rules will reduce $NO_X$ and $PM_{2.5}$ emissions from large nonroad diesel engines by over 90%, compared to current nonroad engines using higher sulfur content diesel. It is estimated that compliance with this rule will cut $NO_X$ emissions from nonroad diesel engines by up to 90%. This rule achieved some emission reductions by 2008, and was fully implemented by 2010. The reduction in fuel sulfur content also yielded an immediate reduction in sulfate particle emissions from all diesel vehicles.

*Nonroad Large Spark-Ignition Engine and Recreational Engine Standards.* In November 2002, EPA promulgated emission standards for groups of previously unregulated nonroad engines. These engines include large spark-ignition engines such as those used in forklifts and airport ground-service equipment; recreational vehicles using spark-ignition engines such as off-highway motorcycles, all-terrain vehicles and snowmobiles; and recreational marine diesel engines. Emission standards from large spark-ignition engines were implemented in two tiers, with Tier 1 starting in 2004 and Tier 2 in 2007. Recreational vehicle emission standards are being phased in from 2006 through 2012. Marine diesel engine standards were phased in from 2006 through 2009. With full implementation of the entire nonroad spark-ignition engine and recreational engine standards, an 80% reduction in $NO_X$ is expected by 2020. Most of these emission reductions occurred by the 2015–2017 period used to demonstrate attainment, but additional emission reductions will occur during the maintenance period.

ii. Control Measures in Contributing Areas

*$NO_X$ SIP Call.* On October 27, 1998 (63 FR 57356), EPA issued a $NO_X$ SIP Call requiring the District of Columbia and 22 states to reduce emissions of $NO_X$. Affected states were required to comply with Phase I of the SIP Call beginning in 2004, and Phase II beginning in 2007. Emission reductions resulting from regulations developed in response to the $NO_X$ SIP Call are permanent and enforceable.

*Clean Air Interstate Rule (CAIR).* On March 10, 2004, EPA promulgated the CAIR. The CAIR rule required Electric Generating Units (EGUs) in 28 eastern states and the District of Columbia to significantly reduce emissions of $NO_X$ and $SO_2$. On July 6, 2011, EPA finalized Cross-State Air Pollution Rule (CSAPR) as a replacement for CAIR. CSAPR became effective on January 1, 2015, for $SO_2$ and annual $NO_X$, and May 1, 2015, for ozone season $NO_X$. EPA estimated CSAPR will reduce EGU $SO_2$ emissions by 73% and $NO_X$ emissions by 54% from 2005 levels in the CSAPR region, which includes Ohio. Between 2011 and 2015, in Ohio alone, annual $NO_X$ EGU emissions decreased from 103,592 tons per year (TPY) to 67,059 TPY and $SO_2$ EGU emissions decreased from 575,474 TPY to 177,257 TPY.

On September 7, 2016, EPA promulgated an update to CSAPR that will bring even greater reductions in $NO_X$ emissions. EPA estimated that the CSAPR update and other changes already underway in the power sector will cut ozone season $NO_X$ emissions from power plants in the eastern United States by 20%, resulting in a reduction of 80,000 tons in 2017 compared to 2015 levels.

Several facilities in the Cleveland have reduced $PM_{2.5}$ and precursor emissions, and Ohio has made the reductions permanent and enforceable. Cleveland Electric Illuminating Co., Lake Shore Plant in Cuyahoga County, permanently shut down December 17, 2015. The Medical Center in Cuyahoga County converted to natural gas by January 13, 2017, shuttering its two coal-fired boilers (B003 and B004) and replacing them with a natural gas boiler (B023) with a federally-enforceable $SO_2$ limit of 1.18 TPY. Cleveland Thermal LLC in Cuyahoga County retired all coal-fired and oil-fired boilers by January 31, 2017, except two oil-fired boilers retained for auxiliary use. The Avon Lake Power Plant in Lorain County accepted a federally enforceable combined emissions limitation on all $SO_2$ emitting sources at the facility at 9,600 lbs/hr, effective beginning January 13, 2017, to satisfy the 1-hour $SO_2$ standard. Oberlin College in Lorain County shut down coal fired boilers on April 22, 2014. These emissions reductions are detailed in Table 2.

TABLE 2—2011 AND 2016 EMISSIONS TOTALS FOR THE CLEVELAND 2012 ANNUAL $PM_{2.5}$ NAAQS

[Tons/year]

| Pollutant | 2011 | 2016 | Difference |
|---|---|---|---|
| $PM_{2.5}$ | 5843.68 | 4989.39 | −854.29 |
| $NO_X$ | 46892.19 | 35414.24 | −11477.95 |
| $SO_2$ | 39406.99 | 14724.02 | −24682.97 |
| VOC | 33402.70 | 26968.63 | −6434.07 |
| $NH_3$ | 1606.26 | 1570.86 | −35.4 |

4. Maintenance Plan Pursuant to Section 175A of the CAA (Section 107(d)(3)(E)(iv))

In conjunction with Ohio's request to redesignate the Cleveland nonattainment area to attainment status, Ohio has submitted a SIP revision to provide for maintenance of the 2012 annual $PM_{2.5}$ NAAQS in the area through 2030.

a. What is required in a maintenance plan?

Section 175A of the CAA sets forth the required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after EPA approves a redesignation to attainment. Eight years after redesignation, the state must submit a revised maintenance plan which demonstrates that attainment will continue to be maintained for ten years following the initial 10-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures with a schedule for implementation as EPA deems necessary to assure prompt correction of any future $PM_{2.5}$ NAAQS violations.

The Calcagni memorandum provides additional guidance on the content of a maintenance plan. The memorandum states that a maintenance plan should address the following items: The attainment emissions inventory, a maintenance demonstration showing maintenance for the 10 years of the maintenance period, a commitment to maintain the existing monitoring network, factors and procedures to be used for verification of continued attainment of the NAAQS, and a contingency plan to prevent or correct future violations of the NAAQS.

As discussed in detail in the section below, the state's maintenance plan submission expressly documents that the area's emissions inventory and modeling show that the area will remain below the attainment year inventories through 2030, more than ten years after redesignation.

b. Attainment Inventory

Ohio developed an emissions inventory for annual $PM_{2.5}$ emissions for 2016, one of the years in the period during which the Cleveland area monitored attainment of the 2012 annual $PM_{2.5}$ NAAQS. The attainment levels of emissions are summarized in Tables 3 through 7, along with future maintenance projections.

c. Demonstration of Maintenance

As discussed above, EPA has determined that the Cleveland area attained the 2012 annual $PM_{2.5}$ NAAQS based on monitoring data for the 3-year period from 2015–2017. In its maintenance plan, Ohio selected 2016 as the attainment emission inventory year. The attainment inventory identifies the level of emissions in the Cleveland area that is sufficient to attain the 2012 annual $PM_{2.5}$ NAAQS. Ohio began development of the attainment inventory by first generating a baseline emissions inventory for the Cleveland area. The year 2011 was chosen as the base year for developing a comprehensive emissions inventory for direct $PM_{2.5}$, $NO_X$, $SO_2$, VOC, and $NH_3$. The projected inventory included with the maintenance plan estimates emissions forward to 2022 and 2030, which satisfies the 10-year interval required in section 175(A) of the CAA.

The emissions inventories address four major types of sources: Point, area, on-road mobile, and non-road mobile. The future year emissions inventories have been estimated using projected rates of growth in population, traffic, economic activity, expected control programs, and other parameters. Non-road mobile emissions estimates were based on EPA's non-road mobile model, with the exception of the railroad locomotives, commercial marine, and aircraft. On-road mobile source emissions were calculated using EPA's MOVES2014a on-road mobile emission model. The 2016 $PM_{2.5}$, $NO_X$, $SO_2$, VOC, and $NH_3$ emissions for Cleveland area, as well as the emissions for other years, were developed consistent with EPA guidance.

Section 175A requires a state seeking redesignation to attainment to submit a SIP revision to provide for the maintenance of the NAAQS in the area ''for at least 10 years after the redesignation.'' EPA has interpreted this as a showing of maintenance ''for a period of ten years following redesignation.'' Calcagni Memorandum, p. 9. Where the emissions inventory method of showing maintenance is used, the purpose is to show that emissions during the maintenance period will not increase over the attainment year inventory. Calcagni Memorandum, pp. 9–10.

As discussed in detail below, Ohio's maintenance plan submission expressly documents that the Cleveland area's overall emissions inventories will remain well below the attainment year inventories through 2030. In addition, for the reasons set forth below, EPA believes that the Cleveland area will continue to maintain the 2012 annual $PM_{2.5}$ NAAQS through 2030. Thus, if EPA finalizes its proposed approval of the redesignation request and maintenance plan, the approval will be based upon this showing, in accordance with section 175A, and EPA's analysis described herein, that the Ohio's maintenance plan provides for maintenance for at least 10 years after redesignation.

The maintenance plan for the Cleveland 2012 annual $PM_{2.5}$ area includes a maintenance demonstration that:

(i) Shows compliance with and maintenance of the annual $PM_{2.5}$ standard by providing information to support the demonstration that current and future emissions of $PM_{2.5}$ and $NO_X$, as well as other precursors, remain at or below 2016 emissions levels.

(ii) Uses 2016 as the attainment year and includes future emission inventory projections for 2022 and 2030.

(iii) Identifies an ''out year'' at least 10 years after EPA review and potential approval of the maintenance plan. Per 40 CFR part 93, $PM_{2.5}$, and $NO_X$ MVEBs were established for the last year (2030) of the maintenance plan.

(iv) Provides, as shown in Tables 3 through 7 below, the estimated and projected emissions inventories, in tons per year, for the Cleveland area, for $PM_{2.5}$, $NO_X$, $SO_2$, VOC, and $NH_3$.

TABLE 3—CLEVELAND, OHIO $PM_{2.5}$ EMISSION INVENTORIES

[Tons/year]

| Sector | 2016 Attainment | 2022 Interim | 2030 Maintenance | Difference 2016–2030 |
|---|---|---|---|---|
| EGU Point | 244.52 | 244.2 | 244.06 | −0.46 |
| Non-EGU | 959.26 | 947.74 | 947.74 | −11.52 |
| Non-road | 483.3 | 404.76 | 389.63 | −93.67 |
| Area | 2618.69 | 2632.91 | 2612.65 | −6.04 |
| MAR | 109.8 | 97.54 | 79.43 | −30.37 |
| On-road | 573.82 | 353.73 | 235.28 | −338.54 |
| Total | 4989.39 | 4680.88 | 4508.79 | −480.6 |

TABLE 4—CLEVELAND, OHIO $NO_X$ EMISSION INVENTORIES

[Tons/year]

| Sector | 2016 Attainment | 2022 Interim | 2030 Maintenance | Difference 2016–2030 |
|---|---|---|---|---|
| EGU Point | 2094.74 | 2130.53 | 2081.42 | −13.32 |
| Non-EGU | 3019.4 | 2472.33 | 2472.33 | −547.07 |
| Non-road | 5302.02 | 4259.67 | 3888.48 | −1413.54 |
| Area | 5979.36 | 6033.34 | 6034.14 | 54.78 |
| MAR | 3693.28 | 3391.82 | 2847.09 | −846.19 |
| On-road | 15325.44 | 8201.77 | 4267.43 | −11058.01 |
| Total | 35414.24 | 26489.46 | 21590.89 | −13823.35 |

TABLE 5—CLEVELAND, OHIO $SO_2$ EMISSION INVENTORIES

[Tons/year]

| Sector | 2016 Attainment | 2022 Interim | 2030 Maintenance | Difference 2016–2030 |
|---|---|---|---|---|
| EGU Point | 9022.75 | 9020.59 | 9020.59 | −2.16 |
| Non-EGU | 5312.54 | 1411.93 | 1411.93 | −3900.61 |
| Non-road | 9.39 | 12.63 | 13.89 | 4.5 |
| Area | 183.9 | 200.83 | 200.92 | 17.02 |
| MAR | 94.2 | 118.21 | 119.03 | 24.83 |
| On-road | 101.24 | 88.63 | 70.59 | −30.65 |
| Total | 14724.02 | 10852.82 | 10836.95 | −3887.07 |

TABLE 6—CLEVELAND, OHIO VOC EMISSION INVENTORIES

[Tons/year]

| Sector | 2016 Attainment | 2022 Interim | 2030 Maintenance | Difference 2016–2030 |
|---|---|---|---|---|
| EGU Point | 15.74 | 16.76 | 15.45 | −0.29 |
| Non-EGU | 1354.24 | 1202.43 | 1202.43 | −151.81 |
| Non-road | 7687.75 | 6725.32 | 6625.2 | −1062.55 |
| Area | 14994.33 | 14988.5 | 14913.02 | −81.31 |
| MAR | 325.14 | 336.16 | 313.96 | −11.18 |
| On-road | 2591.43 | 1095.4 | 470.43 | −2121 |
| Total | 26968.63 | 24364.57 | 23540.49 | −3428.14 |

TABLE 7—CLEVELAND, OHIO $NH_3$ EMISSION INVENTORIES

[Tons/year]

| Sector | 2016 Attainment | 2022 Interim | 2030 Maintenance | Difference 2016–2030 |
|---|---|---|---|---|
| EGU Point | 0.13 | 0.13 | 0.13 | 0 |

TABLE 7—CLEVELAND, OHIO $NH_3$ EMISSION INVENTORIES—Continued

[Tons/year]

| Sector | 2016 Attainment | 2022 Interim | 2030 Maintenance | Difference 2016–2030 |
|---|---|---|---|---|
| Non-EGU | 57.58 | 44.99 | 44.99 | −12.59 |
| Non-road | 11.93 | 12.97 | 14.31 | 2.38 |
| Area | 1131.54 | 1134.31 | 1134.25 | 2.71 |
| MAR | 1.55 | 1.54 | 1.54 | −0.01 |
| On-road | 368.13 | 322.31 | 313.39 | −54.74 |
| Total | 1570.86 | 1516.25 | 1508.61 | −62.25 |

As discussed in the section below, the state's maintenance plan submission expressly documents that the area's emission levels will remain below the attainment year emission levels through 2030.

d. Monitoring Network

Ohio operates eight $PM_{2.5}$ monitors in the Cleveland, Ohio area. Ohio's maintenance plan includes a commitment to continue to operate an adequate EPA-approved monitoring network to demonstrate ongoing compliance with the NAAQS.

e. Verification of Continued Attainment

Ohio remains obligated to continue to quality-assure monitoring data and enter all data into the Air Quality System in accordance with Federal guidelines. Ohio will use these data, supplemented with additional information as necessary, to assure that the area continues to attain the standard. Ohio will also continue to develop and submit periodic emission inventories as required by the Federal Consolidated Emissions Reporting Rule (67 FR 39602, June 10, 2002) to track future levels of emissions. Both of these actions will help to verify continued attainment in accordance with 40 CFR part 58.

f. Contingency Plan

The contingency plan provisions are designed to promptly correct or prevent a violation of the NAAQS that might occur after redesignation of an area to attainment. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that the state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation of the contingency measures, and a time limit for action by the state. The state should also identify specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must include a requirement that the state will implement all pollution control measures that were contained in the SIP before redesignation of the area to attainment. *See* section 175A(d) of the CAA.

Ohio's contingency plan defines a warning level and action level response. The warning level response will trigger when the $PM_{2.5}$ average of the weighted annual mean of 12.5 μg/m³ or greater occurs in a single calendar year within the maintenance area. A warning level response will consist of a study to determine whether the $PM_{2.5}$ value indicates a trend toward higher $PM_{2.5}$ values or whether emissions appear to be increasing. The action level response will be prompted whenever a two-year average of the weighted annual means of greater than 12.0 μg/m³ occurs within the maintenance area. A violation of the standard (three-year average of the weighted annual means of greater than 12.0 μg/m³) shall also prompt an action level response. If the action level is triggered and is not found to be due to an exceptional event, malfunction, or noncompliance with a permit condition or rule requirement, Ohio EPA, in conjunction with the metropolitan planning organization or regional council of governments, will determine additional control measures needed to assure future attainment of the NAAQS for annual $PM_{2.5}$. Action level measures that can be implemented in a short time will be selected to be in place within 18 months from the close of the calendar year that prompted the action level. Ohio EPA will also consider the timing of an action level trigger and determine if additional, significant new regulations not currently included as part of the maintenance provisions will be implemented in a timely manner and will constitute our response.

Because it is not possible to determine what control measures will be appropriate at an unspecified time in the future, the list of contingency measures outlined below is not exhaustive.

(1) Diesel reduction emission strategies.

(2) Alternative fuel (*e.g.,* liquid propane and compressed natural gas) and diesel retrofit programs for fleet vehicle operations.

(3) Tighter $PM_{2.5}$, $SO_2$, and $NO_X$ emissions offsets for new and modified major sources.

(4) Impact crushers located at recycle scrap yards—upgrade wet suppression.

(5) Concrete manufacturing—upgrade wet suppression.

(6) Additional $NO_X$ RACT statewide.

As required by section 175A(b) of the CAA, Ohio commits to submit to EPA an updated $PM_{2.5}$ maintenance plan eight years after redesignation of the Cleveland area to cover an additional ten-year period beyond the initial 10 year maintenance period.

For the reasons set forth above, EPA is proposing to approve Ohio's 2012 annual $PM_{2.5}$ maintenance plan for the Cleveland area as meeting the requirements of CAA section 175A.

Ohio further commits to conduct ongoing review of its data, and if monitored concentrations or emissions are trending upward, Ohio commits to take appropriate steps to avoid a violation if possible. Ohio commits to continue implementing SIP requirements upon and after redesignation.

EPA finds that Ohio's approved contingency measures, as well as the commitment to continue implementing any SIP requirements, satisfy the pertinent requirements of section 175A.

5. Motor Vehicle Emissions Budget (MVEBs) for $PM_{2.5}$ and $NO_X$, and Safety Margin for the Cleveland Area

The maintenance plan submitted by Ohio for the Cleveland contain new primary $PM_{2.5}$ and $NO_X$ MVEBs for the area for the years 2022 and 2030. MVEBs are the projected levels of controlled emissions from the transportation sector (mobile sources) that are estimated in the SIP to provide

for maintenance of the ozone standard. The MVEBs were calculated using MOVES2014a. Table 8 details Ohio's 2022 and 2030 MVEBs for the Cleveland.

TABLE 8—MVEBS FOR THE CLEVELAND 2012 ANNUAL $PM_{2.5}$ MAINTENANCE PLAN

[tons/year]

| Pollutant | 2022 MVEB | 2030 MVEB |
|---|---|---|
| $PM_{2.5}$ | 406.79 | 270.57 |
| $NO_X$ | 9,432.04 | 4,907.54 |

Ohio included ''safety margins'' as provided for in 40 CFR 93.124(a). A ''safety margin'', as defined in the transportation conformity rule (40 CFR part 93 subpart A), is the amount by which the total projected emissions from all sources of a given pollutant are less than the total emissions that would satisfy the applicable requirement for reasonable further progress, attainment, or maintenance. The attainment level of $PM_{2.5}$ and $NO_X$ emissions for the Cleveland is shown in tables 3 and 4. Tables 9 and 10 show the remaining safety margin for the Cleveland area following the allocation to the $PM_{2.5}$ and $NO_X$ MVEBs.

TABLE 9—2022 SAFETY MARGIN FOR CLEVELAND 2012 ANNUAL $PM_{2.5}$ MAINTENANCE PLAN

[tons/year]

| Pollutant | 2022 Safety margin | Safety margin allocated to 2022 MVEB | Safety margin remaining |
|---|---|---|---|
| $PM_{2.5}$ | 308.51 | 53.06 | 255.45 |
| $NO_X$ | 8924.78 | 1230.27 | 7694.51 |

TABLE 10—2030 SAFETY MARGIN FOR CLEVELAND 2012 ANNUAL $PM_{2.5}$ MAINTENANCE PLAN

[tons/year]

| Pollutant | 2030 Safety margin | Safety margin allocated to 2030 MVEB | Safety margin remaining |
|---|---|---|---|
| $PM_{2.5}$ | 480.6 | 35.29 | 445.31 |
| $NO_X$ | 13823.35 | 640.11 | 13183.24 |

The 2022 and 2030 projected emissions, even with this allocation, will be below the 2016 attainment year emissions for both $PM_{2.5}$ and $NO_X$. For this reason, EPA finds that the allocation of the safety margin to the MVEBs for the Cleveland area meet the requirements of the transportation conformity regulations at 40 CFR part 93, and are approvable. Once allocated to mobile sources, these portions of the safety margins will not be available for use by other sources.

## V. What are the effects of EPA's actions?

EPA is proposing to change the official designation of the Cleveland, Ohio area for the 2012 annual $PM_{2.5}$ NAAQS, found at 40 CFR part 81, from nonattainment to attainment. EPA is proposing to determine that the Cleveland area has attained the 2012 annual $PM_{2.5}$ standard, based on the most recent three years of certified air quality data. This action also proposes to approve the maintenance plan for the 2012 annual $PM_{2.5}$ NAAQS as revisions to the Ohio SIP for the Cleveland area. Finally, EPA finds adequate and is proposing to approve 2022 and 2030 primary $PM_{2.5}$ and $NO_X$ MVEBs for the Cleveland area. These MVEBs will be used in future transportation conformity analyses for the area.

## VI. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

**List of Subjects**

*40 CFR Part 52*

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Sulfur oxides.

*40 CFR Part 81*

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: December 6, 2018.

**Cathy Stepp,**

*Regional Administrator, Region 5.*

[FR Doc. 2018–27746 Filed 12–21–18; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 62

**[EPA–R07–OAR–2018–0812; FRL–9988–10–Region 7]**

## Approval of State Plans for Designated Facilities and Pollutants; Kansas; Sewage Sludge Incineration Units

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to accept the negative declaration submitted by the State of Kansas, for Sewage Sludge Incineration (SSI) units. This negative declaration submitted by the Kansas Department of Health and Environment (KDHE) certifies that SSI units subject to sections 111(d) and 129 of the Clean Air Act (CAA) do not exist within the jurisdiction of the State of Kansas. The EPA is accepting the negative declaration in accordance with the requirements of the CAA.

**DATES:** Comments must be received on or before January 25, 2019.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA–R07–OAR–2018–0812, to *https://www.regulations.gov.* Follow the online instructions for submitting comments.

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received will be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Written Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Larry Gonzalez, Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number (913) 551–7041; email address *gonzalez.larry@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document ''we,'' ''us,'' or ''our'' refer to EPA.

**Table of Contents**

I. Written Comments
II. Background
III. What action is EPA taking?
IV. Statutory and Executive Order Reviews

### I. Written Comments

Submit your comments, identified by Docket ID No. EPA–R07–OAR–2018–0812, at *https://www.regulations.gov.* 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://www.epa.gov/dockets/commenting-epa-dockets.*

### II. Background

The CAA requires that state regulatory agencies implement emission guidelines and associated compliance times using a state plan developed under sections 111(d) and 129 of the CAA.

The general provisions for the submittal and approval of state plans are codified in 40 Code of Federal Regulations (CFR) part 60, subpart B and 40 CFR part 62, subpart A. Section 111(d) establishes general requirements and procedures on state plan submittals for the control of designated pollutants. Section 129 requires emission guidelines to be promulgated for all categories of solid waste incineration units, including SSI units. SSI units are defined at 40 CFR part 60.5250 as ''an incineration unit combusting sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter. Sewage sludge incineration unit designs include fluidized bed and multiple hearth. An SSI unit also includes, but is not limited to, the sewage sludge feed system, auxiliary fuel feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The SSI unit includes all ash handling systems connected to the bottom ash handling system. The combustion unit bottom ash system ends at the truck loading station or similar equipment that transfers the ash to final disposal. The SSI unit does not include air pollution control equipment or the stack.''

Section 129 mandates that all plan requirements be at least as protective as the promulgated emission guidelines. This includes fixed final compliance dates, fixed compliance schedules, and Title V permitting requirements for all affected sources. Section 129 also requires that state plans be submitted to EPA within one year after EPA's promulgation of the emission guidelines and compliance times.

States have options other than submitting a state plan in order to fulfill their obligations under CAA sections 111(d) and 129. If a state does not have any existing SSI units for the relevant emission guidelines, a letter can be submitted certifying that no such units exist within the state (*i.e.,* negative declaration) in lieu of a state plan, in accordance with 40 CFR 60.5010. The negative declaration exempts the state from the requirements of subpart B that

would otherwise require the submittal of a CAA section 111(d)/129 plan.

On March 21, 2011, EPA finalized emission guidelines for SSI units at 76 FR 15372, (found at 40 CFR part 60, subpart MMMM). Following the 2011 final rule, KDHE determined that there were two SSI units operating at a single facility in Kansas, but those units were permanently shut down on June 14, 2014 and September 7, 2016. Prior to shutdown of the two units at the single facility in Kansas, the two units were regulated via the Federal plan under the enforcement oversight of EPA Region 7. In response and following the shutdown of the units, KDHE submitted a negative declaration for SSI units on April 30, 2018.

EPA is proposing to accept KDHE's negative declaration submission made on April 30, 2018. This action applies to the state's regulatory requirements for existing facilities and not new sources.

### III. What action is EPA proposing to take?

In this proposed action the EPA proposes to amend 40 CFR part 62 to reflect receipt of the negative declaration letter from KDHE certifying that there are no existing SSI units subject to 40 CFR part 60, subpart MMMM, in accordance with section 111(d) of the CAA.

### IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). This proposed action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely proposes to approve the state's negative declaration as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this proposed action does not impose an enforceable duty upon State, local, or tribal governments, and does not reduce or eliminate the amount of authorization of Federal appropriations, and because it contains no regulatory requirements applicable to small governments, this proposed action 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).

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

This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this action. This action merely proposes to approve a state negative declaration submitted in response to a Federal standard and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rulemaking also is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) because it proposes to approve a state submission in response to a Federal standard.

This proposed action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Burden is defined at 5 CFR 1320.3(b).

### List of Subjects in 40 CFR Part 62

Environmental protection, Air pollution control, Administrative practice and procedure, Sewage sludge incineration units.

Dated: December 14, 2018.

**James B. Gulliford,**

*Regional Administrator, Region 7.*

For the reasons stated in the preamble, EPA proposes to amend 40 CFR part 62 as set forth below:

## PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

■ 1. The authority citation for part 62 continues to read as follows:

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

## Subpart R—Kansas

■ 2. Amend Subpart R by adding paragraph § 62.4183 to read as follows: Air Emissions From Existing Sewage Sludge Incineration Units.

**§ 62.4183 Identification of plan—negative declaration.**

Letter from the Kansas Department of Health and Environment submitted April 30, 2018, certifying that there are no sewage sludge incineration units subject to 40 CFR 60, subpart MMMM.

[FR Doc. 2018–27906 Filed 12–21–18; 8:45 am]

BILLING CODE 6560–50–P

---

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 258

**[EPA–HQ–RCRA–2015–0354; FRL–9988–41–OLEM]**

**RIN 2050–AG86**

## Revisions to the Criteria for Municipal Solid Waste Landfills To Address Advances in Liquids Management

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Advance Notice of Proposed Rulemaking.

**SUMMARY:** The Environmental Protection Agency (EPA) is considering whether to propose revisions to the criteria for Municipal Solid Waste Landfills (MSWLFs) to support advances in effective liquids management. To this end, EPA is seeking information relating to: Removing the prohibition on the addition of bulk liquids to MSWLFs; defining a particular class of MSWLF units (*i.e.,* bioreactor landfill units) to operate with increased moisture content; and establishing revised MSWLF criteria to address additional technical considerations associated with liquids management, including waste stability, subsurface reactions, and other important safety and operational issues. This Advance Notice of Proposed Rulemaking (ANPRM) also discusses the results of related research conducted to date, describes EPA's preliminary analysis of that research, and seeks additional scientific studies, data, and public input on issues that may inform a future proposed rule. The EPA is not reopening any existing regulations through this ANPRM.

**DATES:** Comments must be received on or before March 26, 2019. If necessary, EPA may convene a public meeting to collect more information on this issue after the close of the public comment period. The EPA would provide notice

and details of such a meeting on its website.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2015–0354 to the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. If you need to include CBI as part of your comment, please visit *http://epa/gov/dockets/comments.html* for instructions. 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. For additional submission methods, the full EPA public comment policies, and general guidance on making effective comments, please visit *http://www.epa.govdockets/comments.html*.

The EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be CBI or other information whose disclosure is restricted by statute.

**FOR FURTHER INFORMATION CONTACT:** For questions regarding this ANPRM, contact Craig Dufficy or John Sager, Materials Recovery and Waste Management Division of the Office of Resource Conservation and Recovery (mail code 5304P), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; Craig Dufficy telephone: 703–308–9037; email: *dufficy.craig@epa.gov*; John Sager telephone: 703–308–7256; email: *sager.john@epa.gov*.

**SUPPLEMENTARY INFORMATION:** The following outline is provided to aid in locating information in this preamble.

I. Does this action apply to me?
II. What action is EPA contemplating?
III. Regulatory Background
A. RCRA Subtitle D MSWLF Regulations
B. RCRA MSWLF RD&D Rule
C. Air Emissions Regulations
IV. Bioreactor Landfill Research History
A. Project XL and CRADAs
B. Report: *Bioreactor Landfills, State of the Practice Review*
C. Report: *Permitting of Landfill Bioreactor Operations: Ten Years After the RD&D Rule*
D. RCRA MSWLF RD&D Annual Reports
V. Potential Environmental Benefits, Cost Savings, and Environmental Considerations
A. Potential Environmental Benefits
B. Potential Cost Savings
C. Environmental Considerations
1. Groundwater Considerations
2. Air Emissions Considerations
VI. Additional Technical Considerations
VII. Characteristics of Bioreactor Landfill Units and Wet Landfill Units
VIII. Universe of MSWLFs Potentially Affected by This ANPRM
IX. Relationship to Organics Diversion and Composting Programs
X. What information is EPA seeking?
A. Information on Benefits and Risks of Bioreactor Landfill Units and Wet Landfill Units
B. Questions on Characteristics of Bioreactor Landfill Units and Wet Landfill Units
C. Questions on Operations and Post-Closure Care
D. Questions on Potential Risks
E. Questions on Potential Costs and Benefits
XI. Statutory and Executive Order Review
XII. Conclusion

## I. Does this action apply to me?

Entities potentially affected by a future rulemaking on liquids management in Municipal Solid Waste Landfills (MSWLFs), including public or private owners or operators of MSWLF units, may be interested in commenting on this ANPRM. Potentially affected categories and entities include the following:

TABLE 1—CATEGORIES OF POTENTIAL AFFECTED ENTITIES

| Category | Example of affected entities |
|---|---|
| Federal Government | Agencies procuring waste services. |
| State Governments | Regulatory agencies and agencies operating landfills. |
| Industry | Owners or operators of municipal solid waste landfills. |
| Municipalities, including Tribal Governments | Owners or operators of municipal solid waste landfills. |

The potentially affected entities may also fall under the North American Industry Classification System (NAICS) code 924110, Sanitation engineering agencies, government; or 562212, Solid Waste Landfill. The industry sector(s) identified above may not be exhaustive; other types of entities not listed may also be affected. If you have any questions regarding the applicability of a future final rule to a particular entity, contact the person listed in the following section.

## II. What action is EPA contemplating?

The EPA is considering whether to propose revisions to the criteria in 40 CFR part 258 to support advances in effective liquids management. The purpose of this ANPRM is to solicit data and information to inform our thinking on this potential action.

First, EPA is evaluating whether to propose easing current restrictions on the addition of liquids in order to promote accelerated biodegradation of the waste. Time-limited variances for liquids addition are currently allowed at facilities with Research, Development and Demonstration (RD&D) permits authorized under 40 CFR 258.4. The EPA is considering whether it would be appropriate to propose removing the prohibition on the addition of bulk (*i.e.,* non-containerized) liquids and providing for the operation of bioreactor landfill units outside of the current RD&D program.

Second, future revisions could also include defining a new class of MSWLF units with specific requirements for how liquids may be managed in such units. For example, bioreactor landfill units were described in the preamble to the 2004 RD&D rule as units in which the controlled addition of non-hazardous liquid wastes or water accelerates biodegradation and landfill gas (LFG) generation.[1] A future proposed definition under the Resource Conservation and Recovery Act (RCRA) could also be quantitative in nature, such as by employing a specified percentage of moisture content or more by weight as a threshold criterion. Any future proposed definition might also include other factors such as the average amount of annual precipitation in an area; whether liquids are added intentionally for any purpose other than cleaning, maintenance, and wetting of daily cover; whether leachate is recirculated; and the magnitude of the

[1] 69 FR 13251, March 22, 2004, Research, Development and Demonstration Permits Rule for MSWLFs.

first-order biodegradation constant (k) discussed later in this document. Relatedly, EPA also believes that there may be some MSWLFs operating at high levels of moisture content (so-called ''wet landfill units'') that can be distinguished from bioreactor landfill units to which liquids are purposefully added. [2] Specific characteristics that may be considered in developing a RCRA definition for a bioreactor landfill unit or a wet landfill unit are discussed later in Section VII of this ANPRM. As in the 2004 RD&D rule preamble, bioreactor landfill units are generally characterized by the intentional addition of liquids to accelerate biodegradation, while the term wet landfill unit, which does not have a RCRA regulatory definition, is generally used to describe landfill units with a high moisture content, whether intentional or not. The intent of this ANPRM is to draw a distinction between these terms and consider possible revisions to Part 258.

Third, EPA is also considering whether other revisions to Part 258 may be necessary for MSWLFs operating as bioreactor landfill units or wet landfill units. These issues include whether to revise the design and operating criteria under Part 258 to address important safety and operational issues related to leachate collection, waste stability, subsurface reactions, and other issues. These are discussed in Section VI below. For informational purposes, Section IV of this ANPRM also discusses the results of related research conducted to date and describes EPA's preliminary analysis of that research.

Any revisions to Part 258 in a subsequent, proposed rulemaking could be narrowly tailored to focus on facilities that choose to add bulk liquids or otherwise operate as bioreactor landfill units. Alternatively, such revisions could be broadly applicable to address liquids management practices at all facilities. The EPA is not making any specific proposal through this ANPRM and plans to evaluate the data and comments received in response to this ANPRM before proposing any specific action.

With this notice, EPA is seeking public input on key issues at this preliminary stage to inform its thinking on any future proposed rulemaking. The EPA is not reopening any existing regulations through this ANPRM. The EPA anticipates that any revisions would be proposed under the authority of RCRA sections 1008, 2002, 4004, 4005 and 4010, 42 U.S.C. 6907, 6912, 6944, 6945, and 6949a. At that time, EPA would take public comment on those proposed revisions.

## III. Regulatory Background

### *A. RCRA Subtitle D MSWLF Regulations*

Under RCRA Subtitle D, as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. 6941–6949a, EPA promulgated minimum national standards in 1991 [3] for owners and operators of MSWLFs at 40 CFR part 258, subparts A through G. The EPA has revised Part 258 on several occasions since 1991.[4] The regulations specifically include seven subparts: (1) General provisions, including RD&D permits; (2) location restrictions; (3) operating criteria; (4) design criteria; (5) groundwater monitoring and corrective action; (6) closure and post-closure care; and (7) financial assurance.

Under RCRA Subtitle D, approved states are to have permitting programs or other systems of prior approval to ensure that all MSWLFs in the state meet the federal minimum criteria. The EPA reviews and approves state permit programs in accordance with 40 CFR part 239. Upon EPA approval, a state program may provide flexibility for owners and operators of MSWLF units, as allowed by Part 258. For example, an approved state program may allow an owner/operator to use an alternative material or an alternative thickness for daily cover.

When promulgated in 1991, EPA's MSWLF regulations were intended to have the effect of keeping the contents of the unit as dry as possible. While EPA recognized at the time that moisture was necessary to promote biodegradation and waste stabilization,[5] there was concern that the risk of liner leakage and groundwater contamination increased as the moisture content increased. Based on data available at that time, EPA believed that minimizing the amount of liquid in a landfill was necessary to reduce the possibility of groundwater contamination resulting from the leakage of leachate; reduce possible damage to the liner and final cover of the unit resulting from waste subsidence; and reduce the buildup of hydrostatic pressure on the liner due to the ''bathtub'' [6] effect, when the combined rate of liquids addition and infiltration outpaced the leachate removal rate. To address these risks, the regulations prohibit disposal of bulk liquids in MSWLFs and require low permeability final cover systems. The design criteria in 258.40 indicate that, unless an alternative is approved, new units and lateral expansions are to be operated with a composite liner and leachate collection system that is designed and constructed to maintain a maximum allowable hydraulic head on the liner of 30 cm. The resulting design has accordingly come to be referred to as a ''dry-tomb landfill.'' [7]

### *B. RCRA MSWLF RD&D Rule*

In 2004, EPA promulgated the RD&D rule at 40 CFR 258.4 [8] to expand research into liquids addition and other innovative landfill practices. The RD&D rule enables the director of an approved state waste management program to issue time-limited RD&D permits for the use of innovative methods that can vary the liquids restrictions in 40 CFR 258.28(a) and the run-on/run-off control systems in 40 CFR 258.26(a)(1), provided that the MSWLF unit has a leachate collection system designed and constructed to maintain less than 30 cm of leachate on the liner. The RD&D permits can also vary the final cover criteria of § 258.60(a)(1), (a)(2) and (b)(1), provided that the owner/operator demonstrates that the infiltration of liquid through the alternative cover system will not cause contamination of groundwater or surface water, or cause leachate depth on the liner to exceed 30 cm. All RD&D permits issued under 40 CFR 258.4 are required to include terms and conditions as protective as the MSWLF criteria in Part 258 to assure protection of human health and the environment. After the initial permit term of three years, owner/operators may apply to the director of an approved state program to renew the RD&D permit for an additional three-

[2] The terms ''wet,'' ''leachate recirculation,'' and ''bioreactor'' are sometimes used interchangeably in technical and popular literature to describe a landfill operated under conditions of elevated in-situ moisture content. The EPA also defines bioreactor landfills under the Clean Air Act NESHAP for MSWLFs. Unless otherwise noted, in this ANPRM the term ''bioreactor landfill unit'' refers to those units meeting the description contained in the 2004 RD&D preamble, and ''wet landfill unit'' refers to MSWLFs with elevated moisture content under consideration for possible revisions to Part 258.

[3] 56 FR 50978 (October 9, 1991), 40 CFR parts 257 and 258, Solid Waste Disposal Facility Criteria, Final Rule.

[4] *https://www.epa.gov/landfills/municipal-solid-waste-landfills.*

[5] 56 FR 51055 (October 9, 1991), 40 CFR parts 257 and 258, Solid Waste Disposal Facility Criteria, Final Rule.

[6] See 53 FR 33356 (August 30, 1988), 40 CFR parts 257 and 258, Solid Waste Disposal Facility Criteria, Proposed Rule; the ''bathtub'' effect is an analogy used to describe filling up a landfill with liquids faster than the the leachate collection system can remove them.

[7] 81 FR 28720, May 10, 2016, Revision to the Research, Development and Demonstration Permits Rule for MSWLFs.

[8] 69 FR 13242, March 22, 2004, Research, Development and Demonstration Permits Rule for MSWLFs.

year term. The initial RD&D rule allowed three renewals for a maximum permit term of 12 years. In 2016, EPA amended the RD&D rule to extend the maximum permit term to 21 years.[9]

As shown in Table 2, 16 states have approved RCRA Subtitle D RD&D programs. Among these states, EPA believes there are 35 facilities operating bioreactor landfill units with RD&D permits providing variances allowing liquids additions. The EPA has also issued a site-specific rule for the Salt River Landfill facility in Indian Country that authorizes, in part, the operation of a research, development, and demonstration bioreactor landfill.[10] All facilities with RD&D permits are required to submit annual performance reports to their state waste management programs demonstrating progress toward project goals. The EPA's site-specific rule for the Salt River Landfill also requires annual reports to EPA. The most recent annual reports available to EPA are shown in Table 2. The EPA provides information on its preliminary review of this information in Section IV.4 below.

TABLE 2—RD&D PERMITTED FACILITIES

| State | Date program approved by EPA [11] | Listing of permitted facilities | Date latest annual report available [12] |
|---|---|---|---|
| Alaska | 2011 | Anchorage Regional Landfill, Eagle River | 2009 |
| | | Central Peninsula Landfill, Soldotna | 2017 |
| | | Fairbanks North Star Borough Landfill, Fairbanks | 2018 |
| | | Palmer Central Landfill, Palmer | 2014 |
| California | 2007 | CWM Kettleman Hills Facility, Kettleman City | 2010 |
| | | Yolo County Central Landfill, Woodland | 2005 |
| Illinois | 2006 | River Ben Prairie Landfill, Cook County | 2018 |
| Indiana | 2005 | None | N/A |
| Iowa | 2009 | None | N/A |
| Kansas | 2009 | Barton County Landfill, Great Bend | 2016 |
| | | Johnson County Landfill, Shawnee | 2017 |
| | | Plumb Thicket Landfill, Harper | 2016 |
| | | Seward County Landfill, Liberal | 2015 |
| | | Western Plains Landfill, Finney County | 2017 |
| Massachusetts | 2013 | None | N/A |
| Michigan | 2006 | Midland City Landfill, Midland | 2016 |
| | | Smiths Creek Landfill, St. Clair | 2016 |
| Minnesota | 2005 | Spruce Ridge Landfill, Plymouth | 2015 |
| Missouri | 2006 | City of Columbia Landfill, Columbia | 2017 |
| Nebraska | 2008 | None | N/A |
| New Hampshire | 2010 | None | N/A |
| Ohio | 2011 | None | N/A |
| Oregon | 2013 | Columbia Ridge Landfill, Arlington | 2018 |
| | | Finley Buttes Regional Landfill, Boardman | 2016 |
| Virginia | 2009 | Maplewood Landfill, Amelia County | 2010 |
| Wisconsin | 2006 | Cranberry Creek Landfill, Wood County | 2017 |
| | | Deer Track Park Landfill, Watertown | 2017 |
| | | Emerald Park Landfill, Waukesha County | 2017 |
| | | Glacier Ridge Landfill, Horicon | 2017 |
| | | Hickory Meadows Landfill, Hilbert | 2017 |
| | | La Crosse County Landfill, La Crosse County | 2017 |
| | | Lake Area Landfill, Sarona | 2017 |
| | | Mallard Ridge Landfill, Walworth County | 2017 |
| | | Metro Landfill, Franklin | 2017 |
| | | Orchard Ridge Landfill, Menomonee Falls | 2017 |
| | | Pheasant Run Landfill, Paris | 2017 |
| | | Ridgeview Landfill, Whitelaw | 2017 |
| | | Seven Mile Creek Landfill, Eau Claire | 2017 |
| | | Timberline Trail Landfill, Stubbs | 2017 |
| | | Valley Trail Landfill, Berlin | |
| Salt River Pima-Marcopa Indian Community (Arizona). | Site-specific rule | Salt River landfill, Phoenix Metropolitan Area | 2011 |

*C. Air Emissions Regulations*

As will be seen in the discussion of bioreactor landfill research in the next section of this notice, one of the primary characteristics of bioreactor landfill units is that the rate of LFG generation is accelerated. Should EPA propose in a subsequent rulemaking to move bioreactor landfill operations outside of RD&D permits, EPA intends to evaluate changes to the RCRA regulations to ensure that LFG gas emissions are properly controlled in compliance with existing emissions regulations. Air emissions from MSWLFs are regulated under the RCRA Subtitle D regulations as well as EPA regulations issued pursuant to two Clean Air Act (CAA)

[9] 81 FR 28720, May 10, 2016, Revision to the Research, Development and Demonstration Permits Rule for MSWLFs.

[10] 74 FR 11677, March 19, 2009, Final Determination to Approve Research, Development, and Demonstration Request for the Salt River Landfill.

[11] Date listed is when the state RD&D Program was approved.

[12] Date listed is most recent report available to EPA; ''N/A'' means that EPA is not aware of any permitted facility in a state that is approved to issue an RD&D permit.

programs, the National Emission Standards for Hazardous Air Pollutants (NESHAP), and the New Source Performance Standards (NSPS). The RCRA rules impose standards to limit methane generation to a level below the Lower Explosive Limit (LEL) to prevent landfill fires and explosions that can kill or injure and damage containment structures and thereby cause emissions of toxic fumes.[13] By contrast, the CAA regulations for air emissions principally address hazardous air pollutants (HAP) and LFG, and they do not explicitly address methane. Yet, methane comprises close to 50% of LFG[14] on average, and EPA understands that adding liquids increases the rate of LFG generation. Thus, EPA plans to examine whether an increase in methane surface emissions may also result in exceedances of the current explosive gas limits in Part 258. Consequently, in any proposal to amend the RCRA rules to allow bulk liquids addition, EPA expects the need to consider the implications of enhanced methane generation at such units.

As mentioned, the RCRA Subtitle D standards for MSWLFs address explosive gas control. Section 258.23 of those rules specifies that the concentration of methane generated by a MSWLF must not exceed 25% of the lower explosive limit (LEL) in facility structures, and it must not exceed the LEL for methane at the property boundary. The rules also require a routine methane monitoring program to ensure those standards are met. (40 CFR 258.23(b).) If methane levels exceed the standards, the owner or operator must immediately take all necessary steps to ensure protection of human health and safety and notify the regulatory authority; place in the operating record information on the gas levels detected and steps taken to protect human health; and implement a remediation plan. (40 CFR 258.23(c))

The MSWLF NESHAP was promulgated in 2003 and is scheduled for a Residual Risk and Technology Review (RTR) due in 2020. Bioreactor landfill units are defined in the NESHAP to be a MSWLF or portion of a MSWLF to which any liquid other than leachate (leachate includes LFG condensate) is added in a controlled fashion into the waste mass (often in combination with recirculating leachate) to reach a minimum average moisture content of 40% by weight to accelerate or enhance the anaerobic (without oxygen) biodegradation of the waste. The NESHAP requires bioreactor landfill units to install and operate LFG collection systems within six months of reaching the 40% moisture content threshold. The MSWLF NSPS and Emission Guidelines (EG) were promulgated in 1996, followed by a revised NSPS/EG in 2016. The NSPS/EG rules, currently under reconsideration, require LFG collection 30 months after emissions reach a threshold of 34 metric tons (revised from a 50 metric ton threshold in the 1996 rules) of non-methane organic compounds (NMOCs) or more per year.

## IV. Bioreactor Landfill Research History

After promulgation of the Part 258 standards in 1991, EPA increasingly became aware that landfill technology was evolving and that alternative designs and operations could benefit from further study through research and demonstration projects. Research initiated in the 1970s and 1980s by the University of Wisconsin—Madison[15] and Georgia Institute of Technology[16] contributed to EPA's understanding of the potential benefits of liquids addition. The EPA has been researching[17] bioreactor landfill units and liquids addition since 2001.

That year, EPA's Office of Research and Development (ORD) began conducting research through EPA's Project XL program and the use of Cooperative Research and Development Agreements (CRADAs). Project XL, which stands for ''eXcellence and Leadership,'' was a national pilot program that allowed state and local governments, businesses and federal facilities to work with EPA to develop innovative technologies and more cost-effective ways of achieving environmental and public health protection. As part of these partnerships, EPA issued regulatory, program, policy, or procedural flexibilities to conduct the work. Beginning in 2001, four bioreactor landfills were accepted into Project XL, including those in Buncombe County, North Carolina; Yolo County, California; King George County, Virginia; and the Maplewood facility in Amelia Country, Virginia.

The use of CRADAs was a means for EPA to promote collaborative research between EPA's ORD and external parties. Bioreactor landfill units operating with CRADAs[18] included the Outer Loop Landfill in Louisville, Kentucky, and the Polk County Landfill in Florida. The purpose of the research conducted at these Project XL and CRADA sites was to allow the landfills to add non-hazardous and non-containerized liquids and investigate the impact on waste biodegradation and stabilization.

In 2004, EPA promulgated the RD&D rule as described in Section III.2 above. The EPA believes there are 35 facilities with RD&D permits involving variances for liquids management including the addition of bulk liquids. The EPA has also issued a site-specific rule for the Salt River Landfill facility in Indian Country that in part authorizes operation of a research, development, and demonstration bioreactor landfill.

In preparing this ANPRM, EPA has reviewed and made a preliminary analysis of data from approximately 41 landfill facilities with variances for liquids addition granted through the Project XL, CRADA and RD&D research programs. Data analysis from the Project XL and CRADA facilities draws extensively from the 2007 ''Bioreactor Landfills State-Of-The Practice Review'' published by ORD. Data analysis from the 35 RD&D-permitted facilities, along with additional data analysis from the Project XL and CRADA facilities, draws extensively from the 2014 ORD report ''Permitting of Landfill Bioreactor Operations: Ten Years after the RD&D Rule.'' The EPA also compiled and reviewed the most recent annual reports available from the facilities identified in Table 2 above.[19] The EPA presents examples of these data in the sub-sections below. Later, in Section V, EPA discusses potential benefits and environmental considerations associated with bioreactor landfill units based on preliminary analysis of the data now available to it. Should EPA determine after further analysis to proceed with a rulemaking proposal,

[13] 56 FR 51051–52.

[14] See *https://www.epa.gov/lmop/basic-information-about-landfill-gas.*

[15] Ham & Bookter, 1982; Barlaz et al., 1987 as referenced in ''Bioreactor Landfills State-Of-The Practice Review,'' U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/071.

[16] Pohland, 1975; Pohland & Harper, 1986 as referenced in ''Bioreactor Landfills State-Of-The Practice Review,'' pages iv–vi, U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/071.

[17] As used in this ANPRM, the term ''EPA research'' is used to describe EPA cooperative efforts with and analysis of data from facilities with variances for liquids addition granted through the Project XL, CRADA, and RD&D programs. Variances were granted with the understanding that performance data would be shared with EPA and the states. The EPA is not the owner/operator of these facilities where full-scale landfill operations are taking place.

[18] See EPA Docket # EPA–HQ–RCRA–2015–0354 for summaries of the Outer Loop, Buncomb County, and Yolo County landfills.

[19] These reports and other citations for this ANPRM are accessible via *http://www.regulations.gov* (Federal eRulemaking Portal) using ID No. EPA–HQ–RCRA–2015–0354.

that proposal will be based on additional risk evaluation.

*A. Project XL and CRADAs*

Summary data from the Outer Loop facility in Kentucky, the Yolo County landfill in California, and the Buncombe County facility in North Carolina are presented below. The data as presented are intended to be illustrative but not a comprehensive summary of the operation and performance of these facilities.

1. Outer Loop Landfill

The Outer Loop Landfill Bioreactor (OLLB) project in Louisville, KY [20] studies solid waste decomposition, moisture balance, LFG generation, and leachate quality to evaluate the effect of bioreactor landfill operations on municipal solid waste (MSW) decomposition.

Operations

The OLLB study evaluates three types of landfill cells: (i) Control cells, in which no liquids were added; (ii) cells in which liquids were added after the cell had been completely filled with waste (the Retrofit cells); and (iii) cells in which liquids and air were added as the waste was placed in the landfill (the As-Built cells).

Reported Results

- The results of the moisture balance calculations indicate an increase in moisture content of six to seven percent in the As-Built cells, an increase of approximately one percent in the Retrofit cells and a slight decrease in the Control cells during the 2000–2005 study period.
- Data regarding leachate head in the sump, which was used as an indirect indicator of leachate head on the liner, indicated that operating a landfill as a bioreactor caused an overall increase in leachate head in the sump compared to the Control cells. However, in all three cases, the average leachate level on the liner was well below the 30 cm maximum allowable head.
- Based on data evaluated in the 2006 Outer Loop Second Interim Report, there is no indication that the bottom liner system of the test cells was compromised while installing liquid application features, or while applying liquid through those features.
- While variable, the rate of LFG generation in the As-Built bioreactor landfill cell was greater than that of the Control cell, potentially providing a greater rate of energy production if collection occurred early and consistently.
- The LFG decay constant (k value [21]) for As-Built bioreactor landfill cells was evaluated to be 0.16 yr-1 while the Retrofit cells and the Control cells had a k valueof approximately 0.061 yr-1.

Although the concentration (ppmv) of non-methane organic carbon (NMOC) in the collected LFG did not appear to be higher in the bioreactor landfill cells compared to the Control cells, the overallproduction was higher because of the higher gas flow rate.

- Evaluation of the biochemical oxygen demand to chemical oxygen demand ratio (which is generally an indicator of organic solids decomposition) revealed that waste decomposition in the As-Built bioreactor landfill cells may have been accelerated compared to the Control cells.
- Overall, the analysis of the data collected during the first five years indicate that the addition of liquids accelerated waste degradation based on leachate quality and solid waste decomposition data. The LFG quantity data indicate that the decay rate was highest in the As-Built cell and lowest in the Control cell.

2. Yolo County Central Landfill, California

The goal of the Yolo County Central landfill project [22] is to manage landfill solid waste for rapid waste decomposition, maximum LFG generation and capture, and minimum long-term environmental consequences.

Operations

- Waste decomposition is accelerated by improving conditions for either the aerobic or anaerobic biological processes and involves circulating controlled quantities of liquid (leachate, groundwater, gray water, etc.), and, in the aerobic process, large volumes of air.
- Cover cells with surface membrane for high-efficiency gas capture; and liquid addition to the first (enhanced) cell, but not the second (control) cell.
- The gas capture cover system was installed before liquid addition was initiated.

Reported Results

- Over five-fold acceleration of methane production.
- Reduction of fugitive methane emissions to <5% of generated LFG.
- Rapid and extensive volume reduction in the enhanced cell compared to the control cell.
- Waste stabilization (indicated by methane recovery, air-space volume loss and other indicators) compared to the dry-tomb control.
- Observed leachate head over the base liner was 2 inches, and less than 20% of the 30 cm maximum hydraulic head allowed under Part 258.
- Settlement in the 3.5-acre study enhanced cell averaged 8.5% of the waste mass, and settlement in the 6-acre control cell averaged 4% of the waste mass.
- Landfill stabilization and completed LFG generation are estimated to be complete at 15 years for full-scale cells.

3. Buncombe County, North Carolina Landfill

The Buncombe County bioreactor landfill [23] is a full-scale implementation of a bioreactor landfill system performed in two phases.

Operations

- Phase 1 is a retro-fit system; the trenches were installed after the landfill cells were filled to capacity. The Phase 1 Retrofit System was installed in Cells 1–5 and has been in operation since April 2007.
- Phase 2 is a build-as-you-go, full-scale bioreactor landfill system; the infrastructure was installed in stages as the waste was being placed. The build-as-you-go approach provides more extensive wetting of the waste and earlier capture of LFG.
- This project was granted regulatory flexibility to apply liquids other than leachate to the waste. As of 2011, only leachate had been used since there was adequate leachate available onsite to meet the needs of the project.
- In 2011, the County completed construction of a 1.4 MW landfill gas-to-energy project at the site. Part of the project included the installation of 25 vertical gas wells in Cells 1-5 in the Retrofit System, and the gas collection component of the Phase 1 Retrofit System was removed. It was decided

[20] ''Landfill Bioreactor Performance: Second Interim Report Outer Loop Recycling and Disposal Facility,'' EPA/600/R–07/060, September, 2006.

[21] The ''k'' value is a biodegradation constant; the higher the k value, the higher the rate of biodegradation. See *https://www3.epa.gov/ttn/chief/ap42/ch02/index.html* for further discussion of k values. Also see ''Impact of Accelerated Biodegradation'' in a memo to the docket for this ANPRM by John Sager, USEPA, September 24.

[22] ''Full Scale Landfill Bioreactor Project at the Yolo County Central Landfill,'' Yazdani, Kieffer, Akau, 2002; ''Full Scale Bioreactor Landfill for Carbon Sequestration and Greenhouse Gas Emission Control, Final Technical Progress Report,'' Yazdani, Kieffer, Sananikone, Augenstein, March 2006, D.O.E. Award Number DE–FC26–01NT41152; and ''Controlled Bioreactor Landfill Program at the Yolo County Central Landfill,'' Yazdanie, Kieffer, Sananikone, Methane to Markets Partnership Expo, Beijing, China, November, 2007.

[23] USEPA PROJECT XL Buncombe County Bioreactor Project, 2011 and 2014 Progress Reports, CDM Smith.

that dedicating the bioreactor landfill cell trenches to leachate recirculation and using the vertical wells for gas collection would be simpler to operate and provide a more consistent flow of LFG to the generator.

Reported Results

- Cumulatively, 4 million gallons of leachate were recirculated, resulting in an estimated 803 fewer truck trips to the wastewater treatment plant and $306,758 in hauling cost savings.
- Significant settlement occurred in the closed landfill cells receiving leachate recirculation, leading to a more stable ground surface layer, while adding the equivalent of 5 months of capacity valued at nearly $2 million.
- Landfill stabilization and completed LFG generation are estimated to be complete at 15 years for the full-scale cells.
- A surface cover geomembrane was used as a temporary cover (when no cell activity) to prevent gas emissions to the atmosphere and confine gas to the conductive layer just below the surface.
- No downgradient groundwater contamination has been identified through 2017 from groundwater monitoring.[24]

*B. Report: Bioreactor Landfills, State of the Practice Review*

In 2009, ORD published the report ''Bioreactor Landfills, State of the Practice Review'' (State of the Practice report)[25]. The State of the Practice report includes the following summary conclusions:

- Conventional containment systems (liners, covers, and leachate collection systems) employed for conventional landfills function effectively for bioreactor landfills.
- Action leakage rates were never exceeded and flow rates were similar between conventional and bioreactor landfill cells where comparisons were possible.
- Concentrations of heavy metals and organic compounds are similar in bioreactor landfills and conventional landfills, and leakage rates for conventional and bioreactor landfills are comparable.
- Bioreactor landfill operations employing conventional containment technologies (including alternative liners) do not impose greater risk to groundwater than conventional landfills.
- Methane generation at bioreactor landfills is accelerated relative to predicted rates.
- There is no indication that gas production increases appreciably as the moisture content increases above 40%.

In addition to these findings, another finding of the study was that insufficient data were being collected at commercial and municipal landfills to fully evaluate whether bioreactor landfill methods used in practice are effective in enhancing waste degradation, stabilization, and gas generation. Future studies should include more detailed monitoring and evaluation schemes that can be used to form definitive conclusions regarding the effectiveness of bioreactor landfill operational methods.

*C. Report: Permitting of Landfill Bioreactor Operations: Ten Years After the RD&D Rule*

In 2014, ORD published ''Permitting of Landfill Bioreactor Operations: Ten Years After the RD&D Rule.''[26] The report found that, since promulgation of EPA's MSWLF criteria in 1991, a growing number of landfill sites have practiced leachate recirculation as well as addition of bulk free liquids, generally under *ad hoc* state-level research and development programs (*e.g.,* the Florida Bioreactor Demonstration Project) or site-specific permitting mechanisms administered in association with EPA, such as described above. The report identifies a number of associated economic and environmental benefits, including: The acceleration of LFG generation; minimization of the need for leachate treatment and offsite disposal; more rapid reduction in concentration of leachate constituents of concern; and an increase in the rate of landfill settlement. The report also concludes that bioreactor landfill unit operations require increased levels of engineering design, operational control, and monitoring to safely achieve the benefits of accelerated LFG generation and meet EPA's goals for protection of human health and the environment. Additional challenges for bioreactor landfill management that are identified in the report include issues with temperature control and increased LFG collection and associated control. The study also identified that buildup of saturated conditions and rapid waste settlement from accelerated waste decomposition can compromise the structural stability of the waste mass.

*D. RCRA MSWLF RD&D Annual Reports*

Research at MSWLFs with RD&D permits is ongoing, and as discussed above, facilities with RD&D permits are required to submit annual performance reports to their state waste management programs demonstrating progress toward project goals. The EPA conducted a preliminary review of these reports in 2018 looking specifically for evidence of exceedances of groundwater protection standards, and we found no evidence of significant exceedances resulting from bioreactor landfill unit operations. For example, we found evidence of exceedances of state action limits and other parameters that were attributed in the reports we examined to background concentrations, activities at non-bioreactor landfill cells, and normal variations.

The EPA presents the following data from one 2016 annual report[27] as illustrative of the information and data in the reports. The data as presented are not intended to be a comprehensive summary of the operation and performance of this facility. In that report, the report authors state the following:

- A total of 865,800 gallons has been added to the bioreactor landfill unit since sludge acceptance began in August, 2014.
- The sludge application did not result in any odor issues during the reporting period.
- The overall quality of leachate generated by the bioreactor landfill unit does not appear to have been impacted by sludge addition during the reporting period. Some of the components, such as organic and suspended solids, were adequately treated by the bioreactor landfill unit.
- Temperature of the waste mass was within a suitable range for the development of microbial activity, therefore indicating the addition of sludge did not have a negative impact on waste temperature.
- The predicted gas generation volume was in general agreement with the measured data using the selected methane generation parameters, including the relationship between the sludge addition and the first order decay coefficient.
- The overall results of this analysis show that wastewater digested sludge

[24] The ''2017 Environmental Monitoring and Reporting Form'' submitted to the North Carolina Department of Environmental Quality suggested possible groundwater exceedances; these were identified as background contamination in telephone communication November 20, 2017, USEPA and NCDEQ.

[25] C. Benson, M. Barlaz, and T. M. Tolaymat. ''Bioreactor Landfills State-Of-The Practice Review,'' pages iv–vi, U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/071.

[26] Tolaymat, T. AND J. Morris. ''Permitting of Landfill Bioreactor Operations: Ten Years after the RD&D Rule.'' U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–14/335, 2014.

[27] 2016 RD&D Annual Report, City of Midland, Michigan MSWLF; CTI and Associates, Novi, Michigan; June, 2017.

can be safely received, transported, and applied to accelerate solid waste decomposition.

The EPA continues to analyze these reports and additional data and information that are provided to the agency. As it does so, EPA will consider questions such as those presented in Section X. Interested stakeholders may thus use those questions as a guide in submitting data and information in response to this ANPRM. The EPA notes that the following questions are of particular importance in the evaluation of site data to distinguish the potential risks of bioreactor landfill units as compared to landfill units with lower moisture content, including whether the addition of some kinds of bulk liquids may pose greater risk than other kinds of bulk liquids:

(1) What type and what quantity of bulk liquids were added to the waste mass?

(2) Is there evidence of groundwater contamination, air emissions violations or other liquids management problems?

(3) Was LFG collection required in the RD&D permit, and if so, when was gas collection required in relation to the timing of liquids addition?

(4) Was gas collection infrastructure required to be installed early in the construction of new cells, or were vertical wells inserted at some point after cells were being filled?

## V. Potential Environmental Benefits, Cost Savings, and Environmental Considerations

### *A. Potential Environmental Benefits*

Based on research conducted at facilities with RD&D, Project XL and CRADA-based permits discussed in Section IV above, the data from these facilities and EPA analysis of the data suggest the following potential environmental benefits from controlled liquids addition to MSWLFs:

- Acceleration of LFG generation rate, thereby decreasing the duration of LFG generation potential and limiting the post-closure care period during which air emissions can occur;
- Acceleration of LFG generation rate, thereby decreasing the duration of LFG generation potential and limiting the post-closure care period during which air emissions can occur;
- Minimization and potentially elimination of the need for leachate treatment and offsite disposal, thereby decreasing the risk of spills during transport and decreasing potential releases to the environment during off-site treatment and disposal;
- More rapid reduction in concentrations of biodegradable organic compounds, potentially limiting the post-closure care period required for leachate control and decreasing the risk of releases of contaminants to the air and groundwater during post-closure care;
- An increase in the rate of waste settlement and compaction, thereby promoting more efficient utilization of permitted landfill capacity;
- Enhanced opportunities for beneficial reuse of the landfill property.

The available data also suggest that bioreactor landfill units, when compared to conventional dry-tomb MSWLF units, may offer the potential for reduced long-term risk through decreased release of gas emissions to the environment, faster waste subsidence and stabilization, decreased transport and treatment of leachate, and potentially a shorter period of time for post-closure care. The economic benefits that may accrue include decreased costs for leachate treatment and increased revenue from the use or sale of captured LFG and acceptance of bulk liquid wastes. The EPA requests public comment on our analysis of these potential benefits and on the related questions found in Section X.

### *B. Potential Cost Savings*

Based on research conducted at facilities with RD&D, Project XL and CRADA-based permits, the data from these facilities and EPA analysis of the data suggest the following potential cost savings to owners and operators of MSWLFs:

- Acceleration of LFG generation rate thereby: Increasing opportunities for economically viable energy utilization options, such as on-site co-generation of electricity or sale of LFG for use off-site; extending the period over which capture of LFG is economically viable; and limiting the post-closure period required for LFG control and associated costs;
- Decrease in transport costs and the need to rely on publicly owned treatment works (POTWs) due to minimizing or eliminating the need for leachate treatment and offsite disposal;
- Reduction in post-closure care costs associated with maintenance and emission monitoring due to more rapid reduction in concentrations of biodegradable organic compounds;
- Increased utilization of permitted landfill capacity resulting from increased waste settlement and compaction;
- Reductions in the scope, duration, and associated costs for post-closure care.

### *C. Environmental Considerations*

Due to the nature of bioreactor landfill operations, which are based on adding liquids to accelerate biodegradation, EPA is particularly interested in further examination of three categories of potential adverse effects to human health and the environment: (1) The potential for release of contaminants to the groundwater due to increased moisture content and the potential for increased hydrostatic pressure on the liner; (2) the potential for release of contaminants to the air resulting from accelerated biodegradation and LFG generation; and (3) the potential for liquids management practices within the current regulatory framework to magnify any potentially adverse impact of bioreactor landfill operations, including releases to the environment due to the presence of additional liquids, resultant subsurface heating events, or waste stability issues. The EPA thus expects to consider, among other things, the following factors as it considers proposed design and operating criteria including whether:

- Increased engineering design requirements and more complex construction would be necessary;
- Higher levels of oversight and operator skill would be necessary due to increased complexity of conducting day-to-day operations;
- Issues with temperature control, particularly in aerobic bioreactor landfill units, may be present;
- There are potential waste compatibility issues associated with adding liquids to unknown MSW constituents; and
- There are potential waste stability issues and the potential for lateral leachate seeps.

#### 1. Groundwater Considerations

The EPA intends to carefully examine the potential for increased risk of groundwater contamination from liquids addition and bioreactor landfill units as part of its evaluation of the existing liquids restrictions. The information available to EPA to date has not identified evidence of significant differences between groundwater contamination at bioreactor landfill units compared to conventional units. The ORD ''State of the Practice'' report,[28] for example, provides a summary of data comparing the impact

[28] C. Benson, M. Barlaz, and T. M. Tolaymat. ''Bioreactor Landfills State-Of-The Practice Review,'' pages iv–vi, U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/071.

of bioreactor landfill and conventional units, including that:

- Conventional containment systems (liners, covers, and leachate collection systems) employed for conventional landfills function effectively for bioreactor landfills.
- Liner leakage rates for conventional and bioreactor landfills are comparable.
- For the landfills evaluated, the action leakage rates (*i.e.,* the rates at which remedial action should be taken) were not exceeded and flow rates were similar between conventional and bioreactor cells where comparisons were possible.
- The evaluated bioreactor landfill unit operations employing conventional containment technologies do not impose greater risk to groundwater than conventional landfills.

The EPA requests any monitoring data that may demonstrate an increased risk of groundwater contamination resulting from the operation of bioreactor landfill units or from liquids addition as compared to conventional landfill units. See Section X for additional questions.

2. Air Emissions Considerations

The EPA also expects to carefully consider the potential for releases of LFG and other non-methane organic compound air emissions associated with liquids addition to MSWLF units. The information available to EPA described above indicates strongly that the rate of LFG generation is accelerated with the addition of liquids, and that the potential exists for methane and other HAPs to be released if LFG is not properly controlled. Accelerated emission of odors may also begin after liquids addition due to the possible formation of sulfur compounds, terpenes and aldehydes. Again, as described above, the ''State of the Practice'' report indicates:

- Methane generation at bioreactor landfill units is accelerated relative to rates predicted using AP–42 default values [29] for conventional bioreactor landfill units. Accordingly, gas collection should be initiated as soon as possible after waste burial or potentially prior to liquid introduction. Design and analysis of gas collection systems should also account for the higher rate of LFG produced over a shorter duration.
- There is no indication that gas production increases appreciably when the wet weight water content of a bioreactor landfill reaches 40%, which is the metric for the current bioreactor landfill regulatory framework under the 2003 CAA NESHAP regulations. Metrics other than wet weight water content, such as those described in Section VII, should be considered as thresholds to require installation of gas collection systems.

The EPA thus requests data and information concerning the risk of air emissions from bioreactor landfill units, including data concerning the correlation between moisture content and LFG generation rates. The EPA also intends to examine LFG collection requirements in RD&D permits and requests information about additional LFG collection requirements in those permits, including early gas collection, over and above requirements for non-bioreactor landfill units. Examples of data that may be helpful include the results of air emissions testing and other operations reports that correlate LFG emissions with moisture content. See Section X for additional questions.

## VI. Additional Technical Considerations

In addition to considerations associated with potential releases to groundwater and air, EPA is interested in evaluating the following design and operating characteristics [30] as they pertain to effective liquids management in bioreactor landfill units:

- Leachate collection and removal systems (LCRS);
- Waste stability;
- Waste compatibility;
- Cumulative loading of constituents of concern; and
- Elevated temperature landfills (ETLFs).

Foremost among these issues is that bioreactor landfill units need to be designed and operated to handle high moisture content and high leachate volume. For landfills with elevated moisture content, either as result of purposeful liquids addition, stormwater management practices, or incoming waste properties, the LCRS must be designed and operated to handle higher volumes of leachate. The use of liquids addition or leachate recirculation at a site can influence LCRS design in three primary ways. First, the leachate impingement rate (flow of leachate intercepted by the liner and LCRS) requires more flow removal capacity. Second, the increased unit weight of the waste, as a result of the elevated moisture levels, results in greater overburden stress being placed on the landfill foundation, which can in turn result in greater differential settlement over the sloped base of the landfill. Third, the potential for clogging the LCRS must be considered. While it is possible to retrofit a landfill unit to become a bioreactor landfill unit, ideally liquids addition infrastructure is installed at the outset, with similar infrastructure also in place to collect LFG.

The impact of high moisture content on waste stability is another important factor for consideration. If the LCRS is insufficiently designed or improperly operated, liquids can mound on the bottom liner, resulting in the development of increased pore-water pressures at the base of the landfill and raising concerns about slope stability. The key design and operational challenge to minimizing potential slope concerns is to avoid excessive buildup of pore pressure. This can be accomplished by maintaining and monitoring the LCRS, avoiding the creation of low permeability zones within the landfill where leachate can become perched, and allowing appropriate time in between large pressure liquids addition events.

Waste compatibility and the potential for cumulative loading from the application of liquid industrial wastes are additional factors that EPA intends to consider in association with any change to the current prohibition on the addition of bulk liquids. The EPA is interested in examining the potential for application of such wastes to introduce constituents that would not otherwise be in the unit. The potential risk could be due to constituents in those liquid wastes impacting biodegradation or forming products of concern in the unit. With respect to cumulative loading, the potential risk could arise from the presence of constituents in liquid industrial wastes at concentrations that, while below toxicity characteristic leaching procedure (TCLP) thresholds for hazardous wastes at the time of application, could nevertheless build up over time within the unit. For example, if the constituents are at concentrations just below the TCLP (*e.g.,* mercury-bearing liquid wastes with [Hg] = 0.19 mg/L; and lead-bearing liquid waste with [Pb] = 4.9 mg/L), EPA is interested in the potential to exceed the TCLP once introduced to the landfill unit. The EPA requests comment to identify specific bulk liquids that have the potential to cause waste compatibility problems or could pose problems due to cumulative loading.

[29] See *https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors.*

[30] For a comprehensive discussion of design and operating characteristics associated with bioreactor landfill units, see ''Sustainable Practices for Landfill Design and Operation,'' by Townsend, Powell, Jain, Xu, Tolaymat (USEPA/ORD) and Reinhart, Springer Science and Business Media, New York, 2015.

The possibility of subsurface reactions or heating events (known as elevated temperature landfills (ETLFs)) is also present in landfill units with increased levels of liquids. ETLFs pose significant challenges including (1) changes in gas and leachate quality and quantity which adversely impact the ability to manage these emissions effectively; (2) rapid waste settlement with implications for slope stability; and (3) recorded gas and waste temperatures as high as 300 °C, which can compromise parts of the internal landfill infrastructure.

While current research and data [31] suggest that ETLFs may be caused by many factors, one factor that EPA believes contributes to their development is high moisture content, possibly due in some instances to either perched water tables or large volumes of leachate head buildup on the bottom landfill liner in ETLF-affected areas. While it is not clear at this time if the abundance of liquids is the cause or the result of these subsurface heating reactions, it is important to recognize that the head on liners (HOL) is a regulatory requirement (see 40 CFR 258.40(a)(2)) which provides an upper limit for the head on the bottom liner and which EPA is not considering altering at this time. In the context of bioreactor landfill units, proper leachate drainage and conveyance from the waste mass are needed to prevent exceedances of the HOL limit.

To address concerns from ETLFs, EPA expects that particular attention will need to be given to landfill units that are proposed to be retrofitted for leachate injection to enhance waste stabilization. Retrofitting landfill cells to handle increased moisture content is complicated by the need to install the necessary infrastructure with the waste mass already in place, and because of the reduced hydraulic conductivity of aged wastes and soils with high overburden pressures. The EPA requests comment on the possibility of establishing different regulatory requirements for new vs. retrofitted bioreactor landfill units.

## VII. Characteristics of Bioreactor Landfill Units and Wet Landfill Units

If it proceeds to a future proposed rule, EPA will need to identify those units which are subject to revised requirements. The EPA is therefore also seeking public input on how it most appropriately may define a ''bioreactor landfill unit.'' The EPA has identified and is seeking public comment on two possible approaches to defining these units that reflect EPA's understanding of the information it has assembled to date.

One approach to define a bioreactor landfill unit in RCRA regulations is by moisture content.[32] Should EPA take such an approach, EPA is considering whether a 30% moisture threshold may be appropriate as a quantitative characteristic of a bioreactor landfill unit. Thirty percent represents a point above the 20–25% [33] moisture content range in which MSWLFs typically operate, and at which biodegradation may be accelerated on as a consequence of the addition of liquids.

Alternatively, a bioreactor landfill unit may be characterized qualitatively, as a MSWLF unit to which liquids have been intentionally added for any purpose other than cleaning, maintenance, and wetting of daily cover. This qualitative approach to defining a bioreactor landfill unit is consistent with the understanding that liquids need to be added for normal maintenance, including cleaning and wetting of daily cover, while additional liquids may serve only to accelerate biodegradation. The EPA solicits comment on the impact of increased moisture content in the range of 25–40% and above, and whether there are factors governing moisture content for which EPA should account, other than normal maintenance and accelerated biodegradation.

The EPA is also interested in obtaining public comment on whether to regulate wet landfill units as a distinct group under the RCRA regulations and as a possible alternative to defining and regulating bioreactor landfill units. Increased moisture content has a similar effect on biodegradation whether it is added intentionally (as in bioreactor landfill research projects) or not, and thus EPA is exploring whether increased moisture content from any or all sources may pose similar technical issues that warrant special regulatory treatment.

The EPA therefore solicits comment on the following characteristics which it is considering to identify which MSWLF units may be appropriately identified as ''wet landfill units.'' The EPA also requests comment on whether these factors should be considered individually or in combination with one another to identify such units, including whether:

- Liquids are recirculated or added for any purpose other than cleaning, maintenance, and wetting of daily cover;
- The unit is located in a region with 40 inches or more of annual precipitation;
- The unit has a k value of 0.057 or more;
- Precipitation plus leachate recirculation is greater than 55 inches per year; or
- The unit is a bioreactor landfill unit.

Another measure that may be appropriate to identify a bioreactor landfill unit or a wet landfill unit is the rate of leachate collection. Leachate collection data are generally available at MSWLFs, and these data could be used as a surrogate measure of the amount of liquid in a unit.

In considering the merits of defining a new class of bioreactor landfill units or wet landfill units, EPA is motivated to improve the management of liquids at MSWLFs based on advances since the Part 258 standards were promulgated in 1991. As currently used, EPA believes the term bioreactor landfill may unnecessarily connote a small class of research facilities, the benefits of which may not be recognized as practicable in wider use. The EPA solicits input on the options for defining bioreactor landfill units or wet landfill units presented here and whether a new RCRA definition for one or the other may contribute to the advancement of liquids management practices at MSWLFs.

## VIII. Universe of MSWLFs Potentially Affected by This ANPRM

In addition to potentially defining a new RCRA class of bioreactor landfill units or wet landfill units, EPA is also considering how to address existing bioreactor landfill units, such as those with RD&D permits, in future proposed rules. As discussed previously, EPA is aware of 35 facilities with RD&D

[31] Ohio EPA (2011). Subsurface Heating Events at Solid Waste and Construction and Demolition Debris Landfills: Best Management Practices. Guidance Document #1009. October 14, 2011. (*http://www.epa.ohio.gov/portals/34/document/guidance/subsurface%20heating%20events.1009.pdf*).

Ohio EPA (2016). Higher Operating Value Demonstrations. Division of Air Pollution Control Engineering Guide #78. Division of Materials and Waste Management Guidance Document #1002. (*http://epa.ohio.gov/Portals/34/document/guidance/gd_1002.pdf*).

Palmiotto, M., Fattore, E., Paiano, V., Celeste, G., Colombo, A., & Davoli, E. (2014). Influence of a municipal solid waste landfill in the surrounding environment: Toxicological risk and odor nuisance effects. Environment international, 68, 16–24. DOI: 10.1016/j.envint.2014.03.004.

West Lake landfill, *https://www.epa.gov/mo/west-lake-landfill;* Stony Hollow landfill, *http://stonyhollowlandfill.com/*; and Rumpke landfill, *http://epa.ohio.gov/Portals/47/pic/Rumpke%20Landfill%20factsheet.pdf?ver=2014-07-08-103928-983*.

[32] See EPA–456/R–05–004, ''Example Moisture Balance Calculations for Bioreactor Landfills'' for a discussion of methods to calculate moisture content.

[33] Solid Waste Association of North America, ''Manager of Landfill Operations Training Manual,'' page 1–12, January, 2003.

permits. Because the RD&D authorization is time-limited, bioreactor landfill units operating under RD&D permits will have to suspend operations authorized under their RD&D permit no later than 21 years after they began, unless EPA makes nationwide regulatory changes or issues a site-specific rule to authorize the unit's continued operation. The EPA understands some RD&D permits may reach the end of the 21-year maximum permit term as soon as 2024.

The EPA believes that regulatory changes to allow the addition of bulk liquids to MSWLF units as a revised minimum criterion in 40 CFR 258, or as a variance under which state directors could approve bulk liquids addition on a site-specific basis, would enable a larger group of facilities to pursue bioreactor landfill operations or liquids addition practices. Anecdotally, EPA has learned that some facilities would like to develop bioreactor landfill units, but only if EPA were to allow bulk liquid addition outside of the temporary RD&D permit process. The 35 facilities with RD&D permits are a small portion of the open MSWLFs in the US.

As discussed in Section V, there are many potential environmental and economic benefits that may motivate a landfill owner or operate to pursue construction and operation of a bioreactor landfill unit. Due to the significant impact on LFG generation from the addition of liquids, EPA believes that information in its Landfill Methane Outreach Program (LMOP) database may serve as a good predictor for the potential impact of developing a RCRA definition and regulations for bioreactor landfill units or wet landfill units. Of the estimated 1,221 open MSWLFs [34] in the EPA Landfill Methane Outreach Program (LMOP) database, there are approximately 565 MSWLFs that currently provide LFG to one or more or more operational LFG energy projects (LFG electricity projects, LFG direct-use projects, and upgraded LFG projects) for a total of 623 operational LFG projects. The EPA plans to explore whether some of these 565 MSWLFs may be able to achieve better environmental and economic results if EPA were to remove the prohibition on the addition of bulk liquids and define bioreactor landfill units or wet landfill units as a class of facilities that can get standard RCRA Subtitle D permits in approved states.

In addition to those 565 MSWLFs, EPA estimates that there are approximately 470 additional MSWLFs [35] that may be good candidates for development of an LFG energy project. These 470 MSWLFs are those that are currently accepting waste or have been closed for five years or less, have at least one million tons of waste, and do not currently have an operational, under-construction, or planned LFG project. The EPA intends to explore whether some of these 470 MSWLFs may be able to achieve better environmental and economic results if EPA were to remove the prohibition on the addition of bulk liquids and define bioreactor landfill units or wet landfill units as a class of facilities that can get standard RCRA permits in approved states. Some of these 470 facilities may ultimately be candidates for developing bioreactor landfill units upon changes to the RCRA regulations.

In considering the number of facilities that may be affected, it is important to note that the primary intent of this ANPRM is to explore whether regulatory flexibility is warranted for those facilities that want to add liquids for the purpose of accelerating biodegradation in the manner of a bioreactor landfill unit. The EPA believes that bioreactor landfill units may reduce the overall risk to the environment and have significant economic benefits.

## IX. Relationship to Organics Diversion and Composting Programs

Apart from any future changes to the MSWLF regulations, EPA is considering how such changes fit into the Agency's broader Sustainable Materials Management (SMM) approach. Sustainable materials management is a systemic approach to using and reusing materials more productively over their entire life cycles. It represents a change in how our society thinks about the use of natural resources and environmental protection. As part of this effort, EPA has developed a non-hazardous materials and waste management hierarchy that recognizes that no single waste management approach is suitable for managing all materials and waste streams in all circumstances. The hierarchy ranks the various management strategies from most to least environmentally preferred. The hierarchy places emphasis on reducing, reusing, and recycling as key to sustainable materials management. Consistent with the hierarchy, EPA supports reducing the landfilling of organic waste through a variety of policies and programs. While not directly under EPA's SMM approach, various state and local initiatives described in this section have also been emerging to divert organics from landfilling operations. As discussed above, effective bioreactor landfill units depend upon the performance of biodegredation processes of organic materials in the unit. As a policy matter, EPA sees the development of appropriately-regulated bioreactor landfill units or wet landfill units as a potential complement to diversion programs, with both reducing the environmental impacts from organics management, albeit under different management scenarios.

The EPA data [36] indicate that organic materials are historically the largest component of materials landfilled in the MSW stream, constituting about 51 percent of landfilled material in 2015. Food waste is the largest component of the organic materials waste stream, followed by paper and paperboard, wood wastes and yard trimmings. Recycling and composting have been increasing over time for organic materials (except rubber and leather). For example, the percentage of paper and paperboard that is recycled has increased from 16.9 percent in 1960 to 66.6 percent in 2015. The amount of composted yard trimmings has increased from a negligible amount in 1960 to 61.3 percent in 2015. Composted food waste has increased less significantly from negligible amounts in 1960 to 5.3 percent in 2015. Information available to EPA further indicates that states and cities with robust recycling and composting programs may realize an even greater percentage of recycling and composting.

Such organic waste diversion programs are in effect in multiple U.S. states and cities. These programs also appear to be growing in number. The EPA expects that as the numbers of households covered by such programs grows, so will the quantities of materials diverted from landfilling operations. A survey conducted by *BioCycle* in fall 2017 [37] identified 198 curbside collection programs and 67 drop-off programs. This represented significant growth compared to 42 communities with curbside collection of food waste

[34] USEPA, Landfill Methane Outreach Program (LMOP) Database. Data from the LMOP Database are current as of September 2018. For information on the LMOP Database including its sources, please see the LMOP website *https://www.epa.gov/lmop.*

[35] USEPA, Landfill Methane Outreach Program (LMOP) Database. Data from the LMOP Database are current as of September 2018. For information on the LMOP Database including its sources, please see the LMOP website *https://www.epa.gov/lmop.*

[36] *www.epa.gov/smm/advancing-sustainable-materials-management-facts-and-figures.*

[37] ''Residential Food Waste Collection Access in the U.S.,'' Virginia Streeter and Brenda Platt, Biocycle, December 2017, Vol. 58, No. 11, p. 20.

in 2007 [38] representing 752,000 households. In addition, numerous communities encourage residents to compost food in their backyards. In some cities, private companies offer food scrap pick-up services for a fee.

Additionally, several states and cities have statutes, ordinances, and/or mandates that require organics diversion from landfills.[39] The EPA expects that these laws will have an effect on the amount of organic waste that would otherwise be available for management in bioreactor landfill units and wet landfill units, at least within the jurisdictions in which the diversion laws apply. As of 2018, four states—Connecticut, Massachusetts, Rhode Island, and Vermont —have adopted bans on organic waste, going to landfills, while one state—California —has instituted a waste recycling law requiring commercial generators of organic waste to either compost or anaerobically digest organic waste. All five of these states prohibit certain entities that generate specified amounts of food waste from sending this waste to landfills, subject to exceptions. Each state's ban varies in how it applies to various entities, how much organic waste an entity must produce in order to be covered, and whether exceptions exist for entities located far from a certified recycling or composting facility that accepts food scraps. For example, as of 2020, Vermont's law will cover anyone, including residents that generate any amount of food waste, while the other states' bans cover only certain commercial, industrial, and institutional entities. City ordinances in New York City and Portland, Oregon, mandate materials separation from commercial generators. Ordinances in Seattle and San Francisco extend the separation mandate to single family dwellings. An ordinance in Austin, Texas requires restaurants of a certain size to compost food scraps.

Other surveys and data also suggest that state- and local-level organics diversion programs are gaining momentum. The EPA's State Measurement Program (Program) estimates that, for 2016, 27 states have reported having 2,666 organics materials management systems, and 11 of those states have systems that include anaerobic digestion. The Program also reports that 21 states have yard waste landfill bans. Finally, Program data indicate that five states have implemented composting goals, including Arkansas, California, Maryland, Massachusetts, and Washington.

The EPA seeks data and information on how organics diversion and composting programs may interact with, complement, or enhance the policy goal of reducing the environmental impact of organics management across management scenarios. In addition, EPA is also interested in obtaining data and information on how such programs may otherwise affect the operation or geographic distribution of bioreactor and wet landfill units.

## X. What information is EPA seeking?

### *A. Information on Benefits and Risks of Bioreactor Landfill Units and Wet Landfill Units*

The EPA requests information and data on the benefits and risks to human health and the environment that may result from the addition of bulk liquids and the construction, operation, and post-closure care of bioreactor landfill units and/or wet landfill units. This includes risks that have concerned the EPA in the past such as potential contamination of groundwater from liner leakage; potential contamination of the air from accelerated LFG emissions; the impact of higher temperatures and potential for fire under various landfill conditions; and any other potential risks EPA has not yet identified. (See Section V for a discussion of potential benefits and environmental considerations.) For information about where to submit information and comments on the following questions, please see the ''Addresses'' section at the beginning of this document. In responding to any questions in this document, please identify the question(s) to which you are responding before each response.

### *B. Questions on Characteristics of Bioreactor Landfill Units and Wet Landfill Units*

The EPA requests comments and supporting information on the following questions concerning characteristics that may be used to define the universe of bioreactor landfill units or wet landfill units. (See section VII for additional discussion.)

(1) If EPA should adopt a definition of a new RCRA class of MSWLFs outside of RD&D permits, is the qualitative definition in Section VII, *i.e.,* that a bioreactor landfill unit is defined by the intentional addition of liquids for any purpose other than cleaning, maintenance, and wetting of daily cover, an appropriate to definition? Or is a quantitative definition based on moisture content more appropriate?

(2) If EPA should adopt a quantitative definition of a bioreactor landfill unit based on moisture content, what is the appropriate threshold for moisture content?

(3) Are there factors other than moisture content that should be used to define a bioreactor landfill unit in a quantitative manner?

(4) Should EPA include the use of leachate recirculation, run-on and run-off systems, and alternative cover designs in any new definition of a bioreactor landfill unit or wet landfill unit?

(5) If EPA should determine that it is more appropriate to define and regulate wet landfill units instead of bioreactor landfill units, what factors should be considered in such a definition?

### *C. Questions on Operations and Post-Closure Care*

The EPA requests comments, data and supporting information on appropriate operational requirements associated with the addition of bulk liquids and the construction, operation, and post-closure care of bioreactor landfill units and wet landfill units. (See section VI for additional discussion.)

(1) Are there any additional facilities with RD&D permit applications in the process of state approval, of which EPA is not yet aware (*i.e.,* are not listed in Table 2 above)? If so, please identify them.

(2) What other changes to the part 258 criteria may be warranted if EPA were to regulate bioreactor landfill units or wet landfill units as a subset of MSWLF units? For example, if EPA were to make changes to the existing criteria for liquids restrictions, run-on and run-off control systems, and alternative cover designs for such units, should EPA consider changes to other 258 criteria to complement those changes?

(3) Did state permitting authorities impose any additional groundwater protection or air emission controls in the initial RD&D permits as a pre-condition for allowing the addition of bulk liquids? The EPA is aware that Wisconsin, for example, required LFG collection from the beginning of operations for MSWLFs granted variances to add bulk liquids.

(4) What design and operating changes, if any, should be considered to manage accelerated waste settlement in bioreactor landfill units and minimize waste instability issues?

(5) Should the prospect of increased leachate and accelerated LFG generation require that a Professional Engineer certify that any or all MSWLF components and subsystems (*e.g.,* leachate collection and storage, LFG

[38] ''Source Separated Residential Composting,'' Biocycle, December 2007.

[39] *www.chlpi.org/wp-content/uploads/2013/12/Food-Waste-Toolkit_Oct-2016_smaller.pdf.*

collection and control) be designed properly to handle the increased demands at a bioreactor landfill unit or wet landfill unit?

(6) Are there alternative cover design modifications using RD&D permits or in other settings that have demonstrated the ability to optimize biodegradation?

(7) If the variances contained in the current RD&D rule were to be made allowable outside of RD&D permits (see Section II), what additional performance and prescriptive standards, if any, would be necessary to demonstrate protection of human health and the environment?

*D. Questions on Potential Risks*

The EPA requests comments, data and other supporting information on the risks to human health and the environment that may result from the addition of bulk liquids and the construction, operation, and post-closure care of bioreactor landfill units and wet landfill units. (See Sections V and VI for additional discussion.)

(1) Are there current scientific studies or other data available pertaining to the impact of moisture content on the frequency and rate of leachate leakage or other types of environmental releases from landfills?

(2) Is there evidence of increased groundwater contamination from bioreactor landfill units as compared to dry-tomb landfill units?

(3) Should EPA remove or modify the bulk liquids restriction in 40 CFR 258.28? For example, should the addition of liquids be limited to off-specification consumable liquids or be open to all non-hazardous liquid waste?

(4) What specific bulk liquids and in what quantity were added at RD&D rule bioreactor landfill units?

(5) Are there restrictions or conditions on liquid waste acceptance that EPA should consider? For example, are there any properties (*e.g.,* pH, ionic strength, biological activity) of specific kinds of liquid waste (*e.g.,* sewage sludge, grey water, animal feedlot waste) that may exacerbate releases from co-managed wastes and should be considered for possible restrictions on liquid waste acceptance? Are there any properties of the residual solids from these liquids that may pose risk when managed at the lower water content within the landfill?

(6) Could increasing the moisture content of the landfill increase the risk of fire through exothermic chemical reactions? Are there specific waste types that are appropriately managed in dry-tomb MSWLFs but could be incompatible with bioreactor landfill units and/or wet landfill units?

(7) How might overall leachate quality be affected by:

a. Management under aerobic, anaerobic, or hybrid conditions?

b. Saturation of waste and/or recirculation of leachate?

(8) At what point should LFG collection and control systems be installed and operating before allowing the addition of liquids in order to minimize odors, reduce fugitive LFG emissions, and prevent accumulation of gasses above the lower explosive limit (LEL)?

(9) When was LFG collection required to be initiated at bioreactor landfill units as specified in the initial RD&D permit that allowed the addition of bulk liquids?

(10) Are there any changes to the part 258 criteria that the EPA should consider to better ensure the protectiveness of bioreactor landfill units and wet landfill units in closure and post-closure?

(11) Are there special types of containment systems or other preventative measures that should be considered to mitigate risk from spills or increased leachate circulation?

*E. Questions on Potential Costs, Cost Savings and Benefits*

The EPA requests comments, data and supporting information on the following questions related to the potential costs, cost savings and benefits associated with the addition of bulk liquids and the construction, operation, and post-closure care of bioreactor landfill units and/or wet landfill units.

(1) The EPA requests information pertaining to the costs or estimated costs of construction, operation, closure, and post-closure care of bioreactor landfill units and wet landfill units. How do these costs compare with the costs associated with dry-tomb MSWLFs?

(2) How do costs differ for units managed under aerobic, anaerobic, and hybrid conditions? [40]

(3) What are the costs associated with early installation of LFG collection systems?

(4) What are the benefits associated with increased LFG generation and capture?

(5) What are the costs, cost savings and benefits associated with faster settling of waste in bioreactor landfill units and wet landfill units?

(6) How might tipping fees (the charges levied for a given quantity of waste delivered to a landfill) change in response to any additional costs incurred during the operation and closure of bioreactor landfill units and wet landfill units (*e.g.,* updated design criteria, waste handling requirements)?

(7) How does managing organic waste in bioreactor landfill units compare, in terms of the cost, cost savings and benefits, to managing segregated organic wastes through composting or anaerobic digestion?

(8) For MSWLFs in areas with organic waste diversion programs, have owners and operators of such units documented reductions in the proportion of organics received at the unit? Have any such documented reductions been shown to affect the performance or environmental risks associated with bioreactor landfill units?

(9) Are there cost savings associated with the ability to add bulk liquids to bioreactor landfill units as compared to other treatment, storage and disposal methods? Please provide the cost savings or the estimated cost savings associated with the above mentioned methods.

(10) Would changes to part 258 to provide national operating and design criteria for bioreactor landfill units or wet landfill units create an incentive or disincentive to state and local food waste diversion programs?

(11) Are there cost savings associated with the ability to add bulk liquids to bioreactor landfill units as compared to other treatment, storage and disposal methods?

(12) What are the capital costs and operation and maintenance costs associated with operating a bioreactor landfill unit? How do these costs compare to those of landfills that do not have bioreactors landfill units?

(13) In addition to the standard bioreactor landfill unit infrastructure and practices, are there any bundled engineering practices (*e.g.,* complimentary requirements for leachate recirculation, LFG collection, and leak detection) that landfills operating bioreactor landfill units are likely to invest in? What are the additional or complementary benefits or risks of these investments?

(14) Are there any existing bioreactor landfill facilities operating under RD&D permits, that would cease operations due to financial and/or operational difficulties without continued operation as a bioreactor landfill unit?

(15) Has the temporary status of permits under the RD&D rule discouraged any owner/operators from otherwise investing in bioreactor landfill units?

[40] See *https://www.epa.gov/landfills/bioreactor-landfills* for a description of aerobic, anaerobic and hybrid bioreactor landfill units.

## XI. Statutory and Executive Order Review

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), this is a ''significant regulatory action'' because it relates to a novel approach to nationwide landfill management. Accordingly, EPA submitted this Advance Notice of Proposed Rulemaking to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

Because this document does not impose or propose any requirements, and instead seeks comments and suggestions for the Agency to consider in possibly developing a subsequent proposed rule, the various other review requirements that apply when an agency imposes requirements do not apply to this action. Nevertheless, as part of your comments on this ANPRM, you may include any comments or information that could help the Agency: To assess the potential impact of a subsequent regulatory action on small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*); to consider voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (15 U.S.C. 272 note); to consider environmental health or safety effects on children pursuant to Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997); to consider human health or environmental effects on minority or low-income populations pursuant to Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994); or to consider potential impacts to state and local governments or tribal governments.

## XII. Conclusion

The information available to EPA to date suggests that liquids addition in well-managed bioreactor landfill units and/or wet landfill units may provide reductions in long-term risk and operational costs in comparison to dry-tomb landfills as a result of accelerated waste biodegradation. The EPA continues to gather information on this issue, including the information received in response to this ANPRM. This information will assist EPA in making a determination concerning what actions, if any, to take to revise the MSWLF criteria.

## List of Subjects in 40 CFR Part 258

Environmental protection, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

Dated: December 14, 2018.

**Andrew R. Wheeler,**

*Acting Administrator.*

[FR Doc. 2018–27748 Filed 12–21–18; 8:45 am]

BILLING CODE 6560–50–P

---

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 3, 31, and 52

**[FAR Case 2017–005; Docket No. 2017–0005, Sequence No. 1]**

**RIN 9000–AN32**

## Federal Acquisition Regulation: Whistleblower Protection for Contractor Employees

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement an act to enhance whistleblower protection for contractor employees. The rule would make permanent the protection for disclosure of certain information. It also would clarify that the prohibition on reimbursement for certain legal costs applies to subcontractors, as well as contractors.

**DATES:** Interested parties should submit comments to the Regulatory Secretariat Division at one of the addresses shown below on or before February 25, 2019 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2017–005 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''FAR Case 2017–005'' under the heading ''Enter Keyword or ID'' and selecting ''Search.'' Select the link ''Comment Now'' that corresponds with ''FAR Case 2017–005.'' Follow the instructions provided on the screen. Please include your name, company name (if any), and ''FAR Case 2017–005'' on your attached document.
- *Mail:* General Services Administration, Regulatory-Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

*Instructions:* Please submit comments only and cite ''FAR case 2017–005'' in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Cecelia L. Davis, Procurement Analyst, at 202–219–0202. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite ''FAR Case 2017–005.''

**SUPPLEMENTARY INFORMATION:**

## I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement an act to enhance whistleblower protection for contractor and grantee employees (Pub. L. 114–261), enacted December 14, 2016. Although the statute addresses both contractor and grantee employees, the FAR only covers contracts and contractors. Grants are covered in title 2 of the Code of Federal Regulations.

This statute amends 41 U.S.C. 4712 to make permanent the pilot program for enhancement of contractor protection from reprisal for sharing certain information. The four-year pilot program was enacted on January 2, 2013, by section 828 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239), with an effective period of four years from the date of enactment (*i.e.,* January 2, 2013, through January 1, 2017). Section 1091(e) of the NDAA for FY 2014 (Pub. L. 113–66) modified the effective period of the pilot program to be four years from the date that is 180 days after the date of enactment (*i.e.,* July 1, 2013, through June 30, 2017). However, the program did not expire as it became permanent on December 14, 2016, before either of those expiration dates. This program does not apply to DoD, NASA, or the Coast Guard.

This statute also clarifies that the cost principles at 10 U.S.C. 2324(k) and 41

U.S.C. 4304 and 4310 that prohibit reimbursement for certain legal costs apply to costs incurred by a contractor, subcontractor, or personal services contractor. Personal services contractors are contractors. Cost principles generally already apply in the same way to costs incurred by subcontractors as to costs incurred by contractors.

**II. Discussion and Analysis**

A. Pilot program becomes permanent. This rule proposes to amend the FAR to make permanent the civilian agency contractor pilot program that implements 41 U.S.C. 4712, currently located at FAR 3.908.

• FAR 3.900 is amended to delete: (1) The discussion of 41 U.S.C. 4705, the prior whistleblower statute (which had been implemented at FAR 3.901 through 3.906, but which had been suspended for the duration of the 41 U.S.C. 4712 pilot program), since the successor statute, 41 U.S.C. 4712, has been made permanent; and (2) the sunset date for 41 U.S.C. 4712.

• The FAR 3.908 heading is amended to remove the designation as a pilot program, and the entire section is relocated to 3.900 through 3.906 as follows:

○ 3.908–1 = 3.900(a)
○ 3.908–2 = 3.901 (retains the definition of ''authorized official of the Department of Justice'')
○ 3.908–3 = 3.903
○ 3.908–4 = 3.904–1
○ 3.908–5 = 3.904–2
○ 3.908–6 = 3.905–1
○ 3.908–7 = 3.905–2
○ 3.908–8 = 3.902
○ 3.908–9 = 3.906

• There are a few minor edits in FAR 3.900(a).

• FAR 3.903(a) and 3.905–1 are reformatted with vertical lists for improved clarity.

• FAR 3.904–2 is amended to state that the complainant, contractor, and/or subcontractor shall submit their responses to the written report to both the head of the agency and the Office of Inspector General.

• FAR clause 52.203–17, Contractor Employee Whistleblower Rights, is amended to remove the reference to section 828 of the NDAA for FY 2013, which is no longer necessary since 41 U.S.C. 4712 has been made permanent. The title of the clause is also simplified.

• Agencies will use FAR clause 52.203–17 in contracts for both commercial and noncommercial items that exceed the simplified acquisition threshold. Previously, the requirement to comply with the civilian agency contractor Whistleblower statute was implemented through paragraph (r) of FAR clause 52.212–4, Contract Terms and Conditions—Commercial items.

• The civilian agency contractor whistleblower protections of 41 U.S.C. 4712 listed in paragraph (r) of FAR clause 52.212–4 are removed, because the clause 52.203–17 is now included in FAR clause 52.212–5, Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

• Coverage of 10 U.S.C. 2409 will remain in FAR clause 52.212–4(r) to cover DoD, NASA, and the Coast Guard. Only 41 U.S.C. 4712 coverage is being moved to FAR clause 52.212–5.

• FAR clause 52.212–5 is amended to list FAR clause 52.203–17.

• Conforming changes are made to FAR 52.244–6, Subcontracts for Commercial Items.

B. Prohibition on reimbursement for legal costs.

• In order to clarify that the prohibition on reimbursement for certain legal costs applies to subcontractors, as well as contractors, this rule proposes to amend FAR 31.205–47 and 31.603 to add ''or subcontract'' or ''or subcontractor'' as appropriate. The term ''personal services contract'' and ''personal services contractor'' are not added to the FAR, because they are covered by the terms ''contract'' and ''contractor.'' Also, the term ''or subcontract'' is not added at FAR 31.205–47(b)(3)(ii) and (iii), because the Government does not have the authority to rescind, void, or terminate a subcontract.

**III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items**

This proposed rule does not add any new provisions or clauses, nor does it change the applicability of existing provisions or clauses to contracts at or below the SAT and contracts for the acquisition of commercial items, including COTS items. The clause at 52.203–17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights, is not prescribed for use in contracts valued at or below the SAT.

**IV. Expected Cost Impact on the Public**

FAR subpart 3.9, Whistleblower Protections for Contractor Employees, was added to the FAR on September 19, 1995, to implement sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355) codified at 41 U.S.C. 265, recodified as 41 U.S.C. 4705. DoD, GSA, and NASA published an interim rule in the **Federal Register** at 78 FR 60169 on September 30, 2013 (finalized on December 4, 2015, at 80 FR 75911) to implement a four-year pilot program to enhance the existing whistleblower protections, as required by section 828 of the NDAA for FY 2013, effective through January 1, 2017. This pilot program is inapplicable to DoD, NASA, and the Coast Guard, because these agencies are covered by 10 U.S.C. 2409, as amended by section 827 of the NDAA for FY 2013. Using FPDS data for FY 2016, there were about 20,800 new awards over the simplified acquisition threshold in FY 2016 by agencies other than DoD, NASA and the Coast Guard, to approximately 9,100 unique awardees.

This proposed rule would implement Public Law 114–261, which makes the pilot program permanent. If Public Law 114–261 had not been enacted, the pilot program would have expired and 41 U.S.C. 4705, as implemented in 1995 at FAR 3.900–3.906, would automatically become effective again. Therefore, any impact of this rule is due to the differences between the pilot program authorized by the NDAA for FY 2013, as made permanent, and the prior whistleblower regulations implemented in 1995.

The enhancements to the whistleblower regulations created by the pilot that would be made permanent by this rulemaking do not impose any substantive burden on the public. The rule provides more details about the nature of what constitutes whistleblower information and to whom it may be disclosed, as well as more detailed procedures for filing and investigating complaints and enforcing orders. A clause, applicable above the simplified acquisition threshold, informs the contractor that employees working under the contract are subject to whistleblower protection and requires the contractor to inform its employees in writing, in the predominant language of the workforce, of the employee whistleblower rights and protections. This requirement can be easily satisfied by issuing an email to all employees working on the contract. For this reason, DoD, GSA, and NASA consider the burden to be de minimis.

The rule would also add the words ''or subcontractor'' at multiple locations throughout FAR 31.205–47, which also has no or de minimis impact, because the cost principles generally already apply in the same way to costs incurred by subcontractors as to costs incurred by contractors. FAR 31.000 states that the part contains cost principles and procedures for the pricing of contracts,

subcontracts, and modifications to contracts and subcontracts whenever cost analysis is performed (see 15.404–1), and the determination, negotiation, or allowance of costs when required by a contract clause. FAR 31.103 further states that the contracting officer shall incorporate the cost principles and procedures in subpart 31.2 and agency supplements by reference in contracts with commercial organizations as the basis for determining reimbursable costs under cost-reimbursement contracts and cost-reimbursement subcontracts under these contracts performed by commercial organizations. Other sections expand this to contracts and subcontracts thereunder with educational institutions and construction and architect-engineer contracts. FAR 31.204 further addresses the applicability of the cost principles and procedures to subcontracts.

There were a small number of whistleblower cases filed during the pilot period as shown in a U.S. Government Accountability Office (GAO) report. GAO report 17–227, Contractor Whistleblower Protections Pilot Program—Improvements Needed to Ensure Effective Implementation showed that GAO surveyed 14 departments for reprisal complaints received from July 1, 2013, to December 31, 2015. This report was published and publicly released on March 2, 2017.

The report stated ''Of the 127 reprisal complaints submitted by employees of contractors, subcontractors, and grantees under the pilot program, 44 were investigated by the OIG [Office of Inspector General] and none of the investigations completed thus far resulted in findings that substantiated reprisal.''

## V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is 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 proposed rule is not expected to be subject to E.O. 13771, because this rule has a *de minimis* impact on the public (see section IV of this preamble).

## VII. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601 *et seq.* However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

This proposed rule would implement Public Law 114–261, which was enacted December 14, 2016. The objective of this rule is to enhance whistleblower protection for contractor employees, by making permanent the protection for disclosure of certain information, and ensuring that the prohibition on reimbursement for certain legal costs applies to subcontractors, as well as contractors, as required by Public Law 114–261.

This proposed rule does not make any substantive changes to the pilot program applicable to civilian agencies authorized by the NDAA for FY 2013, other than to make it permanent. The clause is prescribed above the simplified acquisition threshold (SAT). It also does not apply to DoD, NASA, and the Coast Guard, nor to certain elements of the intelligence community. Based on Federal Procurement Data System (FPDS) data for fiscal year (FY) 2016, there were approximately 10,000 new contract awards to small businesses by civilian agencies that exceeded the SAT (about 5,000 unique vendors).

Regarding the amendment to the cost principles, addition of the words ''or subcontractor'' at multiple locations throughout FAR 31.205–47 has no or de minimis impact, because the cost principles generally already apply in the same way to costs incurred by subcontractors as to costs incurred by contractors.

There are no reporting, recordkeeping, or other compliance requirements in this rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules. DoD, GSA, and NASA were unable to identify any alternatives to the rule that would reduce the impact on small entities and still meet the requirements of the statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2017–005) in correspondence.

## VIII. Paperwork Reduction Act

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

## List of Subjects in 48 CFR Parts 3, 31, and 52

Government procurement.

Dated: December 14, 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 proposing to amend 48 CFR parts 3, 31, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 3, 31, 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 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Revise section 3.900 to read as follows:

### 3.900 Scope of subpart.

This subpart implements various statutory whistleblower programs. This subpart does not implement 10 U.S.C. 2409, which is applicable only to DoD, NASA, and the Coast Guard.

(a) 41 U.S.C. 4712 is implemented in 3.900 through 3.906. These sections do not apply to—

(1) DoD, NASA, and the Coast Guard; or

(2) Any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)). Sections 3.900 through 3.906 do not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(i) Relates to an activity of an element of the intelligence community; or

(ii) Was discovered during contract or subcontract services provided to an element of the intelligence community.

(b) Section 743 of Division E, Title VII of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) and its successor provisions in subsequent appropriations acts (and as extended in continuing

resolutions), is implemented in 3.909, which is applicable to all agencies.

(c) Contracts funded by the American Recovery and Reinvestment Act. Section 3.907 of this subpart implements section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) and applies to all contracts funded in whole or in part by that Act.

■ 3. Amend section 3.901 by—

■ a. Adding in alphabetical order, the definition, ''Abuse of authority''; ■ b. Removing the definition ''Authorized official of an agency''; and ■ c. Revising the definition ''Inspector General''.

The added and revised text reads as follows:

**3.901 Definitions.**

* * * * *

*Abuse of authority* means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract of such agency.

* * * * *

*Inspector General* means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for, or on behalf of, the executive agency concerned. This definition does not apply to 3.907.

* * * * *

■ 4. Revise section 3.902 to read as follows:

**3.902 Classified information.**

41 U.S.C. 4712 does not provide any right to disclose classified information not otherwise provided by law.

■ 5. Revise section 3.903 to read as follows:

**3.903 Policy.**

(a)(1) Contractors and subcontractors are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the entities listed at paragraph (b) of this section, information that the employee reasonably believes is—

(i) Evidence of gross mismanagement of a Federal contract;

(ii) A gross waste of Federal funds;

(iii) An abuse of authority relating to a Federal contract;

(iv) A substantial and specific danger to public health or safety; or

(v) A violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract).

(2) A reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) Entities to whom disclosure may be made.

(1) A Member of Congress or a representative of a committee of Congress.

(2) An Inspector General.

(3) The Government Accountability Office.

(4) A Federal employee responsible for contract oversight or management at the relevant agency.

(5) An authorized official of the Department of Justice or other law enforcement agency.

(6) A court or grand jury.

(7) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

(c) An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract shall be deemed to have made a disclosure.

■ 6. Amend section 3.904 by revising the section to read as follows:

**3.904 Complaints.**

■ 7. Add section 3.904–1 to read as follows:

**3.904–1 Procedures for filing complaints.**

A contractor or subcontractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 may submit a complaint with the Inspector General of the agency concerned. Procedures for submitting fraud, waste, abuse, and whistleblower complaints are generally accessible on agency Office of Inspector General Hotline or Whistleblower internet sites or the complainant may directly contact the cognizant Office of the Inspector General for submission instructions. A complaint by the employee may not be brought under 41 U.S.C. 4712 more than three years after the date on which the alleged reprisal took place.

■ 8. Add section 3.904–2 to read as follows:

**3.904–2 Procedures for investigating complaints.**

(a) Investigation of complaints will be in accordance with 41 U.S.C. 4712(b).

(b) Upon completion of the investigation, the head of the agency shall ensure that the Inspector General provides the report of findings to—

(1) The complainant and any person acting on the complainant's behalf;

(2) The contractor and/or subcontractor alleged to have committed the violation; and

(3) The head of the agency.

(c) Unless otherwise provided in agency procedures, the complainant, contractor, and/or subcontractor shall be afforded the opportunity to submit a written response to the report of findings to the head of the agency and the Office of Inspector General.

■ 9. Revise section 3.905 to read as follows:

**3.905 Remedies and enforcement of orders.**

■ 10. Add section 3.905–1 to read as follows:

**3.905–1 Remedies.**

(a) *Agency response to Inspector General report.* Not later than 30 days after receiving a report pursuant to 3.904–2, the head of the agency shall—

(1) Determine whether sufficient basis exists to conclude that the contractor or subcontractor has subjected the employee who submitted the complaint to a reprisal as prohibited by 3.903; and

(2) Either issue an order denying relief or take one or more of the following actions:

(i) Order the contractor or subcontractor to take affirmative action to abate the reprisal.

(ii) Order the contractor or subcontractor to reinstate the complainant-employee to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(iii) Order the contractor or subcontractor to pay the complainant-employee an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(b) *Complainant's right to go to court.*

(1) Paragraph (b)(2) of this section applies if—

(i) The head of the agency issues an order denying relief; or

(ii)(A) The head of the agency has not issued an order—

(*1*) Within 210 days after the submission of the complaint; or

(*2*) Within 30 days after the expiration of an extension of time granted in accordance with 41 U.S.C. 4712(b)(2)(B)

for the submission of the report to those stated in 3.904–2(b); and

(B) There is no showing that such delay is due to the bad faith of the complainant.

(2) If the conditions in either paragraph (b)(1)(i) or (ii) of this section are met—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor or subcontractor to seek compensatory damages and other relief available under 41 U.S.C. 4712 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(A) Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(B) An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(c) *Admissibility in evidence.* An Inspector General determination and an agency head order denying relief under this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 41 U.S.C. 4712.

(d) *No waiver.* The rights and remedies provided for in 41 U.S.C. 4712 may not be waived by any agreement, policy, form, or condition of employment.

■ 11. Add section 3.905–2 to read as follows:

**3.905–2 Enforcement of orders.**

(a) Whenever a contractor or subcontractor fails to comply with an order issued under 3.905–1(a)(2), the head of the agency concerned shall file an action for enforcement of the order in the U.S. district court for a district in which the reprisal was found to have occurred. In any action brought pursuant to this authority, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The complainant-employee upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.

(b) Any person adversely affected or aggrieved by an order issued under 3.905–1(a)(2) may obtain review of the order's conformance with 41 U.S.C. 4712 and its implementing regulations, in the U.S. court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.

■ 12. Revise section 3.906 to read as follows:

**3.906 Contract clause.**

(a) Except as provided in paragraph (b) of this section, the contracting officer shall insert the clause at 52.203–17, Contractor Employee Whistleblower Rights, in all solicitations and contracts that exceed the simplified acquisition threshold.

(b) The clause prescription in paragraph (a) of this section does not apply to solicitations and contracts of DoD, NASA, the Coast Guard, or applicable elements of the intelligence community (see 3.900(a)).

**3.907–7 [Amended]**

■ 13. Amend section 3.907–7 by removing ''Reinvestment Act of 2009 in'' and adding ''Reinvestment Act of 2009, in'' in its place.

**3.908 [Removed and reserved]**

■ 14. Remove and reserve section 3.908.

**3.908–1 through 3.908–9 [Removed]**

■ 15. Remove sections 3.908–1 through 3.908–9.

## PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

**31.205–47 [Amended]**

■ 16. Amend section 31.205–47 by—

■ a. In paragraph (a), in the definition of ''Costs'' by removing ''or others retained by the contractor to assist it;'' and adding ''or others retained by the contractor or subcontractor to assist it;'' in its place;

■ b. In the introductory text of paragraph (b), by removing ''law or regulation by the contractor'' and adding ''law or regulation by the contractor or subcontractor'' in its place;

■ c. In paragraph (b)(2) by removing ''either a finding of contractor liability'' and adding ''either a finding of contractor or subcontractor liability'' in its place;

■ d. In paragraph (b)(3)(i), by removing ''the contractor;'' and adding ''the contractor or subcontractor;'' in its place;

■ e. In paragraph (c)(1), by removing ''between the contractor'' and adding ''between the contractor or subcontractor'' in its place;

■ f. In paragraph (c)(2)(i), by removing ''incurred by the contractor'' and adding ''incurred by the contractor or subcontractor'' in its place;

■ g. In paragraph (d)(1) by removing ''Federal contract; or'' and adding ''Federal contract or subcontract; or'' in its place;

■ h. In the introductory paragraph of paragraph (f) by removing ''connection with'' and adding ''connection with the following'' in its place;

■ i. In paragraph (f)(4) by removing ''the contractor under'' and adding ''the contractor or subcontractor under'' in its place; and removing ''the contractor was'' and adding ''the contractor or subcontractor was'' in its place;

■ j. In the introductory paragraph of paragraph (f)(5) by removing ''contractors arising from either'' and adding ''contractors or subcontractors arising from either—'' in its place;

■ k. In paragraph (f)(5)(i) by removing ''an agreement'' and adding ''An agreement'' in its place;

■ l. In paragraph (f)(5)(ii) by removing ''dual sourcing'' and adding ''Dual sourcing'' and removing ''except when'' and adding ''except when—'' in its place;

■ m. In paragraph (f)(5)(ii)(A) by removing ''incurred as'' and adding ''Incurred as'', removing ''contract or'' and adding ''contract or subcontract, or'' in its place, and removing ''contracting officer, or'' and adding ''contracting officer; or'' in its place;

■ n. In paragraph (f)(5)(ii)(B) by removing ''when agreed'' and adding ''When agreed'' in its place;

■ o. In paragraph (f)(6) by removing ''contract.'' and adding ''contract or subcontract.'' in its place;

■ p. In paragraph (f)(7) by removing ''the contractor is'' and adding ''the contractor or subcontractor is'' in its place;

■ q. In paragraph (g) by removing ''contractor separately.'' and adding ''contractor or subcontractor separately.'' in its place, and removing ''contractor to repay all'' and adding ''contractor or subcontractor to repay all'' in its place.

■ 17. Amend section 31.603 by revising paragraph (b)(15) to read as follows:

**31.603 Requirements.**

* * * * *

(b) * * *

(15) Unless any of the exceptions at 31.205–47(c) or (d) apply, costs incurred by a contractor or subcontractor in connection with any criminal, civil, or administrative proceedings that result in dispositions described at 31.205–47(b)(1) through (5) commenced by: A Federal, State, local, or foreign government, for a violation of, or failure to comply with, law or regulation by the contractor or subcontractor (including its agents or employees); a contractor or

subcontractor employee submitting a whistleblower complaint of reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C. 2409; or a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730. For any such proceeding that does not result in a disposition described at 31.205–47(b)(1) through (5), or to which 31.205–47(c) exceptions apply, the cost of that proceeding shall be subject to the limitations in 31.205–47(e).

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 18. Amend section 52.203–17 by—
■ a. Revising the section heading;
■ b. Removing from the introductory text ''3.908–9'' and adding ''3.906'' in its place;
■ c. Revising the date of the clause; and
■ d. Revising paragraphs (a) and (b) to read as follows:

### 52.203–17 Contractor Employee Whistleblower Rights.

* * * * *

**Contractor Employee Whistleblower Rights (Date)**

(a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies established at 41 U.S.C. 4712 and FAR 3.901 through 3.905.

(b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under 41 U.S.C. 4712, as described in FAR 3.901 through 3.905.

* * * * *

■ 19. Amend section 52.212–4 by revising the date of the clause; and removing from paragraph (r) ''41 U.S.C. 4712 and''. The revised text reads as follows:

### 52.212–4 Contract Terms and Conditions—Commercial Items.

* * * * *

**Contract Terms and Conditions—Commercial Items (Date)**

* * * * *

■ 20. Amend section 52.212–5 by:
■ a. Revising the date of the clause;
■ b. Redesignating paragraphs (b)(4) through (60) as paragraphs (b)(5) through (61), respectively;
■ c. Adding a new paragraph (b)(4);
■ d. Redesignating paragraphs (e)(1)(ii) through (xxii) as paragraphs (e)(1)(iii) through (xxiii), respectively;
■ e. Adding a new paragraph (e)(1)(ii);
■ f. Revising the date of Alternate II;
■ g. Redesignating paragraphs of Alternate II; (e)(1)(ii)(C) through (T) as paragraphs (e)(1)(ii)(D) through (U), respectively; and
■ h. Adding a new paragraph (e)(1)(ii)(C).

The revised and added text reads 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 (Date)**

* * * * *

(b) * * *

____(4) 52.203–17, Contractor Employee Whistleblower Rights (Date) (41 U.S.C. 4712)

* * * * *

(e)(1) * * *

(ii) 52.203–17, Contractor Employee Whistleblower Rights (Date) (41 U.S.C. 4712)

* * * * *

Alternate II (Date). * * *

* * * * *

(e)(1) * * *

(ii) * * *

(C) 52.203–17, Contractor Employee Whistleblower Rights (Date) (41 U.S.C. 4712)

* * * * *

■ 21. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(2)(viii) 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) (Date)**

(a) * * *

(2) * * *

(viii) 52.244–6, Subcontracts for Commercial Items (Date).

* * * * *

■ 22. Amend section 52.244–6 by—
■ a. Revising the date of the clause;
■ b. Redesignating paragraphs (c)(1)(iii) through (c)(1)(xix) as paragraphs (c)(1)(iv) through (c)(1)(xx), respectively;
■ c. Adding a new paragraph (c)(1)(iii).

The revised and added text reads as follows:

### 52.244–6 Subcontracts for Commercial Items.

* * * * *

**Subcontracts for Commercial Items (Date)**

* * * * *

(c)(1) * * *

(iii) 52.203–17, Contractor Employee Whistleblower Rights (Date) (41 U.S.C. 4712) relating to whistleblower protections, if the subcontract is over the simplified acquisition threshold; this clause does not apply to contracts of DoD, NASA, the Coast Guard, or applicable elements of the intelligence community–see FAR 3.900(a).

* * * * *

[FR Doc. 2018–27493 Filed 12–21–18; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF TRANSPORTATION

## National Highway Traffic Safety Administration

## 49 CFR Part 571

**[Docket No. NHTSA–2010–0012]**

**RIN 2127–AK58**

## Federal Motor Vehicle Safety Standards; Motor Vehicle Brake Fluids

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** NHTSA withdraws its notice of proposed rulemaking (NPRM), published on February 3, 2010, proposing amendments to the Federal Motor Vehicle Safety Standard (FMVSS) No. 116, Motor Vehicle Brake Fluids. Since publication of the NPRM and after review of the comments, the agency has determined that updates and corrections outside the scope of the notice are necessary in order to publish a final rule. Based on this, the agency has decided to withdraw the proposal to amend FMVSS No. 116.

**DATES:** The NPRM ''Federal Motor Vehicle Safety Standards; Motor Vehicles Brake Fluids,'' RIN 2027–AK58, published February 3, 2010 (75 FR 5553), is withdrawn as of December 26, 2018.

**ADDRESSES:** *Electronic Access:* You can view and download related documents and public comments by going to the website *https://www.regulations.gov.* Enter the docket number NHTSA–2010–0012 in the search field.

**FOR FURTHER INFORMATION CONTACT:** Joshua Fikentscher, Office of Crash Avoidance Standards (Phone: 202–366–1810; Fax: 202–493–0073) or Sara R. Bennett, Office of the Chief Counsel (Phone: 202–366–2992; Fax: 202–366–3820). You may send mail to both of these officials at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

### Background

Federal Motor Vehicle Safety Standard (FMVSS) No. 116, ''Motor Vehicle Brake Fluids,'' specifies

requirements for fluids for use in hydraulic brake systems of motor vehicle, containers for these fluids, and labeling of the containers. The purpose of this standard is to reduce failures, which may occur because of the manufacture or use of improper or contaminated fluid, in the hydraulic braking systems of motor vehicles. This standard applies to all fluid for use in hydraulic brake systems of motor vehicles.

**The NPRM**

On February 3, 2010, NHTSA published a Notice of Proposed Rulemaking (NPRM) proposing to amend FMVSS No. 116 to include tests to measure the impact of brake fluid on ethylene, propylene, and diene terpolymer (EPDM) rubber, update references to industry standards, and correct minor errors in the standard.[1] The supporting rationale for the proposed EPDM testing amendment was that the motor vehicle industry had shifted over the last two decades from using styrene-butadiene rubber (SBR), which is currently covered by FMVSS No. 116, to EPDM rubber. The proposed rule informed the public about the agency's proposal to amend the standard by: (1) Adding the testing of a terpolymer of ethylene, propylene, and diene (EPDM) rubber to the corrosion test and the temperature sensitivity test; (2) updating the Society of Automotive Engineers International (SAE) and American Society for Testing and Materials (ASTM) references; and (3) correcting minor errors.

**Comments Received**

NHTSA received comments on the 2010 NPRM from three manufacturers of brake fluid/components, an international standards organization, and an individual. Two of the manufacturers mentioned that the Compatibility Fluid, RM–66–05, was no longer available, and had been replaced by RM–66–06 or ISO 4926 fluid. All three manufacturers suggested changes to a performance test that was unmentioned in the agency's proposal. The international standards organization suggested changes that reflected more recent SAE standards. The individual opposed the incorporation of industry standards into Federal regulations and suggested additional performance tests.

**Reason for Withdrawal**

Although the agency proposal in 2010 provided amendments to add EPDM rubber to the standard and update the references to industry standards, further research and studies are necessary to develop a proposed upgrade to FMVSS No. 116 that would effectively provide minimum performance requirements for the type of EPDM rubber currently available. The rubber formulations included in recent updates to industry standards have changed, and the blends referenced in the NPRM include ingredients that are no longer available.

In addition to changes to the SBR and EPDM rubber formulations, the agency determined other corrections are necessary that were not included in the NPRM. One such correction brought up by commenters is the reference to the Compatibility Fluid, RM–66–05, which had been replaced by the RM–66–06 fluid. Another correction needed is the hardness test procedure for the EPDM rubber, which had been inadvertently omitted from the proposed performance tests in the NPRM. Finally, NHTSA notes SAE International and the ASTM have updated several of the industry standards and tests referenced in the NPRM since the publication of the notice in 2010.

Since publication of the NPRM and after review of the comments, the agency has determined that updates and corrections outside the scope of the notice are necessary in order to publish a final rule, and additional research and data analyses are needed. Accordingly, NHTSA has determined that the proposed updates in the 2010 NPRM to FMVSS No. 116 should not be adopted at this time and is withdrawing the NPRM.

Issued in Washington, DC, under authority delegated in 49 CFR 1.95 and 501.5.

**Heidi Renate King,**

*Deputy Administrator.*

[FR Doc. 2018–27796 Filed 12–21–18; 8:45 am]

BILLING CODE 4910–59–P

[1] 75 FR 5553 (Feb. 3, 2010).

## SURFACE TRANSPORTATION BOARD

### 49 CFR Parts 1002 and 1312

**[Docket No. EP 743]**

### Water Carrier Tariff Filing Procedures

**AGENCY:** Surface Transportation Board.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Surface Transportation Board (STB or Board) proposes a new procedure for water carriers operating in the noncontiguous domestic trade to electronically publish, file, and keep tariffs available for public inspection. As explained in this notice of proposed rulemaking (NPRM), the Board proposes to update its water carrier tariff filing regulations to reflect current business practices.

**DATES:** Comments are due by January 25, 2019. Reply comments are due by February 25, 2019.

**ADDRESSES:** Comments may be submitted either via the Board's e-filing format or in paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's website at *www.stb.gov* at the E–FILING link. Any person submitting a filing in paper format should send an original and 10 paper copies of the filing to: Surface Transportation Board, Attn: Docket No. EP 743, 395 E Street SW, Washington, DC 20423–0001. Written comments and replies will be posted on the Board's website and can also be obtained by contacting the Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) at *RCPA@stb.gov* or (202) 245–0238.

**FOR FURTHER INFORMATION CONTACT:** Michael Higgins at 202–245–0284. Assistance for the hearing impaired is available through Federal Information Relay Service (FIRS) at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** In April 2017, the Board established its Regulatory Reform Task Force (RRTF), with the primary objective of identifying Board rules and practices that are burdensome, unnecessary, or outdated and to recommend how they should be addressed. *See Regulatory Reform Task Force,* EP 738 (STB served June 20, 2017). The RRTF identified the current water carrier tariff regulations at 49 CFR part 1312 as imposing significant costs on the carriers as well as the Board. *See* RRTF 90-Day Status Report (issued May 25, 2017); RRTF Status Report (issued Nov. 21, 2017).[1] Accordingly, the proposed rules would update the Board's regulations to allow water carriers[2] to electronically publish, file, and keep tariffs available for public inspection. The Board anticipates that the new procedures would significantly reduce costs and burdens that water carriers incur in complying with tariff-related statutory requirements.

*Background.* Water carriers operating in the noncontiguous domestic trade[3]

[1] These status reports can both be accessed on the Board's website at *https://www.stb.gov/stb/about/RRTF.html.*

[2] Many water carriers use third-party service providers to manage and maintain their tariffs on the internet.

[3] Noncontiguous domestic trade means ''transportation subject to jurisdiction under chapter 135 involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States.'' 49 U.S.C. 13102(17).

are subject to the jurisdiction of the Board under 49 U.S.C. 13521. For their common carrier services, water carriers are required to publish, file, and keep available for public inspection tariffs setting forth their rates, charges, rules, and classifications. 49 U.S.C. 13702(a)–(b).[4] Water carriers are required to charge and receive compensation for their services in accordance with the rates set forth in their tariffs and are prohibited from rebating or granting special privileges or accommodations to shippers that affect the value of the transportation or service provided. 49 U.S.C. 13702(a).[5] Under 49 U.S.C. 13702(b), the Board is required to prescribe the form and manner of publishing, filing, and keeping tariffs available for public inspection.

The current regulations for filing water carrier tariffs, which are set forth in Part 1312 and were last substantively updated in April 1997,[6] contemplate the filing of tariffs with the Board in paper format and require the rates, rules, and practices for any transportation or service provided by the carrier to be contained in a published tariff that is on file with the Board. 49 CFR 1312.2; 1312.4(b). Between 1996 and 1999, the Board granted Special Tariff Authority to water carriers that allowed them to file tariffs electronically through the Automated Tariff Filing and Information (ATFI) system, a web-based portal hosted and maintained by the Federal Maritime Commission (FMC). *See Electronic Filing of Noncontiguous Domestic Trade Tariffs,* 1 S.T.B. 635 (1996). The FMC developed the ATFI system to allow ocean carriers operating in the U.S. foreign trade subject to its jurisdiction to file tariffs electronically. The FMC shared the ATFI system with the STB, thereby facilitating electronic tariff filing for water carriers subject to the Board's jurisdiction. *1997 Regulations for Publ'n,* 2 S.T.B. at 191.

After the Ocean Shipping Reform Act of 1998, Public Law 105–258, 112 Stat. 1902 (1998), which eliminated tariff filing for ocean carriers operating in the U.S. foreign trade, the FMC terminated the ATFI system, and the Board declined to assume control over it or develop a new electronic system. However, the Board permitted individual water carriers to continue to apply for Special Tariff Authority, under 49 CFR 1312.2(e), to file their tariffs in alternative electronic formats. *See Regulations for the Publ'n, Posting & Filing of Tariffs for Transp. of Prop. by or with a Water Carrier in Noncontiguous Domestic Trade* (*1999 Regulations for Publ'n*), 4 S.T.B. 1 (1999). Special Tariff Authority applications are handled by the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC). *See* 49 CFR 1011.7(b)(3).

Special Tariff Authority applications have been addressed on a case-by-case basis. For example, in April 1999, the Board granted the application of D.X.I. Incorporated (DXI), a third-party tariff publisher, to file tariffs electronically.[7] *Electronic Filing of Noncontiguous Domestic Trade Tariffs* (*Electronic Filing Decision*), 4 S.T.B. 43 (1999). In that decision, the Board allowed DXI to maintain tariffs in an online system that Board staff and the public would be able to access via ''dial up'' to DXI's system from the Board's offices. DXI was required to submit an electronic transmittal letter of all tariff changes made on a given day as well as a machine-readable copy of tariff changes. While some subsequent Special Tariff Authority applications have been similar to the one in the *Electronic Filing Decision,* other applications have contemplated that water carriers would convert their paper tariffs into PDF documents and file PDF updates with the Board via email or compact disk. *See, e.g., Filing of Printed Noncontiguous Domestic Trade Tariffs by Email,* STA 8 (STB served Dec. 4, 2000.)

Although few formal cases relating to water carrier rates and services have been filed with the agency,[8] the Board believes it is important to ensure that its water carrier tariff rules are updated to reflect current business practices and reduce unnecessary burdens.

*Proposed Rules.* The RRTF has reviewed the water carrier tariff regulations, including grants of Special Tariff Authority and filing requirements, and has recommended that the Board update these regulations to allow for more convenient electronic filing procedures. The Board finds that it is appropriate to modify the regulations at 49 CFR part 1312. Specifically, the Board proposes to allow water carriers to publish, file, and keep their tariffs electronically, but would also continue to allow water carriers the option of filing their tariffs in paper format.

Under the proposal, water carriers would be permitted to comply with the filing requirement in 49 U.S.C. 13702 by: (1) Maintaining a publicly available version of its current and historical tariffs on the internet, and (2) electronically filing (e-filing) with the Board an annual certification made by a duly authorized corporate officer of the carrier that (a) contains an active link[9] to the internet location and access information for its tariffs and (b) affirms the water carrier's continuing compliance with the relevant sections of Part 1312. The proposed rule provides sample language to be used in the certification. To utilize e-filing, a filer would first pay the required fee[10] via electronic payment through *Pay.gov.*[11] Once the payment has been submitted, a confirmation email from *Pay.gov* would be sent containing a unique transaction number. The filer would then go to the Board's e-filing website and, through a registered account, submit the transaction number received from *Pay.gov* and attach the annual certification. *See Payment, Filing, and Service Procedures,* EP 747, slip op. at 5–6. OPAGAC would acknowledge receipt of each carrier's annual certification in writing.

The Board would create a specific page on its website for water carriers that electronically file their tariffs. The page would provide links to the location of a water carrier's current tariff, links to the most recent annual certification, and links to prior certifications. Access to water carrier tariffs filed in paper format would continue to be available to the public via requests to OPAGAC.

[4] Section 13702(a)(1) includes an exception from the tariff filing requirement for bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste.

[5] Water carriers, however, are permitted to enter into private contracts with shippers to provide transportation services subject to privately-negotiated rates and terms. 49 U.S.C. 14101(b). In these contracts, water carriers and shippers may mutually agree to waive rights and remedies that would otherwise be available. *Id.*

[6] *See Regulations for the Publ'n, Posting & Filing of Tariffs for the Transp. of Prop. by or with a Water Carrier in the Noncontiguous Domestic Trade* (*1997 Regulations for Publ'n*), 2 S.T.B. 188, *recon. granted in part,* 2 S.T.B. 301 (1997).

[7] At the time, DXI represented several water carriers operating in the noncontiguous domestic trade.

[8] The Board's last water carrier case was decided in October 2010, *West Point Relocation, Inc. & Eli Cohen–Petition for Declaratory Order,* FD 35290 (STB served Oct. 29, 2010), and the last rate case involving a water carrier was dismissed at the request of the complainant in October 2007, *Government of the Territory of Guam* v. *Sea-Land Service, Inc.,* WCC 101, (STB served Oct. 12, 2007).

[9] If the water carrier's internet address changes during the 12-month period following the filing of its annual certification, the water carrier should provide the Board an updated certification with an active link as soon as possible.

[10] The Board proposes an expansion of fee item 78 at 49 CFR 1002.2(f), to reflect the filing fee associated with the annual certification.

[11] In a separate rulemaking, the Board is proposing to update its regulations to, among other things, add an electronic payment option at 49 CFR 1002.2(a). *See Payment, Filing, and Service Procedures,* EP 747 (STB served Aug. 24, 2018). As described further in that rulemaking, the Board would implement electronic payment through *Pay.gov*, which would accept bank accounts, credit cards, debit cards with a MasterCard or Visa logo, and digital wallet for the payment of fees.

By adding an e-filing option to the regulations, the Board believes it is appropriate to eliminate the option for obtaining tariff filing relief under the existing Special Tariff Authority applications process. *See* 49 CFR 1312.2(e). Accordingly, this proposal would also eliminate prior grants of Special Tariff Authority, meaning that all water carriers must either file their tariffs in paper format or electronically under the proposal outlined here. Currently under grants of Special Tariff Authority, some water carriers send notifications to the Board by email each time a tariff changes, which for many carriers is a daily occurrence. Discontinuing this practice, as well as the use of compact discs and floppy disks, as a means to submit and keep tariffs is anticipated to reduce the overall costs and burdens incurred by water carriers in complying with tariff-related statutory requirements.

Under the new framework, Board staff would be able to access and review water carrier tariffs for purposes of maintaining regulatory oversight. In addition, stakeholders would have access to current and historical tariffs without requesting them from the Board. Tariffs kept on the internet would need to comply with the content requirements of 49 CFR 1312.3, in addition to the new requirement that water carriers provide the date on which tariffs first appear on the internet and the date on which they are expected to become effective. The proposed rule would not prescribe the specific information technology resources (programming, applications or software, etc.) that carriers must use to house this information. As proposed, whatever information technology platform that a water carrier chooses would need to allow the Board and the public to retrieve historical versions of the tariff, including all rates and applicable rules, for a period of not less than five years. The requirement for electronically archiving five years of existing historical data would begin when a carrier first electronically files its tariffs.

The Board expects that water carrier tariffs would be available to the Board and the public 24 hours a day, seven days a week, year-round. If a water carrier anticipates an outage for routine electronic maintenance, it would be required to provide the Board with at least two days' advance notice of the start and duration of the outage. If a tariff were to become unavailable for reasons beyond the carrier's control (such as a software malfunction), the carrier would be required to notify the Board promptly via email at *tariffs@stb.gov.* In the event of any outage, carriers would be required to make alternative arrangements with the agency to ensure that the Board and public have access to the tariffs in effect during the outage. In turn, the Board would provide that information on its website so that the public would be made aware of the particular outage as soon as reasonably possible.

The proposed rule would allow water carriers to establish registration requirements on their own portal for tariff access over the internet. However, any registration process would be required to allow access to the tariff free of charge by anyone who requests it. For example, registration features that require a showing of ''need'' or ''relevance,'' or proof that a person or entity is a customer or potential customer as a prerequisite to accessing tariff information would be prohibited. Registration requirements would be permitted to require basic information, such as a person's name and email address. *See Publ'n Requirements for Ag. Products,* EP 528 et al., slip op. at 6 (STB served June 30, 2017).

*Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities, (2) analyze effective alternatives that may minimize a regulation's impact, and (3) make the analysis available for public comment. Sections 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, section 603(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' section 605(b). The impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

The proposed rules would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.[12] The proposed regulations provide for new procedures for water carriers operating in the noncontiguous domestic trade to electronically publish, file, and keep tariffs available for public inspection. When a carrier chooses to utilize these e-filing procedures, the requirements contained in these proposed regulations would not have a significant impact on participants, including small entities. They are intended as an option to eliminate the burdens associated with the current tariff filing requirements. Therefore, the Board 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 as defined by the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

*Paperwork Reduction Act.* Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521, Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), and the Appendix, the Board seeks comments about the revisions in the proposed rules to the currently approved collection of Water Carrier Tariffs (OMB Control No. 2140–0026) regarding: (1) Whether the collection of information, as modified in the proposed rule below, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

Because water carriers may make annual certifications and post their tariffs on their websites, rather than submitting each tariff directly to the Board, the Board estimates the proposed rules would reduce the total annual hourly burden by 583.75 hours under the PRA. The Board welcomes comment on the estimates of actual time and costs of compliance with the proposed rules, as detailed below and in the Appendix. Information pertinent to these issues is included in the Appendix. The proposed rules will be submitted to OMB for review as required under 44 U.S.C. 3507(d) and 5 CFR 1320.11(b). Comments received by the Board regarding the information collection will also be forwarded to OMB for its review when the final rule is published.

*It is ordered:*

1. Comments are due by January 25, 2019. Reply comments are due by February 25, 2019.

[12] The Small Business Administration's Office of Size Standards has established a size standard for water transportation, pursuant to which deep sea freight transportation is considered small if its number of employees is 500 or less, and coastal and Great Lakes freight transportation is considered small if its number of employees is 750 or less. 13 CFR 121.201 (industry subsector 483).

2. Notice of this decision will be published in the **Federal Register**.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

4. This decision is effective on its service date.

Decided: December 18, 2018.

By the Board, Board Members Begeman and Miller.

BOARD MEMBER MILLER, commenting:

I write separately to remind parties that have an interest in this proceeding that the Board adopted new regulations in *Ex Parte Communications in Informal Rulemaking Proceedings,* EP 739 (STB served Feb. 28, 2018) that removed the prohibition on ex parte communications in informal rulemakings, such as the one here. Under these newly adopted regulations, 49 CFR 1102.2(g), parties may schedule ex parte meetings with Board Members by February 4, 2019. As the regulations specify, parties wishing to schedule ex parte meetings should contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance (202–245–0238) or the Board Member's office with whom the meeting is requested. Parties are not, however, required to schedule such meetings if they instead wish to participate solely by filing written comments.

**List of Subjects**

*49 CFR Part 1002*

Administrative practice and procedure, Common carriers, Freedom of information.

*49 CFR Part 1312*

Freight forwarders, Maritime carriers, Motor carriers, Pipelines, Railroads, Reporting and recordkeeping requirements.

**Brendetta Jones,**
*Clearance Clerk.*

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1002 and 1312 of title 49, chapter X, of the Code of Federal Regulations as follows:

## PART 1002—FEES

■ 1. The authority citation for part 1002 is revised to read as follows:

**Authority:** 5 U.S.C. 552(a)(4)(A), (a)(6)(B), and 553; 31 U.S.C. 9701; and 49 U.S.C. 1321. Section 1002.1(f)(11) is also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

■ 2. Amend § 1002.2 by, re-designating the introductory text of paragraph (f)(78) as paragraph (f)(78)(i) and adding paragraph (f)(78)(ii) to read as follows:

**§ 1002.2 Filing fees.**

* * * * *

(f) * * *

| Type of proceeding | Fee |
|---|---|
| * * * * * * * | |
| PART VI: Informal Proceedings: | |
| * * * * * * * | |
| (78) (i) The filing of tariffs, including supplements, or contract summaries | $1 per page. ($29 min charge.) |
| (ii) The filing of water carrier electronic annual certifications | $29. |
| * * * * * * * | |

* * * * *

## PART 1312—REGULATIONS FOR THE PUBLICATION, POSTING AND FILING OF TARIFFS FOR THE TRANSPORTATION OF PROPERTY BY OR WITH A WATER CARRIER IN NONCONTIGUOUS DOMESTIC TRADE

■ 3. The authority citation for part 1312 continues to read as follows:

**Authority:** 49 U.S.C. 1321(a), 13702(a), 13702(b) and 13702(d).

■ 4. The heading of part 1312 is revised to read as set forth above.

■ 5. Amend § 1312.1(c) by revising the definition of publication to read as follows:

**§ 1312.1 Scope; definitions.**

* * * * *

(c) * * *

*Publication* means a bound tariff, a tariff supplement, a looseleaf tariff page, or an electronically published tariff.

* * * * *

■ 6. Amend § 1312.2 by revising paragraph (b), removing paragraph (e) and re-designating paragraph (f) as paragraph (e) to read as follows:

**§ 1312.2 Requirement to publish and file a tariff.**

* * * * *

(b) *Adherence to tariff.* The carrier may not charge or receive a different compensation for the transportation or service than the rate specified in the tariff, whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

* * * * *

■ 7. Amend § 1312.3 by revising paragraph(a) to read as follows:

**§ 1312.3 Tariff contents and standards; Essential criteria.**

*(a) Contents.* Tariffs filed with the Board, including tariffs published, filed, and kept electronically in accordance with § 1312.4(c) of this part, must be filed in English; must include an accurate description of the services offered to the public; must provide the specific applicable rates explicitly stated in U.S. dollars and cents (or the basis for calculating the specific applicable rates) and service terms; and must be arranged in a way that allows for the determination of the exact rate(s) and service terms applicable to any given shipment (or to any given group of shipments). Tariffs that are electronically kept on the internet must also provide the date on which a new tariff or any change in a tariff matter first appears on the internet and the date on which it becomes effective.

* * * * *

■ 8. Amend § 1312.4 by revising paragraphs (a) and (b) to read as follows:

**§ 1312.4 Filing of tariffs.**

(a) *Paper filing requirements.* (1) Two copies of each tariff publication shall be filed with the Board. Packages containing tariff filings should be prominently marked ''TARIFF FILING'' and addressed to: Office of Public Assistance, Governmental Affairs and Compliance, Surface Transportation Board, Washington, DC 20423–0001.

Tariffs shall be printed on paper not larger than 8½ x 11 inches.

(2) A paper tariff filing must be accompanied by an authorized document of transmittal identifying each publication filed, and by the appropriate filing fee (see 49 CFR part 1002). Acknowledgement of Board receipt of a paper tariff filing can be obtained by enclosing a duplicate transmittal letter and a postage-paid, self-addressed return envelope. Each transmittal letter shall clearly indicate in the upper left-hand corner thereof:

(i) The assigned alpha code of the issuing carrier or agent;

(ii) The number of pages transmitted;

(iii) The filing fee enclosed (pursuant to 49 CFR 1002.2(a)); and

(iv) The transmittal number if the filer utilizes transmittal numbers.

(b) *Electronic filing requirements.* As an alternative to the paper tariff filing procedures set forth in paragraph (a) of this section, a water carrier may file its tariff(s) electronically in accordance with the procedures and requirements of this section. Tariffs published, filed, and kept electronically in accordance with the requirements of this section shall be deemed to be on file with the Board for purposes of 49 U.S.C. 13702(b).

(1) *Annual certification.* A water carrier that seeks to file its tariff electronically must electronically file an annual certification with the Board, made by the water carrier's duly authorized corporate officer. The annual certification must be submitted to the Board on the first business day in February each year. The Director of the Office of Public Assistance, Governmental Affairs, and Compliance or a designee will acknowledge receipt of each carrier's certification in writing. The annual certification shall include the following:

(i) Certification that it is a water carrier operating in the noncontiguous domestic trade subject to the Board's jurisdiction;

(ii) Certification that it is in compliance with the regulations of this section for purposes of publishing, filing, and keeping its tariff electronically;

(iii) Certification that it is in compliance with all other regulations at part 1312, except those specifically applicable to tariffs maintained in paper format;

(iv) An active link to the internet address of tariffs;

(v) The assigned alpha code of the issuing carrier or agent; and

(vi) The filing fee (pursuant to 49 CFR 1002.2(a)).

(vii) The annual certification must be submitted to the Board on the first business day in February each year. The Director of the Office of Public Assistance, Governmental Affairs, and Compliance or a designee will acknowledge receipt of each carrier's certification in writing.

(2) Sample text for the annual certification.

[Name of Director, Office of Public Assistance, Governmental Affairs, and Compliance], Office of Public Assistance, Governmental Affairs and Compliance, Surface Transportation Board, Washington, DC.

Dear Director: I, [name of signor], certify that I am [title of office] of [name of water carrier], a water carrier operating in the noncontiguous domestic trade subject to STB jurisdiction, that [Name of water carrier] is in compliance with the regulations at part 1312 for purposes of publishing, filing, and keeping its tariff electronically, and that it is in compliance with all other regulations at part 1312, except those specifically applicable to tariffs maintained in paper format.

The internet address where [name of water carrier]'s tariffs can be located is:

This internet address is current as of [date].

I further declare (certify, verify or state) under penalty of perjury (''under the laws of the United States of America'' if executed outside of the United States of America) that the foregoing is true and correct. Executed on (date).

Very truly yours,
[signature of a duly authorized corporate officer of water carrier.]

(3) *Tariff Access Requirement.* (i) A water carrier must provide the Board with at least two business days advance notice of any planned outage when its tariff will not be available on the internet, and prompt notice on any occasion when the tariff becomes unavailable due to circumstances beyond the carrier's control. Notice shall be submitted by email to *tariffs@stb.gov.* In the event of any outage, carriers are required to make alternative arrangements with the agency to ensure that the Board receives the tariff(s) in effect during the outage.

(ii) A water carrier may establish reasonable registration requirements for purposes of public access to its current tariff and historical tariff information, such as requiring a user to provide his or her name and email address; however, such requirements may not limit tariff access to any particular group or class of users (such as shippers or potential shippers) or impose unreasonable burdens on the user, such as access fees or a showing of need.

(4) *Historical Tariff Information and Archiving.* Tariffs kept on the internet by a water carrier must allow the Board and the public to retrieve historical versions, including all rates and applicable rules, for a period of not less than five years, beginning on the date when a carrier first electronically files its tariffs under these regulations.

* * * * *

■ 9. In § 1312.6, add paragraph (e) to read as follows:

**§ 1312.6 Advance notice required.**

* * * * *

(e) *Notice for purposes of electronically filed tariffs.* A water carrier that keeps its tariffs on the internet must comply with the notice requirements set forth in paragraph (b) of this section, provided however, that the relevant notice periods set forth in paragraphs (b)(1) and (2) of this section shall run from the date on which the tariff matter first appears in the water carrier's tariff on the internet.

■ 10. Amend § 1312.12 by adding paragraph (c) to read as follows:

**§ 1312.12 Posting requirements.**

* * * * *

(c) *Exemption for electronically filed tariffs.* A water carrier that publishes, files, and keeps its tariffs electronically in accordance with § 1312.4(b) is exempt from the posting requirements of this section.

■ 11. Amend § 1312.13 by adding paragraph (g) to read as follows:

**§ 1312.13 Furnishing copies of tariff publications.**

* * * * *

(g) *Exemption for electronically filed tariffs.* A water carrier that publishes, files, and keeps its tariffs electronically in accordance with § 1312.4(b) is exempt from this section.

■ 12. Amend § 1312.15 by adding a sentence at the end of paragraph (a) and a sentence at the end of paragraph (b) to read as follows:

**§ 1312.15 Change of carrier or agent.**

(a) * * * A water carrier that publishes, files, and keeps its tariffs electronically in accordance with § 1312.4(b) shall promptly submit any such change by email to *tariffs@stb.gov,* but in no case later than 20 days after the effective date.

(b) * * * A water carrier that publishes, files, and keeps its tariffs electronically in accordance with § 1312.4(b) shall promptly submit any such change of agent by email to *tariffs@stb.gov,* but in no case later than 20 days after the effective date.

**Note:** The following appendix will not appear in the Code of Federal Regulations.

## Appendix—Information Collection Under the Paperwork Reduction Act

*Title:* Water Carrier Tariffs.
*OMB Control Number:* 2140–0026.
*STB Form Number:* None.
*Type of Review:* Extension with change.
*Summary:* As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA), the Surface Transportation Board (STB or Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the revision of the currently approved information collection, Water Carrier Tariffs, OMB Control No. 2140–0026, as further described below. The requested revision to the currently approved collection is necessitated by this NPRM.
*Respondents:* Water carriers that provide freight transportation in noncontiguous domestic trade.
*Number of Respondents:* Approximately 20.
*Frequency:* Annually.
*Total Burden Hours* (annually including all respondents): 80 hours (20 annual filings × 4 hours estimated time per certification).
*Total ''Non-Hour Burden'' Cost (such as start-up costs and mailing costs):* There are no non-hourly burden costs for this collection. The annual certifications will be submitted electronically.
*Needs and Uses:* Under 49 U.S.C. 13702(b) and 49 CFR part 1312, water carriers that provide freight transportation in noncontiguous domestic trade (*i.e.,* shipments moving to or from Alaska, Hawaii, or the U.S. territories or possessions (Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands) to or from the mainland U.S.) may file an annual certification with the Board that includes the internet address of a website containing a list of current and historical prices and fees that the water carrier charges to the shipping public, rather than submit individual tariffs to the Board.
The collection by the Board of these water carrier annual certifications with active website links will decrease the burden on carriers.

[FR Doc. 2018–27913 Filed 12–21–18; 8:45 am]
**BILLING CODE 4915–01–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 648

**[Docket No. 181010932–8999–01]**

**RIN 0648–XG562**

## Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; 2019 Bluefish Specifications

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes specifications for the 2019 Atlantic bluefish fishery, as recommended by the Mid-Atlantic Fishery Management Council. This action is necessary to comply with the implementing regulations of the Bluefish Fishery Management Plan that require NMFS to publish specifications for the fishery after providing the opportunity for public comment. The proposed specifications are intended to establish allowable harvest levels for the stock that will prevent overfishing while allowing optimum yield, consistent with the Magnuson-Stevens Fishery Conservation and Management Act and the Bluefish Fishery Management Plan. This action also informs the public of the proposed fishery specifications, and provides an opportunity for comment.

**DATES:** Comments must be received by January 10, 2019.

**ADDRESSES:** You may submit comments on this document, identified by NOAA–NMFS–2018–0127, by either of the following methods:

*Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2018-0127,*
2. Click the ''Comment Now!'' icon, complete the required fields, and
3. Enter or attach your comments.

—OR—

*Mail:* Submit written comments to Michael Pentony, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: ''Comments on the Proposed Rule for Bluefish Specifications.''

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Copies of the Supplemental Information Report (SIR) prepared for this action and other supporting documents for the proposed specifications are available upon request from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 N State Street, Dover, DE 19901. These documents are also accessible via the internet at *http://www.mafmc.org.*

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

**SUPPLEMENTARY INFORMATION:**

### Background

The Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission jointly manage the Atlantic Bluefish Fishery Management Plan (FMP). The FMP requires the specification of the acceptable biological catch (ABC), annual catch limit (ACL), annual catch targets (ACT), commercial quotas, recreational harvest limit, and other management measures, for up to three years at a time. This action proposes specifications for the bluefish fishery for the 2019 fishing year.

In 2015, the 60th Northeast Stock Assessment Workshop concluded that the Atlantic bluefish stock is not overfished, and overfishing is not occurring. The most recent data update (2018) showed slight declines in biomass after 2016, but no change in stock status from the 2015 benchmark assessment. Based on this best available scientific information, the Council's Scientific and Statistical Committee (SSC) recommended that specifications for the 2019 bluefish fishery remain unchanged from the 2018 specifications provided in the August 4, 2016, final rule (81 FR 26267), as corrected in the September 27, 2016, final rule (81 FR 66197). The SSC found no compelling reason to change the overfishing limit, ABC, or subsequent catch limits and targets. The Council's Bluefish Monitoring Committee (MC) also made status quo recommendations following their 2018 meeting, consistent with the SSC.

The Bluefish FMP has a prescriptive process for deriving specifications from the ABC. The FMP sets the ACL equal to the ABC, and there is historically no reduction due to management uncertainty because of persistent under-harvest of available catch limits. The ACL is then divided between the commercial and recreational sectors by allocating 17 percent to the commercial ACT and 83 percent to the recreational ACT. Discards are then subtracted from each sector to calculate each sector's TAL. Commercial discards are assumed to be negligible and recreational discards are projected using a terminal

year estimate derived from Marine Recreational Information Program (MRIP) data. If the recreational fishery is not projected to land its harvest limit, then quota may be transferred from the recreational to the commercial sector increasing the resulting commercial quota up to 10.5 million pounds (4,763 mt). The Council may also specify a research set-aside (RSA) quota of up to 3 percent of the TAL; however, no RSA quota has been allocated since 2015. The final commercial quota is then allocated to the coastal states from Maine to Florida based on percent shares specified in the FMP.

The Council and the Commission's Bluefish Management Board met jointly in August 2018 to consider the SSC and MC's recommendations and receive public comments. The Council and Board also voted to recommend largely status quo specifications for the 2019 bluefish fishery. Additionally, the Council recommended that the 2017 estimate of recreational catch be used as the basis for recreational landings projections and discards. They also recommended that the sector quota transfer from the recreational fishery to the commercial fishery be 4.0 million pounds (1,814 mt), rather than the maximum allowable transfer of 6.1 million pounds (2,767 mt). The Council stated that the resulting final quotas more accurately represent the current sector-based allocations and the overall goals of the Bluefish FMP. This will result in slightly different final commercial quotas and recreational harvest limits than 2018, so proposed specifications are not entirely status quo. The Council and Board did not recommend changes to any other regulations in place for bluefish; therefore, all other fishery management measures in place would remain unchanged for the 2019 fishing year.

The bluefish stock will undergo an operational assessment in early 2019. The assessment is designed to incorporate updated MRIP information. It is expected the Council and Commission will use the assessment results to set specifications for the 2020–2022 fishing years.

**Proposed Specifications**

A summary of the Council's recommended specifications is shown below in Table 1.

TABLE 1—SUMMARY OF CURRENT 2018 AND PROPOSED 2019 BLUEFISH SPECIFICATIONS

| | Current 2018 specifications | | Proposed 2019 specifications | |
|---|---|---|---|---|
| | million lb | metric tons | million lb | metric tons |
| Overfishing Limit | 27.97 | 12,688 | 27.97 | 12,688 |
| ABC = ACL | 21.81 | 9,895 | 21.81 | 9,895 |
| Commercial ACT | 3.71 | 1,682 | 3.71 | 1,682 |
| Recreational ACT | 18.11 | 8,213 | 18.11 | 8,213 |
| Commercial TAL | 3.71 | 1,682 | 3.71 | 1,682 |
| Recreational TAL | 15.11 | 6,857 | 15.62 | 7,083 |
| Sector Transfer | 3.54 | 1,604 | 4.00 | 1,814 |
| Commercial Quota | 7.24 | 3,286 | 7.71 | 3,497 |
| Recreational Harvest Limit | 11.58 | 5,253 | 11.62 | 5,271 |

These recommendations are largely status quo compared to the current 2018 specifications, with only minor adjustments to the final commercial quota and recreational harvest limit to account for most recent recreational catch and an adjusted sector transfer. The Council and Board did not recommend any changes to the recreational fishing measures for bluefish, so the possession limit of up to 15 fish per person would remain in place for 2019.

Once the final commercial quota is determined, state commercial quota from Maine through Florida are allocated based on specified percentages defined in the FMP. The proposed commercial state allocations for 2019 based on the Council-recommended commercial quota is shown below in Table 2. No states exceeded their state allocated quota in 2018; therefore, no accountability measures need to be implemented for the 2019 fishing year.

TABLE 2—PROPOSED 2019 BLUEFISH STATE COMMERCIAL QUOTA ALLOCATIONS

| State | Percent share | Proposed quota (lb) | Proposed quota (mt) |
|---|---|---|---|
| Maine | 0.67 | 51,538 | 23.38 |
| New Hampshire | 0.41 | 31,956 | 14.49 |
| Massachusetts | 6.72 | 517,828 | 234.88 |
| Rhode Island | 6.81 | 524,874 | 238.08 |
| Connecticut | 1.27 | 97,626 | 44.28 |
| New York | 10.39 | 800,645 | 363.17 |
| New Jersey | 14.82 | 1,142,264 | 518.12 |
| Delaware | 1.88 | 144,801 | 65.68 |
| Maryland | 3.00 | 231,426 | 104.97 |
| Virginia | 11.88 | 915,857 | 415.43 |
| North Carolina | 32.06 | 2,471,746 | 1121.17 |
| South Carolina | 0.04 | 2,714 | 1.23 |
| Georgia | 0.01 | 732 | 0.33 |
| Florida | 10.06 | 775,558 | 351.79 |
| Total | 100.00 | 7,709,565 | 3,497.00 |

The current 2018 specifications are in effect until December 31, 2018. After this date, the bluefish fishery will function without a quota in 2019 until these proposed specifications are finalized. Therefore, it is important to implement final specifications as quickly as possible into the fishing year in January 2019 to minimize time without functional quotas. To accomplish this, NMFS is requesting public comments by January 10, 2019. Please see the **DATES** section for submission instructions.

## Classification

Pursuant to section 304(b)(1)(A) of the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Bluefish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule is exempt from review under Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

The Council conducted an evaluation of the potential socioeconomic impacts of the proposed measures in conjunction with a SIR. Because no regulatory changes are proposed that would affect the bluefish fishery, they are not considered in the evaluation. The proposed measures would maintain the existing 2018 bluefish catch specifications and management measures with only minor adjustments to the final recreational TAL and resulting specifications.

According to the commercial ownership database, 703 affiliate firms landed bluefish commercially (with a Federal commercial and/or charter/party permit) during the 2015–2017 period. Of the 703 affiliate firms categorized as commercial fishing operations, 698 are categorized as small business and 5 categorized as large business. Because the Council-recommended specifications are largely status quo, the proposed action would have no impact on the way the fishery operates or affect small entities. These measures are expected to provide similar fishing opportunities in 2019 when compared to 2018 (proxy for base year 2017). As such, revenue changes are not expected in 2019 due to these specifications.

Analyses indicate that the proposed action is not expected to substantially change fishing effort or the risk of overfishing, prices/revenues, or fishery behavior. The proposed specifications are intended to maintain stability in the fishery for all regulated entities, while maintaining the healthy stock condition.

There are no new reporting or recordkeeping requirements contained in this action.

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

Dated: December 18, 2018.

**Donna S. Wieting,**

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

[FR Doc. 2018–27878 Filed 12–21–18; 8:45 am]

**BILLING CODE 3510–22–P**

# Notices

Federal Register

Vol. 83, No. 246

Wednesday, December 26, 2018

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

December 19, 2018.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 25, 2019 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725—17th Street NW, Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

#### Office of the Secretary, White House Liaison Office

*Title:* Advisory Committee and Research and Promotion Board Membership Background Information.

*OMB Control Number:* 0505–0001.

*Summary of Collection:* The Department is required under Section 1804 of the Food and Agriculture Act of 1977 (7 U.S.C. 2281, *et seq.*) to provide information concerning advisory committee members' principal place of residence, persons or companies by whom employed, and other major sources of income. The Agriculture and Food Act of 1981 (Pub. L. 97–98) reiterates this requirement. Similar information will be required of research and promotion boards/committees/councils in addition to the supplemental commodity specific questions. The Secretary appoints board members under each program. Some of the information contained on form AD–755 is used by the Department to conduct background clearances of prospective board members required by departmental regulations. The clearance is required for all committee members who are appointed by the Secretary. The White House Liaison Office (WHLO) will collect information using form AD–755, ''Advisory Committee and Research and Promotion Board Membership Background Information''.

*Need and Use of the Information:* The WHLO will collect information on the background of the nominees to make sure there are no delinquent loans to the United States Department of Agriculture, (USDA), as well as making sure they have no negative record that could be a negative reflection to the USDA. The information obtained from the form is used in the compilation of an annual report to Congress. Failure of the Department to provide this information would require the Secretary to terminate the pertinent committee or board.

*Description of Respondents:* Individuals or households.

*Number of Respondents:* 5,500.

*Frequency of Responses:* Reporting: Annually.

*Total Burden Hours:* 5,958.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2018–27826 Filed 12–21–18; 8:45 am]

BILLING CODE 3410–01–P

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

December 19, 2018.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 25, 2019 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW, Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such

person are not required to respond to the collection of information unless it displays a currently valid OMB control number.

**Office of the Chief Financial Officer**

*Title:* Suspension and Debarment and Drug-Free Workplace Certifications.

*OMB Control Number:* 0505–0027.

*Summary Of Collection:* Suspension and debarment is a discretionary or statutory administrative action taken by Federal agencies to protect the government by excluding person and entities that are not presently responsible from participating in Federal programs or activities. The information will be collected by USDA Federal financial assistance agencies as certifying information concerning applicant suitability in compliance with Federal Suspension and Debarment and Drug-Free Work Place regulations, as defined by 2 CFR parts 180, 417 and Public Law, 100–690, Title V, Subtitle D; 41 U.S.C. 8101 *et seq.,* 2 CFR parts 182 and 421.

*Need And Use of the Information:* The information will be collected using the following Forms: AD–1047, Certification Regarding Debarment, Suspension, and Other Responsibility Matters Primary Covered Transaction; AD–1048, Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion Lower Tier Covered Transactions; AD–1049, Certification Regarding Drug-Free Workplace Requirements (Grants) Alternative I—For Grantees Other than Individuals; AD–1050, Certification Regarding Drug-Free Workplace Requirements (Grants) Alternative II—For Grantees Who Are Individuals; AD–1052, Certification Regarding Drug-Free Workplace State and State Agencies, Federal Fiscal Year.

*Description of Respondents:* Individuals or household; Business or other for-profit; Not-for-profit institutions; Federal Government; State, Local or Tribal Government.

*Number of Respondents:* 1.

*Frequency of Responses:* Reporting: One time.

*Total Burden Hours:* 1.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2018–27830 Filed 12–21–18; 8:45 am]

**BILLING CODE 3410–KS–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2018–0086]**

### Notice of Request for Revision to and Extension of Approval of an Information Collection; Importation of Tomatoes From Certain Central American Countries

**ACTION:** Revision to and extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with the regulations for the importation of tomatoes from Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.

**DATES:** We will consider all comments that we receive on or before February 25, 2019.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docket Detail;D=APHIS-2018-0086.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2018–0086, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail; D=APHIS-2018-0086* or in our reading room, which is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

**FOR FURTHER INFORMATION CONTACT:** For information on the regulations related to the importation of tomatoes from certain Central American countries, contact Ms. Claudia Ferguson, Senior Regulatory Policy Coordinator, Plant Protection and Quarantine, APHIS, 4700 River Road Unit 40, Riverdale, MD 20737–1236; (301) 851–2352. For more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2483.

**SUPPLEMENTARY INFORMATION:**

*Title:* Importation of Tomatoes From Certain Central American Countries.

*OMB Control Number:* 0579–0286.

*Type of Request:* Revision to and extension of approval of an information collection.

*Abstract:* The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. As authorized by the PPA, the Animal and Plant Health Inspection Service regulates the importation of fruits and vegetables into the United States from certain parts of the world as provided in the regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–12, referred to below as the regulations).

In accordance with the regulations, tomatoes from Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama may be imported into the United States under certain conditions to prevent the introduction of plant pests into the United States. These conditions require the use of certain information collection activities including development and monitoring of an insect trapping and quality control plan; registration and recertification of production sites; production site and insect trap inspections and recordkeeping; export certifications; box labelling; notices of arrival to ports; responses to emergency action notifications; and permit applications. Also, each consignment of tomatoes must be accompanied by a phytosanitary certificate issued by the country's national plant protection organization (NPPO). Depending on the Mediterranean fly (Medfly) status of the region of origin, the certificate must contain an additional declaration stating that the tomatoes were either grown in an approved production site and the consignment has been inspected and found free of the pests listed in the requirements or grown in an area recognized to be free of Medfly and the consignment has been inspected and found free of the pests listed in the requirements. These information collection activities allow the importation of tomatoes from these countries while continuing to protect the United States against the introduction of plant pests.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

*Estimate of burden:* The public burden for this collection of information is estimated to average 0.18 hours per response.

*Respondents:* The NPPOs of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama; import brokers; and commercial tomato producers in the countries of origin.

*Estimated annual number of respondents:* 49.

*Estimated annual number of responses per respondent:* 142.

*Estimated annual number of responses:* 6,937.

*Estimated total annual burden on respondents:* 1,242 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 19th day of December 2018.

**Kevin Shea,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2018–27940 Filed 12–21–18; 8:45 am]

BILLING CODE 3410–34–P

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2018–0060]**

### National Wildlife Services Advisory Committee; Intent to Reestablish

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice of intent.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, we are giving notice that the Secretary of Agriculture intends to reestablish the National Wildlife Services Advisory Committee for a 2-year period. The Secretary has determined that the Committee is necessary and in the public interest.

**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Joyce, Designated Federal Officer, Wildlife Services, APHIS, 4700 River Road Unit 87, Riverdale, MD 20737; (301) 851–3999.

**SUPPLEMENTARY INFORMATION:** The purpose of the National Wildlife Services Advisory Committee (the Committee) is to advise the Secretary of Agriculture on policies, program issues, and research needed to conduct the Wildlife Services program. The Committee also serves as a public forum enabling those affected by the Wildlife Services program to have a voice in the program's policies.

Done in Washington, DC, this 19th day of December 2018.

**Kevin Shea,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2018–27943 Filed 12–21–18; 8:45 am]

BILLING CODE 3410–34–P

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2018–0089]**

### Notice of Request for Approval of an Information Collection; Volunteer Service Agreements and Volunteer Service Time and Attendance Record

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** New information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request approval of a new information collection associated with volunteer service agreements and volunteer service time and attendance record.

**DATES:** We will consider all comments that we receive on or before February 25, 2019.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0089.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2018–0089, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0089* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

**FOR FURTHER INFORMATION CONTACT:** For information on volunteer service agreements and volunteer service time and attendance record, contact Ms. Beverly Cassidy, HR Specialist, HR Policy, HRD, APHIS, 4700 River Road Unit 21, Riverdale, MD, 20737; (301) 851–2914. For more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2483.

**SUPPLEMENTARY INFORMATION:**

*Title:* Volunteer Service Agreements and Volunteer Service Time and Attendance Record.

*OMB Control Number:* 0579–XXXX.

*Type of Request:* Approval of a new information collection.

*Abstract:* Section 1526 of the Food and Agricultural Act of 1981 (7 U.S.C. 2272) permits the Secretary of Agriculture to establish a program to use volunteers to carry out U.S. Department of Agriculture (USDA) programs. Departmental Regulation No. 4230–001, Volunteer Programs, provides the guidelines USDA agencies must use for acceptance of volunteers and sets a requirement for agencies to publish their guidelines. Regulations of the Office of Personnel Management (OPM) in 5 CFR part 308 provide agencies with the authority to establish programs designed to provide educationally related volunteer assignments for students in nonpay status.

The Marketing and Regulatory Programs (MRP) mission area of USDA uses several information collection activities to assist MRP program officials, administrative personnel, and USDA Human Resources offices in determining a volunteer's eligibility and suitability for volunteer service. The information is necessary to facilitate establishment of guidelines for acceptance of volunteer services under the above authorities and regulations, make a determination of an individual's

eligibility and suitability to serve as a volunteer in MRP, and comply with OPM regulations requiring documentation of volunteer service and maintenance of records.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 0.22 hours per response.

*Respondents:* Individuals engaged in activities for which they are not paid, except for authorized expenses associated with performance of volunteer activities.

*Estimated annual number of respondents:* 85.

*Estimated annual number of responses per respondent:* 2.

*Estimated annual number of responses:* 170.

*Estimated total annual burden on respondents:* 38 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 19th day of December 2018.

**Kevin Shea,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2018–27847 Filed 12–21–18; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2018–0088]**

### Notice of Request for Revision to and Extension of Approval of an Information Collection; Lacey Act Declaration Requirement; Plants and Plant Products

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Revision to and extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection required by the Lacey Act for the importation of certain plants and plant products.

**DATES:** We will consider all comments that we receive on or before February 25, 2019.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0088.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2018–0088, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0088* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

**FOR FURTHER INFORMATION CONTACT:** For information concerning the Lacey Act declaration requirements for plants and plant products, contact Dr. Robert Baca, Assistant Director, Compliance and Environmental Coordination, PPQ, APHIS, 4700 River Road Unit 150, Riverdale, MD 20737–1231; (301) 851–2292. For more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2483.

**SUPPLEMENTARY INFORMATION:**

*Title:* Lacey Act Declaration Requirement; Plants and Plant Products.

*OMB Control Number:* 0579–0349.

*Type of Request:* Revision to and extension of approval of an information collection.

*Abstract:* The Lacey Act, as amended, makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with some limited exceptions, taken, possessed, transported, or sold in violation of the laws of the United States, a State, an Indian tribe, or any foreign law that protects plants. The Act also makes it unlawful to make or submit any false record, account, or label for, or any false identification of, any plant covered by the Act.

In addition, section 3 of the Act makes it unlawful to import certain plants and plant products without an import declaration. The declaration must contain, among other things, the scientific name of the plant, value of the importation, quantity of the plant, and name of the country in which the plant was harvested. For paper and paperboard products with recycled plant content, the importer is not required to specify the species or country of harvest with respect to the recycled plant product component, but is required to provide the average percentage of recycled content. If the product also contains non-recycled plant materials, the basic declaration requirements still apply to that component of the product imported.

In addition to the declaration, there is a supplemental form that must be completed if additional space is needed to declare additional plants and plant products. Also, records of the import declaration and supplemental form must be retained for at least 5 years.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

*Estimate of burden:* The public burden for this collection of information is estimated to average 0.48 hours per response.

*Respondents:* Importers of certain plants and plant products.

*Estimated annual number of respondents:* 26,044.

*Estimated annual number of responses per respondent:* 27.

*Estimated annual number of responses:* 703,189.

*Estimated total annual burden on respondents:* 338,990 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 19th day of December 2018.

**Kevin Shea,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2018–27849 Filed 12–21–18; 8:45 am]

**BILLING CODE 3410–34–P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the Indiana Advisory Committee to the U.S. Commission on Civil Rights.

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Indiana Advisory Committee (Committee) will hold a meeting on Tuesday January 29, 2019, from 3–4 p.m. EST for the purpose of discussing civil rights in the state.

**DATES:** The meeting will be held on Tuesday January 29, 2019, from 3–4 p.m. EST.

*Public Call Information:* Dial: 855–719–5012; Conference ID: 8851927.

**FOR FURTHER INFORMATION CONTACT:** Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or 312–353–8311.

**SUPPLEMENTARY INFORMATION:** This meeting is free and open to the public. Members of the public may join through the above listed toll free call in number. Members of the public will be invited to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit Office, U.S. Commission on Civil Rights, 230 S Dearborn, Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353–8324, or emailed to Carolyn Allen at *callen@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit Office at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Indiana Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit Office at the above email or street address.

**Agenda**

Welcome and Introductions

Discussion: Civil Rights in Indiana

Public Comment

Adjournment

Dated: December 19, 2018.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2018–27868 Filed 12–21–18; 8:45 am]

**BILLING CODE P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meetings of the Mississippi Advisory Committee to the U.S. Commission on Civil Rights

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Mississippi Advisory Committee (Committee) will hold a meeting on Wednesday January 9, 2019 at 1:00 p.m. Central time. The Committee will discuss next steps in their study of prosecutorial discretion in the state.

**DATES:** The meeting will take place on Wednesday January 9, 2019 at 1:00 p.m. Central Time.

**ADDRESSES:** Public Call Information: Dial: 888–220–8474, Conference ID: 9669981

**FOR FURTHER INFORMATION CONTACT:** Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or (312) 353–8311 .

**SUPPLEMENTARY INFORMATION:** Members of the public may listen to this discussion through the above call in number. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit, U.S. Commission on Civil Rights, 230 S. Dearborn, Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353–8324, or emailed to Corrine Sanders at *csanders@usccr.gov.* Persons who desire

additional information may contact the Regional Programs Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Mississippi Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

**Agenda**

I. Welcome and Roll Call
II. Discussion: Prosecutorial Discretion in Mississippi
III. Public Comment
IV. Next Steps
V. Adjournment

Dated: December 19, 2018.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2018–27842 Filed 12–21–18; 8:45 am]

**BILLING CODE P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meetings of the Arkansas Advisory Committee to the U.S. Commission on Civil Rights

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Arkansas Advisory Committee (Committee) will hold a meeting on Friday January 18, 2018 at 2:00 p.m. Central time. The Committee will discuss next steps in their study of civil rights and criminal justice in the state.

**DATES:** The meeting will take place on Friday January 18, 2018 at 2 p.m. Central.

*Public Call Information:* Dial: 855–719–5012, Conference ID: 1767752.

**FOR FURTHER INFORMATION CONTACT:** Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or 312–353–8311.

**SUPPLEMENTARY INFORMATION:** Members of the public can listen to these discussions. These meetings are available to the public through the above call in numbers. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit, U.S. Commission on Civil Rights, 230 S. Dearborn, Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353–8324, or emailed to Corrine Sanders at *csanders@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Arkansas Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

**Agenda**

Welcome and Roll Call

Civil Rights in Arkansas: Mass Incarceration

Future Plans and Actions

Public Comment

Adjournment

Dated: December 19, 2018.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2018–27867 Filed 12–21–18; 8:45 am]

**BILLING CODE P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the Minnesota Advisory Committee

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that a meeting of the Minnesota Advisory Committee (Committee) to the Commission will be held at 12 p.m. CST Wednesday January 23, 2018 to discuss civil rights concerns in the State.

**DATES:** The meeting will be held on Wednesday January 23, 2018, at 12 p.m. CST.

*Public Call Information:* Dial: 877–260–1479; Conference ID: 2776473.

**FOR FURTHER INFORMATION CONTACT:** Carolyn Allen at *callen@usccr.gov* or (312) 353–8311.

**SUPPLEMENTARY INFORMATION:** This meeting is available to the public through the above toll-free call-in number. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the U.S. Commission on Civil Rights, Regional Programs Unit, 230 S. Dearborn, Suite 2120, Chicago, IL 60604. They may be faxed to the Commission at (312) 353–8324, or emailed to Carolyn Allen at *callen@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (312) 353–8311.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting on the Federal Advisory Committee database (*facadatabase.gov*), under the Minnesota Advisory

Committee link. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

**Agenda**

I. Welcome
II. Approval of Minutes
III. Discussion: Racial Trauma and Civil Rights
IV. Public Comment
V. Next Steps
VI. Adjournment

Dated: December 19, 2018.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2018–27869 Filed 12–21–18; 8:45 am]

BILLING CODE 6335–01–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–570–913]**

### Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2016

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) finds that Tianjin Leviathan International Trade Co., Ltd. (Tianjin Leviathan) received countervailable subsidies during the period of review (POR) January 1, 2016, through December 31, 2016.

**DATES:** Applicable December 26, 2018.

**FOR FURTHER INFORMATION CONTACT:** Chien-Min Yang, AD/CVD Operations, Office VII, Enforcement and Compliance, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5484.

**Background**

Commerce published the preliminary results of the administrative review of the countervailing duty order on certain new pneumatic off-the-road tires (OTR Tires) from China on July 11, 2018.[1] The period of review (POR) is January 1, 2016, through December 31, 2016. In the *Preliminary Results,* Commerce partially rescinded the administrative review with respect to two companies and preliminarily applied total adverse facts available (AFA) with regard to Tianjin Leviathan because it failed to submit a timely response to Commerce's questionnaire.[2] No interested party commented on Commerce's preliminary results.

**Scope of the Order**

The products covered by the scope are new pneumatic tires designed for off-the-road (OTR) and off-highway use. The subject merchandise is currently classifiable under Harmonized Tariff Schedule of the United States (''HTSUS'') subheadings: 4011.20.10.25, 4011.20.10.35, 4011.20.50.30, 4011.20.50.50, 4011.70.0010, 4011.62.00.00, 4011.80.1020, 4011.90.10, 4011.70.0050, 4011.80.1010, 4011.80.1020, 4011.80.2010, 4011.80.2020, 4011.80.8010, and 4011.80.8020. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.[3]

**Methodology**

Commerce conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs we found to be countervailable, we determined that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[4]

**Final Results of Administrative Review**

Our determination to apply AFA in determining a net subsidy rate for Tianjin Leviathan remains unchanged for these final results. However, we have updated the AFA subsidy rates assigned to various programs, which results in an updated net subsidy rate of 129.72 percent.[5]

**Assessment and Cash Deposit Requirements**

In accordance with 19 CFR 351.212(b)(2), Commerce intends to issue appropriate instructions to U.S. Customs and Border Protection (CBP) 15 days after publication of the final results of this review. Commerce will instruct CBP to liquidate shipments of subject merchandise produced and/or exported by the companies listed above, entered or withdrawn from warehouse, for consumption from January 1, 2016, through December 31, 2016, at the percent rates, as listed above for each of the respective companies, of the entered value.

Commerce intends also to instruct CBP to collect cash deposits of estimated countervailing duties, in the amounts shown above for each of the respective companies shown above, on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits at the most-recent company-specific or all-others rate applicable to the company, as appropriate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

**Administrative Protective Order**

This notice also serves as a final reminder to parties subject to an administrative protective order (APO) of their responsibilities concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

These final results are issued and published 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. 2018–27863 Filed 12–21–18; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review; 2016,* 83 FR 32080 (July 11, 2018) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* PDM at 5–6.

[3] For a full description of the scope of the order, *see* PDM.

[4] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[5] *See* Memorandum to Thomas Gilgunn, Program Manager, Antidumping and Countervailing Duty Operations, Office VII, ''Final Results of the Countervailing Duty Administrative Review of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Revised Rates for the Application of Adverse Facts Available for Tianjin Leviathan International Trade Co., Ltd.,'' dated concurrently with this notice.

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–533–840]**

### Certain Frozen Warmwater Shrimp From India: Initiation of Antidumping Duty Changed Circumstances Review

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) is initiating a changed circumstances review to determine if Sunrise Seafoods India Private Limited (SSIPL) is the successor-in-interest to Sunrise Aqua Food Exports (SAFE) in the context of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from India.

**DATES:** Applicable December 26, 2018.

**FOR FURTHER INFORMATION CONTACT:** Brittany Bauer, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: 202–482–3860.

**SUPPLEMENTARY INFORMATION:**

#### Background

On February 1, 2005, Commerce published in the **Federal Register** an antidumping duty order on shrimp from India.[1] On October 31, 2018, SSIPL requested that, pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.216(b), Commerce conduct an expedited changed circumstances review of the *Order* to confirm that SSIPL is the successor-in-interest to SAFE and, accordingly, to assign it the cash deposit rate of SAFE.[2] In its submission, SSIPL explained that SAFE undertook a business reorganization and transferred its shrimp business to SSIPL.[3]

#### Scope of the Order

The merchandise subject to the order is certain frozen warmwater shrimp.[4] The product is currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) item numbers: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. Although the HTSUS numbers are provided for convenience and customs purposes, the written product description remains dispositive.

#### Initiation of Changed Circumstances Review

Pursuant to section 751(b)(1) of the Act, Commerce will conduct a changed circumstances review upon receipt of information concerning, or a request from, an interested party for a review of an antidumping duty order which shows changed circumstances sufficient to warrant a review of the order. As indicated in the ''Background'' section, we received information indicating that SAFE transferred its shrimp business to SSIPL. This constitutes changed circumstances warranting a review of the order.[5] Therefore, in accordance with section 751(b)(1) of the Act and 19 CFR 351.216(d) and (e), we are initiating a changed circumstances review based upon the information contained in SSIPL's submission.

In making a successor-in-interest determination, Commerce examines several factors, including, but not limited to, changes in the following: (1) Management; (2) production facilities; (3) supplier relationships; and (4) customer base.[6] While no single factor or combination of factors will necessarily provide a dispositive indication of a successor-in-interest relationship, generally, Commerce will consider the new company to be the successor to the previous company if the new company's resulting operation is not materially dissimilar to that of its predecessor.[7] Thus, if the record evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, Commerce may assign the new company the cash deposit rate of its predecessor.[8]

Based on the information provided in its changed circumstances review request, SSIPL has provided sufficient evidence to warrant a review to determine if SSIPL is the successor-in-interest to SAFE for purposes of the antidumping duty order on shrimp from India. Commerce intends to publish in the **Federal Register** a notice of preliminary results of the antidumping duty changed circumstances review, in accordance with 19 CFR 351.221(b)(4) and 351.221(c)(3)(i), which will set forth Commerce's preliminary factual and legal conclusions. Commerce will issue its final results of the review in accordance with the time limits set forth in 19 CFR 351.216(e).

We are issuing this notice in accordance with sections 751(b)(1) and 777(i)(1) of the Act and 351.216 and 351.221(b)(l).

Dated: December 17, 2018.

**Gary Taverman,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive duties and functions of the Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2018–27862 Filed 12–21–18; 8:45 am]

**BILLING CODE 3510–DS–P**

---

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Advance Notification of Sunset Review; Correction

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) is correcting an advance notification of sunset review.

**DATES:** Applicable (December 3, 2018).

**FOR FURTHER INFORMATION CONTACT:** Brenda E. Brown, Office of AD/CVD Operations, Customs and Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4735.

**SUPPLEMENTARY INFORMATION:**

---

[1] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India,* 70 FR 5147 (February 1, 2005) (*Order*).

[2] *See* SSIPL's Letter re: Frozen Warmwater Shrimp from India: Request to Initiate a Successor-in-Interest Changed Circumstances Review, dated October 31, 2018 (SSIPL CCR Request).

[3] *Id.* at 4–5.

[4] For a complete description of the Scope of the Order, *see 12th AR,* and accompanying Issues and Decision Memorandum at ''Scope of the Order.''

[5] *See* 19 CFR 351.216(d).

[6] *See, e.g., Certain Frozen Warmwater Shrimp from India: Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review,* 81 FR 75376 (October 31, 2016) (*Shrimp from India Preliminary Results*), unchanged in *Certain Frozen Warmwater Shrimp from India: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 81 FR 90774 (December 15, 2016) (*Shrimp from India Final Results*).

[7] *See, e.g., Shrimp from India Preliminary Results,* 81 FR at 75377, unchanged in *Shrimp from India Final Results,* 81 FR at 90774.

[8] *Id.; see also Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Polychloroprene Rubber from Japan,* 67 FR 58, 59 (January 2, 2002); *Ball Bearings and Parts Thereof from France: Final Results of Changed-Circumstances Review,* 75 FR 34688, 34689 (June 18, 2010); and *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Preliminary Results of Antidumping Duty Changed Circumstances Review,* 63 FR 14679 (March 26, 1998), unchanged in *Circular Welded Non-Alloy Steel Pipe from Korea; Final Results of Antidumping Duty Changed Circumstances Review,* 63 FR 20572 (April 27, 1998), in which Commerce found that a company which only changed its name and did not change its operations is a successor-in-interest to the company before it changed its name.

## Background

On December 3, 2018, Commerce published the *January 2019 Advance Sunset Review Notice,*[1] in which Commerce inadvertently omitted Sodium Nitrite from China (C–570–926) from the list of sunset reviews that will initiate on January 2019; we are advancing the initiation of this sunset review to promote administrative efficiency. Additionally, the *January 2019 Advance Sunset Review Notice* listed the incorrect case numbers for two sunset reviews involving Certain Hot-Rolled Carbon Steel Flat Products from Indonesia. The correct case numbers for the Certain Hot-Rolled Carbon Steel Flat Products from Indonesia sunset reviews are (A–560–812) and (C–560–813). This notice serves to correct the *January 2019 Advance Sunset Review Notice* for the aforementioned items.

This correction notice for the advance notification of sunset reviews is being published in accordance with section 751(c) of the Act and 19 CFR 351.218 (c).

Dated: December 18, 2018.

**James Maeder,**

*Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations performing the duties of Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2018–27864 Filed 12–21–18; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Review, 83 FR 62292 (December 3, 2018) (January 2019 Advance Sunset Review Notice).*

# DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**RIN 0648–XG694**

## Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Training and Testing Activities in the Atlantic Fleet Training and Testing Study Area

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

**ACTION:** Notice; receipt of application and request for Letters of Authorization extension; request for comments and information.

**SUMMARY:** NMFS has received a request from the U.S. Navy (Navy) to amend NMFS' Marine Mammal Protection Act (MMPA) regulations authorizing the take of marine mammals incidental to Navy training and testing activities conducted in the Atlantic Fleet Training and Testing (AFTT) Study Area from November 2018 to November 2023 to cover seven years of the Navy's activities, instead of five. Section 316 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (2019 NDAA), signed into law on August 13, 2018, amended the MMPA to extend the maximum period for MMPA incidental take regulations under section 101(a)(5)(A) from five to seven years for military readiness activities. The Navy's activities qualify as military readiness activities pursuant to the MMPA, as amended by the NDAA for Fiscal Year 2004. The Navy proposes no changes to their specified activities, mitigation measures, monitoring, or reporting and requests that NMFS amend the final rule issued on November 14, 2018, to authorize incidental take of marine mammals for the two additional years now allowed under the statute. NMFS invites the public to provide information, suggestions, and comments on the Navy's application.

**DATES:** Comments and information must be received no later than January 25, 2019.

**ADDRESSES:** Comments on the application should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Piniak@noaa.gov.*

*Instructions:* NMFS is not responsible for information or comments sent by any other method, to any other address or individual, or received after the end of the comment period. Information and comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All information and comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Wendy Piniak, Office of Protected Resources, NMFS, (301) 427–8401. An electronic copy of the Navy's application may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.* In case of problems accessing these documents, please call the contact listed above.

**SUPPLEMENTARY INFORMATION:**

## Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An incidental take authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term ''take'' means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal. The 2004 NDAA (Public Law 108–136) amended the MMPA to remove the ''small numbers'' and ''specified geographical region'' limitations for military readiness activities. It also amended the definition of ''harassment'' as it applies to military readiness activities to read as follows (Section 3(18)(B) of the MMPA): (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns

are abandoned or significantly altered (Level B harassment).

On August 13, 2018, the 2019 NDAA (Public Law 115–232) amended the MMPA to allow incidental take regulations for military readiness activities to be issued for up to seven years.

**Summary of Request**

On November 16, 2018, NMFS received an adequate and complete application from the Navy requesting an amendment of the regulations published on November 14, 2018, that authorize the take of marine mammals incidental to the Navy's training and testing activities in the AFTT Study Area (83 FR 57076). Specifically, the activities include training and testing (all categorized as military readiness activities) including the use of active acoustic sonar systems and other transducers, in-water detonations, air guns, construction activities involving pile removal and installation, and the operation of a fleet of vessels throughout the AFTT Study Area. These activities may result in the incidental take of marine mammals in the form of Level B harassment (behavioral disruption or temporary hearing impairment), Level A harassment (permanent hearing impairment or tissue damage), or serious injury or mortality in a very small number of cases. The requested amendment would change the expiration date of the regulations from November 13, 2023 to November 13, 2025, allowing for seven total years of validity, as allowed under the MMPA as recently amended by the 2019 NDAA.

**Description of Amendment**

The Navy proposes that NMFS amend the existing AFTT regulations and associated Letters of Authorization (LOAs) such that they would cover incidental take caused by seven years of training and testing activities instead of five, extending the expiration date from November 13, 2023 to November 13, 2025. The amendment would be conducted through a proposed and final rulemaking, consistent with the requirements of section 101(a)(5)(A). The Navy has not proposed any changes to the nature of the specified activities and, therefore, the boundaries of the AFTT Study Area, the training and testing activities (*e.g.,* equipment and sources used, exercises conducted), and the mitigation, monitoring, and reporting measures are identical to those described and analyzed in the existing AFTT regulations published on November 14, 2018 (83 FR 57076).

The only changes contemplated in the extension of the regulations are those necessary to identify the appropriate type and amount of incidental take to authorize in the two additional years that the amended regulations would cover, and determine whether the incidental take would have a negligible impact on the affected species and stocks.

The current AFTT rule authorizes three serious injuries or mortalities from vessel strike. The Navy's request for an amendment includes a revised vessel strike analysis encompassing seven years of activities versus the five years addressed in the analysis supporting the mortality estimate in the current LOAs. Based on the revised analysis, the Navy requests one additional large whale mortality bringing the total from three vessel strikes over five years to four vessel strikes over seven years. The large whale stocks that are proposed to be lethally taken by vessel strike are the same as those included in the current AFTT rule. Please see Chapter 6, Section 6.2 of the Navy's application for a full description of the incidental take by vessel strike.

Regarding the quantification of expected takes from acoustic and explosive sources (by Level A and Level B harassment, as well as mortality resulting from exposure to explosives), the number of takes are based directly on the level of activities (days, hours, counts, etc., of different activities and events) in a given year. In the existing AFTT rule, the Navy bases their take estimates across the five-year rule on conducting three years of a nominal (average) level of activity and two years of a maximum level of activity. For the amended seven year rule, the Navy proposes to add one additional nominal year and one additional maximum year to determine the predicted take numbers. Specifically, as in the current rule, the Navy proposes to use the maximum annual level to calculate annual takes (which will remain identical to the current rule), and the sum of all years (four nominal and three maximum, in the case of the new amended rule) to calculate the seven-year totals. Please see Chapter 6, Section 6.1 of the Navy's application for a description of the proposed take from acoustic and explosive sources.

As noted above, the proposed amendment of the rule would include mitigation, monitoring, and reporting measures that are identical to those included in the current final rule (83 FR 57076, November 14, 2018). In summary, mitigation would include: (1) the use of Lookouts to observe for biological resources and communicate the need for mitigation implementation; (2) powerdowns, shutdowns, and delay of starts to avoid exposure of marine mammals to high levels of sound or explosive blasts more likely to result in injury or more serious behavioral disruption; (3) limiting the use of active sonar or explosives in certain biologically important areas to reduce the probability or severity of impacts when they are more likely to contribute to fitness impacts, and (4) broadcasting awareness notification messages to all of the vessels in an area to reduce the likelihood of vessel strike. Please see Chapter 11 of the Navy's application for a full description of the proposed mitigation, which is identical to that required under the existing rule.

The Navy proposes to continue forward the implementation of the robust Integrated Comprehensive Monitoring Program and Strategic Planning Process outlined in the current regulations. The Navy's monitoring strategy, currently required by the AFTT regulations, is well-designed to work across Navy ranges to help better understand the impacts of the Navy's activities on marine mammals and their habitat by focusing on learning more about marine mammal occurrence in different areas and exposure to Navy stressors, marine mammal responses to different sound sources, and the consequences of those exposures and responses on marine mammal populations. Similarly, the proposed amended regulations would include identical adaptive management provisions and reporting requirements as the existing regulations. Please refer to Chapter 13 of the Navy's application for full details on the monitoring and reporting proposed by the Navy.

**Information Solicited**

Interested persons may submit information, suggestions, and comments concerning the Navy's request (see **ADDRESSES**). NMFS will consider all information, suggestions, and comments related to the request during the development of proposed regulations governing the incidental taking of marine mammals by the Navy, if appropriate.

Dated: December 18, 2018.

**Donna S. Wieting,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2018–27788 Filed 12–21–18; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XG680**

### Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meeting (webinar).

**SUMMARY:** The Ecosystem and Highly Migratory Species (HMS) Subcommittees of the Pacific Fishery Management Council's (Pacific Council's) Scientific and Statistical Committee (SSC) will hold a meeting via webinar to review analyses of drivers of albacore distribution and availability to fisheries in the California Current. The webinar meeting is open to the public.

**DATES:** The SSC Ecosystem and HMS Subcommittees webinar will be held Monday, January 7, 2019, from 1 p.m. to 4 p.m. Pacific Standard Time or until business for the day has been completed.

**ADDRESSES:** The SSC's Ecosystem and HMS Subcommittees' meeting will be held by webinar. To attend the webinar, (1) join the meeting by visiting this link *https://global.gotomeeting.com/join/666423461,* (2) enter your name and email address (required). After logging into the webinar, please (1) dial this TOLL number: 1–872–240–3412 (not a toll-free number); (2) enter the attendee phone audio access code: 666–423–461; and (3) then enter your audio phone pin (shown after joining the webinar). NOTE: We have disabled mic/speakers as an option and require all participants to use a telephone or cell phone to participate. Technical Information and System Requirements: PC-based attendees are required to use Windows® 7, Vista, or XP; Mac®-based attendees are required to use Mac OS® X 10.5 or newer; Mobile attendees are required to use iPhone®, iPad®, Android™ phone or Android tablet (See the *https://www.gotomeeting.com/meeting/ipad-iphone-android-apps*). You may send an email to Mr. Kris Kleinschmidt at *Kris.Kleinschmidt@noaa.gov* or contact him at (503) 820–2280, extension 411 for technical assistance. A public listening station will also be available at the Pacific Council office.

*Council address:* Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

**FOR FURTHER INFORMATION CONTACT:** Mr. John DeVore, Staff Officer, Pacific Fishery Management Council; telephone: (503) 820–2413.

**SUPPLEMENTARY INFORMATION:** The purpose of the SSC Ecosystem and HMS Subcommittees' meeting is to review analyses of drivers of albacore distribution and availability to fisheries in the California Current. The review will focus on how these analyses may inform future reports to the Pacific Council, including reports from National Oceanic and Atmospheric Administration's California Current Integrated Ecosystem Assessment Team.

No management actions will be decided by the SSC's Ecosystem and HMS Subcommittees. The SSC Ecosystem and HMS Subcommittees members' role will be development of recommendations and reports for consideration by the SSC and Pacific Council at the March Pacific Council meeting in Vancouver, WA.

Although nonemergency issues not contained in the meeting agendas may be discussed, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent of the SSC Groundfish Subcommittee to take final action to address the emergency.

#### Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt, (503) 820–2411, at least 10 days prior to the meeting date.

Dated: December 18, 2018.

**Tracey L. Thompson,**

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

[FR Doc. 2018–27806 Filed 12–21–18; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XG687**

### New England Fishery Management Council; Public Meeting

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

**ACTION:** Notice; public meeting.

**SUMMARY:** The New England Fishery Management Council (Council) is scheduling a public meeting of its Groundfish Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

**DATES:** This meeting will be held on Tuesday, January 15, 2018 at 1:30 p.m.

**ADDRESSES:** The meeting will be held at the DoubleTree by Hilton, 50 Ferncroft Road, Danvers, MA 01950; phone: (978) 777–2500.

*Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

**SUPPLEMENTARY INFORMATION:**

#### Agenda

The committee will review the recreational advisory panel recommendations and then provide recommendations to the Council on fishing year 2019 recreational measures for Gulf of Maine cod and haddock, and Georges Bank cod. They will receive an overview of the Council's priorities for 2019. The committee will receive an overview of the recreational workshops held in January. The committee will also discuss and provide recommendations on a proposal for a new groundfish sector. Other business will be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

#### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at 978–465–0492, at least 5 days prior to the meeting date. This meeting will be recorded. Consistent with 16 U.S.C.

1852, a copy of the recording is available upon request.

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

Dated: December 19, 2018.

**Tracey L. Thompson,**

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

[FR Doc. 2018–27840 Filed 12–21–18; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XG686**

### New England Fishery Management Council; Public Meeting

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

**ACTION:** Notice; public meeting.

**SUMMARY:** The New England Fishery Management Council (Council) is scheduling a public meeting of its Recreational Advisory Panel to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

**DATES:** This meeting will be held on Tuesday, January 15, 2019 at 8:30 a.m.

**ADDRESSES:** The meeting will be held at the DoubleTree by Hilton, 50 Ferncroft Road, Danvers, MA 01950; phone: (978) 777–2500.

*Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

**SUPPLEMENTARY INFORMATION:**

#### Agenda

The Recreational Advisory Panel will provide recommendations to the Groundfish Committee on fishing year 2019 recreational measures for Gulf of Maine cod and haddock, and Georges Bank cod. The panel will receive an overview of the Council's priorities for 2019. They also plan to receive an overview of the recreational workshops held in January. Other business will be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

#### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. This meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

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

Dated: December 19, 2018.

**Tracey L. Thompson,**

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

[FR Doc. 2018–27839 Filed 12–21–18; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XG677**

### Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meeting.

**SUMMARY:** The Pacific Fishery Management Council's (Pacific Council) Highly Migratory Species Management Team (HMSMT) will hold a meeting, which is open to the public.

**DATES:** The meeting will be held Wednesday, January 16, through Friday, January 18, 2019. The meeting will start at 1 p.m. on January 16 and 8:30 a.m. on January 17–18 and continue until business is concluded on each day.

**ADDRESSES:** The meeting will be held at Hyatt Place Portland Airport/Cascade Station, Meeting Place 3a, 9750 NE Cascades Parkway, Portland, OR 97220; phone: (503) 288–2808.

*Council address:* Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

**FOR FURTHER INFORMATION CONTACT:** Dr. Kit Dahl, Pacific Council; telephone: (503) 820–2422.

**SUPPLEMENTARY INFORMATION:** The purpose of this meeting is for the HMSMT to discuss and begin preparing reports for North Pacific albacore fishing effort characterization, management strategies for Pacific bluefin tuna, drift gillnet performance metrics, pelagic shallow-set longline scoping, and an updated analysis for the deep-set buoy gear range of alternatives. The HMSMT will also meet with the Ad Hoc Ecosystem Workgroup to discuss climate scenario planning topics.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

#### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt, (503) 820–2411, at least 10 business days prior to the meeting date.

Dated: December 19, 2018.

**Tracey L. Thompson,**

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

[FR Doc. 2018–27836 Filed 12–21–18; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XG682**

### Gulf of Mexico Fishery Management Council; Public Meeting

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

**ACTION:** Notice of a public meeting.

**SUMMARY:** The Gulf of Mexico Fishery Management Council will hold a half day meeting via webinar of its Standing, Reef Fish, and Mackerel Scientific and Statistical Committees (SSC).

**DATES:** The meeting will convene via webinar on Wednesday, January 9, 2019, from 1 p.m. to 5 p.m., EDT.

**ADDRESSES:** The meeting will be held via webinar.

*Council address:* Gulf of Mexico Fishery Management Council, 4107 W Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

**FOR FURTHER INFORMATION CONTACT:** Dr. John Froeschke, Deputy Director, Gulf of Mexico Fishery Management Council; *john.froeschke@gulfcouncil.org,* telephone: (813) 348–1630.

**SUPPLEMENTARY INFORMATION:**

**Day 1—Wednesday, January 9, 2019; 1 p.m.–5 p.m.**

I. Introductions and Adoption of Agenda

II. Approval of SSC Minutes

a. October 2–3, 2018 SSC Standing, Reef Fish, and Socioeconomic SSC Meeting

III. SEDAR Terms of Reference (TOR)

a. Review King Mackerel Update TOR

b. Review Cobia Update TOR

c. Vermilion Snapper TOR, project schedule and workshop appointments

d. Scamp stock ID and Data Workshop appointments

IV. Review Gulf SEDAR Stock Assessment Schedule 2021

**Other Items**

Other Business: Update on National SSC VI meeting

— Meeting Adjourns

The meeting will be broadcast via webinar. You may register for the webinar by visiting *www.gulfcouncil.org* and clicking on the SSC meeting on the calendar.

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on *www.gulfcouncil.org* as they become available.

Although other non-emergency issues not on the agenda may come before the Scientific and Statistical Committee for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Scientific and Statistical Committee will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Dated: December 18, 2018.

**Tracey L. Thompson,**

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

[FR Doc. 2018–27808 Filed 12–21–18; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

*Agency:* National Oceanic and Atmospheric Administration (NOAA).

*Title:* Northeast Multispecies Amendment 16.

*OMB Control Number:* 0648–0605.

*Form Number(s):* None.

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

*Number of Respondents:* 1,334.

*Average Hours Per Response:* Sector operations plan and membership list updates, 176 hr/response; Monitoring service provider initial application, 10 hr/response; Monitoring service provider response to application disapproval, 10 hr/response; Data entry for sector discard monitoring system, 3 min/response; Sector weekly catch report, 4 hr/response; Sector annual report, 12 hr/response; Notification of expulsion from a sector, 30 min/response; Request to transfer Annual Catch Entitlement (ACE), 5 min/response; Request to lease day-at-sea (DAS), 5 min/response; request to downgrade, 5 min/response; VMS certification form, 10 min/response; VMS confirmation call, 5 min/response; VMS area and DAS declaration, 5 min/response; VMS trip-level catch report; VMS daily catch reports when fishing in multiple broad stock areas, 15 min/response; Daily VMS catch reports when fishing in the U.S./Canada Management Area and CA II SAPs, 15 min/response; Daily VMS catch reports when fishing in the CA I Hook Gear Haddock SAP, 15 min/response; Daily VMS catch reports when fishing in the Regular B DAS Program, 15 min/response; Pre-trip hail report, 2 min/response; Trip-end hail report, 15 min/response; Forward trip start/end hails to NMFS, 2 min/response; ASM Pre-Trip Notification, 2 min/response; Vessel notification of selection for at-sea monitoring coverage, 5 min/response; at-sea monitor deployment report, 10 min/response; at-sea monitoring service provider catch report to NMFS upon request, 5 min/response; at-sea monitor report of harassment and other issues, 30 min/response; at-sea monitoring service provider contract upon request, 30 min/response; at-sea monitoring service provider information materials upon request, 30 min/response; OLE debriefing of at-sea monitors, 2 hr/response; ASM Database and Data Entry Requirements, 3 min/response; Observer program pre-trip notification, 2 min/response; DAS Transfer Program, 5min/response; Expedited Submission of Proposed SAPs, 20 hr/response; NAFO Reporting Requirements, 10 min/response.

*Burden Hours:* 35,476.

*Needs and Uses:* This request is for an extension of a current information collection. Under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Secretary of Commerce has the responsibility for the conservation and management of marine fishery resources. We, National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS), and the Regional Fishery Management Councils are delegated the majority of this responsibility. The New England Fishery Management Council (Council) develops management plans for fishery resources in New England.

In 2010, we implemented a new suite of regulations for the Northeast (NE) multispecies fishery through Amendment 16 to the NE Multispecies Fishery Management Plan (FMP). This action updated status determination criteria for all regulated NE multispecies or ocean pout stocks; adopted rebuilding programs for NE multispecies (groundfish) stocks newly classified as being overfished and subject to overfishing; revised management measures, including significant revisions to the sector management measures (established under Amendment 13) necessary to end overfishing, rebuild overfished regulated NE multispecies and ocean pout stocks, and mitigate the adverse economic impacts of increased effort controls. It also implemented new requirements under Amendment 16 for establishing acceptable biological catch (ABC), annual catch limits (ACLs), and accountability measures (AMs) for each stock managed under the FMP, pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Sectors are a management tool in the NE groundfish fishery. A sector consists

of three of more limited access NE multispecies vessel permits, with distinct ownership, who voluntarily enter into a contract to manage their fishing operations and to share liability. A sector is granted an annual allocation of most stocks of fish managed by the NE Multispecies FMP. In return for increased operational flexibility, such as exemptions from certain effort controls and the ability to pool and trade quota, sectors have additional reporting and monitoring requirements. The sector reporting and monitoring requirements, as established by Amendment 16 and revised by subsequent framework adjustments to the NE Multispecies FMP, are contained within this information collection.

*Affected Public:* Business or other for-profit organizations.

*Frequency:* Weekly and on occasion.

*Respondent's Obligation:* Mandatory.

This information collection request may be viewed at reginfo.gov. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Dated: December 18, 2018.

**Sarah Brabson,**

*NOAA PRA Clearance Officer.*

[FR Doc. 2018–27814 Filed 12–21–18; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XG679**

### South Atlantic Fishery Management Council; Public Meetings

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

**ACTION:** Notice of a meeting of the South Atlantic Fishery Management Council's (Council) System Management Plan Workgroup via webinar.

**SUMMARY:** The Council will hold a meeting of its System Management Plan (SMP) Workgroup via webinar.

**DATES:** The SMP Workgroup will meet via webinar from 1:30 p.m. until 3:30 p.m. on January 14, 2019.

**ADDRESSES:** The meeting will be held via webinar. The meeting is accessible to the public via webinar. Registration is required. Information regarding registration and other meeting information will be posted to the Council's website at: *http://safmc.net/safmc-meetings/* as it becomes available.

*Council address:* South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405.

**FOR FURTHER INFORMATION CONTACT:** Kim Iverson, Public Information Officer, SAFMC; phone: (843) 571–4366 or toll free (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

**SUPPLEMENTARY INFORMATION:** The SMP Workgroup is an advisory group for the Council that reviews actions items, evaluates protected areas, and reviews management of protected areas recommended by the Council. The SMP Workgroup was formed in March 2018. The Workgroup will hold a series of meetings to discuss components of the System Management Plans created by the Council. The Workgroup is responsible for development of a report to the Council with recommendations.

During this meeting the SMP Workgroup will review writing assignments for each section of the report including: background information on managed areas; biological and habitat monitoring; socio-economic factors; enforcement and compliance; and outreach.

### Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 5 days prior to the public meeting.

**Note:** The times and sequence specified in this agenda are subject to change.

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

Dated: December 19, 2018.

**Tracey L. Thompson,**

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

[FR Doc. 2018–27838 Filed 12–21–18; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XG540**

### Marine Mammals; File No. 22187

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that Heather E. Liwanag, Ph.D., 1 Grand Avenue, San Luis Obispo, CA 93407–0401, has applied in due form for a permit to conduct research on northern elephant seals (*Mirounga angustirostris*) in California.

**DATES:** Written, telefaxed, or email comments must be received on or before January 25, 2019.

**ADDRESSES:** The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 22187 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

**FOR FURTHER INFORMATION CONTACT:** Sara Young or Shasta McClenahan, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

The applicant requests a five year permit to study northern elephant seals at the Piedras Blancas Rookery in San Simeon, CA, and new pupping beaches at Vandenberg Air Force Base. Research would be conducted year-round on all age classes and both sexes, with increased frequency and effort during the breeding season (December–April). This study would establish a catalog of known individual seals at the Piedras Blancas colony via marking, tagging, and weighing of young-of-the-year pups. Types of takes include behavioral

observations, measurements, bioacoustic recordings, acoustic playbacks, marking, flipper tagging, capture, and non-invasive physiological sampling. A total of 64, 927 elephant seals will be taken annually: 3,550 handle/release takes, 500 capture/handle/release takes, 1,575 harassment takes, 59,000 incidental disturbance takes, and two unintentional mortality takes, not to exceed five mortalities over the life of the permit. Samples from up to 300 naturally deceased elephant seals may be salvaged and imported, exported, or received annually. Non-target species that may be incidentally disturbed include California sea lions (*Zalophus californianus*), harbor seals (*Phoca vitulina*), and northern fur seals (*Callorhinus ursinus*).

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 19, 2018.

**Julia Marie Harrison,**

*Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2018–27870 Filed 12–21–18; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XG678**

### Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meeting.

**SUMMARY:** The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Ecosystem Workgroup (EWG) will hold a meeting, which is open to the public.

**DATES:** The meeting will be held Tuesday, January 15 and Wednesday, January 16, 2019. The meeting will start at 1 p.m. on January 15 and 8:30 a.m. on January 16 and will continue until 4:30 p.m. on both days.

**ADDRESSES:** The meeting will be held at Hyatt Place Portland Airport/Cascade Station, Meeting Place 2, 9750 NE Cascades Parkway, Portland, OR 97220; phone: (503) 288–2808.

*Council address:* Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

**FOR FURTHER INFORMATION CONTACT:** Dr. Kit Dahl, Pacific Council; telephone: (503) 820–2422.

**SUPPLEMENTARY INFORMATION:** The purpose of the meeting is for the EWG to discuss assignments from the Pacific Council due at the March Council meeting. These include topic selection for a climate change scenario planning exercise and recommendations on changes to the Fishery Ecosystem Plan as part of the 5-year review. The EWG will also meet with the Groundfish Management Team and Highly Migratory Species Management Team to discuss climate change scenario planning topics.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt, (503) 820–2411, at least 10 business days prior to the meeting date.

Dated: December 19, 2018.

**Tracey L. Thompson,**

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

[FR Doc. 2018–27837 Filed 12–21–18; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XF888**

### Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Trawl Rationalization Program; 2019 Cost Recovery

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

**ACTION:** Notice; 2019 cost recovery fee percentages and mothership (MS) pricing.

**SUMMARY:** This action provides participants in the Pacific Coast Groundfish Trawl Rationalization Program with the 2019 fee percentages and MS pricing needed to calculate the required payments for the cost recovery fees due in 2019.

For calendar year 2019, NMFS announces the following fee percentages by sector specific program:

- 2.9 percent for the Shorebased Individual Fishing Quota (IFQ) Program,
- 0 percent for the MS Co-op Program,
- 0 percent for the Catcher/Processer (CP) Co-op Program.

For 2019, the MS pricing to be used as a proxy by the CP Co-op Program is: $0.07./lb for Pacific whiting.

**DATES:** Applicable January 1, 2019.

**FOR FURTHER INFORMATION CONTACT:** Christopher Biegel, Cost Recovery Program Coordinator, (503) 231–6291, fax (503) 872–2737, email *Christopher.Biegel@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** The Magnuson-Stevens Fishery Conservation and Management Act (MSA) requires NMFS to collect fees to recover the costs directly related to the management, data collection and analysis, and enforcement directly related to and in support of a limited access privilege program (LAPP) (16 U.S.C. 1854(d)(2)), also called ''cost recovery.'' The Pacific Coast Groundfish Trawl Rationalization Program is a LAPP, implemented in 2011, and consists of three sector-specific programs: The Shorebased IFQ Program, the MS Co-op Program, and the CP Co-op Program. In accordance with the MSA, and based on a recommended structure and methodology developed in coordination with the Pacific Fishery Management Council (Council), NMFS began collecting mandatory fees of up to three percent of the ex-vessel value of

groundfish from each program (Shorebased IFQ Program, MS Co-op Program, and CP Co-op Program) in 2014. NMFS collects the fees to recover the incremental costs of management, data collection and analysis, and enforcement of the Groundfish Trawl Rationalization Program. Additional background can be found in the cost recovery proposed and final rules, 78 FR 7371 (February 1, 2013) and 78 FR 75268 (December 11, 2013), respectively. The details of cost recovery for the Groundfish Trawl Rationalization Program are in regulation at 50 CFR 660.115 (Trawl fishery -cost recovery program), § 660.140 (Shorebased IFQ Program), § 660.150 (MS Co-op Program), and § 660.160 (CP Co-op Program).

By December 31 of each year, NMFS must announce the next year's fee percentages and the applicable MS pricing for the CP Co-op Program. NMFS calculated the 2019 fee percentages by sector using the best available information. For 2019, the fee percentages by program, taking into account the adjusted direct program costs (DPCs), are:

- 2.9 percent for the Shorebased IFQ Program,
- 0 percent for the MS Co-op Program, and
- 0 percent for the CP Co-op Program.

MS Co-Op and CP Co-Op program fee percentages are 0 percent because of the application of a credit from overpayment of cost recovery fees in prior years.

To calculate the fee percentages, NMFS used the formula specified in regulation at § 660.115(b)(1), where the fee percentage by sector equals the lower of three percent or DPC for that sector divided by total ex-vessel value (V) for that sector multiplied by 100 (Fee percentage = the lower of 3 percent or (DPC/V) × 100).

'DPC,' as defined in the regulations at § 660.115(b)(1)(i), are the actual incremental costs for the previous fiscal year directly related to the management, data collection and analysis, and enforcement of each program (Shorebased IFQ Program, MS Co-op Program, and CP Co-op Program). Actual incremental costs means those net costs that would not have been incurred but for the implementation of the Groundfish Trawl Rationalization Program, including both increased costs for new requirements of the program and reduced costs resulting from any program efficiencies.

''V'', as specified at § 660.115(b)(1)(ii), is the total ex-vessel value, as defined at § 660.111, for each sector from the previous calendar year. The regulations define ex-vessel value slightly differently for each sector, thus NMFS uses slightly different methods to calculate ''V'' for each sector. For the Shorebased IFQ Program, NMFS used the ex-vessel value for calendar year 2017 as reported in Pacific Fisheries Information Network (PacFIN) from shorebased IFQ electronic fish tickets. For the MS Co-op Program and the CP Co-op Program, NMFS uses the average price of Pacific whiting as reported in PacFIN from the shorebased IFQ sector in 2017 and the retained catch estimates (weight) from the observer data, as reported in the North Pacific Observer Program database. NMFS does not collect pricing data for these two sectors so it uses the shorebased IFQ sector data as a proxy.

*Redetermination of Past DPCs and Adjustment of DPCs*

On August 10, 2016, the U.S. Court of Appeals for the Ninth Circuit issued its opinion in *Glacier Fish Co. LLC* v. *Pritzker,* 832 F.3d 1113 (9th Cir. 2016), a case involving a challenge to NMFS' authority to collect cost recovery fees from members of the CP Co-op Program and the reasonableness of NMFS' calculation of the CP Co-op Program's 2014 fee percentage. In response to the court decision, NMFS re-evaluated and modified the methodology used to determine the CP Co-op Program's DPC for the 2014 fee calculation. NMFS elected to apply a similar revised methodology for all programs for 2014–2016 to redetermine the DPC for those years and to continue to use the revised methodology for all programs going forward, including the 2017–2019 fee calculations.

The redetermination resulted in overpayments of the cost recovery fee by the CP and MS Co-op Programs. NMFS adjusted the fees for these two sectors in subsequent years to account for this overpayment, as specified at § 660.115(b)(1)(i).

In addition, for the 2019 fee calculation, the NMFS Northwest Fishery Science Center (NWFSC) determined that some of the observer hours attributed to the CP Co-op Program in 2017 were not incremental. Therefore, these hours were removed and used as a $1,207 credit to the 2018 CP Co-op Program DPC in the 2019 fee calculation. This credit is reflected in the NWFSC initial DPC.

Based on the estimated fees received in 2018 and adjustments for overpayments by the MS and CP Co-op Programs, the adjusted DPCs for 2019 are:

| | Total by sector | 2017 Fee adjustment | Final sector totals |
|---|---|---|---|
| IFQ | $1,753,653.57 | $0.00 | $1,753,653.57 |
| MS | 71,400.39 | −145,328.85 | −73,928.46 |
| CP | 47,178.23 | −116,563.48 | −69,385.25 |

The fee calculations using the adjusted 2018 DPCs are described below.

Shorebased IFQ Program:

2.9 percent = the lower of 3 percent or ($*1,753,653.57*/$60,624,195.00) × 100

MS Co-op Program:

−0.7 percent = the lower of 3 percent or (−$*73,928.46*/$11,350,915.58) × 100

CP Co-op Program:

−0.3 percent = the lower of 3 percent or (−$*69,385.25*/$24,656,732.10) × 100.

The 2019 fee percentages for the MS and CP Co-op Programs will be set at 0.0 percent to reflect the application of a credit from overpayment of cost recovery fees in prior years.

MS pricing is the average price per pound that the CP Co-op Program will use to determine their fee amount due (MS pricing multiplied by the value of the Pacific whiting harvested by the vessel registered to a CP-endorsed limited entry trawl permit, multiplied by the CP fee percentage, equals the fee amount due). MS pricing is based on the average price per pound of Pacific whiting as reported in PacFIN from the shorebased IFQ sector. In other words, data from the IFQ fishery was used as a proxy for the MS average price per pound to determine the MS pricing used in the calculation for the CP Co-op Program's fee amount due. NMFS has calculated the 2019 MS pricing to be used as a proxy by the CP Co-op Program as: $0.07/lb for Pacific whiting.

Cost recovery fees are submitted to NMFS by Fish buyers via *Pay.gov* (*https://www.pay.gov/paygov/*). Fees are only accepted in *Pay.gov* by credit/debit card or bank transfers. Cash or checks cannot be accepted. Fish buyers registered with *Pay.gov* can login in the upper left-hand corner of the screen. Fish buyers not registered with *Pay.gov* can go to the cost recovery forms directly from the website below. The links to the *pay.gov* forms for each program (IFQ, MS, or CP) are listed below:

IFQ: *https://www.pay.gov/public/form/start/58062865*

MS: *https://www.pay.gov/public/form/start/58378422*

CP: *https://www.pay.gov/public/form/start/58102817*

As stated in the preamble to the cost recovery proposed and final rules, in the spring of each year, NMFS will release an annual report documenting the details and data used for the above calculations. The report includes information such as the fee percentage calculation, program costs, and ex-vessel value by sector. The 2017–2018 annual report was delayed until November 2018 to allow for changes to the report following discussions with members of industry. Annual reports are available at: *http://www.westcoast.fisheries.noaa.gov/fisheries/groundfish_catch_shares/rules_regulations/costrecovery.html.*

*Corrections to the 2018 Cost Recovery Fee Calculations*

Between the publication of the 2018 cost recovery fees in the **Federal Register** (82 FR 61752) and the presentation of the 2017–2018 Cost Recovery Annual Report to the Council, NMFS identified two costs (totaling $163,614.41) that had been included in the 2017 IFQ DPCs that were not recoverable. This does not affect the 2019 fees, and a description of these costs is included below as an explanation.

While reviewing the DPCs for the 2018 cost recovery fee, NMFS identified a total of $163,614.41 in costs that were not recoverable and, therefore, removed that amount from the fee calculations. Part of that total consisted of a contracting cost of $74,480.64, which NMFS removed because these contracting costs were to fund a database that supports both catch share and non-catch share data and is not considered incremental. The remainder, *i.e.,* $89,133.77, was associated with a task code that staff used on their timesheet intended for cost recovery for non-recoverable tasks, and NMFS also removed that cost. Both of these costs were only associated with the Shorebased IFQ Program and their removal did not affect the 2018 fee percentage for that program because the IFQ DPC remained above the three percent cap.

IFQ DPC adjustment from the **Federal Register** notice announcing the 2018 cost recovery fees

$2,179,402.10—Original 2017 IFQ DPC
− $163,614.41—Adjustment to the 2017 IFQ DPC
$2,015,787.69—Adjusted 2017 IFQ DPC

**Authority:** 16 U.S.C. 1801 *et seq.,* 16 U.S.C.773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

Dated: December 19, 2018.

**Karen H. Abrams,**

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

[FR Doc. 2018–27872 Filed 12–21–18; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF DEFENSE

### Department of the Army

**[Docket ID: USA–2018–HQ–0022]**

### Submission for OMB Review; Comment Request

**AGENCY:** U.S. Army Public Health Center, DoD

**ACTION:** 30-day information collection notice.

**SUMMARY:** The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

**DATES:** Consideration will be given to all comments received by January 25, 2019.

**ADDRESSES:** Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

**FOR FURTHER INFORMATION CONTACT:** Fred Licari, 571–372–0493, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

**SUPPLEMENTARY INFORMATION:**

*Title; Associated Form; and OMB Number:* Application for Temporary Food Establishment; DD Form 2970; OMB Control Number 0702–0132.

*Type of Request:* Extension.

*Number of Respondents:* 91.

*Responses per Respondent:* 1.

*Annual Responses:* 91.

*Average Burden per Response:* 15 minutes.

*Annual Burden Hours:* 23.

*Needs and Uses:* The information collection requirement is necessary for the installation Preventive Medicine or Public Health Activity to evaluate a food vendor's ability to prepare and dispense safe food on the installation. The form, submitted one time by a food vendor requesting to operate a food establishment on a military installation, characterizes the types of foods, daily volume of food, supporting food equipment, and sanitary controls. Approval to operate the food establishment is determined by the installation's medical authority; the Preventive Medicine or Public Health Activity conducts an operational assessment based on the food safety criteria prescribed in the Tri-Service Food Code (TB MED 530/NAVMED P–5010–1/AFMAN 48–147_IP). Food vendors who are deemed inadequately prepared to provide safe food service are disapproved for operating on the installation.

*Affected Public:* Business or other for-profit; Not-for-profit institutions.

*Frequency:* On occasion.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

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

*DOD Clearance Officer:* Mr. Frederick Licari.

Requests for copies of the information collection proposal should be sent to Mr. Licari at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: December 14, 2018.

**Aaron T. Siegel,**

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

[FR Doc. 2018–27476 Filed 12–24–18; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Vietnam War Commemoration Advisory Committee; Notice of Federal Advisory Committee Meeting

**AGENCY:** Chief Management Officer, Vietnam War Commemoration Advisory Committee, Department of Defense.

**ACTION:** Notice of federal advisory committee meeting.

**SUMMARY:** The Department of Defense (DoD) is publishing this notice to announce that the following Federal Advisory Committee meeting of the Vietnam War Commemoration Advisory Committee will take place.

**DATES:** Open to the public Friday, February 8, 2019 from 1:00 p.m. to 4:00 p.m.

**ADDRESSES:** The address of the open meeting is 241 18th Street South, Room 101, Arlington VA 22202.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Marcia L. Moore, 703–571–2005 (Voice), 703–692–4691 (Facsimile), *marcia.l.moore12.civ@mail.mil* (Email) or Mr. Mark Franklin, 703–697–4849 (Voice), *mark.r.franklin.civ@mail.mil* (Email). Mailing address is DOD Vietnam War Commemoration Program Office 241 18th Street South, Suite 101 Arlington, VA 22202. Website: *http://www.vietnamwar50th.com.* The most up-to-date changes to the meeting agenda can be found on the website.

**SUPPLEMENTARY INFORMATION:** This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150. *Purpose of the Meeting:* The Department of Defense is publishing this notice to announce the following Federal advisory committee meeting of the Vietnam War Commemoration Advisory Committee. This meeting is open to the public. The Committee is asked to provide advice on the concept and design of the types of commemoration events the Vietnam War Commemoration Office (VWC) should consider supporting or coordinating during the close-out phase from 2023 through 2025. The objective for this meeting is to finalize the Advisory Committee's recommendations. *Agenda:* The Committee will convene from 1:00 p.m. to 4:00 p.m. on February 8, 2019 to finalize the Committee's recommendations on the concept and types of commemoration events the Vietnam War Commemoration Office (VWC) should consider supporting or coordinating during the close-out phase from 2023 through 2025. Meeting Accessibility: Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Mrs. Marcia Moore or Mr. Franklin at the number listed in the **FOR FURTHER INFORMATION CONTACT** section by February 1, 2019 so that appropriate arrangements can be made. *Written Statements:* Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written comments to the Committee about its mission and topics pertaining to this public meeting. Written comments should be received by the DFO by February 1, 2019. Written comments should be submitted via email to the address for the DFO given in the **FOR FURTHER INFORMATION CONTACT** section in either Adobe Acrobat or Microsoft Word format. Please note that since the Committee operates under the provisions of the Federal Advisory Committee Act, as amended, all submitted comments and public presentations will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the Committee's website.

Dated: December 18, 2018.

**Shelly E. Finke,**

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

[FR Doc. 2018–27828 Filed 12–21–18; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Docket ID: DOD–2018–OS–0072]**

### Submission for OMB Review; Comment Request

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

**ACTION:** 30-Day information collection notice.

**SUMMARY:** The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

**DATES:** Consideration will be given to all comments received by January 25, 2019.

**ADDRESSES:** Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

**FOR FURTHER INFORMATION CONTACT:** Fred Licari, 571–372–0493, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

**SUPPLEMENTARY INFORMATION:**

*Title; Associated Form; and OMB Number:* The Defense Institute of Security Assistance Management (DISAM) Information Technology Mission System; DISAM Form GSI–001; OMB Control Number 0704–0548.

*Type of Request:* Extension.

*DISCS Student Registration Form:*

*Number of Respondents:* 12,353.

*Responses per Respondent:* 2

*Annual Responses:* 24,706.

*Average Burden per Response:* 15 minutes.

*Annual Burden Hours:* 6,177.

*DISCS Guest Speaker Form:*

*Number of Respondents:* 206.

*Responses per Respondent:* 1.

*Annual Responses:* 206.

*Average Burden per Response:* 15 minutes.

*Annual Burden Hours:* 52.

*Annual Totals:*

*Annual Burden Hours:* 6,228.

*Total Annual Respondents:* 12,559.

*Total Average Burden per Response:* 15 minutes.

*Total Annual Responses:* 24,912.

*Needs and Uses:* The DISAM Information Technology Mission System (DISM): Is a web based portal designed to hold several web applications for the purposes of efficient administration of U.S. and international students, and the effective management of DISAM personnel and guest lecturers. The portal provides DISAM personnel the ability to submit travel request and travel arrangements. Finally, the web based portal uses a relational database to record, manage and report information about students, personnel, travel. Reports of annual training of Foreign nationals to Congress as required by 22 U.S. Code 2394 (Foreign Assistance Act (FAA)) and 22 U.S. Code 2770A (Arms Export Control Act (AECA)).

*Affected Public:* Individuals and households.

*Frequency:* On occasion.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

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

*DOD Clearance Officer:* Mr. Frederick Licari.

Requests for copies of the information collection proposal should be sent to Mr. Licari at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: December 14, 2018.

**Shelly E. Finke,**

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

[FR Doc. 2018–27851 Filed 12–21–18; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

**[Docket ID: USN–2018–HQ–0024]**

### Proposed Collection; Comment Request

**AGENCY:** Department of the Secretary of the Navy, DoD.

**ACTION:** Information collection notice.

**SUMMARY:** In compliance with the *Paperwork Reduction Act of 1995,* the Department of the Navy 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 25, 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 390 San Carlos Rd, Ste. A, Pensacola, FL 32508–5508 (Attn: Navy Flight Demonstration Squadron) or email *BAPAO@navy.mil.*

**SUPPLEMENTARY INFORMATION:**

*Title; Associated Form; and OMB Number:* Navy Flight Demonstration Squadron (Blue Angels) Backseat Rider Programs, OPNAV Forms 5720/13, 5720/14, 572/15; OMB Control Number 0703–XXXX.

*Needs and Uses:* This information collection requirement is necessary to medically clear and coordinate with individuals selected through the Key Influencer (KI) program and media personnel so that they may participate in backseat flights at Blue Angels' air shows and demonstrations. Flying these candidates, in coordination with media presence, is intended to promote the Navy and Marine Corps as professional and exciting organizations in which to serve.

**OPNAV Forms 5720/13, ''MEDIA RIDER NOMINEE'' and 5720/14, ''KEY INFLUENCER NOMINEE FORM AND BIOGRAPHY''**

*Affected Public:* Individuals and Households.

*Annual Burden Hours:* 30.

*Number of Respondents:* 30.

*Responses per Respondent:* 2.

*Annual Responses:* 60.

*Average Burden per Response:* 30 minutes.

*Frequency:* On occasion.

**OPNAV Form 5720/15, ''F/A–18 RIDER LETTER AND MEDICAL QUESTIONNAIRE''**

*Affected Public:* Individuals and Households.

*Annual Burden Hours:* 120.

*Number of respondents:* 240.

*Responses per Respondent:* 1.

*Annual Responses:* 240.

*Average Burden per Response:* 30 minutes.

*Frequency:* On occasion.

*Total Annual Burden Hours:* 150.

*Average Burden per Response:* 30 minutes.

*Total Number of Respondents:* 270.

*Total Annual Responses:* 300.

Respondents are persons selected through the KI program, credentialed media representatives and local air show liaisons. The completed forms certify that the selected individuals are physically fit to fly and that the Blue Angels Public Affairs staff are able to coordinate flight information with respondents. If these forms are not completed, Blue Angels' staff cannot be readily assured of the physical fitness, qualifications and contact information of respondents. Having these forms reviewed by medical personnel and public affairs staff is essential in maintaining the safety and integrity of the Navy Flight Demonstration Backseat Rider process and program.

Dated: December 14, 2018.

**Shelly E. Finke,**

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

[FR Doc. 2018–27857 Filed 12–21–18; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Notice of Availability of Record of Decision for the Hawaiian Islands and Southern California Training and Testing Final Environmental Impact Statement/Overseas Environmental Impact Statement

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice.

**SUMMARY:** The United States Department of the Navy (DoN), after carefully weighing the strategic, operational, and environmental consequences of the Proposed Action, announces its decision to conduct training and testing activities as identified in Alternative 1 of the Hawaii-Southern California Training and Testing (HSTT) Final Environmental Impact Statement (EIS)/Overseas Environmental Impact Statement (OEIS) dated October 2018. Under Alternative 1, the DoN will be able to meet current and future DoN training and testing requirements.

**SUPPLEMENTARY INFORMATION:**

Alternative 1 is the DoN's preferred alternative, and is representative of

training to account for the natural fluctuations of training cycles, deployment schedules, and use of synthetic training opportunities. Alternative 1 also includes an annual level of testing that reflects the fluctuations in DoN testing programs. The complete text of the Record of Decision (ROD) for the HSTT FEIS/OEIS is available on the project website at *http://hstteis.com*, along with the October 2018 HSTT FEIS/OEIS and supporting documents. Single copies of the ROD are available upon request by contacting: Naval facilities Engineering Command Pacific, Attn: Code EV21 (HSTT EIS/OEIS Project Manager), 258 Makalapa Drive, Suite 100, Pearl Harbor, HI 96860–3134.

Dated: December 18, 2018.

**Meredith Steingold Werner,**

*Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. 2018–27811 Filed 12–21–18; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEPARTMENT OF EDUCATION

### National Advisory Committee on Institutional Quality and Integrity

**AGENCY:** U.S. Department of Education, National Advisory Committee on Institutional Quality and Integrity (NACIQI).

**ACTION:** Notice of membership.

**SUMMARY:** This notice lists the members of the National Advisory Committee on Institutional Quality and Integrity (NACIQI). This notice is required under Section 114(e)(1) of the Higher Education Act of 1965, as amended (HEA).

**ADDRESSES:** U.S. Department of Education, Office of Postsecondary Education, 400 Maryland Ave. SW, Room 271–03, Washington, DC 20202.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Hong, Executive Director/Designated Federal Official, NACIQI, U.S. Department of Education, 400 Maryland Ave. SW, Room 271–03, Washington, DC 20202, telephone: (202) 453–7805, or email *Jennifer.Hong@ed.gov.*

**SUPPLEMENTARY INFORMATION:**

### NACIQI's Statutory Authority and Functions

The NACIQI is established under Section 114 of the HEA, and is composed of 18 members appointed—

(A) On the basis of the individuals' experience, integrity, impartiality, and good judgment;

(B) From among individuals who are representatives of, or knowledgeable concerning, education and training beyond secondary education, representing all sectors and types of institutions of higher education; and,

(C) On the basis of the individuals' technical qualifications, professional standing, and demonstrated knowledge in the fields of accreditation and administration of higher education.

The NACIQI meets at least twice a year and advises the Secretary of Education with respect to:

- The establishment and enforcement of the standards of accrediting agencies or associations under subpart 2 of part G of Title IV of the HEA;
- The recognition of specific accrediting agencies or associations;
- The preparation and publication of the list of nationally recognized accrediting agencies and associations;
- The eligibility and certification process for institutions of higher education under Title IV of the HEA, together with recommendations for improvements in such process;
- The relationship between (1) accreditation of institutions of higher education and the certification and eligibility of such institutions, and (2) State licensing responsibilities with respect to such institutions; and
- Any other advisory functions relating to accreditation and institutional eligibility that the Secretary of Education may prescribe by regulation.

*What are the terms of office for the committee members?*

The term of office of each member is six years. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed shall be appointed for the remainder of such term.

*Who are the current members of the committee?*

The current members of the NACIQI are:

*Members Appointed by the Secretary of Education with Terms Expiring September 30, 2019:*

- Simon J. Boehme (Student Member), Founder of *JoinMagnify.com*, San Francisco, California.
- John Etchemendy, Ph.D., Provost Emeritus, Stanford University, Stanford, California.
- Susan D. Phillips, Ph.D., Former Provost and Vice President for Academic Affairs and Former Vice President for Strategic Partnership, University at Albany/SUNY, Albany, New York.
- Frank H. Wu, J.D., Distinguished Professor, University of California Hastings College of Law, San Francisco, California.
- Federico Zaragoza, Ph.D., President, College of Southern Nevada, Las Vegas, Nevada.

*Members Appointed by the Speaker of the House of Representatives with Terms Expiring September 30, 2020:*

- Kathleen Sullivan Alioto, Ed.D., Strategic Advisor, Fundraiser, and Consultant, New York, New York, San Francisco, California, and Boston, Massachusetts.
- George T. French, Jr., Ph.D., President, Miles College, Fairfield, Alabama.
- Brian W. Jones, J.D., President, Strayer University, Washington, DC.
- Arthur E. Keiser, Ph.D., Chancellor, Keiser University, Fort Lauderdale, Florida.
- Arthur J. Rothkopf, J.D., President Emeritus, Lafayette College, Washington, DC.
- Ralph Wolff, J.D., President, The Quality Assurance Commons for Higher and Postsecondary Education, Oakland, California.

*Members Appointed by the President Pro Tempore of the Senate with Terms Expiring September 30, 2022:*

- Jill Derby, Ph.D., Senior Consultant, Association of Governing Boards of Universities and Colleges, Gardnerville, Nevada.
- Paul J. LeBlanc, Ph.D., President, Southern New Hampshire University, Manchester, New Hampshire.
- Anne D. Neal, J.D., President, The Garden Club of America, Washington, DC.
- Richard F. O'Donnell, Founder and CEO, Skills Fund, Austin, Texas.
- Claude O. Pressnell, Jr., Ed.D., President, Tennessee Independent Colleges and Universities Association, Nashville, Tennessee.
- Steven Van Ausdle, Ph.D., President Emeritus, Walla Walla Community College, Walla Walla, Washington.

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

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

**Authority:** 20 U.S.C. 1011c.

**Betsy DeVos,**

*Secretary of Education.*

[FR Doc. 2018–27932 Filed 12–21–18; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2018–ICCD–0134]**

### Agency Information Collection Activities; Comment Request; FSA Payment Vehicle Account (PVA) Program Pilot Institutions

**AGENCY:** Federal Student Aid (FSA), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection.

**DATES:** Interested persons are invited to submit comments on or before February 25, 2019.

**ADDRESSES:** To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2018–ICCD–0134. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 550 12th Street SW, PCP, Room 9086, Washington, DC 20202–0023.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

*Title of Collection:* FSA Payment Vehicle Account (PVA) Program Pilot Institutions.

*OMB Control Number:* 1845–NEW.

*Type of Review:* A new information collection.

*Respondents/Affected Public:* Private Sector; State, Local, and Tribal Governments.

*Total Estimated Number of Annual Responses:* 40.

*Total Estimated Number of Annual Burden Hours:* 1,250.

*Abstract:* This is a request for clearance of a new information collection to be used to obtain information from institutions of higher education (IHEs) that participate in the student financial assistance programs under title IV of the Higher Education Act of 1965, as amended. This information collection will be used to invite IHEs to complete an application questionnaire to participate in Federal Student Aid's (FSA) Next Generation Financial Services Environment—Payment Vehicle Account (PVA) program pilot as well as a follow-on questionnaire used to ask pilot progress questions to gauge early pilot progress. We are requesting that the full clearance package be filed and that the 60 day public comment period be initiated at this time.

Dated: December 18, 2018.

**Kate Mullan,**

*Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.*

[FR Doc. 2018–27813 Filed 12–21–18; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF ENERGY

### Western Area Power Administration

### Falcon and Amistad Projects' Rate Order No. WAPA–186

**AGENCY:** Western Area Power Administration (WAPA), DOE.

**ACTION:** Notice of proposed extension for the Falcon and Amistad Projects' firm power rate formula.

**SUMMARY:** WAPA proposes extending the Falcon and Amistad Projects' firm power rate formula through June 7, 2024. The Falcon and Amistad Projects' firm power rate formula expires June 7, 2019.

**DATES:** The comment period will begin December 26, 2018 and end January 25, 2019. WAPA will accept written comments any time during the comment period. Upon completion of the comment period, WAPA will take further action on the proposed rate formula extension consistent with 10 CFR 903.23(a).

**ADDRESSES:** Written comments and requests to be informed of Federal Energy Regulatory Commission (FERC) actions concerning the rates submitted by WAPA to FERC for approval should be sent to: Mr. Brent Osiek, Power Marketing Manager, Colorado River Storage Project Management Center, Western Area Power Administration, 299 South Main Street, Suite 200, Salt Lake City, UT 84111, (801) 524–5495, email: *osiek@wapa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas Hackett, Rates Manager, Colorado River Storage Project Management Center, Western Area Power Administration, 299 South Main Street, Suite 200, Salt Lake City, UT 84111, (801) 524–5503, email: *hackett@wapa.gov.*

**SUPPLEMENTARY INFORMATION:** The Falcon and Amistad Dams are features of international water storage projects located on the Rio Grande River between Texas and Mexico. The portion of the dams located in the United States is operated by the United States International Boundary and Water Commission (USIBWC). Under arrangements with the United States Department of State and USIBWC,

WAPA is the Federal agency responsible for marketing and selling the electricity generated at these facilities. WAPA markets the power generated at Falcon and Amistad as a combined product to only one customer—the South Texas Electric Cooperative. The cost of the power is determined by a power rate formula. This power rate formula was initially approved by the Federal Power Commission (FPC), the predecessor to FERC, in FPC Docket No. E–9566 on August 12, 1977 (59 FPC 1653), for a 5-year period effective on the date of initial operation of Amistad Power Plant, June 8, 1983.[1]

The power rate formula calculates the revenue WAPA must annually repay to the Department of the Treasury for the United States' investment in the Falcon and Amistad hydroelectric facilities with interest, as well as associated operation, maintenance, and administrative costs. This annual installment is collected in 12 monthly payments and is independent of the amount of available generation. The existing rate formula provides sufficient revenue to recover annual expenses, interest, and capital replacements, within the cost recovery criteria set forth in Department of Energy (DOE) Order RA 6120.2; therefore, WAPA proposes to extend the current rate formula schedule for 5 years.

By Delegation Order No. 00–037.00B, effective November 19, 2016, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to WAPA's Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve on a final basis, remand, or disapprove such rates to FERC. This extension is issued pursuant to the Delegation Order and DOE rate extension procedures at 10 CFR 903.23(a).

In accordance with 10 CFR 903.23(a)(2), WAPA determined that it is not necessary to hold a public information or public comment forum, but WAPA is providing a 30-day comment period on the proposed formula rate extension to allow for public participation. Comments must be received by the end of the comment period. WAPA will post comments received to its website: *https://www.wapa.gov/regions/CRSP/rates/Pages/rates.aspx.* After considering public comments, WAPA will take further action on the proposed rate formula extension consistent with 10 CFR 903.23(a).

Dated: December 13, 2018.

**Mark A. Gabriel,**

*Administrator.*

[FR Doc. 2018–27873 Filed 12–21–18; 8:45 am]

**BILLING CODE 6450–01–P**

[1] A 5-year rate extension of this same power formula rate through June 7, 1993, was approved by FERC on June 20, 1988, at 44 FERC ¶ 62,058. Subsequent 5-year extensions of the formula rate have been approved by FERC; the most recent approval was on April 9, 2015, in Docket No. EF14–9–000, which approved the same formula rate through June 7, 2019.

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2018–0671; FRL–9987–10]**

## Pesticide Experimental Use Permit; Receipt of Application; Comment Request

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces EPA's receipt of application 73049–EUP–RN from Valent BioSciences LLC, requesting an experimental use permit (EUP) for aminoethoxyvinylglycine. EPA has determined that the permit may be of regional or national significance. Therefore, because of the potential significance, EPA is seeking comments on this application.

**DATES:** Comments must be received on or before January 25, 2019.

**ADDRESSES:** Submit your comments, identified by Docket Identification (ID) Number EPA–HQ–OPP–2018–0671, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

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

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

This action is directed to the public in general. Although this action may be of particular interest to those persons who conduct or sponsor research on pesticides, EPA has not attempted to describe all the specific entities that may be affected by this action.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through 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 preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, EPA seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

### II. What action is the agency taking?

Under section 5 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136c, EPA can

allow manufacturers to field test pesticides under development. Manufacturers are required to obtain an EUP before testing new pesticides or new uses of pesticides if they conduct experimental field tests on more than 10 acres of land or more than one surface acre of water.

Pursuant to 40 CFR 172.11(a), EPA has determined that the following EUP application may be of regional or national significance, and therefore is seeking public comment on the EUP application:

*Submitter:* Valent BioSciences LLC, (73049–EUP–RN).

*Pesticide Chemical:* Aminoethoxyvinylglycine.

*Summary of Request:* Valent BioSciences LLC (Valent) submitted a request for an experimental use permit (EUP) that will involve application of an end-use product (EP) (ReTain OL Plant Growth Regulator Liquid Concentrate) that contains the active ingredient aminoethoxyvinylglycine (AVG). Concurrently, Valent also petitioned EPA to establish temporary tolerances (*i.e.,* 0.065 parts per million (ppm) of AVG in or on apple and 0.065 ppm of AVG in or on pear) for 3 years for harvest management in commercial apple and pear production. The EP is to be applied via spray to apples and pears across a total of 5,500 acres per year for 3 years in the following states: Washington (5,000 acres), Michigan (100 acres), Pennsylvania (100 acres), Connecticut (75 acres), Massachusetts (75 acres), Vermont (75 acres), and Virginia (75 acres). The EP will be applied at a maximum amount per year of 112,000 fluid ounces and at a maximum rate per acre of 20 fluid ounces.

Following the review of the application and any comments and data received in response to this solicitation, EPA will decide whether to issue or deny the EUP request, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

**Authority:** 7 U.S.C. 136 *et seq.*

Dated: December 4, 2018.

**Delores Barber,**

*Director, Information Technology and Resources Management Division, Office of Pesticide Programs.*

[FR Doc. 2018–27917 Filed 12–21–18; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2018–0578; FRL–9987–06]

## Pesticide Product Registration; Receipt of Applications for New Active Ingredients

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

**DATES:** Comments must be received on or before January 25, 2019.

**ADDRESSES:** Submit your comments, identified by the Docket Identification (ID)

Number and the File Symbol of interest as shown in the body of this document, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

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

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

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

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

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

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through 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 preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

### II. Registration Applications

EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

### III. New Active Ingredients

*File Symbol:* 71771–RE. *Docket ID number:* EPA–HQ–OPP–2018–0687. *Applicant:* Plant Health Care, Inc., 2626 Glenwood Ave., Suite 350, Raleigh, NC 27608. *Product name:* PHC–91398. *Active ingredient:* Plant regulator-Ea Peptide 91398 at 1%. *Proposed use:* To stimulate growth and defense systems in agricultural plants. *Contact:* BPPD.

**Authority:** 7 U.S.C. 136 *et seq.*

Dated: December 4, 2018,

**Delores Barber,**

*Director, Information Technology and Resources Management Division, Office of Pesticide Programs.*

[FR Doc. 2018–27911 Filed 12–21–18; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2018–0805; FRL–9987–54]**

## Pesticides; Petition Seeking Rulemaking or a Formal Agency Interpretation for Planted Seeds Treated With Systemic Insecticides; Request for Comment

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA is seeking public comment on a petition from the Center for Food Safety (CSF) requesting that the Agency either initiate a rulemaking or issue a formal Agency interpretation for planted seeds treated with systemic insecticides. CSF believes that the Agency has improperly applied the treated article exemption in exempting these products from registration and labeling requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

**DATES:** Comments must be received on or before March 26, 2019.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2018–0805, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

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

**FOR FURTHER INFORMATION CONTACT:** Connie Hernandez, Field and External Affairs Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 305–5190; email address: *hernandez.connie@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including pesticide registrants, environmental, human health, and agricultural advocates, pesticide users, and members of the public interested in the use of pesticides. This listing is not intended to be exhaustive but rather provides a guide for readers regarding entities likely to be affected by his action. Because others may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### II. What action is the agency taking?

EPA requests public comment on a petition received from CFS that asks EPA to take the following actions:

1. Amend or formally reinterpret the Treated Article Exemption in 40 CFR 152.25(a) to clarify whether the exemption applies to seeds treated with systemic insecticides intended to kill pests of the plants.
2. Enforce FIFRA's registration and labeling requirements for seed products coated with systemic pesticides.

A copy of the petition is available in the docket.

### III. What should I consider as I prepare my comments for EPA?

Do not submit this information to EPA through 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.

When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

**Authority:** 7 U.S.C. 136 *et seq.*

Dated: December 11, 2018,

**Richard Keigwin,**

*Director, Office of Pesticide Programs.*

[FR Doc. 2018–27780 Filed 12–21–18; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2018–0576; FRL–9987–07]**

## Pesticide Product Registration; Receipt of Applications for New Uses

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

**DATES:** Comments must be received on or before January 25, 2019.

**ADDRESSES:** Submit your comments, identified by the Docket Identification (ID)

Number and the File Symbol or EPA Registration Number of interest as shown in the body of this document, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

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

**FOR FURTHER INFORMATION CONTACT:** Michael Goodis, Registration Division (7505P), main telephone number: (703) 305–7090, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC

20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each application summary.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

*A. Does This action apply to me?*

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

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

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through 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 preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

## II. Registration Applications

EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

## III. New Uses

1. *EPA Registration Number:* 100–617, 100–618. *Docket ID number:* EPA–HQ–OPP–2018–0127. *Applicant:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Propiconazole. *Product type:* Fungicide. *Proposed use:* Avocado; brassica, leafy greens, subgroup 4–16B, except watercress; celtuce; fennel, Florence; leaf petiole vegetable subgroup 22B; swiss chard; tomato subgroup 8–10A; vegetable, root, except sugar beet, subgroup 1B. *Contact:* RD.

2. *EPA Registration Numbers:* 100–632 and 66222–272. *Docket ID number:* EPA–HQ–OPP–2018–0286. *Applicant:* IR–4 Project Headquarters, Rutgers, The State University of New Jersey, 500 College Road East, Suite 201 W, Princeton, NJ 08540. *Active ingredient:* Cyromazine. *Product type:* Insecticide. *Proposed uses:* Brassica, leafy greens, subgroup 4–16B; celtuce; chickpea, edible podded; chickpea, succulent shelled; dwarf pea, edible podded; edible podded pea, edible podded; grass-pea, edible podded; green pea, edible podded; English pea, succulent shelled; garden pea, succulent shelled; Florence fennel; green pea, succulent shelled; Kohlrabi; leafy green subgroup 4–16A; leaf petiole vegetable subgroup 22B; lentil, edible podded; lentil, succulent shelled; onion, bulb, subgroup 3–07A; onion, green, subgroup 3–07B; pepper/eggplant subgroup 8–10B; pigeon pea, edible podded; pigeon pea, succulent shelled; snap pea, edible podded; snow pea, edible podded; sugar snap pea, edible podded; tomato subgroup 8–10A; vegetable, tuberous and corm, subgroup 1C; and vegetable, brassica, head and stem, group 5–16, except broccoli. *Contact:* RD.

3. *EPA Registration Numbers:* 100–1381 and 100–1374. *Docket ID number:* EPA–HQ–OPP–2018–0526. *Applicant:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Sedaxane. *Product type:* Fungicide. *Proposed use:* vegetable, legume, group 6. *Contact:* RD.

4. *EPA Registration Number:* 1258–1286, 1258–1267 and 1258–1249. *Docket ID number:* EPA–HQ–OPP–2018–0749. *Applicant:* Arch Chemicals Inc. 1200 Bluegrass Lakes Parkway, Alpharetta, GA 30004. *Active ingredient:* N-Butyl-1, 2-benzisothiazolin-3-one. *Product type:* Materials Preservative. *Proposed use:* Preserve Metal Working Fluids that are used in open machining systems. *Contact:* AD.

5. *EPA Registration Numbers:* 71512–7, 71512–9, 71512–10 and 71512–14. *Docket ID number:* EPA–HQ–OPP–2018–0273. *Applicant:* IR–4 Project Headquarters, Rutgers, The State University of New Jersey, 500 College Road East, Suite 201 W, Princeton, NJ 08540. *Active ingredient:* Flonicamid. *Product type:* Insecticide. *Proposed use:* Sunflower subgroup 20B. *Contact:* RD.

**Authority:** 7 U.S.C. 136 *et seq.*

Dated: December 4, 2018,

**Delores Barber,**

*Director, Information Technology and Resources Management Division, Office of Pesticide Programs.*

[FR Doc. 2018–27910 Filed 12–21–18; 8:45 am]

BILLING CODE 6560–50–P

---

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–1223]**

## Information Collection Being Reviewed by the Federal Communications Commission

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

**DATES:** Written PRA comments should be submitted on or before February 25,

2019. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.ongele@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

**SUPPLEMENTARY INFORMATION:**

*Title:* Payment Instructions from the Eligible Entity Seeking Reimbursement from the TV Broadcaster Relocation Fund.

*Form Number:* FCC Form 1876.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit, Not-for-profit institutions and State, Local or Tribal Government.

*Number of Respondents and Responses:* 2,500 respondents; 2,500 responses.

*Estimated Time per Response:* 5 hours.

*Frequency of Response:* One-time reporting requirement.

*Obligation To Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in the Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96 (Spectrum Act) § 6403(b)(4)(A) and Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018, Public Law 115–141, Div. P, (RAY BAUM'S Act) § 1452.

*Total Annual Burden:* 12,500 hours.

*Total Annual Cost:* No Cost.

*Privacy Act Impact Assessment:* No Impact(s).

*Nature and Extent of Confidentiality:* The information collection includes information identifying bank accounts and providing account and routing numbers to access those accounts. FCC considers that information to be records not routinely available for public inspection under 47 CFR 0.457, and exempt from disclosure under FOIA exemption 4 (5 U.S.C. 552(b)(4)).

*Needs and Uses:* The Commission is requesting Office of Management and Budget (OMB) approval for revisions to, and a three-year extension of, this information collection as described below.

- There will be 2,500 respondents in FY19, because reimbursements from the Broadcaster Relocation Fund has been expanded to include additional types of eligible entities: TV translator stations, low power TV stations, and FM radio stations. The additional eligible entities will use the form to provide payment instructions to the government.
- A few data elements have been added to adapt the form to the additional types of eligible entities, which do not materially affect respondent burden.
- Instructions have been revised based on the first year's experience with the form, to reduce error rates.

The Spectrum Act requires the Commission to reimburse broadcast television licensees for costs ''reasonably incurred'' in relocating to new channels assigned in the repacking process and Multichannel Video Programming Distributors (MVPDs) for costs reasonably incurred in order to continue to carry the signals of stations relocating to new channels as a result of the repacking process or a winning reverse auction bid.[1] RAY BAUM'S Act expands the program to include reimbursement to TV translator stations, low power TV stations, and FM radio stations.[2]

The information collection for which we are requesting approval is necessary for eligible entities to instruct the Commission on how to pay the approved amounts the entities requested, and for the entities to make certifications that reduce the risk of waste, fraud, abuse and improper payments.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2018–27835 Filed 12–21–18; 8:45 am]

**BILLING CODE 6712–01–P**

[1] Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96 (Spectrum Act) § 6403(b)(4)(A)(i), (ii).

[2] Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018, Public Law 115–141, Div. P, (RAY BAUM'S Act) § 1452.

## 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 8, 2019.

A. *Federal Reserve Bank of Chicago* (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Daniel K. Miller, Barrington Hills, Illinois;* to acquire voting shares of First Ottawa Bancshares, Inc., and thereby indirectly acquire shares of The First National Bank of Ottawa, both of Ottawa, Illinois.

Board of Governors of the Federal Reserve System, December 19, 2018.

**Yao-Chin Chao,**

*Assistant Secretary of the Board.*

[FR Doc. 2018–27904 Filed 12–21–18; 8:45 am]

**BILLING CODE P**

## GENERAL SERVICES ADMINISTRATION

**[OMB Control No. 3090–0286; Docket No. 2018–0001; Sequence No. 14]**

### Information Collections; GSA Mentor Protégé Program and Subcontracting Plans

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

**ACTION:** Notice of termination regarding an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to terminate previously approved information collection requirements under OMB Control Number 3090–0286, GSA Mentor Protégé Program.

**DATES:** Submit comments on or before: February 25, 2019.

**ADDRESSES:** Submit comments for the information collections by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB Control number 3090–0286 or 3090–0252. Select the link ''Comment Now'' that corresponds with ''Information Collections; GSA Mentor Protégé Program.'' Follow the instructions provided on the screen. Please include your name, company name (if any), and ''Information Collection; GSA Mentor Protégé Program'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat

Division (MVCB), 1800 F Street NW, Washington, DC, 20405. ATTN: Ms. Mandell/IC 3090–0286.

*Instructions:* Please submit comments only and cite ''Information Collections; GSA Mentor Protégé Program'' in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Dana Bowman, General Services Acquisition Policy Division, GSA, by phone at 202–357–9652 or by email at *dana.bowman@gsa.gov.*

**SUPPLEMENTARY INFORMATION:** GSA no longer requires a GSA Mentor Protégé Program, as it is duplicative of the Small Business Administration (SBA) governmentwide mentor protégé program. Specifically, General Services Administration Acquisition Regulation (GSAR) Subpart 519.70, GSA Mentor-Protégé Program and associated clauses: 552.219–75, GSA Mentor-Protégé Program, and 552.219–76, Mentor Requirements and Evaluation have been removed.

**Jeffrey A. Koses,**

*Senior Procurement Executive, Office of Acquisition Policy, Office of Government-wide Policy.*

[FR Doc. 2018–27883 Filed 12–21–18; 8:45 am]

**BILLING CODE 6820–61–P**

## GENERAL SERVICES ADMINISTRATION

**[OMB Control No. 3090–0252; Docket No. 2018–0001; Sequence No. 13]**

### Information Collection; GSA Mentor Protégé Program and Preparation, Submission, and Negotiation of Subcontracting Plans

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

**ACTION:** Notice of termination regarding an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to terminate previously approved information collection requirements under OMB Control Number 3090–0252, Preparation, Submission, and Negotiation of Subcontracting Plans.

**DATES:** Submit comments on or before February 25, 2019.

**ADDRESSES:** Submit comments regarding the information collection to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for GSA, Room 10236, NEOB, Washington, DC 20503. Additionally submit a copy to GSA by any of the following methods:

- Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection; Preparation, Submission, and Negotiation of Subcontracting Plans''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection; Preparation, Submission, and Negotiation of Subcontracting Plans'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405, ATTN: Ms. Mandell/IC 3090–0286 and IC 3090–0252.

*Instructions:* Please submit comments only and cite ''Information Collection; Preparation, Submission, and Negotiation of Subcontracting Plans'', in all correspondence related to this collection. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Dana Bowman, General Services Acquisition Policy Division, GSA, by phone at 202–357–9652 or by email at *dana.bowman@gsa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Purpose

GSA no longer requires agency supplemental subcontracting plan information, as it is duplicative of the requirements in the Federal Acquisition Regulation (FAR) clause 52.219–9, Small Business Subcontracting Plan. Specifically, GSAR Section 519.708, Contract Clauses and associated provisions: 552.219–71, Notice to Offerors of Subcontracting Plan Requirements, 552.219–72, Preparation, Submission, and Negotiation of Subcontracting Plans, and 552.219–73, Goals for Subcontracting Plans have been removed.

**Jeffrey A. Koses,**

*Director, Office of Acquisition Policy, Office of Government-wide Policy.*

[FR Doc. 2018–27884 Filed 12–21–18; 8:45 am]

**BILLING CODE 6820–61–P**

## GENERAL SERVICES ADMINISTRATION

**[Notice-MA–2019–01; Docket No. 2018–0002, Sequence No. 30]**

### 2019 Privately Owned Vehicle (POV) Mileage Reimbursement Rates; 2019 Standard Mileage Rate for Moving Purposes

**AGENCY:** Office of Government-wide Policy (OGP), General Services Administration (GSA).

**ACTION:** Notice of Federal Travel Regulation (FTR) Bulletin 19–03, Calendar Year (CY) 2019 Privately Owned Vehicle (POV) Mileage Reimbursement Rates and Standard Mileage Rate for Moving Purposes (Relocation Allowances).

**SUMMARY:** GSA is updating the mileage reimbursement rate for privately owned vehicles (POV) as required by statute. This information will be available in FTR Bulletin 19–03, which can be found on GSA's website at *www.gsa.gov/mileage.*

**DATES:** *Applicability date:* This notice applies to travel and relocation performed on or after January 1, 2019 through December 31, 2019.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, please contact Mr. Cy Greenidge, Office of Government-wide Policy, Office of Asset and Transportation Management, at 202–219–2349, or by email at *travelpolicy@gsa.gov.* Please cite Notice of FTR Bulletin 19–03.

**SUPPLEMENTARY INFORMATION:** GSA is required by statute to set the mileage reimbursement rate for privately owned automobiles (POA) as the single standard mileage rate established by the Internal Revenue Service (IRS). In addition, the IRS mileage rate for medical or moving purposes is used to determine the POA rate when a Government-furnished automobile is authorized. This IRS rate also establishes the standard mileage rate for moving purposes as it pertains to official relocation. Finally, GSA's annual privately owned airplane and motorcycle mileage reimbursement rate reviews have resulted in new CY 2019 rates. GSA conducts independent airplane and motorcycle studies that evaluate various factors, such as the cost of fuel, the depreciation of the original vehicle costs, maintenance and insurance, and/or by applying consumer price index data. FTR Bulletin 19–03 establishes and announces the new CY 2019 POV mileage reimbursement rates for official temporary duty and relocation travel ($0.58 per mile for

POAs, $0.20 per mile for POAs when a Government furnished automobile is authorized, $1.26 per mile for privately owned airplanes, $0.55 per mile for privately owned motorcycles, and $0.20 per mile for moving purposes), pursuant to the process discussed above. This notice of subject bulletin is the only notification to agencies of revisions to the POV mileage rates for official travel, and relocation, other than the changes posted on GSA's website.

GSA posts the POV mileage reimbursement rates, formerly published in 41 CFR Chapter 301, solely on the internet at *www.gsa.gov/mileage.* Also posted on this site is the standard mileage rate for moving purposes. This process, implemented in FTR Amendment 2010–07, 75 FR 72965 (November 29, 2010), FTR Amendment 2007–03, 72 FR 35187 (June 27, 2007), and FTR Amendment 2007–06, 72 FR 70234 (December 11, 2007), ensures more timely updates regarding mileage reimbursement rates by GSA for federal employees who are on official travel or relocating. Notices published periodically in the **Federal Register**, such as this one, and the changes posted on the GSA website, now constitute the only notification to federal agencies of revisions to the POV mileage reimbursement rates and the standard mileage reimbursement rate for moving purposes.

Dated: December 18, 2018.

**Jessica Salmoiraghi,**

*Associate Administrator, Office of Government-wide Policy.*

[FR Doc. 2018–27789 Filed 12–21–18; 8:45 am]

**BILLING CODE 6820–14–P**

## GENERAL SERVICES ADMINISTRATION

**[OMB Control No. 3090–0308; Docket No. 2018–0001; Sequence No. 20]**

## General Services Administration Acquisition Regulation (GSAR); Construction Contract Administration

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

**ACTION:** Notice of request for comments regarding a new OMB information clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve a new information collection requirement regarding OMB Control No. 3090–0308, Construction Contract Administration.

**DATES:** Submit comments on or before January 25, 2019.

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for GSA, Room 10236, NEOB, Washington, DC 20503. Additionally submit a copy to GSA by any of the following methods:

- Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 3090–0308, Construction Contract Administration''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–0308, Construction Contract Administration'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405, ATTN: Ms. Mandell/IC 3090–0308, Construction Contract Administration.

*Instructions:* Please submit comments only and cite Information Collection 3090–0308, Construction Contract Administration, in all correspondence related to this collection. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Mr. Tony Hubbard, General Services Acquisition Policy Division, GSA, by phone at 202–357–5810 or by email at *tony.hubbard@gsa.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. Purpose

A request for public comments was published in the **Federal Register** at 81 FR 62434 on September 9, 2016, as part of a proposed rule under GSAR Case 2015–G503. No comments were received on the information collection.

### B. Annual Reporting Burden

The Paperwork Reduction Act (44 U.S.C. Chapter 35) does apply because the final rule contains six clauses and provisions with information collection requirements. However, five of these clauses and provisions do not impose additional information collection requirements to the paperwork burden previously approved under existing OMB Control Numbers. Only one of the six involves information collection requirements that have not previously been approved by OMB.

The new clause at GSAR 552.236–72 Submittals involves an existing information collection requirement that has never been previously approved by OMB. The information collected is used by PBS to evaluate a contractor's proposals, negotiate contract modifications, evaluate a contractor's progress, and review payment requests during contract administration. The clause was previously GSAR 552.236–78 Shop Drawings, Coordination Drawings, and Schedules. The clause is simplified, including removing the requirement for a specific number of prints and copies of various submittals. This simplification will ease the compliance burden for the contractor during contract administration from the current state.

Public reporting burden for GSAR 552.236–72 Submittals is estimated to average 8 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

*Respondents:* 3,758.

*Responses per respondent:* 1.

*Total annual responses:* 3,758.

*Preparation hours per response:* 8.

*Total response burden hours:* 30,064.

### C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405, telephone 202–501–4755. Please cite OMB Control Number 3090–0308,

Construction Contract Administration, in all correspondence.

**Jeffrey A. Koses,**

*Director, Office of Acquisition Policy, Office of Government-wide Policy.*

[FR Doc. 2018–27885 Filed 12–21–18; 8:45 am]

**BILLING CODE 6820–61–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Toxic Substance and Disease Registry

**[60Day–19–19GW; Docket No. ATSDR–2018–0010]**

### Proposed Data Collection Submitted for Public Comment and Recommendations

**AGENCY:** Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (HHS).

**ACTION:** Notice with comment period.

**SUMMARY:** The Agency for Toxic Substances and Disease Registry (ATSDR), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on ''Exposure Characterization and Measurements during Activities Conducted on Synthetic Turf Fields with Tire Crumb Rubber Infill.'' The purpose of the proposed study is to evaluate and characterize human exposure potential to select chemicals during play on synthetic turf fields with tire crumb rubber infill.

**DATES:** ATSDR must receive written comments on or before February 25, 2019.

**ADDRESSES:** You may submit comments, identified by Docket No. ATSDR–2018–0010 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

*Instructions:* All submissions received must include the agency name and Docket Number. ATSDR will post, without change, all relevant comments to *Regulations.gov*.

Please note: Submit all comments through the Federal eRulemaking portal (regulations.gov) or by U.S. mail to the address listed above.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffery M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

5. Assess information collection costs.

**Proposed Project**

Exposure Characterization and Measurements during Activities Conducted on Synthetic Turf Fields with Tire Crumb Rubber Infill—New—Agency for Toxic Substances and Disease Registry (ATSDR).

*Background and Brief Description*

Currently in the United States, there are more than 12,000 synthetic turf fields in use. While the Synthetic Turf Council has set guidelines for the content of crumb rubber used as infill in synthetic turf fields, manufacturing processes result in differences among types of crumb rubber. Additionally, the chemical composition may vary highly between different processes and source materials and may vary even within granules from the same origin.

The research protocol, Collections Related to Synthetic Turf Fields with Crumb Rubber Infill, has been conducted previously under two ICRs: Activity 1 under OMB Control No. 0923–0054 (expiration date 01/31/2017) and Activities 2 and 3 under OMB Control No. 0923–0058 (expiration date 08/13/2018). Activity 1 aimed to collect tire crumb rubber samples from 40 synthetic turf fields across the US and from nine manufacturing facilities. Samples collection for Activity 1 was completed in November 2016. Activities 2 and 3 aim to evaluate and characterize the human exposure potential to constituents in crumb rubber infill among a convenience sample of 60 field users (Activity 2) and to collect biological specimens (blood and urine) from 45 participants (Activity 3). During Activities 2 and 3, ATSDR and USEPA recruited and sampled a small number of field users in scheduled activities at fields that participated in Activity 1. However, the pilot scale study was limited in sample size and scope.

The agencies are requesting a new information collection request (ICR) for a two-year PRA clearance to conduct a supplemental data collection, now titled ''Exposure Characterization and Measurements during Activities Conducted on Synthetic Turf Fields with Tire Crumb Rubber Infill''. Preliminary results from the pilot scale study indicate the need for further investigation for a select group of chemicals to which field users may potentially be exposed. The proposed study will be a larger-scale assessment of exposure potential for individuals who use/play on synthetic turf fields with tire crumb rubber infill that will address key limitations; specifically, the sample size limitations in the pilot scale study and the lack of a comparison population. The study will include persons who use synthetic turf fields with crumb rubber infill (*e.g.,* field users) and who routinely perform activities that would result in a high level of contact to crumb rubber. The study will also include persons who play on natural grass fields. Persons

who play on natural grass fields will provide a comparison group and allow for evaluation of exposures to constituents in tire crumb rubber among synthetic turf field users.

The respondents will be administered a detailed questionnaire on activity patterns on synthetic turf with crumb rubber infill. This instrument will be used to characterize exposure scenarios, including the nature and duration of potential exposures. Additionally, the questionnaire will include queries on potential external sources, such as dietary sources, to select chemicals. We will collect urine samples pre- and post-activity. The urine samples will be analyzed for polyaromatic hydrocarbons and also archived for future analysis in the event of new analytical methods for potential chemicals of interest.

The research study will screen a total of 220 participants for eligibility. The target sample size for synthetic turf field users is 150 and 50 for the natural grass field users. The total burden hours for the research study is 184 hours among all of the 220 respondents. There is no cost to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hrs.) | Total burden (in hrs.) |
|---|---|---|---|---|---|
| Adult/Adolescent Field Users | Eligibility Screening Form | 110 | 1 | 5/60 | 9 |
| | Adult and Adolescent Questionnaire | 100 | 1 | 30/60 | 50 |
| | Exposure Measurement Form | 100 | 1 | 20/60 | 33 |
| Parents/Guardians of Youth/Child Field Users. | Eligibility Screening Form | 110 | 1 | 5/60 | 9 |
| | Youth and Child Questionnaire | 100 | 1 | 30/60 | 50 |
| Youth/Child Field Users | Exposure Measurement Form | 100 | 1 | 20/60 | 33 |
| Total | | | | | 184 |

**Jeffrey M. Zirger,**

*Acting Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.*

[FR Doc. 2018–27854 Filed 12–21–18; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—DP19–004, Improving Detection and Management of Glaucoma and Other Eye Diseases Among High Risk Populations.

*Dates:* March 26, 2019.

*Times:* 10:00 a.m.–6:30 p.m., EDT.

*Place:* Teleconference.

*Agenda:* To review and evaluate grant applications.

*For Further Information Contact:* Jaya Raman Ph.D., Scientific Review Officer, CDC, 4770 Buford Highway, Mailstop F80, Atlanta, Georgia 30341, Telephone: (770) 488–6511, *kva5@cdc.gov*.

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

**Sherri Berger,**

*Chief Operating Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2018–27894 Filed 12–21–18; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)–PS19–001, The GAIN (Greater Access and Impact with NAT).

*Study:* Improving HIV Diagnosis, Linkage to Care, and Prevention Services with HIV Point-of-Care Nucleic Acid Tests (NATs).

*Date:* April 11, 2019.

*Time:* 10:00 a.m.–5:00 p.m., (EDT).

*Place:* Teleconference, Centers for Disease Control and Prevention, Room 1080, 8 Corporate Square Blvd., Atlanta, GA 30329.

*Agenda:* To review and evaluate grant applications.

*For Further Information Contact:* Gregory Anderson, M.S., M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road, NE, Mailstop E60, Atlanta, Georgia 30333, (404) 718–8833, *gca5@cdc.gov.*

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and

Prevention and the Agency for Toxic Substances and Disease Registry.

**Sherri Berger,**

*Chief Operating Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2018–27895 Filed 12–21–18; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)-PS19–003, Using Real-time Prescription and Insurance Claims Data to Support the HIV Care Continuum.

*Dates:* March 6–7, 2019.

*Time:* 10:00 a.m.–5:00 p.m., (EDT).

*Place:* Teleconference, Centers for Disease Control and Prevention, Room 1080, 8 Corporate Square Blvd., Atlanta, GA 30329.

*Agenda:* To review and evaluate grant applications.

*For Further Information Contact:* Gregory Anderson, M.S., M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road NE, Mailstop E60, Atlanta, Georgia 30333, (404) 718–8833, *gca5@cdc.gov.*

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

**Sherri Berger,**

*Chief Operating Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2018–27896 Filed 12–21–18; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–19–18ANU]**

### Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled Communities Organized To Prevent Arboviruses: Assessment of Knowledge, Attitudes, and Vector Control Practices and Sero-Prevalence and Incidence of Arboviral Infection in Ponce, Puerto Rico (COPA Study) to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on July 20, 2018 to obtain comments from the public and affected agencies. CDC did not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

**Proposed Project**

Communities Organized To Prevent Arboviruses: Assessment of Knowledge, Attitudes, and Vector Control Practices and Sero-Prevalence and Incidence of Arboviral Infection in Ponce, Puerto Rico (COPA)—Existing Collection in use without an OMB Control Number—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Recent years have seen the emergence of two epidemic arthropod-borne viruses (arboviruses) that are transmitted by Aedes aegypti mosquitoes. Chikungunya virus was introduced into the Caribbean in late 2013, and caused large epidemics of fever with severe joint pain throughout the Caribbean and Americas in 2014. Zika virus was first detected in the Americas in Brazil in 2014, spread throughout the Americas, and has since been associated with devastating birth defects, Guillain-Barre syndrome, and is the first arbovirus that can also be transmitted through sexual contact. In addition, the four viruses that cause dengue were introduced to the Americas over the past several hundred years and have since become endemic, and yellow fever virus has recently caused large outbreaks in Brazil and there is risk of importation to other counties in the Americas.

In all of these cases, the public health response to the spread of these arboviruses throughout the tropics, where their mosquito vectors thrive, has been hampered by a lack of sustainable and effective interventions to prevent infection with any of these arboviruses at the community level. Additionally, the rapid speed with which new arboviruses spread does not often provide the time needed to plan and implement community-level interventions to decrease disease transmission. Although several candidate vaccines for chikungunya and Zika are currently in clinical development, none are yet available. A dengue vaccine has been licensed in several countries, but initial analyses have suggested that decades will be needed before it results in reduction in transmission of dengue virus.

In recent years, community based strategies for vector control have been

studied and implemented in different countries as an alternative to vertical strategies (*e.g.* insecticide spraying delivered by government agencies). A new intervention has recently been demonstrated to reduce the rates of infection with common tropical arboviruses transmitted by Ae. aegypti mosquitos (*i.e.,* dengue, chikungunya, and Zika viruses). The Camino Verde approach utilizes community mobilization to motivate clean-up campaigns to reduce rates of dengue virus infections in Nicaragua and Mexico. However, the intervention occurred in small communities, and has not been evaluated in an urban setting. There is therefore a need to determine the effectiveness of such types of interventions in relatively large, urban communities.

Research suggests that vector control programs that have substantial community participation can have significant and lasting impacts on vector density, and are more cost-effective than vertically structured programs. In addition, these types of programs have been reported to readily integrate with other health or development programs, promote an enduring sense of pride in the home and community, and make use of politically viable vector control strategies.

The purpose of this study is to establish longitudinal follow-up of a community cohort and evaluate the impact of vector control interventions in 14 communities in southern Puerto Rico. The study investigators have prior experience working in these communities; however, there is minimal available information regarding the prevalence or incidence of infection with tropical arboviruses, density of Ae. aegypti mosquitos, or community members' knowledge, attitudes, and practices regarding behaviors intended to avoid mosquitos. Such information will be needed to inform decision-making regarding the location, design, and content of interventions to be implemented and evaluated to reduce the burden of these pathogens.

The questionnaire section will vary depending on age and day of birth of each participant. A questionnaire with general household questions will be administered to one household representative in each home with one or more participants. This representative should be 21 years or older, or an emancipated minor. If all eligible household members are unemancipated minors, a household member over the age of 50 may act as household representative and complete this section of the survey only. A questionnaire on socio-demographic information will be administered to all participants. The assessment of knowledge, attitudes, and practices questionnaire will be administered to all participants seven years and older with questions adapted for ages: 7–11 (younger child), 12–13 (older child), 14–50 (adult). A vector control tools questionnaire will be administered to all participants 21 years or older born on an odd numbered day of the month. The questionnaire will be administered after written consent and verbal assent (when appropriate) from those present in the household at the time of the visit. The knowledge, attitudes, and practices questionnaire will be focused on vector control, healthcare-seeking behavior, and disease occurrence. We will collect demographic information (*e.g.,* age, sex, duration of time residing in Puerto Rico), travel history, and information on recent illnesses from all participants via household (and individual) questionnaires. Parents or guardians will serve as proxy respondents for children aged <7 years. The questionnaires will be administered after written consent and verbal assent (when appropriate) from those present in the household at the time of the visit. GPS coordinates will also be collected for each household visited to later assess for potential clustering of arboviral infections within communities. We will ask participants if they have been ill with arbovirus-like illness (*i.e.,* fever, rash, joint pain, and conjunctivitis) in the past year. If so, we will collect details on the symptoms experienced during their illness. The questionnaires will be administered to all randomly selected residents of the 14 communities in Ponce. At the time of the questionnaire administration, ~15 mL of blood will be collected to conduct serological testing of arboviruses for a sero-survey. The sero-survey and socio-demographic questionnaire will be repeated every 12 months after the initial assessment, up to a period of five years. OMB clearance will be extended after three years. This project will allow the evaluation of a community based approach for vector control strategies in Ponce, Puerto Rico. The information obtained will inform decision making regarding the location, design, and content of future interventions to be implemented and evaluated to reduce the burden of arboviral disease in Puerto Rico. Incidence and prevalence of arboviral disease will be estimated to guide control programs development and fill the current knowledge gaps.

There is no burden on respondents other than the time needed to participate. Estimated annual burden is 2,416 hours. Authorizing legislation comes from Section 301 of the Public Health Service Act.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hours) |
|---|---|---|---|---|
| Ponce residents | Household representative questionnaire | 2,506 | 1 | 10/60 |
| | Socio-demographic questionnaire | 2,996 | 1 | 15/60 |
| | Knowledge, attitudes, and practices individual questionnaire. | 2,996 | 1 | 15/60 |
| | Vector control tools questionnaire | 600 | 1 | 25/60 |
| | Specimen collection | 2,996 | 1 | 5/60 |

**Jeffrey M. Zirger,**

*Acting Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.*

[FR Doc. 2018–27852 Filed 12–21–18; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–19–0612; Docket No. CDC–2018–0111]**

### Proposed Data Collection Submitted for Public Comment and Recommendations

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Notice with comment period.

**SUMMARY:** The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project on the Well-Integrated Screening and Evaluation for Women Across the Nation (WISEWOMAN) program. The WISEWOMAN program is designed to prevent, detect, and control, hypertension and other cardiovascular disease risk factors through healthy behavior support services, which are tailored for individual and group behavior change.

**DATES:** CDC must receive written comments on or before February 25, 2019.

**ADDRESSES:** You may submit comments, identified by Docket No. CDC–2018–0111 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

*Instructions:* All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov.*

*Please note: Submit all comments through the Federal eRulemaking portal (regulations.gov) or by U.S. mail to the address listed above.*

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed reinstatement of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.
5. Assess information collection costs.

**Proposed Project**

Well-Integrated Screening and Evaluation for Women Across the Nation (WISEWOMAN) (OMB No. 0920–0612, Exp. 12/31/2018)—Reinstatement—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

The WISEWOMAN program sponsored by the CDC, provides services to low income, uninsured, or underinsured women aged 40–64. The WISEWOMAN program is designed to prevent, detect, and control hypertension and other CVD risk factors through healthy behavior support services which are tailored for individual and group behavior change. The WISEWOMAN program provides services to women who are jointly enrolled in the National Breast and Cervical Cancer Early Detection Program (NBCCEDP), which is also administered by CDC.

The WISEWOMAN program is administered by state health departments and tribal programs. In 2018, new five-year cooperative agreements will be awarded under Funding Opportunity Announcement DP18–1816, subject to the availability of funds. CDC collects two types of information from WISEWOMAN awardees. The WISEWOMAN awardee submits an electronic data file to CDC twice per year. The Minimum Data Elements (MDE) file contains data using a unique identifier with client-level information about cardiovascular disease risk factors, types of healthy behavior support services for participants served by the program. The estimated burden per response for the MDE file is 24 hours. The Annual Progress Report provides a narrative summary of each awardee's objectives and the activities undertaken to meet program goals. The estimated burden per response is 16 hours.

There are no changes to the information collected. CDC will continue to use the information collected from WISEWOMAN awardees to support program monitoring and improvement activities, evaluation, and assessment of program outcomes. The overall program evaluation helps to demonstrate program accomplishments and strengthen the evidence for strategy implementation for improved engagement of underserved populations. It can also determine whether the identified strategies and associated activities can be implemented at various levels within a state or tribal organization. Evaluation is also designed to demonstrate how WISEWOMAN can obtain cardiovascular disease health outcome data on at-risk populations, promote public education about cardiovascular disease risk-factors, and improve the availability of healthy behavior support services for under-served women.

OMB approval is requested for three years. Participation in this information collection is required as a condition of cooperative agreement funding. There are no costs to respondents other than their time. The total annualized burden hours are 1,344.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hrs.) | Total burden (in hrs.) |
|---|---|---|---|---|---|
| WISEWOMAN Awardees | Screening and Assessment and Lifestyle Program MDEs. | 21 | 2 | 24 | 1,008 |
| | Annual Progress Report | 21 | 1 | 16 | 336 |
| Total | | | | | 1,344 |

**Jeffrey M. Zirger,**

*Acting Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.*

[FR Doc. 2018–27855 Filed 12–21–18; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CK19–002, Quantifying Contact Rates and Mixing Patterns in Workers in Non-Healthcare Work Settings in the United States and CK19–004, Study to Assess the Risk of Blood Borne Transmission of Classic Forms of Creutzfeldt-Jakob Disease (CJD).

*Date:* May 7, 2019.

*Time:* 10:00 a.m.–5:00 p.m., (EDT).

*Place:* Teleconference.

*Agenda:* To review and evaluate grant applications.

*For Further Information Contact:* Gregory Anderson, M.S., M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road NE, Mailstop E60, Atlanta, Georgia 30333, (404) 718–8833, *gca5@cdc.gov.*

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

**Sherri Berger,**

*Chief Operating Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2018–27893 Filed 12–21–18; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–19–0600]**

### Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled *CDC Model Performance Evaluation Program (MPEP) for Mycobacterium tuberculosis Drug Susceptibility Testing* to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on August 28, 2018 to obtain comments from the public and affected agencies. CDC received one non-substantive anonymous comment related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

**Proposed Project**

CDC Model Performance Evaluation Program (MPEP) for Mycobacterium tuberculosis Drug Susceptibility Testing (OMB Control No.0920–0600, Expires 3/31/2019)—Revision—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP) Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

As part of the continuing effort to support domestic public health

objectives for treatment of tuberculosis (TB), prevention of multi-drug resistance, and surveillance programs, CDC is requesting approval from the Office of Management and Budget to continue information collection from participants in the Model Performance Evaluation Program for Mycobacterium tuberculosis Susceptibility Testing. This revision request includes (a) modification of the Participant Biosafety Compliance Letter of Agreement to contain language to ensure that participants understand and comply with biosafety guidelines using quality management system practices; (b) modification of Instructions to Participants Letter to include detailed instructions for online data entry of DST results; (c) modification of MPEP Mycobacterium tuberculosis Results Worksheet to include fields for entering methods used for conventional and molecular DST; (d)addition of a MPEP Mycobacterium tuberculosis Minimum Inhibitory Concentration (MIC) Results form for laboratories performing this procedure to enter results manually and submit by email to *TBMPEP@cdc.gov;* and (e) reduction in request for burden hours from 156 hours to 129 hours due to fewer laboratories participating in the program compared to the previous submission request.

While the overall number of cases of TB in the U.S. has decreased, rates still remain high among foreign-born persons, prisoners, homeless populations, and individuals infected with HIV in major metropolitan areas. To reach the goal of eliminating TB, the Model Performance Evaluation Program for Mycobacterium tuberculosis Drug Susceptibility Testing is used to monitor and evaluate performance and practices among national laboratories performing M. tuberculosis susceptibility testing. Participation in this program is one way laboratories can ensure high-quality laboratory testing, resulting in accurate and reliable testing results.

Revision of this information collection provides CDC with an evaluation program to assess the ability of the laboratories to test for drug resistant M. tuberculosis strains, laboratories also have a self-assessment tool to aid in optimizing their skills in susceptibility testing. The information obtained from the laboratories on susceptibility practices and procedures is used to establish variables related to good performance, assessing training needs, and aid with the development of practice standards.

Participants in this program include domestic clinical and public health laboratories. Data collection from laboratory participants occurs twice per year. The data collected in this program will include the susceptibility test results of primary and secondary drugs, drug concentrations, and test methods performed by laboratories on a set of performance evaluation (PE) samples. The PE samples are sent to participants twice a year. Participants also report demographic data such as laboratory type and the number of tests performed annually.

There is no cost to respondents to participate other than their time. Total burden hours is 129.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hours) |
|---|---|---|---|---|
| Domestic Laboratories | Participant Biosafety Compliance Letter of Agreement. | 80 | 1 | 5/60 |
| | MPEP Mycobacterium tuberculosis Results Worksheet. | 80 | 2 | 30/60 |
| | Online Survey Instrument | 80 | 2 | 15/60 |
| | Minimum Inhibitory Concentration (MIC) Results Form. | 4 | 2 | 15/60 |

**Jeffrey M. Zirger,**

*Acting Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.*

[FR Doc. 2018–27853 Filed 12–21–18; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–4188–PN]**

### Medicare Program; Request for Renewal of Deeming Authority of the Utilization Review Accreditation Commission (URAC) for Health Maintenance Organizations and Preferred Provider Organizations

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

**ACTION:** Proposed notice.

**SUMMARY:** This proposed notice announces that CMS is considering granting approval of the Utilization Review Accreditation Commission's (URAC) renewal application for Medicare Advantage ''deeming authority'' of Health Maintenance Organizations and Preferred Provider Organizations. This new 6-year term of approval would begin on the date of publication of the final notice. This notice also announces a 30-day period for the public to submit comments on CMS' renewal of the application.

**DATES:** To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. January 25, 2019.

**ADDRESSES:** In commenting, refer to file code CMS–4188–PN. 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 regulation 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–4188–PN, P.O. Box 8016, Baltimore, MD 21244–8016.

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–4188–PN,

Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

**FOR FURTHER INFORMATION CONTACT:** Greg McDonald, (410) 786–8941; or Nick Proy, (410) 786–8407.

**SUPPLEMENTARY INFORMATION:**

*Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We 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

Under the Medicare program, eligible beneficiaries may receive covered services through a Medicare Advantage (MA) organization that contracts with CMS. The regulations specifying the Medicare requirements that must be met for a Medicare Advantage Organization (MAO) to enter into a contract with CMS are located at 42 CFR part 422. These regulations implement Part C of Title XVIII of the Social Security Act (the Act), which specifies the services that an MAO must provide and the requirements that the organization must meet to be an MA contractor. Other relevant sections of the Act are Parts A and B of Title XVIII and Part A of Title XI pertaining to the provision of services by Medicare certified providers and suppliers. Generally, for an entity to be an MA organization, the organization must be licensed by the state as a risk bearing organization, as set forth in 42 CFR part 422.

As a method of assuring compliance with certain Medicare requirements, an MA organization may choose to become accredited by a CMS approved accrediting organization (AO). By virtue of its accreditation by a CMS-approved AO, the MA organization may be ''deemed'' compliant in one or more requirements set forth in section 1852(e)(4)(B) of the Act. For CMS to recognize an AO's accreditation program as establishing an MA plan's compliance with our requirements, the AO must prove to CMS that their standards are at least as stringent as Medicare requirements for MA organizations. MA organizations that are licensed as health maintenance organizations (HMOs) or preferred provider organizations (PPOs) and are accredited by an approved accrediting organization may receive, at their request, ''deemed'' status for CMS requirements for the deemable areas. At this time, recognition of accreditation does not include the Part D areas of review set out at 42 CFR 423.165(b). AOs that apply for MA deeming authority are generally recognized by the health care industry as entities that accredit HMOs and PPOs. As we specify at § 422.157(b)(2)(ii) the term for which an AO may be approved by CMS may not exceed 6 years. For continuing approval, the AO must apply to CMS to renew their ''deeming authority'' for a subsequent approval period.

The Utilization Review Accreditation Commission (URAC) was approved as a CMS approved accreditation organization for MA deeming of HMOs on May 26, 2012, and that term lapsed on May 25, 2018 prior to our decision on its renewal application. On October 13, 2017 URAC submitted its initial application to renew its deeming authority. On that same date, URAC submitted materials requested by CMS that included information intended to address the requirements set out at § 422.158(a) through (b) that are prerequisites for receiving approval of its accreditation program from CMS. CMS subsequently requested that additional materials, including revisions, be submitted by URAC to satisfy these requirements.

## II. Provisions of the Proposed Notice

The purpose of this notice is to notify the public of URAC's request to renew its Medicare Advantage deeming authority for HMOs and PPOs. URAC submitted all the necessary materials (including its standards and monitoring protocol) to enable us to make a determination concerning its request for approval as an accreditation organization for CMS. This renewal application was determined to be complete on November 8, 2018. Under section 1852(e)(4) of the Act and § 422.158 (federal review of accrediting organizations), our review and evaluation of URAC will be conducted as discussed below.

### *A. Components of the Review Process*

The review of URAC's renewal application for approval of MA deeming authority includes, but is not limited to, the following components:

- The types of MA plans that it would review as part of its accreditation process.
- A detailed comparison of the AO's accreditation requirements and standards with the Medicare requirements (for example, a crosswalk) in the following 5 areas: Quality Improvement, Anti-Discrimination, Confidentiality and Accuracy of Enrollee Records, Information on Advance Directives, and Provider Participation Rules.
- Detailed information about the organization's survey process, including—

++ Frequency of surveys and whether surveys are announced or unannounced.

++ Copies of survey forms, and guidelines and instructions to surveyors.

++ Descriptions of—

—The survey review process and the accreditation status decision making process;

—The procedures used to notify accredited MA organizations of deficiencies and to monitor the correction of those deficiencies; and

—The procedures used to enforce compliance with accreditation requirements.

- Detailed information about the individuals who perform surveys for the accreditation organization, including—

++ The size and composition of accreditation survey teams for each type of plan reviewed as part of the accreditation process;

++ The education and experience requirements surveyors must meet;

++ The content and frequency of the in-service training provided to survey personnel;

++ The evaluation systems used to monitor the performance of individual surveyors and survey teams; and

++ The organization's policies and practice for the participation, in surveys or in the accreditation decision process, by an individual who is professionally or financially affiliated with the entity being surveyed.

- A description of the organization's data management and analysis system for the surveys and accreditation decisions, including the kinds of reports, tables, and other displays generated by that system.
- A description of the organization's procedures for responding to and investigating complaints against accredited organizations, including policies and procedures regarding coordination of these activities with appropriate licensing bodies and ombudsmen programs.
- A description of the organization's policies and procedures for the withholding or removal of accreditation for failure to meet the accreditation organization's standards or requirements, and other actions the organization takes in response to noncompliance with its standards and requirements.
- A description of all types (for example, full, partial) and categories (for

example, provisional, conditional, temporary) of accreditation offered by the organization, the duration of each type and category of accreditation and a statement identifying the types and categories that would serve as a basis for accreditation if CMS approves the accreditation organization.

- A list of all currently accredited MA organizations and the type, category, and expiration date of the accreditation held by each of them.
- A list of all full and partial accreditation surveys scheduled to be performed by the accreditation organization.
- The name and address of each person with an ownership or control interest in the accreditation organization.
- CMS will also consider URAC's past performance in the deeming program and results of recent deeming validation reviews, or look-behind audits conducted as part of continuing federal oversight of the deeming program under § 422.157(d).

*B. Notice Upon Completion of Evaluation*

Upon completion of our evaluation, including evaluation of comments received as a result of this notice, we will publish a notice in the **Federal Register** announcing the result of our evaluation. Section 1852(e)(4)(C) of the Act provides a statutory timetable to ensure that our review of deeming applications is conducted in a timely manner. The Act provides us with 210 calendar days after the date of receipt of an application to complete our survey activities and application review process. At the end of the 210-day period, we must publish an approval or denial of the application in the **Federal Register**.

## III. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. 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. 3501 *et seq.*).

## IV. 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: December 14, 2018.

**Seema Verma,**

*Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 2018–27802 Filed 12–21–18; 8:45 am]

**BILLING CODE 4120–01–P**

---

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–7052–N]**

### Medicare & Medicaid Programs, and Other Program Initiatives, and Priorities; Meeting of the Advisory Panel on Outreach and Education (APOE), January 16, 2019

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

**ACTION:** Notice.

**SUMMARY:** This notice announces the next meeting of the Advisory Panel on Outreach and Education (APOE) (the Panel) in accordance with the Federal Advisory Committee Act. The Panel advises and makes recommendations to the Secretary of the U.S. Department of Health and Human Services (HHS) and the Administrator of the Centers for Medicare & Medicaid Services (CMS) on opportunities to enhance the effectiveness of consumer education strategies concerning CMS programs, initiatives, and priorities. This meeting is open to the public.

**DATES:**

*Meeting Date:* Wednesday, January 16, 2019 8:30 a.m. to 4:00 p.m. eastern standard time (e.s.t).

*Deadline for Meeting Registration, Presentations, Special Accommodations and Comments:* Wednesday, January 2, 2019, 5:00 p.m., e.s.t.

**ADDRESSES:** *Meeting Location:* U.S. Department of Health & Human Services, Hubert H. Humphrey Building, 200 Independence Avenue SW, Room 705A, Conference Room, Washington, DC 20201.

*Presentations and Written Comments:* Presentations and written comments should be submitted to: Lynne Johnson, Acting Designated Federal Official (DFO), Office of Communications, Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Mailstop S1–05–06, Baltimore, MD 21244–1850 or via email at *Lynne.Johnson@cms.hhs.gov.*

*Registration:* The meeting is open to the public, but attendance is limited to the space available. Persons wishing to attend this meeting must register at the website *https://www.regonline.com/apoe2019jan16meeting* or by contacting the Acting DFO listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, by the date listed in the **DATES** section of this notice. Individuals requiring sign language interpretation or other special accommodations should contact the Acting DFO at the address listed in the **ADDRESSES** section of this notice by the date listed in the **DATES** section of this notice.

**FOR FURTHER INFORMATION CONTACT:** Lynne Johnson, Acting Designated Federal Official, Office of Communications, CMS, 7500 Security Boulevard, Mail Stop S1–05–06, Baltimore, MD 21244–1850, 410–786–0090, email *Lynne.Johnson@cms.hhs.gov.* Additional information about the APOE is available on the internet at: *http://www.cms.gov/Regulations-and-guidance/Guidance/FACA/APOE.html.* Press inquiries are handled through the CMS Press Office at (202) 690–6145.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Advisory Panel for Outreach and Education (APOE) (the Panel) is governed by the provisions of Federal Advisory Committee Act (FACA) (Pub. L. 92–463), as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of federal advisory committees. The Panel is authorized by section 1114(f) of the Social Security Act (42 U.S.C. 1314(f)) and section 222 of the Public Health Service Act (42 U.S.C. 217a).

The Secretary of the U.S. Department of Health and Human Services (HHS) (the Secretary) signed the charter establishing the Citizen's Advisory Panel on Medicare Education [1] (the predecessor to the APOE) on January 21, 1999 (64 FR 7899, February 17, 1999) to advise and make recommendations to the Secretary and the Administrator of the Centers for Medicare & Medicaid Services (CMS) on the effective implementation of national Medicare education programs, including with respect to the Medicare+Choice (M+C) program added by the Balanced Budget Act of 1997 (Pub. L. 105–33).

The Medicare Modernization Act of 2003 (MMA) (Pub. L. 108–173) expanded the existing health plan options and benefits available under the

[1] We note that the Citizen's Advisory Panel on Medicare Education is also referred to as the Advisory Panel on Medicare Education (65 FR 4617). The name was updated in the Second Amended Charter approved on July 24, 2000.

M+C program and renamed it the Medicare Advantage (MA) program. We have had substantial responsibilities to provide information to Medicare beneficiaries about the range of health plan options available and better tools to evaluate these options. The successful MA program implementation required CMS to consider the views and policy input from a variety of private sector constituents and to develop a broad range of public-private partnerships.

In addition, Title I of the MMA authorized the Secretary and the Administrator of CMS (by delegation) to establish the Medicare prescription drug benefit. The drug benefit allows beneficiaries to obtain qualified prescription drug coverage. In order to effectively administer the MA program and the Medicare prescription drug benefit, we have substantial responsibilities to provide information to Medicare beneficiaries about the range of health plan options and benefits available, and to develop better tools to evaluate these plans and benefits.

The Affordable Care Act (Patient Protection and Affordable Care Act, Pub. L. 111–148, and Health Care and Education Reconciliation Act of 2010, Pub. L. 111–152) expanded the availability of other options for health care coverage and enacted a number of changes to Medicare as well as to Medicaid and the Children's Health Insurance Program (CHIP). Qualified individuals and qualified employers are now able to purchase private health insurance coverage through a competitive marketplace, called an Affordable Insurance Exchange (also called Health Insurance Marketplace℠, or Marketplace℠). In order to effectively implement and administer these changes, we must provide information to consumers, providers, and other stakeholders through education and outreach programs regarding how existing programs will change and the expanded range of health coverage options available, including private health insurance coverage through the Marketplace℠. The APOE (the Panel) allows us to consider a broad range of views and information from interested audiences in connection with this effort and to identify opportunities to enhance the effectiveness of education strategies concerning the Affordable Care Act.

The scope of this Panel also includes advising on issues pertaining to the education of providers and stakeholders with respect to the Affordable Care Act and certain provisions of the Health Information Technology for Economic and Clinical Health (HITECH) Act enacted as part of the American Recovery and Reinvestment Act of 2009 (ARRA).

On January 21, 2011, the Panel's charter was renewed and the Panel was renamed the Advisory Panel for Outreach and Education. The Panel's charter was most recently renewed on January 19, 2017, and will terminate on January 19, 2019 unless renewed by appropriate action.

Under the current charter, the APOE will advise the Secretary and the Administrator on optimal strategies for the following:

- Developing and implementing education and outreach programs for individuals enrolled in, or eligible for, Medicare, Medicaid, and the Children's Health Insurance Program (CHIP), or coverage available through the Health Insurance Marketplace℠, and other CMS programs.
- Enhancing the federal government's effectiveness in informing Health Insurance Marketplace℠, Medicare, Medicaid, and CHIP consumers, issuers, providers, and stakeholders, through education and outreach programs, on issues regarding these programs, including the appropriate use of public-private partnerships to leverage the resources of the private sector in educating beneficiaries, providers, and stakeholders.
- Expanding outreach to vulnerable and underserved communities, including racial and ethnic minorities, in the context of Health Insurance Marketplace℠, Medicare, Medicaid, and CHIP education programs, and other CMS programs.
- Assembling and sharing an information base of ''best practices'' for helping consumers evaluate health coverage options.
- Building and leveraging existing community infrastructures for information, counseling, and assistance.
- Drawing the program link between outreach and education, promoting consumer understanding of health care coverage choices, and facilitating consumer selection/enrollment, which in turn support the overarching goal of improved access to quality care, including prevention services, envisioned under the Affordable Care Act.

The current members of the Panel are: Kellan Baker, Centennial Scholar, Department of Health Policy and Management, John Hopkins Bloomberg School of Public Health; Robert Blancato, President, Matz, Blancato & Associates; Dale Blasier, Professor of Orthopaedic Surgery, Department of Orthopaedics, Arkansas Children's Hospital; Deborah Britt, Executive Director of Patient Services, Piedmont Fayette Hospital; Deena Chisolm, Associate Professor of Pediatrics and Public Health, The Ohio State University College of Medicine, The Research Institute at Nationwide Children's Hospital; Robert Espinoza, Vice President of Policy, Paraprofessional Healthcare Institute; Louise Scherer Knight, Director, Harry J. Duffey Family Patient and Family Services Program, Johns Hopkins Sidney Kimmel Comprehensive Cancer Center; Roanne Osborne-Gaskin, M.D., Medical Director/Chief Medical Officer, MercyCare Health Plans; Cathy Phan, Business Development Coordinator, Asian American Health Coalition dba HOPE Clinic; Kamilah Pickett, Director, Community Health Compass; Alvia Siddiqi, Medical Director, Advocate Physician Partners, Carla Smith, Executive Vice President, Healthcare Information and Management Systems Society (HIMSS); Tobin Van Ostern, Co-Founder, Young Invincibles Advisors; and Paula Villescaz, Principal Consultant, Assembly Health Committee, California State Legislature.

## II. Provisions of This Notice

In accordance with section 10(a) of the FACA, this notice announces a meeting of the APOE. The agenda for the January 16, 2019 meeting will include the following:

- Welcome and listening session with CMS leadership
- Recap of the previous (September 26, 2018) meeting
- CMS programs, initiatives, and priorities
- An opportunity for public comment
- Meeting summary, review of recommendations, and next steps

Individuals or organizations that wish to make a 5-minute oral presentation on an agenda topic should submit a written copy of the oral presentation to the DFO at the address listed in the **ADDRESSES** section of this notice by the date listed in the **DATES** section of this notice. The number of oral presentations may be limited by the time available. Individuals not wishing to make an oral presentation may submit written comments to the DFO at the address listed in the **ADDRESSES** section of this notice by the date listed in the **DATES** section of this notice.

## III. Security, Building, and Parking Guidelines

The meeting is open to the public, but attendance is limited to the space available. Persons wishing to attend this meeting must register by contacting the DFO at the address listed in the

**ADDRESSES** section of this notice or by telephone at the number listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice by the date specified in the **DATES** section of this notice. This meeting will be held in a federal government building, the Hubert H. Humphrey (HHH) Building; therefore, federal security measures are applicable.

The REAL ID Act of 2005 (Pub. L. 109–13) establishes minimum standards for the issuance of state-issued driver's licenses and identification (ID) cards. It prohibits federal agencies from accepting an official driver's license or ID card from a state for any official purpose unless the Secretary of the Department of Homeland Security determines that the state meets these standards. Beginning October 2015, photo IDs (such as a valid driver's license) issued by a state or territory not in compliance with the Real ID Act will not be accepted as identification to enter federal buildings. Visitors from these states/territories will need to provide alternative proof of identification (such as a valid passport) to gain entrance into federal buildings. The current list of states from which a federal agency may accept driver's licenses for an official purpose is found at *http://www.dhs.gov/real-id-enforcement-brief.*

We recommend that confirmed registrants arrive reasonably early, but no earlier than 45 minutes prior to the start of the meeting, to allow additional time to clear security. Security measures include the following:

- Presentation of a government-issued photographic identification to the Federal Protective Service or Guard Service personnel.
- Inspection, via metal detector or other applicable means, of all persons entering the building. We note that all items brought into HHH Building, whether personal or for the purpose of presentation or to support a presentation, are subject to inspection. We cannot assume responsibility for coordinating the receipt, transfer, transport, storage, set up, safety, or timely arrival of any personal belongings or items used for presentation or to support a presentation.

Note: Individuals who are not registered in advance will not be permitted to enter the building and will be unable to attend the meeting.

## IV. Collection of Information

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. 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).

Dated: December 14, 2018.

**Seema Verma,**

*Administrator Centers for Medicare & Medicaid Services.*

[FR Doc. 2018–27804 Filed 12–21–18; 8:45 am]

**BILLING CODE 4120–01–P**

---

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Community Living

### Agency Information Collection Activities; Submission for OMB Review; Public Comment Request; Independent Living Services (ILS) Program Performance Report (PPR) (0985–0043)

**AGENCY:** Administration for Community Living (ACL), HHS.

**ACTION:** Notice.

**SUMMARY:** The Administration for Community Living is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under the Paperwork Reduction Act of 1995. This 30-Day notice collects comments on the information collection requirements related to Independent Living Services Program Performance Report (Proposed Extension with Changes of a Currently Approved Collection (ICR Rev)).

**DATES:** Comments on the information collection request must be submitted electronically by 11:59 p.m. (EST) or postmarked by February 25, 2019.

**ADDRESSES:** Submit written comments on the collection of information by:

(a) *email to: OIRA_submission@omb.eop.gov,* Attn: OMB Desk Officer for ACL; (b) fax to 202.395.5806, Attn: OMB Desk Officer for ACL; or (c) by mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

**FOR FURTHER INFORMATION CONTACT:** Peter Nye, Administration for Community Living, Washington, DC 20201, (202) 795–7606 or *peter.nye@acl.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, ACL has submitted the following proposed collection of information to OMB for review and clearance. The Act of 1973 requires three Independent Living program reports: (1) State Plan for Independent Living, (2) ILS PPR, and (3) Center for Independent Living (CIL) PPR. The ILS PPR and CIL PPR were previously combined into one submission. However, for the purposes of this data collection, the ILS PPR and CIL PPR are being submitted separately because they are separate collections of different information from different parties. Separating these PRA processes reduces confusion and increases the Independent Living Administration's (ILA) ability to identify issues specific to designated state entities (DSEs) and Statewide Independent Living Councils (SILCs). This request is for the ILS PPR, which is submitted annually by the SILC and DSE in every state that receives Subchapter B funds. The ILS PPRs are used by ACL to assess grantees' compliance with title VII of the Rehabilitation Act of 1973, as amended, with 45 CFR part 1329 of the Code of Federal Regulations, and with applicable provisions of the HHS Regulations at 45 CFR part 75. The ILS PPR serves as the primary basis for ACL's monitoring activities in fulfillment of its responsibilities under sections 706 and 722 of the Act. The PPR is also used by ACL to design CIL and SILC training and technical assistance programs authorized by section 721 of the Act. The data is also used to meet the requirements of GPRAMA regarding performance measures. 31 U.S.C. 1115 (2011).

The current version of the ILS PPR that ILA is requesting an extension for was approved by OMB, but will expire on December 31, 2018. ILA plans to substantively review the data collection and publish a revised ILS program data collection instrument before the expiration of the extension request.

The proposed data collection tools may be found on the ACL website for review at *https://www.acl.gov/about-acl/public-input.*

### Comments in Response to the 60-Day Federal Register Notice

A notice was published in the **Federal Register** on October 19, 2018 (Vol. 83, Number 2018–22751; pp. 53062–53063).

| Data collection form | Comment | ACL response |
|---|---|---|
| One commenter asked whether ACL intends for states to use the new ILS PPR for the report that will be due in January 2019. | ACL does not intend for states to use the new ILS PPR for the report that will be due in January 2019. | No change has been made. |
| One commenter asked whether ACL has an update on the publication of the revised CIL indicators. | ACL is updating the CIL indicators and expects to complete them by the extension's end. | No change has been made. |
| One commenter asked whether there are other email lists related to IL services policies or programs that ACL has that DSEs could benefit from. | ACL knows of no other email lists related to IL services policies or programs that DSEs could benefit from being added to; the commenter might benefit from information provided by ILRU, the training and technical-assistance provider. | No change has been made. |

The proposed form(s) may be found on the ACL website at *https://www.acl.gov/about-acl/public-input.*

**Estimated Program Burden**

ACL estimates the burden of this collection of information as follows: Fifty-six jurisdictions—specifically, the fifty states, Puerto Rico, the District of Columbia, and the outlying areas—will each complete ILS PPRs annually, and it will take an estimated thirty-five hours per jurisdiction per ILS PPR. The fifty-six jurisdictions will take an estimated 1,960 hours per year to complete ILS PPRs. This burden estimate is based on what DSEs and SILCs have told ILA about how long filling out ILS PPRs took in previous reporting years.

| Respondent/data collection activity | Number of respondents | Responses per respondent | Hours per response | Annual burden hours |
|---|---|---|---|---|
| SILCs and DSEs | 56 | 1 | 35 | 1,960 |

Dated: December 18, 2018.

**Mary Lazare,**

*Principal Deputy Administrator.*

[FR Doc. 2018–27900 Filed 12–21–18; 8:45 am]

**BILLING CODE 4154–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Community Living

### Agency Information Collection Activities; Proposed Collection; Public Comment Request; Inventory of Adult Protective Services Practices and Service Innovations

**AGENCY:** Administration for Community Living, HHS.

**ACTION:** Notice

**SUMMARY:** The Administration for Community Living (ACL) is announcing an opportunity for the public to comment on the proposed collection of certain information listed above. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish a notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection requirements relating to a new data collection (ICR New) effort titled ''Inventory of Adult Protective Services Practices and Service Innovations.''

**DATES:** Submit electronic comments on the collection of information by 11:59 p.m. (EST) or written comments postmarked by February 25, 2019.

**ADDRESSES:** Submit electronic comments on the collection of information to Stephanie Whittier Eliason at *stephanie.whittiereliason@acl.hhs.gov.* Submit written comments on the collection of information to: Administration for Community Living, Attention: Stephanie Whittier Eliason, 330 C St., SW, Washington, DC 20201.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Whittier Eliason at 202–795–7467 or *stephanie.whittiereliason@acl.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60- day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, ACL is publishing a notice of the proposed collection of information set forth in this document.

**Authority:**

The Elder Justice Act of 2009 requires the Secretary of the U.S. Department of Health and Human Services to carry out a number of activities related to adult protective services (APS) (42 U.S.C. 1397m–1), including developing and disseminating information on APS best practices and conducting research related to the provision of APS. Furthermore, the Elder Justice Coordinating Council included as its third recommendation for increasing federal involvement in addressing elder abuse, neglect, and exploitation: ''develop a national APS system based upon standardized data collection and a core set of service provision standards and best practices.''

**Background**

The Administration for Community Living (ACL) in the U.S. Department of Health and Human Services (HHS) plans to initiate an Inventory of Adult Protective Services Practices and Service Innovations (APS Practice Survey) during January and February of 2019. Under a contract with ACL, the National Adult Protective Services Technical Assistance Resource Center (APS TARC) is conducting a national program evaluation of APS programs. As part of this evaluation, the APS Practice Survey will identify barriers to meeting policy mandates and practice innovations and model programs that address such barriers and community-

identified needs. It also seeks to identify practice variations in the way APS programs serve older adults and adults with disabilities.

The results of the survey will serve to advance the field of APS and will be useful to many audiences. It will provide baseline information regarding the status of APS programs and services, and the resulting information will help states and territories compare their program characteristics with those of other states and territories. The survey will provide a context for other researchers examining APS programs. It will inform ACL's efforts to support the improvement of APS programs through activities such as innovation grants. Finally, it will inform the APS TARC team's efforts to develop resources to enhance APS programs around the country.

This survey has been developed to gather information on APS practices that is not available from other sources. As part of the National Adult Maltreatment Reporting System (NAMRS), ACL collects descriptive data on state and territory agency policies through the Agency Component of that data collection. Therefore, the proposed survey will not collect any background policy or data items. As part of the APS Program Evaluation, the APS TARC also conducted a detailed examination of state APS policies through development of individual state policy profiles. The profiles were based exclusively on extant information sources obtained without additional data requests from the states. Information on practices gathered in this survey will complement, but will not duplicate, these policy profiles.

Finally, the National Adult Protective Services Association (NAPSA) conducted a survey of State APS programs in 2012, and the National Association of State Units on Aging and Disability (NASUAD) fielded a survey in January 2018 intended to update findings from the NAPSA 2012 survey. NASUAD indicated that they intend to share the results with their members once the survey results are compiled, and indicated that they would share the results with the APS TARC. Since the survey replicates the original NAPSA survey, the questions in it are not focused on APS practice. As noted, a few topics in the original survey overlap with the proposed instrument, but the wording and focus of the few questions on similar topics are different. From this analysis, we conclude the proposed APS Practice Survey will yield vital information on APS practice not available from other sources.

**Proposed Collection Efforts**

The APS Practice Survey will collect state- and territory-specific practices for all aspects of APS casework practice, including staffing, intake, investigation, service planning and delivery, and quality assurance. Across these areas, the survey will collect information on practices such as community partnerships and use of assessment tools.

The APS Practice Survey will be administered online using SurveyMonkey or a similar commercial survey programming tool. The online survey will include data validation routines to minimize errors or unintentional omissions and will include appropriate skip patterns to reduce burden. Respondents will be state and territory APS agencies, including APS agencies in the District of Columbia, Puerto Rico, Guam, Northern Marianas Islands, Virgin Islands, and American Samoa. No personally identifiable information will be collected.

A pilot version of The APS Practice Survey was tested in nine (9) diverse states between July and September 2017. Following their pretest of the survey instrument, pilot respondents participated in focus groups in which they provided recommendations on data collection procedures, views on the availability of data being requested, and estimates of the burden to each state and territory for completion of the survey. It is assumed that nearly every state and territory will participate in the information collection and that time to develop a response will be similar to the experience of states during the pilot test. ACL has calculated the following burden estimates based on the results of the survey pilot test.

The proposed collection of information tool may be found at *https://www.acl.gov/node/790* under ''APS Evaluation.''

**Estimated Program Burden**

ACL estimates the annual burden associated with this collection of information as follows: 56 entities will complete the information requested one time per respondent, and it will take an average of 3.5 hours per respondent to complete the survey. This results in a total estimate of 196 burden hours.

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| APS Practice Survey | 56 | 1 | 3.5 | 196 |

With respect to the collection of information, ACL specifically requests comments on our burden estimates or any other aspect of this collection of information, including:

(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, including the validity of the methodology and assumptions used to determine burden estimates;

(c) ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Consideration will be given to comments and suggestions submitted within 60 days of this publication.

The proposed data collection tools may be found at *https://acl.gov/about-acl/public-input.*

Dated: December 17, 2018.

**Mary Lazare,**

*Principal Deputy Administrator.*

[FR Doc. 2018–27902 Filed 12–21–18; 8:45 am]

BILLING CODE 4154–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Community Living

### Agency Information Collection Activities; Submission for OMB Review; Public Comment Request; Centers for Independent Living Program Performance Report (0985–NEW)

**AGENCY:** Administration for Community Living (ACL), HHS.

**ACTION:** Notice.

**SUMMARY:** The Administration for Community Living (ACL) is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under section 506(c)(2)(A) of the Paperwork Reduction Act of 1995. This 30-Day notice collects comments on the information collection requirements related to Centers for Independent Living Program Performance Report (New Data Collection (ICR New)).

**DATES:** Comments on the information collection request must be submitted electronically by 11:59 p.m. (EST) or postmarked by January 25, 2019.

**ADDRESSES:** Submit written comments on the collection of information by:

(a) email to: *OIRA_submission@omb.eop.gov,* Attn: OMB Desk Officer for ACL;

(b) fax to 202.395.5806, Attn: OMB Desk Officer for ACL; or

(c) by mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

**FOR FURTHER INFORMATION CONTACT:** Peter Nye, Administration for Community Living, Washington, DC 20201, (202) 795–7606 or *peter.nye@acl.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, ACL has submitted the following proposed collection of information to OMB for review and clearance. The Act of 1973 requires three Independent Living program reports: (1) State Plan for Independent Living, (2) Independent Living Services (ILS) Program Performance Report (PPR), and (3) Centers for Independent Living (CIL) PPR. The ILS PPR and CIL PPR were previously combined into one submission. However, for the purposes of this data collection, the ILS PPR and CIL PPR are being submitted separately because they are separate collections of different information from different parties. This will result in a new OMB approval number for the CIL program. Separating these PRA processes reduces confusion and increases the Independent Living Administration's (ILA) ability to identify issues specific to DSEs and Statewide Independent Living Councils. This request is for the CIL PPR, which is submitted annually by all CILs receiving Subchapter C funds. The CIL PPRs are used by ACL to assess grantees' compliance with title VII of the Act, with 45 CFR part 1329 of the Code of Federal Regulations, and with applicable provisions of the HHS Regulations at 45 CFR part 75. The CIL PPR serves as the primary basis for ACL's monitoring activities in fulfillment of its responsibilities under sections 706 and 722 of the Act. The CIL PPR enables ACL to track performance outcomes and efficiency measures of the CIL programs with respect to the annual and long-term performance targets established in compliance with GPRA. The PPR is also used by ACL to design CIL and SILC training and technical assistance programs authorized by section 721 of the Act.

The current version of the CIL PPR that ILA is requesting an extension for was approved by OMB, but will expire on December 31, 2018. ILA plans to publish a revised CIL program data collection instrument before the expiration of the extension request.

### Comments in Response to the 60-Day Federal Register Notice

A notice was published in the **Federal Register** on October 19, 2018 (Vol. 83, Number 2018–22754; pp. 53064–53065).

We received a comment that applied to this notice, as indicated below.

| Data collection form | Comment | ACL Response |
|---|---|---|
| One commenter asked whether ACL has an update on the publication of the revised CIL indicators. | ACL has no update on the publication of the revised CIL indicators. | No change has been made. |

The proposed form(s) may be found on the ACL website at *https://www.acl.gov/about-acl/public-input.*

### Estimated Program Burden

ACL estimates the burden of this collection of information as follows: 353 Centers for Independent Living will each complete one CIL PPR annually, and it will take an estimated 35 hours per CIL for an estimated total of 12,355 hours. This burden estimate is based partly on ILA's estimates of how long CILs take to find the information that PPRs ask for and partly on what CILs have told ILA about how long CILs spend filling out PPRs.

TABLE 37—RANGE TO EFFECTS (METERS) FROM AIR GUNS FOR 1 PULSE

| Respondent/data collection activity | Number of respondents | Responses per respondent | Hours per response | Annual burden hours |
|---|---|---|---|---|
| Centers for Independent Living | 353 | 1 | 35 | 12,355 |
| Total | 353 | 1 | 35 | 12,355 |

Dated: December 18, 2018.

**Mary Lazare,**

*Principal Deputy Administrator.*

[FR Doc. 2018–27898 Filed 12–21–18; 8:45 am]

**BILLING CODE 4154–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2017–E–5040]**

### Determination of Regulatory Review Period for Purposes of Patent Extension; ADLYXIN

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) has determined the regulatory review period for ADLYXIN and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

**DATES:** Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by February 25, 2019. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 24, 2019. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 25, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 25, 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–2017–E–5040 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; ADLYXIN.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

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

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

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts

with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product, ADLYXIN (lixisenatide) indicated as an adjunct to diet and exercise to improve glycemic control in adults with type 2 diabetes mellitus. Subsequent to this approval, the USPTO received a patent term restoration application for ADLYXIN (U.S. Patent No. RE45313) from ZP Holding SPV K/S and the USPTO requested FDA's assistance in determining the patent's eligibility for patent term restoration. In a letter dated October 16, 2017, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of ADLYXIN represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

## II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for ADLYXIN is 5,500 days. Of this time, 5,133 days occurred during the testing phase of the regulatory review period, while 367 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* July 8, 2001. FDA has verified the applicant's claim that the date the investigational new drug application became effective was July 8, 2001.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b)of the FD&C Act:* July 27, 2015. FDA has verified the applicant's claim that the new drug application (NDA) for ADLYXIN (NDA 208471) was initially submitted on July 27, 2015.

3. *The date the application was approved:* July 27, 2016. FDA has verified the applicant's claim that NDA 208471 was approved on July 27, 2016.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,826 days of patent term extension.

## III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see DATES), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: December 18, 2018.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2018–27805 Filed 12–21–18; 8:45 am]

**BILLING CODE 4164–01–P**

---

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2018–N–4428]**

### Agency Information Collection Activities; Proposed Collection; Comment Request; Medicated Feed Mill License Application

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the medicated feed mill licensing system.

**DATES:** Submit either electronic or written comments on the collection of information by February 25, 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 25, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 25, 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–4428 for ''Medicated Feed Mill License Application.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

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

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

**FOR FURTHER INFORMATION CONTACT:** Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10 a.m.–12 p.m., 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Medicated Feed Mill License Application—21 CFR Part 515—OMB Control Number 0910–0337—Extension**

Feed manufacturers that seek to manufacture feed using Category II, Type A medicated articles or manufacture certain liquid and free-choice feed, using Category I, Type A medicated articles that must follow proprietary formulas or specifications are required to obtain a facility license under section 512 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360b). Our regulations in part 515 (21 CFR part 515) establish the procedures associated with applying for a facility license. We require that a manufacturer seeking a facility license submit a completed medicated feed mill license application using Form FDA 3448 (21 CFR 515.10(b)). We use the information submitted to establish that the applicant has made the certifications required by section 512 of the FD&C Act, to register the mill, and to schedule a pre-approval inspection.

We require the submission of a supplemental medicated feed mill license application for a change in facility ownership or a change in facility address (§ 515.11(b)). If a licensed facility is no longer manufacturing medicated animal feed under § 515.23, a manufacturer may request voluntary revocation of a medicated feed mill license. An applicant also has the right to file a request for hearing under § 515.30(c) to give reasons why a medicated feed mill license should not be refused or revoked.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

| 21 CFR section and activity | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| Medicated Feed Mill License Application using Form FDA 3448 (515.10(b)). | 14 | 1 | 14 | 0.25 (15 minutes). | 4 |
| Supplemental Feed Mill License Application using Form FDA 3448 (515.11(b)). | 54 | 1 | 54 | 0.25 (15 minutes). | 14 |
| Voluntary Revocation of Medicated Feed Mill License (515.23). | 29 | 1 | 29 | 0.25 (15 minutes). | 7 |

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]—Continued

| 21 CFR section and activity | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| Filing a Request for a Hearing on Medicated Feed Mill License (515.30(c)). | 1 | 1 | 1 | 4 | 4 |
| Total | | | | | 29 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

| 21 CFR section and activity | Number of recordkeepers | Number of records per recordkeeper | Total annual records | Average burden per recordkeeping | Total hours |
|---|---|---|---|---|---|
| Maintenance of Records for Approved Labeling for Each ''Type B'' and ''Type C'' Feed (510.305). | 837 | 1 | 837 | 0.03 (2 minutes). | 25 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

These estimates are based on our experience with medicated feed mill license applications. We estimate that we will receive 14 medicated feed mill license applications, 54 supplemental applications, 29 requests for voluntary revocation, and that these submissions will take approximately 15 minutes per response, as shown in table 1, rows 1 through 3. We estimate that preparing a request for a hearing under § 515.30(c) takes approximately 4 hours, as shown in table 1, row 4. In table 2, we estimate that 837 licensees will keep the records required by 21 CFR 510.305 expending a total of 25 hours annually.

Our estimated burden for the information collection reflects an overall decrease of 2 hours and a corresponding decrease of 56 responses/records. We attribute this adjustment to a net decrease in the number of submissions we received over the last few years.

Dated: December 18, 2018.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2018–27812 Filed 12–21–18; 8:45 am]

BILLING CODE 4164–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2017–D–3001]**

### Modified Risk Tobacco Product Applications for IQOS System With Marlboro Heatsticks, IQOS System With Marlboro Smooth Menthol Heatsticks, and IQOS System With Marlboro Fresh Menthol Heatsticks Submitted by Philip Morris Products S.A.; Closing of Comment Period

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; closing of comment period.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing a closing date for the period for public comment on modified risk tobacco product applications (MRTPAs) submitted by Philip Morris Products S.A. for its IQOS system products. FDA recently received amendments to these MRTPAs and has made them available for public comment.

**DATES:** Submit either electronic or written comments by February 11, 2019 to ensure FDA considers your comment before completing its review of the applications.

**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–2017–D–3001 for ''Modified Risk Tobacco Product Applications for IQOS system with Marlboro Heatsticks, IQOS system with Marlboro Smooth Menthol Heatsticks, and IQOS system with Marlboro Fresh Menthol Heatsticks submitted by Philip Morris Products

S.A.'' Received comments, those filed in a timely manner (see DATES), 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:** Paul Hart, Center for Tobacco Products, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. G335, Silver Spring, MD 20993, 1–877–CTP–1373, *AskCTP@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

In the **Federal Register** of June 15, 2017 (82 FR 27487), FDA published a notice of availability for MRTPAs submitted by Philip Morris Products S.A. for its IQOS products and gave the public 180 days to comment on the applications. FDA issued a subsequent notice in the **Federal Register** of November 22, 2017 (82 FR 55616), extending the period for public comment and announcing its intent to issue a notice in a future edition of the **Federal Register** announcing when the comment period will close. FDA recently received amendments to the MRTPAs and has made them available for public comment. In this notice, FDA is announcing that the period for public comment on these MRTPAs, including amendments, will close on February 11, 2019.

FDA is required by section 911(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 387k) (FD&C Act) to make an MRTPA available to the public (except for matters in the application that are trade secrets or otherwise confidential commercial information) and to request comments by interested persons on the information contained in the application and on the label, labeling, and advertising accompanying the application. The determination of whether an order is appropriate under section 911(g) of the FD&C Act is based on the scientific information submitted by the applicant as well as the scientific evidence and other information that is made available to the Agency, including through public comments.

In the event FDA receives additional amendments or otherwise needs to modify the comment period closing date, FDA will notify the public via the Agency's web page for the MRTPAs (see section II) and by other means of public communication, such as by email to individuals who have signed up to receive email alerts. FDA does not intend to issue additional notices in the **Federal Register** regarding amendments or the comment period for these MRTPAs. To receive email alerts, visit FDA's email subscription service management website (*http://go.fda.gov/subscriptionmanagement*), provide an email address, scroll down to the ''Tobacco'' heading, select ''Modified Risk Tobacco Product Application Updates'', and click ''Submit''. To encourage public participation consistent with section 911(e) of the FD&C Act, FDA is making the redacted MRTPAs that are the subject of this notice available electronically (see section II).

## II. Electronic Access

Persons with access to the internet may access the application documents at: *https://www.fda.gov/TobaccoProducts/Labeling/MarketingandAdvertising/ucm546281.htm.*

Dated: December 18, 2018.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2018–27807 Filed 12–21–18; 8:45 am]

**BILLING CODE 4164–01–P**

---

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### Findings of Research Misconduct

**AGENCY:** Office of the Secretary, HHS

**ACTION:** Notice.

**SUMMARY:** Findings of research misconduct have been made against Uthra Rajamani, Ph.D. (Respondent), former project scientist in the Induced Pluripotent Stem Cell Core Facility, Cedars-Sinai Medical Center (CSMC). Dr. Rajamani engaged in research misconduct in research supported by National Center for Advancing Translational Science (NCATS), National Institutes of Health (NIH), grant UL1 TR000124. The administrative actions, including supervision for a period of one (1) year, were implemented beginning on November 27, 2018, and are detailed below.

**FOR FURTHER INFORMATION CONTACT:** Wanda K. Jones, Dr.P.H., Interim Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8200.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

*Uthra Rajamani, Ph.D., Cedars-Sinai Medical Center:* Based on the report of an inquiry conducted by CSMC, the Respondent's admission, and additional analysis conducted by ORI in its oversight review, ORI found that Dr. Uthra Rajamani, former project scientist in the Induced Pluripotent Stem Cell Core Facility, CSMC, engaged in research misconduct in research supported by NCATS, NIH, grant UL1 TR000124.

ORI found that Respondent engaged in research misconduct by falsifying data that were included in the following paper: *Nature Communications* 8(219):1–15, 2017 (hereafter referred to as ''*Nature Communications* 2017'').

ORI found that Respondent knowingly and intentionally falsified western blot images in *Nature Communications* 2017 by using the same western blot panel to represent the

expression of different proteins from whole cell lysates exposed to different endocrine disrupting chemical (EDC) treatments. Specifically, Respondent:

• Digitally altered the original image to darken the western blot panel for COX IV expression in Figure 4b in *Nature Communications* 2017 and represented the blot as the expression of:

—pNF-kB p65 Figure 4b in *Nature Communications* 2017
—NF-kB p65 Figure 4b in *Nature Communications* 2017
—p50 Figure 4b in *Nature Communications* 2017
—p105 Figure 4b in *Nature Communications* 2017
—p100 Figure 4b *Nature Communications* 2017

• Digitally altered the original image by superimposing a darker band over the original bands in lanes 2 and 4 of the western blot panel for COX IV expression in whole cell lysates exposed to different endocrine disrupting chemical (EDC) treatments in Figure 4b in *Nature Communications* 2017 and represented the falsified blot in Figure 6a in *Nature Communications* 2017 as expression of:

— P-p65 Figure 6a in *Nature Communications* 2017
— p50 Figure 6a in *Nature Communications* 2017
— p105 Figure 6a in *Nature Communications* 2017
— p52 Figure 6a in *Nature Communications* 2017

• Reused and relabeled the blot from Figure 3d in *Cell Stem Cell* 22:698–712, 2018 to falsely represent BiP expression under different experimental conditions in Figure 3d in *Nature Communications* 2017.

As a result of its inquiry, CSMC recommended that *Nature Communications* 2017 be retracted.

Dr. Rajamani entered into a Voluntary Settlement Agreement (Agreement) and voluntarily agreed:

(1) To have her research supervised for a period of one (1) year beginning on November 27, 2018; Respondent agrees that prior to submission of an application for U.S. Public Health Service (PHS) support for a research project on which Respondent's participation is proposed and prior to Respondent's participation in any capacity on PHS-supported research, Respondent shall ensure that a plan for supervision of Respondent's duties is submitted to ORI for approval; the supervision plan must be designed to ensure the scientific integrity of Respondent's research contribution; Respondent agrees that she shall not participate in any PHS-supported research until such a supervision plan is submitted to and approved by ORI; Respondent agrees to maintain responsibility for compliance with the agreed upon supervision plan;

(2) that for a period of one (1) year beginning on November 27, 2018, any institution employing her shall submit, in conjunction with each application for PHS funds, or report, manuscript, or abstract involving PHS-supported research in which Respondent is involved, a certification to ORI that the data provided by Respondent are based on actual experiments or are otherwise legitimately derived and that the data, procedures, and methodology are accurately reported in the application, report, manuscript, or abstract;

(3) that if no supervisory plan is provided to ORI, Respondent will provide certification to ORI at the conclusion of the supervision period that she has not engaged in, applied for, or had her name included on any application, proposal, or other request for PHS funds without prior notification to ORI;

(4) to exclude herself from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant for a period of one (1) year beginning on November 27, 2018; and

(5) that as a condition of the Agreement, Respondent will request that *Nature Communications* 8(219):1–15, 2017 be retracted.

**Wanda K. Jones,**

*Interim Director, Office of Research Integrity.*

[FR Doc. 2018–27874 Filed 12–21–18; 8:45 am]

BILLING CODE 4150–31–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Indian Health Service

### Organization, Functions, and Delegations of Authority; Part G; Indian Health Service

*Part G,* of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (HHS), as amended at 70 FR 24087, May 6, 2005, as amended at 75 FR 38112, July 1, 2010, and most recently as amended at 79 FR 65671, November 5, 2014, is hereby amended to reflect a reorganization of the Indian Health Service (IHS) Headquarters (HQ).

The IHS proposes a reorganization at IHS HQ to strengthen operations and oversight responsibilities to ensure quality health care by establishing an Office of Quality.

Delete the functional statements for the IHS HQ Office of the Director, Office of Clinical and Preventive Services, and Office of Management Services, and replace with the following revised statements, which includes a new Office of Quality:

**Chapter GA—Office of the Director**

*Section GA–10, Indian Health Service—Organization*

The IHS is an Operating Division within the Department of Health and Human Services (HHS) and is under the leadership and direction of a Director who is directly responsible to the Secretary of Health and Human Services. The IHS Headquarters is proposing to reorganize the following major components: Office of the Director (GA), Office of Clinical and Preventive Services (GAF), Office of Management Services (GAL), and the Office of Quality (OQ).

*Section GA–20, Indian Health Service—Functions*

Office of the Director (OD) (GA)

Provides overall direction and leadership for the IHS: (1) Establishes goals and objectives for the IHS consistent with the mission of the IHS and ensures agency performance is managed through goals/objectives, achievements, and/or improved outcomes; (2) provides for the full participation of Indian tribes in the programs and services provided by the Federal Government; (3) develops health care policy; (4) ensures the delivery of quality comprehensive health services; (5) advocates for the health needs and concerns of American Indians/Alaska Natives (AI/AN); (6) promotes the IHS programs at the local, state, national, and international levels; (7) develops and demonstrates alternative methods and techniques of health services management and delivery with maximum participation by Indian tribes and Indian organizations; (8) supports the development of individual and tribal capacities to participate in Indian health programs through means and modalities that they deem appropriate to their needs and circumstances; (9) the IHS will carry out the responsibilities of the United States to Indian tribes and individual Indians; (10) affords Indian people an opportunity to enter a career in the IHS by applying Indian preference; (11) ensures full application of the principles of Equal Employment Opportunity laws and the Civil Rights Act in managing the human resources of

the IHS; and (12) participates in cross-cutting issues and processes, including but not limited to, emergency preparedness/security, quality assurance, internal controls, recruitment, budget formulation, self-determination issues, and resolution of audit findings as may be needed and appropriate.

Congressional and Legislative Affairs Staff (CLAS) (GA1)

(1) Serves as the principal advisor to the IHS Director on all legislative and congressional relations matters; (2) advises the IHS Director and other IHS officials on the need for changes in legislation and manages the development of IHS legislative initiatives; (3) serves as the IHS liaison office for congressional and legislative affairs with Congressional offices, the HHS, the Office of Management and Budget (OMB), the White House, and other federal agencies; (4) tracks all major legislative proposals in the Congress that would impact Indian health; (5) ensures that the IHS Director and appropriate IHS and HHS officials are briefed on the potential impact of proposed legislation; (6) develops legislative strategy for key policy and legislative initiatives; (7) provides technical assistance and advice relative to the effect that initiatives/implementation would have on the IHS; (9) provides support and collaborates with the Office of Finance and Accounting relative to IHS appropriations efforts; (10) directs the development of IHS briefing materials for congressional hearings, testimony, and bill reports; (11) analyzes legislation for necessary action within the IHS; (12) develops appropriate legislative implementation plans; (13) serves as the IHS liaison office to the Government Accountability Office (GAO) and Office of Inspector General (OIG); (14) except for personnel matters, coordinates the development, clearance, and transmittal of IHS responses and follow-up to reports issued by the OIG, the GAO, and other federal internal and external authorities; and (15) coordinates with IHS HQ and Area Offices as appropriate to provide leadership, advocacy, and technical support to respond to requests from the public, including tribal governments, tribal organizations, and Indian community organizations regarding IHS legislative issues.

Executive Secretariat Staff (ESS) (GA2)

(1) Manages the processing of executive correspondence and related information to the IHS Director from tribes and tribal governments, tribal organizations, and Urban Indian organizations, federal departments and agencies, Congress and congressional staff offices, attorneys, patients, schools, universities, employees, grantees, contractors, and the general public; (2) reviews and monitors correspondence received by the IHS Director and assigns reply or follow-up action to appropriate IHS HQ program offices and IHS Area Offices; (3) ensures the quality (responsiveness, clarity, and substance) of IHS-generated correspondence prepared for the IHS Director's signature by coordinating the review of integrity and policy issues, and performing standard edits and revisions; (4) reviews and coordinates clearance of decision documents for the IHS Director's approval to ensure successful operations and policy-making within the agency; (5) assists IHS officials as they prepare documents for the HHS Secretary's review, decision, and/or signature; (6) serves as the agency's liaison with the HHS Office of the Secretary's Executive Secretariat on IHS program, policy, and special matters; (7) performs special writing assignments for the IHS Director; (8) maintains official records of the IHS Director's correspondence and conducts topic research of files, as needed; (9) oversees an electronic document handling system to assist in managing the timely processing of internal and external executive correspondence; (10) conducts training to promote conformance by IHS HQ and Area staff to the IHS Executive Correspondence Guidelines; (11) tracks reports required by Congress; and (12) manages the IHS review of non-IHS regulatory documents that impact the delivery of health services to Indians.

Diversity Management and Equal Employment Opportunity Staff (DMEEOS) (GA3)

(1) Administers the IHS equal employment opportunity, civil rights, and affirmative action and Alternative Dispute Resolution programs, in accordance with applicable laws, regulations, and HHS policies; (2) plans and oversees the implementation of IHS affirmative employment and special emphasis programs; (3) reviews data and advises IHS managers of possible discriminatory trends; (4) ensures immediate implementation of required actions on complaints of alleged sexual harassment or discrimination; (5) decides on accepting, for investigation, or dismissing discrimination complaints and evaluates accepted complaints for procedural sufficiency and investigates and resolves complaints; (6) evaluates accepted formal complaints of discrimination for procedural sufficiency and adjudicates and resolves complaints; and (7) develops/administers equal employment opportunity education and training programs for IHS managers, supervisors, counselors, and employees.

Public Affairs Staff (PAS) (GA4)

(1) Serves as the principal advisor for strategic planning on communications, media relations, and public affairs policy formulation and implementation; (2) ensures IHS policy is consistent with directives from the HHS Assistant Secretary for Public Affairs; (3) provides leadership and advocacy to establish and implement policy for internal and external dissemination of agency information intended for public release or employee and stakeholder information; (4) serves as the central office for technical guidance and assistance to IHS staff for the development of public affairs and media communication; (5) coordinates public affairs activities with other public and private sector organizations; (6) coordinates the clearance of IHS public relations activities, campaigns, and communications materials; (7) represents the IHS in discussions regarding policy and public affairs initiatives/implementation; (8) provides technical assistance and advice relative to the effect public affairs initiatives/implementation would have on the IHS; (9) collaborates with the Division of Regulatory and Policy Coordination, for review and response to media requests received under the Freedom of Information Act (FOIA) or the Privacy Act, and ensures the security of IHS documents used in such responses that contain sensitive and/or confidential information; and (10) serves as the IHS liaison office for press and public affairs activities with HHS, IHS Area Offices, media and other external organizations and representatives.

Office of Clinical and Preventive Services (OCPS) (GAF)

(1) Advises the IHS Director and Chief Medical Officer on clinical, preventive, and public health programs for the IHS, Area Offices, and Service Units; (2) serves as the primary source of national advocacy, policy development, budget development and allocation for these programs; (3) provides leadership in articulating the clinical, preventive, and public health needs of AI/AN, including consultation and technical support to clinical and public health programs and coordination with the Office of Quality to ensure quality standards are met for all clinical, preventive and public health programs; (4) develops, manages, and administers program functions that include, but are not limited to, oral

health, medicine, telehealth, alcohol and substance use prevention and treatment, mental health, suicide prevention, domestic and sexual violence, behavioral health integration, Youth Regional Treatment Centers, dental services, forensic nursing services, medical services, Health Promotion/Disease Prevention, pharmacy and pharmaceutical acquisition, community health representatives (CHRs), emergency medical services, health records, disabilities, Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome (HIV/AIDS), maternal health, child health, clinical nursing, public health nursing, men's health, women's health, nutrition and dietetics, elder care, cancer prevention and treatment; and chronic diseases such as diabetes, asthma, hypertension, and obesity; (5) leads and coordinates tribal consultation and urban Indian confer sessions for clinical and preventive health topics, funding, and other priority areas; (6) investigates service delivery and community prevention evidence-based and best practice models for dissemination to community service locations; (7) expands the availability of resources available for AI/AN health by working with public and private entities as well as federal agencies within and outside the HHS; (8) coordinates development of staffing requirements for new or replacement health care facilities and approves Congressional budget requests for staffing, in collaboration with the Office of Environmental Health and Engineering; (9) provides clinical oversight and direction for the health facilities planning process; (10) develops and coordinates various grant programs; (11) provides the national focus for recruitment and retention of health professionals and coordinates with the scholarship and loan repayment programs; (12) works with the Purchased/Referred Care (PRC) program on PRC denial appeals to the IHS Director and in determining PRC medical priorities; (13) works with the Office of Human Resources in managing the clinical aspects of the IHS workers' compensation claims; (14) monitors approximately one-half of the IHS's Government Performance and Results Act (GPRA) indicators, overseeing indicator development, data collection, and reporting results; (15) responds to tribal, Departmental, and Congressional inquiries; and (16) participates in cross-cutting issues and processes, including but not limited to, emergency preparedness/security, quality assurance, internal controls, recruitment, budget formulation, self-determination issues, and resolution of audit findings as may be needed and appropriate.

Division of Behavioral Health (DBH) (GAFA)

(1) Manages, develops, and coordinates comprehensive clinical, preventive, and community-based programs for mental health, social work, and alcohol and substance abuse focused on: Prevention, treatment, training, technical assistance, evaluation, quality improvement, data collection, trauma informed care, Native youth programming, recovery services, suicide prevention, tele-behavioral health, behavioral health integration, Youth Regional Treatment Centers; (2) provides, develops, and implements IHS guidelines, standards, policies, and procedures for professional and program standards related to behavioral health services, including maintenance of existing or development of new relevant chapters in the Indian Health Manual; (3) monitors, measures, and evaluates the quality of behavioral health programs to improve the effectiveness and efficacy of behavioral health programs including the development of behavioral health budget materials for resource management, program data collection, behavioral health-related GPRA measures, administrative system integrity and accountability; (4) coordinates behavioral health professional staff recruitment and training needs by serving as a subject matter expert for the American Indians into Psychology, scholarship, and loan repayment assignments to meet Area Office, Service Unit, and tribal health professional human resource needs; (5) develops and monitors behavioral health contracts and grants with IHS programs and other entities, in collaboration with the Division of Acquisition Policy and the Division of Grants Management; (6) develops and disseminates IHS behavioral health program information and materials to IHS facilities and to tribes and Urban Indian organizations including the dissemination of culturally appropriate and traditional best practices in behavioral health; (7) leads and coordinates the National Tribal Advisory Committee on Behavioral Health; (8) partners with tribes and urban Indian organizations on the evaluation of health outcomes of clinical and community behavioral health services; (9) develops, coordinates, and maintains public and private professional partnerships with philanthropies, universities, community-based, and faith-based organizations to promote training, resources, and technical assistance to expand, leverage, increase access to, and coordinate behavioral health resources and services outside of the typical health care setting; (10) manages the operation of direct behavioral health services provided through the Tele-Behavioral Health Center of Excellence; (11) provides continuing education for behavioral health providers, nurses, pharmacists, physicians, and other health care providers and paraprofessionals on current and pressing behavioral health clinical issues; and (12) provides financial resources and programmatic oversight for complying with the Americans With Disabilities Act through programs such as the Indian Children's Program that focus on autism spectrum disorders, fetal alcohol spectrum disorders, and other neurobiological disorders.

Division of Clinical and Community Services (DCCS) (GAFB)

(1) Manages, develops, and coordinates comprehensive clinical, preventive, and community-based programs using a public health approach focused on: Medicine, pharmacy and pharmaceutical acquisition, emergency medical services, CHRs, men's health, maternal and child health, cancer prevention, elder health, hepatitis C prevention and surveillance, medicine, HIV/AIDS, health records, health education, health promotion, and disease prevention; (2) develops objectives, priorities, and methodologies to conduct and evaluate clinical, preventive, and community-based programs; (3) coordinates the analysis and implementation of approaches for recognizing and supporting traditional medicine and cultural practices in the health of all AI/AN; (4) serves as the IHS HQ liaison for the IHS Chief Clinical Consultants; (5) serves as the agency's liaison and coordinating role for the American College of Obstetrics & Gynecology and Association of American Indian Physicians contracts; (6) manages the Veterans Affairs Pharmaceutical Prime Vendor Contract and IHS National Core Formulary; (7) manages the pharmacy residency program; (8) develops program budget materials for resource management, program data collection, clinical and community health-related GPRA measures, administrative system integrity and accountability; (9) applies identified profession and program standards for clinical, preventive, and community health services, including relevant chapters in the Indian Health Manual; (10) disseminates culturally appropriate clinical and community

health best practices, including traditional medicine and cultural healing and disseminates this information among clinical, medical, and community health program directors, division staff, Area staff, and other agencies and institutions; and (11) manages virtual and in-person training for CHRs to ensure that basic training requirements are met for new CHRs, refresher training is available, and continuing education is provided regularly.

Division of Nursing Services (DNS) (GAFC)

(1) Plans, develops, coordinates, evaluates, manages and advocates for administrative, clinical, and public health nursing services focused on acute care, ambulatory care, breastfeeding, prevention, forensic nursing, elder care, infectious disease control and care, immunizations, and adolescent and prenatal care in AI/AN communities; (2) develops objectives, priorities, and methodologies for the conduct and evaluation of clinical, preventive, and public health nursing programs; (3) provides, develops, and implements IHS guidelines, standards, policies, and procedures related to nursing, including relevant chapters in the Indian Health Manual; (4) provides nursing staff with advanced education opportunities in the field of nursing in exchange for payback service obligations; (5) provides funding for nursing programs where junior level commissioned officers with IHS and tribal programs gain experience in nursing; (6) provides specialized training opportunities for specialized nursing experience in critical nursing shortage areas such as obstetrics, intensive care, and the operating room; (7) coordinates professional nursing staff recruitment and training needs, and loan repayment and scholarship recipient assignments and development to meet Area Office, Service Unit, and tribal health professional human resource needs; (8) develops program budget materials for resource management, program data collection, administrative system integrity and accountability; and (9) coordinates nursing quality improvement and other nurse-led initiatives on behalf of the agency, such as Relationship-Based Care and Baby-Friendly Hospitals.

Division of Oral Health (DOH) (GAFD)

(1) Develops broad-based objectives, priorities, and methodologies to evaluate dental health programs; (2) monitors personnel orders for appointments and transfers; (3) processes special pay and retention bonus contracts; (4) disseminates information to IHS, tribal, and urban (I/T/U) dental programs on issues of importance, emerging technologies, standards of care, clinical best or promising practices; (5) provides an annual budget narrative and funding justification; (6) responds to Department, tribal, and other inquiries as required; (7) develops long-term training opportunities to help fill critical dental specialty needs; (8) maintains a continuing dental education program to relay oral health standards of care, educate I/T/U dental staff, and retain a high quality oral health workforce; (9) provides recruitment information, including available positions, for I/T/U dental programs; (10) oversees an externship program to expose dental students to I/T/U dental programs; (11) works with IHS Loan Repayment, Human Resources, and Commissioned Corps to promote loan repayment, special pays, etc., to help recruit a competent, qualified oral health workforce; (12) utilizes existing workforce models, including alternative dental workforce models, to provide maximum, effective, and quality oral health care to AI/AN; (13) monitors clinical productivity, efficiency, and effectiveness of dental programs; (14) establishes standards for staffing ratios, productivity, and efficiency of dental programs; (15) maintains a centralized database of dental productivity and efficiency data; (16) develops and incorporates public health clinical standards of care and publishes clinical guidelines to support I/T/U programs; (17) promotes quality improvement through continuing education of providers on clinical best practices, incorporation of various quality models, and continuous evaluation of program quality, efficiency, and effectiveness; (18) communicates with internal and external stakeholders to provide information on oral health; (19) fosters collaborations with non-dental partners to improve the oral health of AI/AN; (20) serves as a liaison for oral health issues with other federal agencies; (21) develops resource opportunities to promote disease prevention programs; (22) evaluates programs on community-based services and oral health promotion/disease prevention; (23) promotes quality assurance/improvement principles in improving the delivery of oral health services in programs; (24) oversees clinical and preventive support centers that aid in management of oral health promotion/disease prevention programs; (25) monitors the prevalence and burden of dental disease in AI/AN; (26) educates internal and external stakeholders on disease prevalence and disparities and develops strategies for improvement; and (27) supports clinical research and demonstration projects designed to identify and promote evidence-based best practices.

Division of Diabetes Treatment and Prevention (DDTP) (GAFE)

(1) Plans, manages, coordinates, and evaluates a comprehensive clinical and community program focusing on type 2 diabetes in AI/AN communities and other related chronic conditions; (2) plans, manages, develops, coordinates, and evaluates the Congressionally-mandated Special Diabetes Program for Indians (SDPI), a large grant program focused on the prevention and treatment of diabetes; (3) coordinates requirements for and monitors program performance related to contracts and grants with IHS, tribal, Urban Indian organizations and other entities; (4) develops objectives, priorities and methodologies for the conduct of clinical and community diabetes programs; (5) monitors, evaluates, and provides consultation to clinical and community diabetes grant programs and other new initiatives; (6) provides leadership, professional guidance, and staff development to Area Diabetes Consultants and IHS, tribal, Urban diabetes program providers; (7) provides virtual and in-person trainings on diabetes clinical care, nutrition education, SDPI program management, and other topics; (8) develops and implements IHS standards of care and clinical guidelines, policies, and procedures for diabetes and diabetes-related conditions; (9) conducts an annual collection and assessment of clinical process and outcomes data for diabetes and diabetes-related conditions; (10) develops and disseminates diabetes-related information and materials to I/T/U facilities; (11) coordinates the Tribal Leaders Diabetes Committee; (12) provides annual estimates of diabetes prevalence; (13) provides national nutrition and tele-ophthalmology consultation, training, and programming; (14) coordinates and oversees the Healthy Lifestyles for Youth cooperative agreement which funds grants to provide the Together Raising Awareness for Indian Life obesity prevention program at Boys & Girls Clubs in Indian Country; and (15) is responsible for preparing budgetary data, analysis and program evaluations for budget presentations and congressional hearings.

Office of Management Services (OMS) (GAL)

(1) Advises the IHS Director on all aspects of the management of grants, acquisitions, records management, personal property, supply, and the regulations program and provides agency-wide guidance and support for these programs; (2) formulates, administers, and coordinates the review and analysis of IHS-wide policies, delegations of authority, and organizations and functions development; (3) develops and oversees the implementation of policies, procedures and delegations of authority for IHS grants management activities, including grants added to self-governance compacts; (4) ensures that IHS policies and practices for the administrative functions identified above are consistent with applicable regulations, directives and guidance from higher echelons in the HHS and other federal oversight agencies; (5) advises the IHS Director on regulatory issues related to the IHS; (6) provides overall coordination and leadership for policies, services, including the continuity of operations plans, deployment, and public health infrastructure for the IHS HQ emergency preparedness plans consistent with those of the Department of Homeland Security and the HHS, addressing the IHS mission critical elements of emergency plans; (7) provides leadership and direction of activities for continuous improvement of management accountability and administrative systems for effective and efficient program support services IHS-wide; (8) ensures the accountability and integrity of grants and acquisition management, records management, personal property utilization and disposition of IHS resources; (9) assures that the IHS OMS services, policies, procedures, and practices support IHS Indian Self-Determination Act policies; (10) oversees and coordinates the annual development and submission of the agency's federal Activities Inventory Reform Act report to the HHS; and (11) participates in cross-cutting issues and processes, including but not limited to, emergency preparedness/security, quality assurance, internal controls, recruitment, budget formulation, self-determination issues, and resolution of audit findings as may be needed and appropriate.

Division of Asset Management (DAM) (GALA)

(1) Plans, develops, and administers the IHS personal property and supply management program in conformance with federal personal property management laws, regulations, policies, procedures, practices, and standards; (2) interprets regulations and provides advice on execution and coordination of personal property and supply management policies and programs; (3) administers management systems and methods for planning, utilizing, and reporting on personal property and supply programs, including the precious metals recovery program and IHS personal property and supply accountability and control systems; (4) provides guidance and serves as principal administrative authority for IHS on federal personal property and supply management laws, regulations, policies, procedures, practices, and standards; (5) conducts surveys and studies involving evaluation and analysis of the personal property and supply management activities IHS-wide; (6) maintains liaison with the HHS and the General Services Administration (GSA) on personal property and supply management issues and programs affecting the IHS; (7) plans, develops and administers the IHS Fleet Management Program; (8) prepares reports on IHS personal property and supply management activities; and (9) administers the local HQ personal property management program to include receiving, tagging, storage and disposal in addition to conducting the annual inventory for all HQ locations.

Division of Administrative and Emergency Services (DAES) (GALB)

(1) Administers physical security, facility management, space management services, parking management, including the employee transit subsidy program, the IHS mail and commercial printing programs, and Homeland Security Presidential Directive 12 (HSPD–12) badge issuance for HQ; (2) coordinates with OIT to provide telecommunication services to HQ; (3) serves as liaison with HHS and the GSA on logistics issues affecting the IHS; (4) provides guidance and oversight to the IHS on the control and safeguard of classified national security information; (5) plans, develops and administers the IHS-wide HSPD–12 program to include providing leadership on the Physical Access Control Systems, and the Physical Security Program; (6) provides special transportation and security; (7) provides overall coordination and leadership for the IHS HQ emergency preparedness plans consistent with those of the Department of Homeland Security and the HHS, addressing the IHS mission critical elements of emergency plans; (8) provides leadership for the development of emergency preparedness plans, policies, and services, including the continuity of operations plans, deployment, and public health infrastructure; (9) coordinates IHS HQ with the IHS Area Offices activities and available resources of other government and non-government programs for essential services related to homeland security and emergency preparedness; (10) coordinates periodic national emergency preparedness exercises with the HHS and Area Offices; (11) maintains and administers the HQ emergency preparedness equipment including the office-site and alternative locations; (12) advocates for the emergency preparedness needs and concerns of AI/AN and promotes these program activities at the local, state, national, and international levels; (13) serves as an information gathering and dissemination point for local and national emergency preparedness information including situational awareness; (14) distributes key information to IHS locations on a routine and as-needed basis including federal agencies/partners; (15) provides leadership and guidance for the IHS Forms Management Program; and (16) provides leadership and coordination in the planning, development, operation, oversight, and evaluation of special office support projects for office relocations, and inter-and intra-agency activities.

Division of Acquisition Policy (DAP) (GALC)

(1) Develops, recommends, and oversees the implementation of policies, procedures and delegations of authority for the acquisition management activities in the IHS, consistent with applicable regulations, directives, and guidance from higher echelons in the HHS and federal oversight agencies; (2) advises the OMS Director, Deputy Director for Management Operations, and other senior staff of proposed legislation, regulations, and directives that affect contracting in the IHS; (3) provides leadership for compliance reviews of all IHS acquisition operations and oversees completion of necessary corrective actions; (4) administers the agency conference management policy; (5) manages for the agency, the HHS acquisition training and certification program; (6) supports and maintains the IHS Contract Information System and controls entry of data into the HHS Contract Information System; (7) serves as the IHS contact point for contract protests and the HHS contact for contract-related issues; (8) reviews and makes recommendations for approval/disapproval of contract-related

documents such as: Pre- and post-award documents, unauthorized commitments, procurement planning documents, Justification for Other Than Full and Open Competition waivers, deviations, and determinations and findings that require action by the agency Head of the Contracting Activity, or the Office of the Secretary; (9) processes unsolicited proposals for the IHS; (10) coordinates the IHS Small Business programs; (11) oversees compliance with the Buy Indian Act; and (12) manages the processing of Inter- and Intra-agency agreements as well as Memoranda of Understanding.

Division of Grants Management (DGM) (GALD)

(1) Directs grants management and operations for the IHS; (2) authorizes, awards and administers discretionary grants and cooperative agreements for IHS financial assistance programs; (3) provides guidance for the resolution of audit findings for grant programs; (4) manages for the agency, the HHS grants training and certification program; (5) continuously assesses grants operations; (6) oversees implementation of corrective action plans for those entity recipients (grantees) receiving IHS discretionary grant support; (7) reviews and makes recommendations for improvements in grantee and potential grantee management systems; (8) serves as the IHS liaison to the HHS and the public for discretionary grants and cooperative agreements authorized by the IHS; (9) maintains the Catalog of Federal Domestic Assistance for IHS financial assistance programs; (10) provides guidance and limited, technical, grants-related training and assistance for IHS staff, grantees, and applicants; (11) coordinates payment to scholarship recipients; (12) serves as liaison to the Centers for Excellence (grant award system) and controls data entry into the grant award system; and (13) maintains the official, electronic grant files for funded grants.

Division of Regulatory and Policy Coordination (DRPC) (GALE)

(1) Manages the IHS' overall regulations program and responsibilities, including determining the need for and developing plans for changes in regulations, developing or assuring the development of needed regulations, and maintaining the various regulatory planning processes; (2) serves as IHS liaison with the Office of the Federal Register (FR) on matters relating to the submission and clearance of documents for publication in the FR; (3) assures proper agency clearance and processing of FR documents; (4) informs management and program officials of regulatory activities of other federal agencies; (5) advises the OMS Director on such matters as regulations, related policy issues, and administrative support issues; (6) manages the retrieval and transmittal of information in response to requests received under the FOIA, Privacy Act, the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act, in collaboration with the Public Affairs Staff; (7) ensures the security of sensitive and/or confidential information when responding to FOIA, Privacy Act, HIPAA, and HITECH Act issues; (8) advises the IHS Director regarding requests for IHS employees to serve as expert witnesses when IHS is not a party to the suit; (9) provides leadership and guidance for the IHS Records Management Program; (10) develops and recommends policies and procedures for the protection and disposition of IHS records and oversees the evaluation of records management activities in the IHS; (11) develops and implements a management control system for evaluation of records management functions IHS-wide; (12) maintains and updates various regulatory agendas; (13) manages, administers, implements and monitors the IHS's Paperwork Reduction Act and OMB information collection/activities; (14) provides guidance and technical assistance to IHS regarding information collection requirements and procedures for obtaining OMB approvals and extensions for IHS information collections; (15) coordinates the implementation and the application of Privacy Act, HIPAA, and HITECH Act requirements, including but not limited to HIPAA and HITECH Act compliance; (16) formulates, administers, and supports IHS-wide policies, delegations of authority, and organizations and functions development; (17) provides leadership, on behalf of the IHS Director, to functional area managers at IHS HQ in developing, modifying, and overseeing the implementation of IHS policies and procedures; (18) provides analysis, advisory, and assistance services to IHS managers and staff for the development, clearance, and filing of IHS directives and delegations of authority; and (19) serves as principal advisor and source for technical assistance for establishment or modification of organizational infrastructures, functions, and Standard Administrative Code configurations.

Office of Quality (OQ) (GAP)

(1) Advises the IHS Director on all aspects of assuring quality health care and develops and implements a strategic quality framework, integrating feedback and inputs from various levels of the organization and Tribal/Urban Indian organization partners; (2) oversees accreditation readiness activities and compliance with accreditation requirements for all IHS Direct Service facilities, to include periodic mock surveys and formal accreditation surveys; (3) conducts training and informational activities that promote skills development in quality improvement, quality assurance, and performance improvement; (4) routinely assesses and reports on patient satisfaction and experience using standardized survey instruments and processes, and facilitates improvement activities based on survey results; (5) coordinates and organizes participation of IHS facilities and staff in interagency quality improvement activities; (6) develops and monitors quality improvement and assurance metrics for health care delivery processes and outcomes, and advises other IHS Offices on quality improvement methods to improve support and outcomes of IHS administrative functions and processes; (7) develops programs to assess, address, and continuously improve systems and processes to improve health care quality, promote sustained compliance with relevant federal regulations and accreditation and professional standards, reduce and improve patient wait times and patient experience of care in all related health care settings; (8) consults on and provides guidance for standardization of health care delivery policies and protocols; (9) develops programs which promote patient safety management and reporting systems and processes, sentinel event investigations/root cause analysis, and clinical risk management; (10) supports credentialing of licensed independent practitioners via standardized methods and a uniform system; (11) supports patient-centered care processes, engagement of patients as partners in care, and patient activation through self-management support and involvement in service delivery improvements; (12) oversees and coordinates across IHS to establish and communicate IHS's Enterprise Risk Management (ERM) vision, culture, strategy, and framework; (13) oversees and coordinates the agency's efforts to establish and maintain proper internal controls and ensures that requirements are met under OMB Circular A–123; (14) facilitates enterprise-wide, integrated

and comprehensive assessments across IHS's risk portfolio including leading the development of the agency's risk profile and guiding management's prioritization of risks across the agency; and (15) participates in cross-cutting issues and processes, including but not limited to, emergency preparedness/security, quality assurance, recruitment, budget formulation, self-determination issues, and resolution of audit findings as may be needed and appropriate.

Division of Quality Assurance (DQA) (GAPA)

(1) Develops and implements programs to promote sustained compliance with relevant federal regulations and accreditation and professional standards: Manages and coordinates mock surveys, promotes accreditation services coordination, provides accreditation resource management, provides survey corrective action plan development assistance and coordination, manages accreditation and certification survey reports, promotes multidisciplinary integration of survey readiness support activities, supports and promotes patient-centered care including Patient and Family Engagement, and promotes unification of Area Quality Managers and Service Unit Quality Assurance and Performance Improvement Officers; and (2) develops and implements programs to manage credentialing standards and policy, acquires and maintains centralized credentialing software system, promotes unification of credentialing officers/prime source verification officers, and promotes standardized training and support resources for credentialing officers.

Division of Patient Safety and Clinical Risk Management (DPSCRM) (GAPB)

(1) Develops and implements programs to promote patient safety including: Promoting a culture of safety, providing education, training and application, establishing and monitoring systems and metrics related to adverse events, establishing policy and guidelines to reduce adverse events, reducing all types of hospital acquired conditions through technological innovation, attention to detail, and implementation of high reliability science, and reduce avoidable hospital readmissions through enhanced transition-of-care planning and coordination, communication with primary care, and management of community-based resource delivery; (2) develops and implements programs to employ strategies that reduce the possibility of a specific loss, systematically gathers and utilizes data, implements proactive and reactive components to prevent losses and mitigates impact of losses, implements strategies to reduce the risk of harm to patients, liability exposure of health care providers, and financial loss to the IHS; and (3) develops and implements programs to perform incident identification and reporting, identifies and addresses potential tort claims, sequestering medical records, and investigation of medical adverse events, reviews patient grievances concerning quality of care, performs sentinel event/root cause analysis review and documentation, analyzes methods for dismissal of patients from care, reviews outside requests for medical records, responds to inquiries from governmental agencies, media, and advocacy groups, promotes compliance with regulatory, accreditation, and contractual agreements, examining issues related to determination of standards of care, represents IHS when claims are presented for review by the Malpractice Claims Review Panel chartered by the HHS, maintains case files and a malpractice claims database, provides case summaries, peer review, outcome information, and feedback of risk management recommendations, disseminates information about the review process, responds to outside organizations requesting tort claim-involvement histories on former employees, assists providers with Malpractice Claims Review Panel, and submits payment reports to the National Practitioner Data Bank.

Division of Innovation and Improvement (DII) (GAPC)

(1) Develops and implements programs to increase quality improvement capacity in the Indian health system including training health care staff and support team members in the Model for Improvement to rapidly test small scale changes at the local level for improvement in clinical processes to improve patient outcomes, experience of care, and resource utilization, builds capability in all staff to support improvement and ensure that patients, families, providers and care team members are involved in quality improvement activities, establishes and monitors metrics to evaluate improvement efforts and outcomes and ensures all staff members understand the metrics for success, optimizes use of health information technology and data to continuously improve performance, quality and service (Resource and Patient Management System and iCare), and improves patient and staff satisfaction with health care service delivery; (2) leads change management for practice transformation to embrace new models of care delivery and to enhance efficiency of the care delivery process, develops and implements programs to promote the implementation of the patient-centered medical home model of care including: Increase patient empanelment to facilitate care management and population health, promotes continuous and team-based healing relationships in which roles are well defined and tasks are distributed among multidisciplinary care team members to reflect the skills, abilities and credentials of the individual team members, fosters patient-centered interactions through expanded patient roles in decision making, health-related behaviors and self-management, reduces barriers to accessing care through more efficient service delivery processes, alternative care delivery methods, expanded access to the care team, and appointment scheduling flexibility; boosts care coordination through community resource linkages, integrating specialty care referral and coordination processes, assisting with referral-related processes, and assuring completion of all elements of care; and (3) develops and implements programs to promote a competent health care management staff to include coordinating training and support resources for standardized position descriptions and competencies for management staff, standardizing management tools and resources, provides leadership development and skill-building, and facilitates change management to support quality assurance and quality improvement.

Division of Enterprise Risk Management and Internal Controls (DERMIC) (GAPD)

(1) Coordinates with key HQ Offices to ensure cross-cutting agency strategic planning, ERM, and management of internal controls across IHS; (2) ensures IHS' portfolio of enterprise risks are appropriately and effectively managed by identifying accountable individual risk owners; (3) advises on risk management and provides expertise, advice, and assistance to the IHS Director, Office Directors, Area Directors and other key staff at both HQ and Area levels on ERM matters; (4) develops goals and objectives for the ERM program, integrates them with broader IHS-wide strategic goals/objectives, and tracks progress toward achieving them; (5) evaluates and monitors systems of internal control across IHS and uses the assessments of the internal control program as an integral part of ERM to effectively manage risks across IHS; and (6) coordinates the agency's ERM program and administers the agency's

internal control program in compliance with the Federal Managers' Financial Integrity Act, OMB Circular No. A–123, and other applicable requirements.

*Section GA–30, Indian Health Service—Delegations of Authority*

All delegations of authority and re-delegations of authority made to IHS officials that were in effect immediately prior to this reorganization, and that are consistent with this reorganization, shall continue in effect pending further re-delegation.

**Alex M. Azar II,**

*Secretary.*

[FR Doc. 2018–27793 Filed 12–21–18; 11:15 am]

**BILLING CODE 4165–17–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[Docket No. USCG–2010–1066]**

### Recreational Boating Safety Projects, Programs, and Activities Funded Under Provisions of the Fixing America's Surface Transportation Act; Fiscal Year 2018

**ACTION:** Notice.

**SUMMARY:** The Coast Guard is publishing this notice to satisfy a requirement of the Fixing America's Surface Transportation Act that a detailed accounting of the projects, programs, and activities funded under the national recreational boating safety program provision of the Act be published annually in the **Federal Register**. This notice specifies the funding amounts the Coast Guard has committed, obligated, or expended during fiscal year 2018, as of September 30, 2018.

**FOR FURTHER INFORMATION CONTACT:** For questions on this notice please contact Mr. Jeff Ludwig, U.S. Coast Guard, Regulations Development Manager, (202) 372–1061.

**SUPPLEMENTARY INFORMATION:**

### Background and Purpose

Since 1998, Congress has passed a series of laws providing funding for projects, programs, and activities funded under the national recreational boating safety program, which is administered by the U.S. Coast Guard. For a detailed description of the legislative history, please see the Recreational Boating Safety Projects, Programs, and Activities Funded Under Provisions of the Fixing America's Surface Transportation Act; Fiscal Year 2017 Notice published in the **Federal Register** on November 24, 2017 (82 FR 17671).

These funds are available to the Secretary from the Sport Fish Restoration and Boating Trust Fund (Trust Fund) established under 26 U.S.C. 9504(a) for payment of Coast Guard expenses for personnel and activities directly related to coordinating and carrying out the national recreational boating safety program. Amounts made available under this subsection remain available during the two succeeding fiscal years. Any amount that is unexpended or unobligated at the end of the 3-year period during which it is available, shall be withdrawn by the Secretary and allocated to the States in addition to any other amounts available for allocation in the fiscal year in which they are withdrawn or the following fiscal year.

Use of these funds requires compliance with standard Federal contracting rules with associated lead and processing times resulting in a lag time between available funds and spending. The total amount of funding transferred to the Coast Guard from the Trust Fund, and committed, obligated, and/or expended during fiscal year 2018 for each project is shown below.

### Specific Accounting of Funds

The total amount of funding transferred to the Coast Guard from the Sport Fish Restoration and Boating Trust Fund and committed, obligated, and/or expended during fiscal year 2018 for each project is shown in the chart below.

| Project | Description | Cost |
|---|---|---|
| 46 U.S.C. 43 Compliance: Inspection Program/Boat Testing Program. | Provided for continuance of the national recreational boat compliance inspection program, which began in January 2001. | $1,801,974 |
| 46 U.S.C. 43 Compliance: Staff Salaries and Travel. | Provided for personnel to oversee manufacturer compliance with 46 U.S.C. 43 requirements. | 538,685 |
| Administrative Overhead | Office supplies | 63,640 |
| Boating Accident Report Database (BARD) Web System. | Provided for maintaining the BARD Web System, which enables reporting authorities in the 50 States, five U.S. Territories, and the District of Columbia to submit their accident reports electronically over a secure internet connection. | 327,195 |
| Contract Personnel Support | Provided contract personnel to conduct boating safety-related research and analysis. | 653,167 |
| Boating Accident News Clipping Services | Provided for the collection of news stories of recreational boating accidents for more real time accident information and to identify accidents that may involve regulatory non-compliances or safety defects. | 25,000 |
| National Boating Safety Advisory Council | Provided for member travel and meeting costs for the 96th & 97th National Boating Safety Advisory Council meetings. | 52,496 |
| Grant Management Training | Provided to facilitate staff training on new grant management requirements | 121,770 |
| Recreational Boating Safety Program Travel. | Provided for travel by employees of the Boating Safety Division to gather background and planning information for new recreational boating safety initiatives. | 182,164 |
| Reimbursable Salaries | Provided for 18 personnel directly related to coordinating and carrying out the national recreational boating safety program. | 2,429,557 |

Of the $7.984 million made available to the Coast Guard in fiscal year 2018, $2,696,985 has been committed, obligated, or expended and an additional $3,498,663 of prior fiscal year funds have been committed, obligated, or expended, as of September 30, 2018. The remainder of the FY17 and FY18 funds made available to the Coast Guard (approximately $5,329,880) may be retained for the allowable period for the National Recreational Boating Survey, other projects, or transferred into the pool of money available for allocation through the State grant program.

### Authority

This notice is issued pursuant to 5 U.S.C. 552 and 46 U.S.C. 13107(c)(4).

Dated: December 19, 2018.

**Jennifer F. Williams,**

*Captain, U.S. Coast Guard, Director of Inspections & Compliance.*

[FR Doc. 2018–27843 Filed 12–21–18; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

**[1651–0013]**

### Agency Information Collection Activities: Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate and Release

**AGENCY:** U.S. Customs and Border Protection (CBP), Department of Homeland Security.

**ACTION:** 30-Day notice and request for comments; Extension of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection 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 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and will be accepted (no later than January 25, 2019) to be assured of consideration.

**ADDRESSES:** Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *dhsdeskofficer@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number (202) 325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 83 FR Page 48321) on September 24, 2018, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (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, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

#### Overview of This Information Collection

*Title:* Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate and Release.

*OMB Number:* 1651–0013.

*Form Number:* CBP Form 7523.

*Current Actions:* CBP proposes to extend the expiration date of this information collection. There is no change to the burden hours or the information collected.

*Type of Review:* Extension (without change).

*Affected Public:* Businesses.

*Abstract:* CBP Form 7523, *Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate and Release,* is used by carriers and importers as a manifest for the entry of merchandise free of duty under certain conditions. CBP Form 7523 is also used by carriers to show that articles being imported are to be released to the importer or consignee, and as an inward foreign manifest for a vehicle or a vessel of less than 5 net tons arriving in the United States from Canada or Mexico with merchandise conditionally free of duty. CBP uses this form to authorize the entry of such merchandise. CBP Form 7523 is authorized by 19 U.S.C. 1433, 1484 and 1498. It is provided for by 19 CFR 123.4 and 19 CFR 143.23. This form is accessible at *https://www.cbp.gov/newsroom/publications/forms?title=7523&=Apply.*

*Estimated Number of Respondents:* 4,950.

*Estimated Number of Responses per Respondent:* 20.

*Estimated Total Annual Responses:* 99,000.

*Estimated Time per Response:* 5 minutes.

*Estimated Total Annual Burden Hours:* 8,247.

Dated: December 19, 2018.

**Seth D. Renkema,**

*Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.*

[FR Doc. 2018–27925 Filed 12–21–18; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R1–ES–2018–N089; FXES11140100000–189–FF01E00000]**

### Endangered and Threatened Wildlife and Plants; Capitol Boulevard Infrastructure Improvements Habitat Conservation Plan and Environmental Assessment for the Olympia Subspecies of the Mazama Pocket Gopher, Thurston County, Washington

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), received an application from the City of Tumwater Public Works Department for an incidental take permit (ITP) pursuant to the Endangered Species Act. The application includes a habitat conservation plan (HCP), which describes the actions the applicant will take to minimize and mitigate the impacts of the taking of the threatened Olympia subspecies of the Mazama pocket gopher that may occur incidental to the otherwise lawful activities during construction of safety and infrastructure improvements at the intersection of Capitol Boulevard and Tumwater Boulevard in Tumwater, Washington.

We also announce the availability of a draft environmental assessment addressing the HCP and proposed permit. We invite the public to review and comment on the documents.

**DATES:** To ensure consideration, please submit written comments by January 25, 2019.

**ADDRESSES:** To request further information or submit written comments, please use one of the following methods:

- *Internet:* You may view or download copies of the HCP and draft EA and obtain additional information on the internet at *http://www.fws.gov/wafwo/.*
- *Email: wfwocomments@fws.gov.* Include ''City of Tumwater Capitol Boulevard Safety and Infrastructure Improvements HCP/EA'' in the subject line of the message.
- *U.S. Mail:* Public Comments Processing, Attn: FWS–R1–ES–2018–N089; U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, 510 Desmond Drive SE, Suite 102, Lacey, WA 98503.
- *In-Person Drop-off, Viewing, or Pickup:* Call 360–753–5823 to make an appointment (necessary for viewing or picking up documents only) during regular business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Tim Romanski, Conservation Planning and Hydropower Branch Manager, Washington Fish and Wildlife Office (see ADDRESSES); telephone: 360–753–5823. If you use a telecommunications device for the deaf, please call the Federal Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:** The Service received an application from the City of Tumwater Public Works Department for an ITP, pursuant to the section 10(a)(1)(B) of the ESA. The applicant has requested a 5-year permit term that would authorize ''take'' of the threatened Olympia subspecies of the Mazama pocket gopher (Thomomys mazama pugetensis, hereafter Olympia pocket gopher) incidental to construction of safety and infrastructure improvements in Thurston County, Washington. The application includes a HCP that describes the actions the applicant will take to minimize and mitigate the impacts of the taking on the covered species.

## Background

Section 9 of the Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*) prohibits ''take'' of fish and wildlife species listed as endangered or threatened. Under the ESA, the term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). The term ''harm,'' as defined in our regulations, includes significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3). The term ''harass'' is defined in our regulations as to carry out actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering (50 CFR 17.3).

Section 10(a)(1)(B) of the ESA contains provisions that authorize the Service to issue permits to non-Federal entities for the take of endangered and threatened species caused by otherwise lawful activities, provided the following criteria are met: (1) The taking will be incidental; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking; (3) the applicant will ensure that adequate funding for the plan will be provided; (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (5) the applicant will carry out any other measures that the Service may require as being necessary or appropriate for the purposes of the HCP. Regulations governing permits for endangered and threatened species are found in 50 CFR 17.22 and 17.32, respectively.

## Proposed Action

The Service proposes to issue the requested 5-year ITP based on the applicant's commitment to implement the HCP, if permit issuance criteria are met. Covered activities include construction of needed safety and infrastructure improvements. The area covered under HCP consists of a 3-acre project development site located at the intersection of Capitol Boulevard and Tumwater Boulevard in Thurston County, Washington. Take of the Olympia pocket gopher would occur on approximately 0.8 acres of occupied habitat and will be offset by permanent management of 0.8 acres of occupied habitat for the covered species at the Deschutes Corridor Conservation Site.

## Public Comments

You may submit your comments and materials by one of the methods listed in **ADDRESSES**. We specifically request information, views, and suggestions from interested parties regarding our proposed Federal action, including the adequacy of the HCP pursuant to the requirements for permits at 50 CFR parts 13 and 17 and the adequacy of the draft EA pursuant to the requirements of NEPA.

## Public Availability of Comments

All comments and materials we receive become part of the public record associated with this action. Before including your address, phone number, email address, or other personally identifiable information in your comments, you should be aware that your entire comment—including your personally identifiable information—may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety. Comments and materials we receive will be available for public inspection by appointment, during normal business hours, at our Washington Fish and Wildlife Office (see **ADDRESSES**).

## Next Steps

After public review and completion of the EA, we will determine whether the proposed action warrants a finding of no significant impact or whether an environmental impact statement should be prepared. We will evaluate the permit application, associated documents, and any comments received, to determine whether the permit application meets the requirements of section 10(a)(1)(B) of the ESA. We will also evaluate whether issuance of the requested section 10(a)(1)(B) permit would comply with section 7 of the ESA by conducting an intra-Service section 7 consultation under section 7(a)(2) of the ESA on anticipated ITP actions. The final NEPA and permit determinations will not be completed until after the end of the 30-day comment period and will fully consider all comments received during the comment period. If we determine that all requirements are met, we will issue an ITP under section 10(a)(1)(B) of the ESA to the applicant for the take of the covered species, incidental to otherwise lawful covered activities.

## Authority

We provide this notice in accordance with the requirements of section 10 of the ESA and NEPA and their

implementing regulations (50 CFR 17.22 and 40 CFR 1506.6, respectively).

**Theresa E. Rabot,**

*Deputy Regional Director, Pacific Region, U.S. Fish and Wildlife Service.*

[FR Doc. 2018–27887 Filed 12–21–18; 8:45 am]

**BILLING CODE 4333–15–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–HQ–MB–2018–N150; FF09M21200–189–FXMB12320900000; OMB Control Number 1018–0133]**

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Control and Management of Resident Canada Geese

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service, are proposing to renew an information collection.

**DATES:** Interested persons are invited to submit comments on or before January 25, 2019.

**ADDRESSES:** Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov;* or via facsimile to (202) 395–5806. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or by email to *Info_Coll@fws.gov.* Please reference OMB Control Number 1018–0133 in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this ICR, contact Madonna L. Baucum, Service Information Collection Clearance Officer, by email at *Info_Coll@fws.gov,* or by telephone at (703) 358–2503. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

**SUPPLEMENTARY INFORMATION:** In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on April 6, 2018 (83 FR 14879). We received one comment in which the commenter objected to the collection of this information, but did not specifically address the information collection requirements. We did not make changes to our requirements as a result of that comment.

We are again soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) is the collection necessary to the proper functions of the Service; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Service enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Service minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. 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.

*Abstract:* The Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*) prohibits the take, possession, import, export, transport, sale, purchase, or bartering of migratory birds or their parts, except as permitted under the terms of a valid permit or as permitted by regulations. In 2006, we issued regulations establishing two depredation orders and three control orders that allow State and Tribal wildlife agencies, private landowners, and airports to conduct resident Canada goose population management, including the take of birds, nest and eggs. We monitor the data collected for activities under these orders and may rescind an order if monitoring indicates that activities are inconsistent with conservation of Canada geese.

*Control order for airports.* Our regulations at 50 CFR 21.49 allow managers at commercial, public, and private airports and military airfields and their employees or agents to implement management of resident Canada geese to resolve or prevent threats to public safety. An airport must be part of the National Plan of Integrated Airport Systems and have received Federal grant-in-aid assistance or be a military airfield under the jurisdiction, custody, or control of the Secretary of a military department. Each facility exercising the privileges of the order must submit an annual report with the date, numbers, and locations of birds, nests, and eggs taken.

*Depredation order for nests and eggs.* Our regulations at 50 CFR 21.50 allow private landowners and managers of public lands to destroy resident Canada goose nests and eggs on property under their jurisdiction, provided they register annually on our website at *https://epermits.fws.gov/eRCGR.* Registrants must provide basic information, such as name, address, phone number, and email, and identify where the control work will occur and who will conduct it. Registrants must return to the website to report the number of nests with eggs they destroyed.

*Depredation order for agricultural facilities.* Our regulations at 50 CFR 21.51 allow States and Tribes, via their wildlife agencies, to implement programs to allow landowners, operators, and tenants actively engaged in commercial agriculture to conduct damage management control when geese are committing depredations, or to resolve or prevent other injury to agricultural interests. State and Tribal wildlife agencies in the Atlantic, Central, and Mississippi Flyway portions of 41 States may implement the provisions of the order. Each implementing agricultural producer must maintain a log of the date and number of birds taken under this authorization. Each State and Tribe exercising the privileges of the order must submit an annual report of the numbers of birds, nests, and eggs taken, and the county or counties where take occurred.

*Public health control order.* Our regulations at 50 CFR 21.52 authorize States and Tribes of the lower 48 States to conduct (via the State or Tribal wildlife agency) resident Canada goose control and management activities when the geese pose a direct threat to human health. States and Tribes operating under this order must submit an annual report summarizing activities, including

the numbers of birds taken and the county where take occurred.

*Population control.* Our regulations at 50 CFR 21.61 establish a managed take program to reduce and stabilize resident Canada goose populations when traditional and otherwise authorized management measures are not successful or feasible. A State or Tribal wildlife agency in the Atlantic, Mississippi, or Central Flyway may request approval for this population control program. If approved, the State or Tribe may use hunters to harvest resident Canada geese during the month of August. Requests for approval must include a discussion of the State's or Tribe's efforts to address its injurious situations using other methods, or a discussion of the reasons why the methods are not feasible. If the Service Director approves a request, the State or Tribe must (1) keep annual records of activities carried out under the authority of the program, and (2) provide an annual summary, including number of individuals participating in the program and the number of resident Canada geese shot. Additionally, participating States and Tribes must monitor the spring breeding population by providing an annual estimate of the breeding population and distribution of resident Canada geese in their State or on their Tribal lands.

Our regulations at 50 CFR 21.49, 21.50, 21.51, and 21.52 require that persons or entities operating under the depredation and control orders must immediately report the take of any species protected under the Endangered Species Act (ESA). This information ensures that the incidental take limits authorized under section 7 of the ESA are not exceeded.

*Title of Collection:* Control and Management of Resident Canada Geese, 50 CFR 20.21, 21.49, 21.50, 21.51, 21.52, and 21.61.

*OMB Control Number:* 1018–0133.

*Form Number:* None.

*Type of Review:* Extension of a currently approved collection.

*Respondents/Affected Public:* State fish and wildlife agencies, Tribes, and local governments; airports; landowners; and farms.

*Total Estimated Number of Annual Respondents:* 8,698.

*Total Estimated Number of Annual Responses:* 8,698.

*Estimated Completion Time per Response:* Varies from 15 minutes to 8 hours, depending on activity.

*Total Estimated Number of Annual Burden Hours:* 3,360.

*Respondent's Obligation:* Required to obtain or retain a benefit.

*Frequency of Collection:* Annually.

*Total Estimated Annual Nonhour Burden Cost:* None.

| Regulation/activity | Annual number of responses | Completion time per response (hours) | Total annual burden hours * |
|---|---|---|---|
| **21.49—Airport Control Order** *(Annual Report)* | | | |
| Private Sector | 25 | 1.5 | 38 |
| Government | 25 | 1.5 | 38 |
| **21.50—Nest and Egg Depredation Order** *(Initial Registration)* | | | |
| Individuals | 126 | 0.5 | 63 |
| Private Sector | 674 | 0.5 | 337 |
| Government | 200 | 0.5 | 100 |
| **21.50—Nest and Egg Depredation Order** *(Renew Registration)* | | | |
| Individuals | 374 | 0.25 | 94 |
| Private Sector | 2,026 | 0.25 | 507 |
| Government | 600 | 0.25 | 150 |
| **21.50—Nest and Egg Depredation Order** *(Annual Report)* | | | |
| Individuals | 500 | 0.25 | 125 |
| Private Sector | 2,700 | 0.25 | 675 |
| Government | 800 | 0.25 | 200 |
| **21.51—Agricultural Depredation Order** *(Recordkeeping)* | | | |
| Private Sector | 600 | 0.5 | 300 |
| **21.51—Agricultural Depredation Order** *(Annual Report)* | | | |
| Government | 20 | 8 | 160 |
| **21.52—Public Health Control Order** | | | |
| Government | 20 | 1 | 20 |
| **21.49, 21.50, 21.51, and 21.52—Report Take of Endangered Species** | | | |
| Private Sector | 2 | 0.25 | 1 |
| **21.61—Population Control Approval Request** *(Annual Report and Recordkeeping)* | | | |
| Annual Report—Gov't | 3 | 12 | 36 |
| Recordkeeping—Gov't | 12 | 36 | |

| Regulation/activity | Annual number of responses | Completion time per response (hours) | Total annual burden hours * |
|---|---|---|---|
| **21.61—Population Control Approval Request** *(Population and Distribution Estimates)* | | | |
| Government | 3 | 160 | 480 |
| *Totals:* | *8,698* | | *3,360* |

* Rounded.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Dated: December 19, 2018.

**Madonna Baucum,**

*Information Collection Clearance Officer, U.S. Fish and Wildlife Service.*

[FR Doc. 2018–27891 Filed 12–21–18; 8:45 am]

**BILLING CODE 4333–15–P**

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

**[FWS–R1–ES–2018–N100; FXES11140100000–189–FF01E00000]**

## Proposed Crestmont Farm Safe Harbor Agreement for the Taylor's Checkerspot Butterfly in Benton County, Oregon

**AGENCY:** Fish and Wildlife Service, Interior,

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), have received an enhancement of survival permit application from Crestmont Farm pursuant to the Endangered Species Act of 1973. The permit application includes a draft safe harbor agreement (SHA) developed for the conservation of the Taylor's checkerspot butterfly. The permit would authorize the incidental take of the endangered Taylor's checkerspot butterfly associated with habitat management actions intended to benefit the butterfly. We have prepared a draft environment action statement (EAS) for our preliminary determination that the SHA and permit decision may be eligible for categorical exclusion under the National Environmental Policy Act. We are making the permit application package, including the proposed SHA and draft EAS, available for public review and comment.

**DATES:** To ensure consideration, written comments must be received from interested parties no later than January 25, 2019.

**ADDRESSES:** To request further information or submit written comments, please use one of the following methods, and note that your information request or comments are in reference to the ''Crestmont Farm SHA.''

- *Internet:* Documents may be viewed on the internet at *http://www.fws.gov/oregonfwo/*.
- *Email: CrestmontSHAcomments@fws.gov*.
- *U.S. Mail:* State Supervisor, U.S. Fish and Wildlife Service; 2600 SE 98th Avenue, Suite 100; Portland, OR 97266.
- *Fax:* 503–231–6195, Attn: Crestmont Farm SHA.
- *In-Person Drop-off, Viewing, or Pickup:* Comments and materials received will be available for public inspection, by appointment (necessary for viewing or picking up documents only), during normal business hours at the U.S. Fish and Wildlife Service (at the above address); call 503–231–6179 to make an appointment. Written comments can be dropped off during regular business hours at the above address on or before the closing date of the public comment period (see **DATES**).

**FOR FURTHER INFORMATION CONTACT:** Richard Szlemp, U.S. Fish and Wildlife Service (see **ADDRESSES**); telephone: 503–231–6179; facsimile: 503–231–6195. If you use a telecommunications device for the deaf, please call the Federal Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:** We have received an enhancement of survival permit application from Crestmont Farm pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The requested permit would authorize the incidental take of the Taylor's checkerspot butterfly (*Euphydryas editha taylori*) in exchange for habitat conservation actions that are expected to provide a net conservation benefit for the species. The permit application includes a proposed safe harbor agreement (SHA) that describes the existing baseline conditions, and the activities that are intended to produce a net conservation benefit for Taylor's checkerspot butterfly.

### Background

Section 9 of the ESA prohibits the take of fish and wildlife species listed as endangered or threatened under section 4 of the ESA. Under the ESA, the term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). The term ''harm,'' as defined in our regulations, includes significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3). The term ''harass'' is defined in our regulations as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering (50 CFR 17.3). Under specified circumstances, however, we may issue permits that authorize take of federally listed species, provided the take is incidental to, but not the purpose of, an otherwise lawful activity. Regulations governing permits for endangered species are at 50 CFR 17.22.

Under a SHA, participating landowners voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species listed under the ESA. SHAs, and the subsequent enhancement of survival permits that are issued pursuant to section 10(a)(1)(A) of the ESA, encourage private and other non-federal property owners to implement conservation efforts for listed species by providing assurances that they will not be subjected to increased property use restrictions as a result of their efforts to attract listed species to their property, or to increase the numbers or distribution of listed species already on their property. Application requirements and issuance criteria for enhancement of survival permits through SHAs are found in 50 CFR 17.22(c). As provided for in the Service's final Safe Harbor Policy (64 FR 32717; June 17, 1999), SHAs provide assurances that allow the property owner to alter or modify their

enrolled property, even if such alteration or modification results in the incidental take of listed species to such an extent that it returned the species back to the originally agreed upon baseline conditions.

We listed the Taylor's checkerspot as an endangered species on October 3, 2013 (78 FR 61452), with critical habitat. Historically, the Taylor's checkerspot butterfly was likely distributed throughout grassland habitat found on prairies, grassland bluffs, and grassland openings within a forested matrix. Habitat has been lost through conversion and degradation of habitat, particularly from agricultural and urban development, successional changes where grassland habitat reverted more towards forest characteristics, and the spread of invasive plants. In Oregon, the Taylor's checkerspot butterfly is presently only known to occur at two sites. Both sites are located in Benton County on grassland hills within a forested matrix in the Willamette Valley.

**Proposed Action**

Crestmont Farm and the Service jointly developed the proposed SHA for the conservation of the Taylor's checkerspot butterfly. The physical area addressed by this SHA encompasses approximately 27 acres that lie within a suspended, high-voltage powerline corridor. The area covers the majority of the known population of Taylor's checkerspot butterfly at this site. Current vegetative conditions are typical of powerline corridor areas and include a mixture of grassland, shrubs, and young trees, with a fairly linear border of managed conifer forest. Management actions taken under the SHA are intended to maintain existing habitat conditions as well as increase the distribution and abundance of Taylor's checkerspot butterfly through enhancement of adjacent or nearby, unoccupied grassland habitat. Providing additional habitat areas can also increase the likelihood of persistence of the Taylor's checkerspot butterfly by offering microhabitat variations that may provide a range of habitat conditions that is not equally adversely affected by weather, plant community changes, predator populations, etc. The Service will coordinate a variety of management activities with Crestmont Farm pursuant to this SHA. These management activities generally include: (1) Controlling/reducing non-native grasses; (2) controlling/reducing woody vegetation encroachment; (3) increasing the density and diversity of larval host plants, native nectar species, and other native species; and (4) maintaining suitable habitat conditions. In addition, the SHA provides for research and monitoring to occur.

The draft EAS now available for public review (see **ADDRESSES**indicates that the proposed SHA and permit decision may be eligible for a categorical exclusion under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). We are making the permit application package, including the SHA, and draft EAS, available for public review and comment.

**Public Comments**

You may submit your comments and materials by one of the methods listed in the **ADDRESSES** section. We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party on our proposed Federal action, including adequacy of the SHA pursuant to the requirements for permits at 50 CFR parts 13 and 17 and adequacy of the EAS pursuant to NEPA.

**Public Availability of Comments**

All comments and materials we receive become part of the public record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comments, 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. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety. Comments and materials we receive, as well as supporting documentation, will be available for public inspection by appointment, during normal business hours, at our Oregon Fish and Wildlife Office (see **ADDRESSES**).

**Authority**

We provide this notice in accordance with the requirements of section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*), and NEPA (42 U.S.C. 4321 *et seq.*) and their implementing regulations (50 CFR 17.22, and 40 CFR 1506.6, respectively).

**Rollie White,**

*Acting Deputy Regional Director, Pacific Region, U.S. Fish and Wildlife Service.*

[FR Doc. 2018–27890 Filed 12–21–18; 8:45 am]

**BILLING CODE 4333–15–P**

---

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R8–ES–2017–N103; FXES11130000–189–FF08E00000]**

### Endangered and Threatened Wildlife and Plants; Draft Recovery Plan for Franciscan Manzanita (Arctostaphylos franciscana)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of document availability.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce the availability of the Draft Recovery Plan for Franciscan Manzanita (*Arctostaphylos franciscana*) for public review and comment. The draft recovery plan includes objective, measurable criteria for downlisting the species to threatened, and site-specific actions necessary to reclassify the species from endangered to threatened on the Federal Lists of Endangered and Threatened Wildlife and Plants.

**DATES:** We must receive any comments on the draft recovery plan on or before February 25, 2019.

**ADDRESSES:** You may obtain a copy of the draft recovery plan from our website at *http://www.fws.gov/endangered/species/recovery-plans.html.* Alternatively, you may contact the Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W–2605, Sacramento, CA 95825 (telephone 916–414–6700).

**FOR FURTHER INFORMATION CONTACT:** Jennifer Norris, Field Supervisor, at the above street address or telephone number (see **ADDRESSES**).

**SUPPLEMENTARY INFORMATION:**

**Background**

Recovery of endangered or threatened animals and plants to the point where they are again secure, self-sustaining members of their ecosystems is a primary goal of our endangered species program and the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). Recovery means improvement of the status of listed species to the point at which listing is no longer appropriate under the criteria

specified in section 4(a)(1) of the ESA. The ESA requires the development of recovery plans for listed species, unless such a plan would not promote the conservation of a particular species.

Pursuant to section 4(f) of the ESA, a recovery plan must, to the maximum extent practicable, include (1) a description of site-specific management actions as may be necessary to achieve the plan's goals for the conservation and survival of the species; (2) objective, measurable criteria which, when met, would support a determination under section 4(a)(1) that the species should be removed from the List of Endangered and Threatened Species; and (3) estimates of the time and costs required to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

The Service has revised its approach to recovery planning; the revised process is called Recovery Planning and Implementation (RPI). The RPI process is intended to reduce the time needed to develop and implement recovery plans, increase recovery plan relevancy over a longer timeframe, and add flexibility to recovery plans so they can be adjusted to new information or circumstances. Under RPI, a recovery plan will include statutorily required elements (objective, measurable criteria, site-specific management actions, and estimates of time and costs), along with a concise introduction and our strategy for how we plan to achieve species recovery. The RPI recovery plan is supported by a separate Species Status Assessment, or in cases such as this one, a species biological report that provides the background information and threat assessment, which are key to recovery plan development. The essential component to flexible implementation under RPI is producing a separate working document called the Recovery Implementation Strategy (implementation strategy). The implementation strategy steps down from the more general description of actions described in the recovery plan to detail the specific, near-term activities needed to implement the recovery plan. The implementation strategy will be adaptable by being able to incorporate new information without having to concurrently revise the recovery plan, unless changes to statutory elements are required.

Franciscan manzanita was thought to be extirpated in the wild prior to the discovery of a single plant in 2009. There is still only a single known wild specimen, although the species also exists in cultivation to a limited extent. We listed Franciscan manzanita throughout its entire range on September 5, 2012 (77 FR 54434). The species has been known to occur only on the San Francisco peninsula in areas with serpentine soils, bedrock outcrops, greenstone, and mixed Franciscan rock. In addition to these serpentine soils, cool air temperatures, and summer fog are the primary habitat requirements for the species.

The most significant threat to Franciscan manzanita is habitat loss from urbanization, which continues to impact remnant suitable habitat. Other threats include competition from invasive native and nonnative plants, potential infestation by *Phytophthora* sp., damage from herbivores such as the California vole, climate change, visitor use, vandalism, stochastic events, and the effects of small population size, water stress, and hybridization with closely related species.

## Recovery Plan Goals

The purpose of a recovery plan is to provide a framework for the recovery of species so that protection under the ESA is no longer necessary. A recovery plan includes scientific information about the species and provides criteria that enable us to gauge whether downlisting or delisting the species is warranted. Furthermore, recovery plans help guide our recovery efforts by describing actions we consider necessary for each species' conservation and by estimating time and costs for implementing needed recovery measures.

The goal of this draft recovery plan is to improve the status of Franciscan manzanita so that it can be downlisted. Due to the current lack of information about the species' biology and habitat requirements, the magnitude of current threats, and the existence of only a single plant in the wild, it is not currently practicable to determine appropriate delisting criteria; therefore, we focus on meeting the goal of downlisting. To meet the recovery goal of downlisting, the following objectives have been identified:

1. Establish additional stands of Franciscan manzanita using cuttings and layers from the wild plant originally found on Doyle Drive.

2. Establish stands of Franciscan manzanita using cuttings and layers from plants collected from the Laurel Hill Cemetery that represent other genotypes, and plant these individuals sufficiently close to the wild Franciscan manzanita clones so that outcrossing occurs among the genetically distinct individuals.

3. Protect and manage habitat around extant and newly established plants (via vegetation control, irrigation supplementation, disease prevention, herbivore removal, and other means).

4. Protect suitable habitat for future establishment of Franciscan manzanita populations.

As Franciscan manzanita meets reclassification criteria, we will review its status and consider it for downlisting on the Federal Lists of Endangered and Threatened Wildlife and Plants.

## Public Comments Solicited

We solicit written comments on the draft recovery plan described in this notice. All comments received by the date specified in **DATES** will be considered in development of a final recovery plan for Franciscan manzanita. You may submit written comments and information by mail or in person to the Sacramento Fish and Wildlife Office at the above address (see **ADDRESSES**).

## Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

## Authority

We developed this draft recovery plan under the authority of section 4(f) of the Act, 16 U.S.C. 1533(f).

**Lawrence Rabin,**

*Acting Regional Director, Pacific Southwest Region.*

[FR Doc. 2018–27825 Filed 12–21–18; 8:45 am]

**BILLING CODE 4333–15–P**

---

# DEPARTMENT OF THE INTERIOR

## Bureau of Land Management

**[AA–6657–A; AA–6657–C; AA–6657–F; AA–6657–I; AA–6657–A2; 19X.LLAK.944000.L14100000.HY0000.P]**

## Alaska Native Claims Selection

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of decision approving lands for conveyance.

**SUMMARY:** The Bureau of Land Management (BLM) hereby provides constructive notice that it will issue an appealable decision approving conveyance of the surface estate in certain lands to Saguyak Incorporated, for the native village of Clarks Point,

pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA), as amended. As provided by ANCSA, the BLM will convey the subsurface estate in the same lands to Bristol Bay Native Corporation when the BLM conveys the surface estate to Saguyak Incorporated.

**DATES:** Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the time limits set out in the **SUPPLEMENTARY INFORMATION** section.

**ADDRESSES:** You may obtain a copy of the decision from the BLM, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, AK 99513–7504.

**FOR FURTHER INFORMATION CONTACT:** Bettie J. Shelby, BLM Alaska State Office, 907–271–5596 or *bshelby@blm.gov.* The BLM Alaska State Office may also be contacted via a Telecommunications Device for the Deaf (TDD) through the Federal Relay Service at 1–800–877–8339. The relay service is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** As required by 43 CFR 2650.7(d), notice is hereby given that the BLM will issue an appealable decision to Saguyak Incorporated. The decision approves conveyance of the surface estate in certain lands pursuant to ANCSA (43 U.S.C. 1601, *et seq.*). As provided by ANCSA, the subsurface estate in the same lands will be conveyed to Bristol Bay Native Corporation when the surface estate is conveyed to Saguyak Incorporated. The lands are located in the vicinity of Clarks Point, Alaska, and are described as:

Block 3, Tract B, U.S. Survey No. 4992, Alaska.

Containing 0.36 acres.

**Seward Meridian, Alaska**

T. 14 S, R. 55 W,
Sec. 8.

Containing 46.62 acres.

T. 14 S, R. 57 W,
Sec. 25.

Containing 638.74 acres.

T. 15 S, R. 57 W,
Secs. 2, 3, and 4;
Secs. 9, 10, 11 and 16;
Sec. 31.

Containing 3,399.16 acres.
Aggregating 4,084.88 acres.

The BLM will also publish notice of the decision once a week for four consecutive weeks in the *The Bristol Bay Times & The Dutch Harbor Fisherman* newspaper. Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until January 25, 2019 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4 shall be deemed to have waived their rights. Notices of appeal transmitted by facsimile will not be accepted as timely filed.

**Bettie J. Shelby,**

*Land Law Examiner, Adjudication Section.*

[FR Doc. 2018–27879 Filed 12–21–18; 8:45 am]

**BILLING CODE 4310–JA–P**

---

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[F–14875–A, F–14875–A2; 19X.LLAK944000.L14100000.HY0000.P]**

### Alaska Native Claims Selection

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of decision approving lands for conveyance.

**SUMMARY:** The Bureau of Land Management (BLM) hereby provides constructive notice that it will issue an appealable decision approving conveyance of the surface estate in certain lands to Kugkaktlik Limited, for the Native village of Kipnuk, pursuant to the Alaska Native Claims Settlement Act of 1971, as amended (ANCSA). The lands approved for conveyance lie partially within the former Clarence Rhode National Wildlife Range, now known as the Yukon Delta National Wildlife Refuge. The subsurface estate in the lands lying outside the former Clarence Rhode National Wildlife Range will be conveyed to Calista Corporation when the surface estate is conveyed to Kugkaktlik Limited.

**DATES:** Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the time limits set out in the **SUPPLEMENTARY INFORMATION** section.

**ADDRESSES:** You may obtain a copy of the decision from the Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, AK 99513–7504.

**FOR FURTHER INFORMATION CONTACT:** Judy A. Kelley, BLM Alaska State Office, 907–271–3786, or *j1kelley@blm.gov.* The BLM Alaska State Office may also be contacted via Telecommunications Device for the Deaf (TDD) through the Federal Relay Service at 1–800–877–8339. The relay service is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** As required by 43 CFR 2650.7(d), notice is hereby given that the BLM will issue an appealable decision to Kugkaktlik Limited for the Native village of Kipnuk. The decision approves conveyance of the surface estate in certain lands pursuant to ANCSA (43 U.S.C. 1601, *et seq.*). The lands approved for conveyance lie partially within the former Clarence Rhode National Wildlife Range, established December 8, 1960, now known as the Yukon Delta National Wildlife Refuge. As provided by ANCSA, the subsurface estate in lands lying within a national wildlife refuge in existence on December 18, 1971, is not available for conveyance to the regional corporation, Calista Corporation, and will be reserved to the United States in the conveyance document transferring the surface estate. The subsurface estate in the lands lying *outside* the former Clarence Rhode National Wildlife Range will be conveyed to Calista Corporation when the surface estate is conveyed to Kugkaktlik Limited. The lands are located in the vicinity of Kipnuk, and are described as:

**Lands Within the Former Clarence Rhode National Wildlife Range (Public Land Order No. 2213), Now Known as the Yukon Delta National Wildlife Refuge**

Surface estate to be conveyed to Kugkaktlik Limited;

Subsurface estate to be reserved to the United States.

**Seward Meridian, Alaska**

T. 1 S, R. 85 W,
Secs. 31, 32, and 33.

Containing 690 acres.

T. 2 S, R. 85 W,
Sec. 6.
Containing 191 acres.
Aggregating 881 acres.

**Lands Outside the Former Clarence Rhode National Wildlife Range (Public Land Order No. 2213), Now Known as the Yukon Delta National Wildlife Refuge**

Surface estate to be conveyed to Kugkaktlik Limited;

Subsurface estate to be conveyed to Calista Corporation.

**Seward Meridian, Alaska**

T. 1 S, R. 84 W,
Sec. 22.
Containing 0.94 acres.
T. 1 S, R. 85 W,
Secs. 31, 32, and 33.
Containing 1,083 acres.
T. 2 S, R. 85 W,
Secs. 5 and 6.
Containing 916 acres.
Aggregating 2,000 acres.
Aggregating a total of 2,881 acres.

The BLM will publish notice of the decision once a week for four consecutive weeks in *The Delta Discovery* newspaper.

Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until January 25, 2019 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4 shall be deemed to have waived their rights. Notices of appeal transmitted by facsimile will not be accepted as timely filed.

**Judy A. Kelley,**

*Land Law Examiner, Adjudication Section.*

[FR Doc. 2018–27880 Filed 12–21–18; 8:45 am]

**BILLING CODE 4310–JA–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Ocean Energy Management

**[Docket No. BOEM–2018–0065]**

### Outer Continental Shelf, Western, Central, and Eastern Gulf of Mexico, Oil and Gas Lease Sales for Years 2019–2024

**AGENCY:** Bureau of Ocean Energy Management, Interior.

**ACTION:** Call for Information and Nominations.

**SUMMARY:** The Bureau of Ocean Energy Management (BOEM) is issuing a Call for Information and Nominations (Call) covering up to ten proposed Region-wide oil and gas lease sales in the available portions of the Western, Central, and Eastern Gulf of Mexico Planning Areas (WPA, CPA, and EPA, respectively), as included in the 2019–2024 National Outer Continental Shelf (OCS) Oil and Gas Leasing Draft Proposed Program (2019–2024 National Draft Proposed Program), which BOEM announced on January 4, 2018.

**DATES:** All nominations and comments submitted in response to this Call must be received by BOEM no later than January 25, 2019. BOEM will consider submissions sent by mail so long as they are postmarked by the last day of the comment period.

**ADDRESSES:**

*Public Comment Submission Procedures:* All public comments should be submitted through one of the following methods:

1. Federal eRulemaking Portal: *http://www.regulations.gov.* In the field entitled, ''Search,'' enter ''BOEM–2018–0065'' and then click ''search.'' Follow the instructions to submit public comments and view supporting and related materials available for this notice;

2. *U.S. Postal Service or other delivery service to the following address:* Dr. S. Erin O'Reilly Vaughan, Chief, Leasing and Financial Responsibility Section, Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, Mail Stop GM235D, New Orleans, Louisiana 70123–2394. Send your comments in an envelope clearly labelled, ''Comments on the Call for Information and Nominations for Proposed 2019–2024 Gulf of Mexico Region-wide Lease Sales.''

*Nominations/Indications of Industry Interest Submission Procedures:* To ensure security and confidentiality of proprietary information to the maximum extent possible, please send nominations/indications of interest and other proprietary information to Dr. S. Erin O'Reilly Vaughan, Chief, Leasing and Financial Responsibility Section, Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, Mail Stop GM235D, New Orleans, LA 70123–2394. Consistent with subsection 5 in the ''Call For Information and Nominations'' section of this Call below, you should mark all documents and every page containing such information with ''Confidential—Contains Proprietary Information.'' Send your nominations in an envelope clearly labeled, ''Nominations for Proposed 2019–2024 Gulf of Mexico Region-wide Lease Sales.'' Do not send indications of interest or other proprietary information through the Federal eRulemaking Portal.

**FOR FURTHER INFORMATION CONTACT:** Dr. S. Erin O'Reilly Vaughan, Chief, Leasing and Financial Responsibility Section, Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, Mail Stop GM 235D, New Orleans, Louisiana 70123–2394, telephone (504) 736–1759.

**SUPPLEMENTARY INFORMATION:** The purpose of this Call is to solicit comments from industry and the public on: (a) Industry nominations of acreage for possible inclusion in the proposed sales; and (b) information on the Call Area for consideration in planning for these proposed OCS oil and gas lease sales, including geological conditions, archaeological sites, potential use conflicts in the Call Area, areas of special concern and analysis, and other socioeconomic, biological and environmental information. Because the first Gulf of Mexico Region-wide lease sale in the 2019–2024 National Draft Proposed Program is proposed to occur in 2020, and given the long lead time needed to prepare for a proposed sale, BOEM must initiate the planning process before the National OCS Oil and Gas Leasing Program (2019–2024 National Program) has been finalized. This Call is not a decision to lease and does not prejudge any future Secretarial decision concerning areas to be made available for leasing under the 2019–2024 National Program.

*2019–2024 Program Development:* On January 4, 2018, the Department of the Interior announced the release of the 2019–2024 National Draft Proposed Program and published a Notice of Intent (NOI) to prepare a Programmatic Environmental Impact Statement (PEIS) for the 2019–2024 National Program. Information on the development of the proposed 2019–2024 National Program and PEIS is available on BOEM's website at: *https://www.boem.gov/National-OCS-Program/.*

Because the first Gulf of Mexico Region-wide sale in the 2019–2024 National Draft Proposed Program is tentatively proposed to occur near the beginning of the lease sale schedule, and given the long lead time needed to prepare for a proposed oil and gas lease sale, the administrative and environmental review processes for this sale must occur simultaneously and in close coordination with the

development of the 2019–2024 National Program.

This Call should not be construed as a prejudgment by the Secretary concerning whether to schedule a lease sale in this area under the 2019–2024 National Program. This Call does not indicate a preliminary decision to lease in the areas described herein. BOEM will use the information and nominations received in response to this Call to identify the areas to be carried forward for analysis and potential inclusion in future oil and gas leasing. Multiple steps would be required prior to holding any lease sale, including but not limited to: inclusion of this sale in the approved 2019–2024 National Program, completion of environmental analyses and statutory requirements, and issuance of Proposed and Final Notices of Sale (NOS).

*Environmental Review Process:* BOEM intends to prepare a Multisale Environmental Impact Statement (EIS), in accordance with the National Environmental Policy Act (NEPA), covering the proposed lease sales included in this Call. BOEM will also prepare a Supplemental EIS, which will inform decisions for the proposed lease sales scheduled for 2020 in the Gulf of Mexico, as currently scheduled in the 2017–2022 National Program and which are also proposed in the 2019–2024 National Draft Proposed Program. The Multisale EIS and Supplemental EIS will evaluate the potential effects that oil and gas activities resulting from these lease sales could have on the human, marine, and coastal environments, and may propose measures and lease stipulations to mitigate adverse impacts for the options being analyzed. Several consultations will be conducted concurrently with the NEPA process. As appropriate, these may include consultations under the Endangered Species Act (ESA), the Magnuson-Stevens Fishery Conservation and Management Act, Section 106 of the National Historic Preservation Act (NHPA), and Executive Order 13175—''Consultation and Coordination with Tribal Governments.'' The results of these consultations will assist BOEM in its leasing decisions. The Supplemental EIS may be supplemented if necessary for decisions on future Gulf of Mexico proposed Region-wide lease sales.

*BOEM's Leasing Process:* BOEM's regulations for planning and holding an oil and gas lease sale are found at 30 CFR 556.300–309. These regulations include the following steps:

(1) Call for Information and Nominations: See section below.

(2) *Area Identification:* Based on the information and nominations submitted in response to this Call, BOEM will develop a recommendation of the area proposed for further leasing consideration and environmental analysis. Upon approval by the Secretary, BOEM will announce the proposed area identified for leasing in the **Federal Register**, in accordance with 30 CFR 556.302(a)(3).

(3) *Proposed NOS:* If BOEM proceeds with consideration of leasing after completion of Area Identification and environmental analysis, it will publish a Notice of Availability of a Proposed NOS in the **Federal Register** and send the Proposed NOS to the Governors of affected states for comment and recommendations on the size, timing, and location of the proposed sale. The Proposed NOS describes the size, timing, and location of the proposed sale, provides additional information on the area(s) proposed for leasing, lists proposed lease terms and conditions of the sale, and provides proposed stipulations to mitigate potential adverse impacts on the environment and other uses of the area.

(4) *Final NOS:* If BOEM decides to proceed with leasing, it will publish a Final NOS in the **Federal Register** at least 30 days before the date of the lease sale. The Final NOS will describe the place, time, and method for filing bids and the place, date, and hour for opening and publicly announcing bids. It will also contain a description of the area(s) offered for lease, the lease terms and conditions of the sale, and stipulations to mitigate potential adverse impacts on the environment and other uses of the area.

## Call for Information and Nominations

### *1. Purpose of Call*

The purpose of this Call is to solicit industry nominations for areas of leasing interest and to gather comments and information from the public on the area(s) that should be included in the proposed OCS oil and gas lease sales in the Gulf of Mexico under the 2019–2024 National Draft Proposed Program. Pursuant to 30 CFR 556.301, BOEM seeks comments from industry and the public on:

(a) Industry interest in the Call Area, including nominations or indications of interest in specific blocks within the Call Area;

(b) geological conditions, including bottom hazards;

(c) archaeological sites on the seabed or near shore;

(d) potential multiple uses in the Call Area, including navigation, recreation, and fisheries;

(e) areas that should receive special concern and analysis; and

(f) other socioeconomic, biological, and environmental information.

BOEM will consider information submitted in response to this Call to:

- Inform the Area Identification process under 30 CFR 556.302;
- prioritize areas with potential for oil and gas development;
- develop potential lease terms and conditions;
- identify potential use conflicts and potential mitigation measures; and
- assist in BOEM's planning and environmental review process.

### *2. Description of the Call Area*

The GOM Region-wide sale area of this Call includes the entire CPA, WPA, and EPA, except for those areas currently subject to the Gulf of Mexico Energy Security Act of 2006 (GOMESA, Pub. L. 109–432) moratorium.

The CPA is bound on the north by the Federal-State boundaries offshore Louisiana, Mississippi, and Alabama. The eastern boundary of the CPA begins at the offshore boundary between Alabama and Florida and proceeds southeasterly to 26.19° N latitude, thence southwesterly to 25.6° N latitude. The western boundary of the CPA begins at the offshore boundary between Texas and Louisiana and proceeds southeasterly to 28.43° N latitude, thence south-southwesterly to 27.49° N latitude, thence south-southeasterly to 25.80° N latitude. The CPA is bound on the south by the maritime boundary with Mexico as established by the Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles, which took effect in January 2001, and by the limit of the U.S. Exclusive Economic Zone in the area east of the continental shelf boundary with Mexico. BOEM is seeking nominations and comments at this time on the entire CPA, which consists of approximately 66.45 million acres, of which approximately 50.26 million acres are currently unleased.

The WPA is bound on the west and north by the Federal-State boundary offshore Texas. The eastern boundary begins at the offshore boundary between Texas and Louisiana and proceeds southeasterly to 28.43° N latitude, thence south-southwesterly to 27.49° N latitude, thence south-southeasterly to 25.80° N latitude. The WPA is bound on

the south by the maritime boundary with Mexico as established by the Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 nautical miles, which took effect in January 2001. BOEM is seeking nominations and comments at this time on the entire WPA, which consists of approximately 28.58 million acres, of which approximately 26.10 million acres are currently unleased.

The GOM Region-wide sale area includes a small section of the EPA that is not subject to the GOMESA moratorium, which currently runs until June 30, 2022. See *https://www.boem.gov/Areas-Under-Moratoria/* for a map and description of the GOMESA Moratorium Area. The portion of the EPA not subject to Congressional moratorium is bound on the east by the Military Mission Line (86°41′ W longitude), on the south by blocks that are beyond the U.S. Exclusive Economic Zone in the area known as the northern portion of the Eastern Gap, and on the west by the CPA. BOEM is seeking nominations and comments at this time on the portion of the EPA that is not subject to the GOMESA moratorium. The portion of the EPA not subject to the moratorium consists of approximately 657,905 acres, of which approximately 606,995 acres are currently unleased.

A map depicting the Call Area is available for download on the BOEM website at: *http://www.boem.gov/Multi-Sale2020.* Copies of Official Protraction Diagrams (OPDs) also are available for download on the BOEM website at: *https://www.boem.gov/Maps-and-GIS-Data/.*

*3. Instructions on the Call*

Parties interested in leasing one or more whole or partial blocks within the Call Area are requested to indicate their interest in, and comment on, blocks within the boundaries of the Call Area that they wish to have included in the proposed lease sale. Respondents should explicitly outline the areas of interest along block lines and rank the areas or specific blocks in which they are interested, according to their priority, using the following indicators: 1 [high], 2 [medium], or 3 [low]. Respondents are encouraged to be as specific as possible in prioritizing blocks and supporting nominations of specific blocks with detailed information, such as relevant geologic, geophysical, and economic data. Areas where interest has been indicated, but on which respondents have not indicated priorities, will be considered low priority. Respondents may also submit a list of blocks nominated by OPD and Leasing Map designations to ensure correct interpretation of their nominations. OPDs and Leasing Maps are available on BOEM's website at *https://www.boem.gov/Maps-and-GIS-Data/.* See subsection 5, ''Protection of Privileged or Proprietary Information,'' regarding protection and release of information and how to mark and submit proprietary information.

BOEM also seeks comments from all interested parties regarding particular geological, environmental, biological, archaeological, and socioeconomic conditions; potential use conflicts, or other information about conditions that could affect the potential leasing and development of particular areas. Comments may refer to broad areas or may refer to particular OCS blocks.

*4. Protection of Privileged or Proprietary Information*

BOEM will protect privileged or proprietary information in accordance with the Freedom of Information Act (FOIA) and OCSLA requirements. To avoid inadvertent release of such information, you should mark all documents and every page containing such information with ''Confidential—Contains Proprietary Information.'' To the extent a document contains a mix of proprietary and nonproprietary information, you should clearly mark the document to indicate which portion of the document is proprietary and which is not. Exemption 4 of FOIA applies to trade secrets and commercial or financial information that you submit that is privileged or confidential. BOEM considers nominations of specific blocks to be proprietary, and therefore will not release information that identifies any particular nomination with any particular party, so as not to compromise the competitive position of any participants in the process of indicating interest.

However, please be aware that BOEM's practice is to make all comments, including the names and addresses of individuals, available for public inspection. Before including your address, phone number, email address, or other personal identifying information in your comment, please be advised that your entire comment, including your personal identifying information, may be made publicly available at any time. In order for BOEM to withhold from disclosure your personal identifying information, you must identify any information contained in the submission of your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe any possible harmful consequences of the disclosure of information, such as embarrassment, injury or other harm. Although you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so. BOEM will make available for public inspection, in their entirety, all comments submitted by organizations and businesses, or by individuals identifying themselves as representatives of organizations or businesses.

**Authority:** This Call is published pursuant to the Outer Continental Shelf Lands Act (OCSLA), as amended (43 U.S.C. 1331–1356) and the implementing regulations at 30 CFR part 556.301.

Dated: December 19, 2018.

**Walter D. Cruickshank,**

*Acting Director, Bureau of Ocean Energy Management.*

[FR Doc. 2018–27876 Filed 12–21–18; 8:45 am]

**BILLING CODE 4310–MR–P**

---

## DEPARTMENT OF THE INTERIOR

## Bureau of Ocean Energy Management

**[Docket ID: BOEM–2018–0060]**

## Outer Continental Shelf (OCS), Gulf of Mexico (GOM), Oil and Gas Lease Sales for 2020

**AGENCY:** Bureau of Ocean Energy Management (BOEM), Interior.

**ACTION:** Notice of intent to prepare a supplemental environmental impact statement.

**SUMMARY:** Consistent with the regulations implementing the National Environmental Policy Act (NEPA), BOEM is announcing its intent to prepare a Supplemental Environmental Impact Statement (EIS), which is expected to be used to inform the decisions for each of the two proposed lease sales scheduled in 2020 and the subsequent lease sales through 2022 (2020 GOM Supplemental EIS) that are comprised of the Western and Central Planning Areas, and a small portion of the Eastern Planning Area not subject to Congressional moratorium. These planning areas are located off the States of Texas, Louisiana, Mississippi, Alabama, and Florida.

**FOR FURTHER INFORMATION CONTACT:** For information on the 2020 GOM Supplemental EIS or BOEM's policies associated with this notice, please

contact Ms. Helen Rucker, Chief, Environmental Assessment Section, Office of Environment (GM 623E), Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, telephone 504–736–2421, or email at *helen.rucker@boem.gov.*

**SUPPLEMENTARY INFORMATION:** The Council on Environmental Quality's NEPA implementing regulations encourage agencies to analyze similar or related proposals in one EIS (40 CFR 1508.25). Since the proposed lease sale area and the reasonably foreseeable OCS oil and gas activities are similar among GOM lease sales, BOEM plans to use the 2020 GOM Supplemental EIS, and the EISs it tiers from, to support decisions on lease sales proposed to be held in the GOM from 2020 through 2022. The 2020 GOM Supplemental EIS will tier from the 2017–2022 GOM Multisale EIS and the 2018 GOM Supplemental EIS, and will focus on any changes in the proposed action or the new information released since their publication. The resource estimates and scenario information for the 2020 GOM Supplemental EIS will include a range that encompasses the estimated resources and reasonably foreseeable post-lease activities that may result from a single proposed lease sale. At the completion of this Supplemental EIS process, a decision will be made only for the first proposed 2020 GOM lease sale. A separate decision will be made for the subsequent proposed GOM lease sales through 2022.

The proposed lease sales are within the same geographic scope, range of predicted activities, and dates as those analyzed in the 2017–2022 GOM Multisale EIS and 2018 GOM Supplemental EIS. Therefore, BOEM will continue to tier from the 2017–2022 GOM Multisale EIS and 2018 GOM Supplemental EIS, and will begin preparation of the 2020 GOM Supplemental EIS before the 2019–2024 National Program is finalized. Should the GOM lease sales ultimately included in the 2019–2024 National Program differ substantially from those scheduled previously, BOEM will refine the analyses in the 2020 GOM Supplemental EIS or prepare an additional supplemental EIS, as appropriate, to support an individual lease sale decision. Under 40 CFR 1502.9 scoping is not required for a Supplemental EIS. Given the recent publication of the 2017–2022 GOM Multisale EIS and 2018 GOM Supplemental EIS, BOEM is not conducting formal scoping for the 2020 GOM Supplemental EIS. This Notice of Intent (NOI) serves to announce the preparation of the *Gulf of Mexico Outer Continental Shelf Lease Sales: 2020, Draft Supplemental Environmental Impact Statement* (Draft 2020 GOM Supplemental EIS).

The 2020 GOM Supplemental EIS analysis will focus on the potential environmental effects from an oil and gas lease sale offering all available unleased acreage in the GOM, including the Western and Central Planning Areas, and the portion of the Eastern Planning Area not subject to Congressional moratorium (*i.e.,* the proposed action), including the effects of all reasonably foreseeable exploration, development, and production activities that may result from the lease sale. In addition to the no action alternative (*i.e.,* cancel the lease sale), other alternatives will be considered for each proposed lease sale, such as offering individual or multiple planning areas for lease (rather than a regionwide sale) or potentially deferring certain areas from the proposed lease sales. Practicable means of mitigating potential impacts from the proposed action will also be analyzed in the 2020 GOM Supplemental EIS.

*Cooperating Agencies:* BOEM invites other Federal agencies, and State, Tribal, and local governments to consider becoming cooperating agencies in the preparation of the 2020 GOM Supplemental EIS. BOEM invites qualified government entities to inquire about cooperating agency status for this Supplemental EIS. Following the guidelines from the Council on Environmental Quality (CEQ), qualified agencies and governments are those with ''jurisdiction by law or special expertise'' (40 CFR 1508.5). Potential cooperating agencies should consider their authority and capacity to assume the responsibilities of a cooperating agency and should remember that an agency's role in the environmental analysis neither enlarges nor diminishes the final decisionmaking authority of any other agency involved in the NEPA process. Upon request, BOEM will provide potential cooperating agencies with a written summary of expectations for cooperating agencies, including time schedules and critical action dates, milestones, responsibilities, scope and detail of cooperating agencies' contributions, and availability of predecisional information. BOEM anticipates this summary will form the basis for a Memorandum of Agreement between BOEM and any cooperating agency. Agencies should also consider the ''Factors for Determining Cooperating Agency Status'' in Attachment 1 to CEQ's January 30, 2002, Memorandum for the Heads of Federal Agencies: *Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act.* This document is available on the internet at *http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CoopAgenciesImplem.pdf.*

BOEM, as the lead agency, will not provide financial assistance to cooperating agencies. Even if an organization is not a cooperating agency, opportunities will exist to provide information and comments to BOEM during the normal public input stages of the NEPA process.

**Authority:** This NOI is published pursuant to the regulations (40 CFR 1501.7) implementing the provisions of NEPA.

Dated: December 19, 2018.

**Michael A. Celata,**

*Regional Director, Bureau of Ocean Energy Management, Gulf of Mexico OCS Region.*

[FR Doc. 2018–27877 Filed 12–21–18; 8:45 am]

BILLING CODE 4310–MR–P

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–1050]**

### Certain Dental Ceramics, Products Thereof, and Methods of Making the Same Termination of Investigation with a Finding of No Violation of Section 337

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has found no violation of section 337 of the Tariff Act of 1930 in the above-captioned investigation. The investigation is terminated.

**FOR FURTHER INFORMATION CONTACT:** Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436, telephone (202) 708–2532. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://*

*edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on April 25, 2017, based on a complaint, as supplemented, filed by Ivoclar Vivadent AG of Schaan, Liechtenstein; Ivoclar Vivadent, Inc. of Amherst, New York; and Ardent, Inc. of Amherst, New York (collectively ''Ivoclar''). 82 FR 19081 (Apr. 25, 2017). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain dental ceramics, products thereof, and methods of making the same by reason of the infringement of certain claims of four United States patents: U.S. Patent No. 7,452,836 (''the '836 patent''); U.S. Patent No. 6,517,623 (''the '623 patent''); U.S. Patent No. 6,802,894 (''the '894 patent''); and U.S. Patent No. 6,455,451 (''the '451 patent''). The notice of investigation named as respondents GC Corporation of Tokyo, Japan; and GC America, Inc. of Alsip, Illinois (collectively, ''GC''). The Office of Unfair Import Investigations was also named as a party.

Earlier in proceedings, the investigation was terminated as to certain asserted patent claims, including all of the asserted claims of the '623 patent and the '451 patent, based upon withdrawal of the complaint. Order No. 18 (Nov. 21, 2017), *not reviewed,* Notice (Dec. 6, 2017); Order No. 24 (Dec. 19, 2017), *not reviewed,* Notice (Jan. 18, 2017); Order No. 51 (Feb. 22, 2018), *not reviewed,* Notice (Mar. 23, 2018); Order No. 56 (Mar. 28, 2018), *not reviewed,* Notice (Apr. 27, 2018).

On July 23, 2018, the ALJ issued the final initial determination (''ID''). Remaining within the scope of the investigation, as to infringement, domestic industry, or both, were claims 1, 2, 4, 5, 7, 9, 10, 13, 15–19, and 21 of the '836 patent; and claims 1, 2, 4, 16–21, 34, 36 and 38 of the '894 patent. The ID finds, *inter alia,* that Ivoclar failed to demonstrate infringement of the above-referenced claims of the '836 patent. The ID finds, *inter alia,* that claims 36 and 38 (''the '894 flexure strength claims'') are invalid as indefinite under 35 U.S.C. 112 ¶ 2. The ID further finds that Ivoclar failed to demonstrate infringement and failed to meet the technical prong of the domestic industry requirement as to the remaining claims of the '894 patent (claims 1, 2, 4, 5, 7, 9, 10, 13, 15–19, and 21) (''the '894 annealing claims''). The ID finds that some, but not all, of the '894 annealing claims are invalid in view of certain prior art.

After the issuance of the ID, the Commission solicited comments from the public concerning remedy and the public interest. On September 13, 2018, Representative Brian Higgins (R–N.Y.) filed comments in support of his constituent Ivoclar, whose headquarters is in Western New York. Letter from Rep. Brian Higgins to Chairman David S. Johanson at 1 (Sept. 13, 2018). In addition, Ivoclar, GC, and the Commission investigative attorney filed petitions for review and replies to the other parties' petitions.

On September 21, 2018, the Commission issued its notice of review. By that notice, the Commission determined not to review the ID with respect to the '836 patent and the '894 flexure strength claims, thereby terminating the investigation as to those patent claims. The Commission determined to review the ID's findings as to the '894 annealing claims and solicited further briefing from the parties on certain issues concerning those patent claims. The Commission also solicited briefing from the parties, interested government agencies, and members of the public on remedy, the public interest, and bonding. No non-parties filed such briefing. On October 5, 2018, the parties filed opening briefs in response to the Commission notice of review, and on October 12, 2018, the parties filed reply briefs.

Having reviewed the record of the investigation, including the final ID, the parties' petitions for review and responses thereto, and the parties' briefing to the Commission, the Commission has determined to affirm, with modified reasoning, the ID's conclusion that Ivoclar failed to demonstrate infringement of the '894 annealing claims. The Commission has also determined to affirm, with modified reasoning, the ID's finding that claims 1, 2, and 34 of the '894 patent are anticipated by U.S. Patent No. 4,189,325 (Barrett) (RX–27). The Commission has determined to take no position as to whether International Patent Application WO 00/34196 (''WO196'') (RX–563) invalidates any of the '894 annealing claims or whether the technical prong of the domestic industry requirement was met for the '894 patent. The Commission has determined to affirm the ID's remaining findings concerning the '894 annealing claims. Accordingly, the Commission terminates the investigation with respect to the '894 annealing claims, and thereby the investigation in its entirety, with a finding of no violation of section 337. The reasons for the Commission's determinations are set forth more fully in the Commission's accompanying opinion.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

Issued: December 18, 2018.

By order of the Commission.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2018–27815 Filed 12–21–18; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

**[OMB Number 1121–0352]**

### Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension Without Change, of a Previously Approved Collection National Standards to Prevent, Detect, and Respond to Prison Rape (28 CFR part 115)

**AGENCY:** Bureau of Justice Assistance, Department of Justice.

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Assistance, 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 25, 2019.

**FOR FURTHER INFORMATION CONTACT:** If you have additional comments on the estimated burden to facilities covered by the standards to comply with the regulation's reporting requirements, suggestions, or need additional information, please contact Emily Niedzwiecki, Policy Advisor, Bureau of Justice Assistance, 810 Seventh Street NW, Washington, DC 20531 (phone: 202–305–9317).

**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 Bureau of Justice Assistance, 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/or
—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:* Extension of a currently approved collection.

2. *The Title of the Form/Collection:* National Standards to Prevent, Detect, and Respond to Prison Rape (28 CFR part 115).

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* There is no form number associated with this information collection. The applicable component within the Department of Justice is the Bureau of Justice Assistance, in the Office of Justice Programs.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* On June 20, 2012, the Department of Justice published a Final Rule to adopt national standards to prevent, detect, and respond to sexual abuse in confinement settings pursuant to the Prison Rape Elimination Act of 2003 (PREA) 42 U.S.C. 15601 *et seq.* These national standards, which went into effect on August 20, 2012, require covered facilities to retain certain specified information relating to sexual abuse prevention planning, responsive planning, education and training, investigations and to collect and retain certain specified information relating to allegations of sexual abuse within the facility. Covered facilities include: Federal, state, and local jails, prisons, lockups, community correction facilities, and juvenile facilities, whether administered by such government or by a private organization on behalf of such government. As the agency responsible for PREA implementation on behalf of the U.S. Department of Justice, the Bureau of Justice Assistance within the Office of Justice Programs is submitting this request to extend a currently approved collection.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The recordkeeping and reporting requirements established by the PREA standards are based on incidents of sexual abuse. An estimated 13,119 covered facilities nationwide are required to comply with the PREA standards. If all covered facilities were to fully comply with all of the PREA standards, the new burden hours associated with the staff time that would be required to collect and maintain the information and records required by the standards would be approximately 1.16 million in the first year of full compliance, or about 89 hours per facility.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden hours associated with this collection is 1.16 million in the first year of full compliance, or about 89 hours per facility.

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 19, 2018.

**Melody Braswell,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2018–27927 Filed 12–21–18; 8:45 am]

BILLING CODE 4410–18–P

---

## DEPARTMENT OF JUSTICE

**[OMB Number 1121–0259]**

## Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension Without Change, of a Previously Approved Collection: Public Safety Officer Medal of Valor (Public Law 107–12)

**AGENCY:** Bureau of Justice Assistance, Department of Justice.

**ACTION:** 60-day notice.

**SUMMARY:** The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Assistance, 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 25, 2019.

**FOR FURTHER INFORMATION CONTACT:** If you have additional comments on the estimated burden to facilities covered by the standards to comply with the regulation's reporting requirements, suggestions, or need additional information, please contact Gregory Joy, Program Analyst, Bureau of Justice Assistance, 810 Seventh Street NW, Washington, DC 20531.

**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 Bureau of Justice Assistance, 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/or
—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:* Extension of a currently approved collection.

2. *The Title of the Form/Collection:* Public Safety Officer Medal of Valor (Public Law 107–12).

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The application process is managed through the internet, using the Office of Justice Programs' (OJP) MOV online application system at: *https://www.bja.gov/programs/medalofvalor/index.html*

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* The information that is being

collected is solicited from federal, state, local and tribal public safety agencies, who wish to nominate their personnel to receive the Public Safety Officer Medal of Valor (MOV). This information is provided on a voluntary basis, includes agency and nominee information along with details about the events for which the nominees are to be consider when determining who will be recommended to receive the MOV.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* Over the last four application submission periods, (2011–2012 thru 2014–2015), there were a total of 514 applications received. Taking this number into account, the average number of applications that are anticipated to be received on an annual basis is 128.5. This number does not factor in the ongoing outreach efforts (*e.g.* marketing and social medial outreach) that are intended to increase the number of annual submissions. In addition, it is projected that the application submission process takes approximately 25 minutes. This would include, reviewing the fields of required and optional information, arranging the information and populating the online application form.

6. *An estimate of the total public burden (in hours) associated with the collection:* Base upon the average number of submissions over the last 4 years, and the estimated time required to complete each submission, the estimated annual public burden would be 53.54 hours.

a. 128.5 × 25 minutes = 3,212.5 minutes/60 = 53.54 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 19, 2018.

**Melody Braswell,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2018–27916 Filed 12–21–18; 8:45 am]

**BILLING CODE 4410–18–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2019 Adverse Effect Wage Rates for Non-Range Occupations

**AGENCY:** Employment and Training Administration (ETA), Labor.

**ACTION:** Notice.

**SUMMARY:** The Employment and Training Administration (ETA) of the Department of Labor (Department) is issuing this notice to announce the 2019 Adverse Effect Wage Rates (AEWR) for the employment of temporary or seasonal nonimmigrant foreign workers (H–2A workers) to perform agricultural labor or services other than the herding or production of livestock on the range.

AEWRs are the minimum wage rates the Department has determined must be offered and paid by employers to H–2A workers and workers in corresponding employment for a particular occupation and area so that the wages and working conditions of similarly employed workers in the United States (U.S.) will not be adversely affected. In this notice, the Department announces the annual update of the AEWRs.

**DATES:** These rates are applicable January 9, 2019.

**FOR FURTHER INFORMATION CONTACT:** Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, Department of Labor, Box #12–200, 200 Constitution Ave. NW, Washington, DC 20210, Telephone: (202) 693–2772 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:** As a condition precedent to receiving an H–2A visa, employers must first obtain a labor certification from the Department of Labor. The labor certification provides that: (1) There are not sufficient U.S. workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the foreign worker(s) in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188(a); 8 CFR 214.2(h)(5); 20 CFR 655.100.

**Adverse Effect Wage Rates for 2019**

The Department's H–2A regulations at 20 CFR 655.122(l) provide that employers must pay their H–2A workers and workers in corresponding employment at least the highest of: (i) The AEWR; (ii) the prevailing hourly wage rate; (iii) the prevailing piece rate; (iv) the agreed-upon collective bargaining wage rate; or (v) the Federal or State minimum wage rate in effect at the time the work is performed.

The AEWR for all agricultural employment (except for the herding or production of livestock on the range, which is covered by 20 CFR 655.200–655.235) for which temporary H–2A certification is being sought is equal to the annual weighted average hourly wage rate for field and livestock workers (combined) in the State or region as published annually by the United States Department of Agriculture (USDA). 20 CFR 655.120(c) requires that the Administrator of the Office of Foreign Labor Certification publish the USDA field and livestock worker (combined) wage data as AEWRs in a **Federal Register** Notice. Accordingly, the 2019 AEWRs to be paid for agricultural work performed by H–2A and U.S. workers on or after the effective date of this notice are set forth in the table below:

TABLE—2019 ADVERSE EFFECT WAGE RATES

| State | 2019 AEWRs |
|---|---|
| Alabama | $11.13 |
| Arizona | 12.00 |
| Arkansas | 11.33 |
| California | 13.92 |
| Colorado | 13.13 |
| Connecticut | 13.25 |
| Delaware | 13.15 |
| Florida | 11.24 |
| Georgia | 11.13 |
| Hawaii | 14.73 |
| Idaho | 13.48 |
| Illinois | 13.26 |
| Indiana | 13.26 |
| Iowa | 13.34 |
| Kansas | 14.38 |
| Kentucky | 11.63 |
| Louisiana | 11.33 |
| Maine | 13.25 |
| Maryland | 13.15 |
| Massachusetts | 13.25 |
| Michigan | 13.54 |
| Minnesota | 13.54 |
| Mississippi | 11.33 |
| Missouri | 13.34 |
| Montana | 13.48 |
| Nebraska | 14.38 |
| Nevada | 13.13 |
| New Hampshire | 13.25 |
| New Jersey | 13.15 |
| New Mexico | 12.00 |
| New York | 13.25 |
| North Carolina | 12.25 |
| North Dakota | 14.38 |

TABLE—2019 ADVERSE EFFECT WAGE RATES—Continued

| State | 2019 AEWRs |
|---|---|
| Ohio | 13.26 |
| Oklahoma | 12.23 |
| Oregon | 15.03 |
| Pennsylvania | 13.15 |
| Rhode Island | 13.25 |
| South Carolina | 11.13 |
| South Dakota | 14.38 |
| Tennessee | 11.63 |
| Texas | 12.23 |
| Utah | 13.13 |
| Vermont | 13.25 |
| Virginia | 12.25 |
| Washington | 15.03 |
| West Virginia | 11.63 |
| Wisconsin | 13.54 |
| Wyoming | 13.48 |

Pursuant to the H–2A regulations at 20 CFR 655.173, the Department will publish a separate **Federal Register** Notice in early 2019 to announce: (1) The allowable charges for 2019 that employers seeking H–2A workers may charge their workers for providing them three meals a day; and (2) the maximum travel subsistence reimbursement that a worker with receipts may claim in 2019. Also in a separate **Federal Register** Notice, the Department will publish the monthly AEWR for workers engaged to perform herding or production of livestock on the range for 2019.

**Molly E. Conway,**

*Acting Assistant Secretary for the Employment and Training Administration.*

[FR Doc. 2018–28030 Filed 12–20–18; 11:15 am]

**BILLING CODE 4510–FP–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: Adverse Effect Wage Rate for Range Occupations in 2019

**AGENCY:** Employment and Training Administration (ETA), Labor.

**ACTION:** Notice.

**SUMMARY:** The Employment and Training Administration (ETA) of the Department of Labor (Department) is issuing this notice to announce the 2019 Adverse Effect Wage Rate (AEWR) for the employment of temporary or seasonal nonimmigrant foreign workers (H–2A workers) to perform herding or production of livestock on the range.

AEWRs are the minimum wage rates the Department has determined must be offered and paid by employers to H–2A workers and workers in corresponding employment so that the wages and working conditions of similarly employed workers in the United States (U.S.) will not be adversely affected. In this notice, the Department announces the annual update of the AEWR for workers engaged in the herding or production of livestock on the range, as required by the methodology established in the *Temporary Agricultural Employment of H–2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States,* 80 FR 62958, 63067–63068 (Oct. 16, 2015); 20 CFR 655.211.

**DATES:** The rate is applicable January 1, 2019.

**FOR FURTHER INFORMATION CONTACT:** Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, Department of Labor, Box #12–200, 200 Constitution Ave. NW, Washington, DC 20210, Telephone: (202) 693–2772 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:** The U.S. Citizenship and Immigration Services of the Department of Homeland Security will not approve an employer's petition for the admission of H–2A nonimmigrant temporary and seasonal agricultural workers in the United States unless the petitioner has received an H–2A labor certification from the Department. The labor certification provides that: (1) there are not sufficient U.S. workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the foreign worker(s) in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188(a); 8 CFR 214.2(h)(5); 20 CFR 655.100.

Adverse Effect Wage Rate for 2019

The Department's H–2A regulations covering the herding or production of livestock on the range (H–2A Herder Rule) at 20 CFR 655.210(g) and 655.211(a)(1) provide that employers must offer, advertise in recruitment, and pay each worker employed under 20 CFR 655.200–655.235 a wage that is at least the highest of: (1) The monthly AEWR, (2) the agreed-upon collective bargaining wage, or (3) the applicable minimum wage imposed by Federal or State law or judicial action. Further, when the monthly AEWR is adjusted during a work contract and is higher than both the agreed-upon collective bargaining wage and the applicable minimum wage imposed by Federal or State law or judicial action in effect at the time the work is performed, the employer must pay that adjusted monthly AEWR upon publication by the Department in the **Federal Register**. 20 CFR 655.211(a)(2).

As provided in 20 CFR 655.211(c)(2) of the H–2A Herder Rule, the monthly AEWR for range occupations in all states for a calendar year is based on the monthly AEWR for the previous calendar year, adjusted by the Employment Cost Index (ECI) for wages and salaries published by the Bureau of Labor Statistics for the preceding annual period. In setting the AEWR for 2019, ETA applied the required ECI adjustment of 3.1 percent to the monthly AEWR for range occupations in effect for 2018, resulting in a monthly wage of $1,633.33. The 12-month change in the ECI for wages and salaries of private industry workers between September 2017 and September 2018 was 3.1 percent.[1] Thus, the national monthly AEWR rate for all range occupations in the H–2A program in 2019 is calculated by multiplying the monthly AEWR for calendar year 2018 by the October 2018 ECI adjustment ($1,584.22 × 1.031 = 1,633.33) or $1,633.33. Accordingly, any employer certified or seeking certification for range workers must pay each worker a wage that is at least the highest of the monthly AEWR of $1,633.33, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State legislation or judicial action at the time work is performed on or after the effective date of this notice.

**Molly E. Conway,**

*Acting Assistant Secretary for the Employment and Training Administration.*

[FR Doc. 2018–28031 Filed 12–20–18; 11:15 am]

**BILLING CODE 4510–FP–P**

[1] The regulation at 20 CFR 655.211(c)(2) states that the monthly AEWR is calculated based on the ECI for wages and salaries ''for the preceding October—October period.'' This regulatory language was intended to identify the Bureau of Labor Statistics' October publication of ECI for wages and salaries, which presents data for the September—September period. Accordingly, the most recent 12-month change in the ECI for private sector workers published on October 31, 2018, by the Bureau of Labor Statistics was used for establishing the monthly AEWR under the regulations. *See https://www.bls.gov/news.release/eci.htm.* The ECI for private sector workers was used rather than the ECI for all civilian workers given the characteristics of the H–2A herder workforce.

## DEPARTMENT OF LABOR

### Agency Information Collection Activities; Submission for OMB Review; Comment Request, Implementation Evaluation of the National Health Emergency (NHE) Demonstration Grants To Address the Opioid Crisis, New Collection

**AGENCY:** Office of the Assistant Secretary for Policy, Chief Evaluation Office, Department of Labor.

**ACTION:** Notice of Information Collection; request for comment.

**SUMMARY:** The Department of Labor (DOL), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents is properly assessed. Currently, the Department of Labor is soliciting comments concerning the collection of data about the Implementation Evaluation of the National Health Emergency Demonstration Grants to Address the Opioid Crisis. A copy of the proposed Information Collection Request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice.

**DATES:** Written comments must be submitted to the office listed in the addressee's section below on or before February 25, 2019.

**ADDRESSES:** You may submit comments by either one of the following methods:

*Email: ChiefEvaluationOffice@dol.gov; Mail or Courier:* Jennifer Daley, Chief Evaluation Office, OASP, U.S. Department of Labor, Room S–2312, 200 Constitution Avenue NW, Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and OMB Control Number identified above for this information collection. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for OMB approval of the information collection request.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Daley by email at *ChiefEvaluationOffice@dol.gov* or by phone at (202) 693–5913.

**SUPPLEMENTARY INFORMATION:**

*I. Background:* The Chief Evaluation Office (CEO) of the U.S. Department of Labor (DOL) intends to design and conduct information collection activities to provide data for the implementation evaluation of the National Health Emergency (NHE) Demonstration Grants to Address the Opioid Crisis. DOL awarded $22 million in NHE grants to six states in 2018. States have proposed a variety of strategies including services for individuals or family members affected by opioid addiction, training for workers to address the crisis, and system-wide investments to align workforce services with services provided by other organizations at the state and local levels. The implementation study of the grants will address four research questions: (1) How were the grants implemented, what services were provided, and what factors influenced implementation and job placement and retention?; (2) Who were the major partners involved and what services did they provide?; (3) What challenges did grantees encounter in implementation and how were those addressed?; and (4) What practices developed under the grant appear to be promising or potentially promising?

This **Federal Register** Notice provides the opportunity to comment on proposed data collection instruments that will be used in the implementation evaluation: Key informant interview protocols, survey of key informants (state- and local-level administrators) and a program participant interview guide.

1. *Key informant interview protocol.* The protocol will be used during site visits to the grantees to collect information from administrators and staff at the state- and local-level, and with partner organizations and employers at either the state or local level. Issues to be covered include the state and local community context, strategies and approaches to service delivery, target populations and recruiting, the role of various partners in grant and subgrant activities, successes and challenges, preliminary outcomes, promising practices, and other topics.

2. *Survey of key informants.* This short questionnaire for key informants (administrators and staff at the state- and local-level) includes basic background information, such as their highest education level and experience, and brief questions about their perspectives on the opioid crisis and the state's partnerships to address the crisis.

3. *Program participant interview guide.* The guide will be used for individual or group discussions with approximately 10 program participants in each state. Topics will include participant background, service receipt, participants' views on the quality and effectiveness of the workforce services received, and their current or anticipated labor market experiences as a result of the services.

*II. Desired Focus of Comments:* Currently, the Department of Labor is soliciting comments concerning the above data collection for the Implementation Evaluation of the National Health Emergency (NHE) Demonstration Grants to Address the Opioid Crisis. DOL is particularly interested in comments that do the following:

○ Evaluate whether the proposed collection of information is necessary for the proper performance functions of the agency, including whether the information will have practical utility;

○ evaluate the accuracy of the agency's burden estimate of the proposed information collection, including the validity of the methodology and assumptions;

○ enhance the quality, utility, and clarity of the information to be collected; and

○ minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology—for example, permitting electronic submissions of responses.

*III. Current Actions:* At this time, DOL is requesting clearance for the key informant interview protocol, written survey for key informants, and a program participant interview guide.

*Type of Review:* New information collection request.

*OMB Control Number:* 1290–0NEW.

*Affected Public:* NHE grantee administrators, participants, and partners.

Comments submitted in response to this request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

ESTIMATED ANNUAL BURDEN HOURS

| Type of instrument | Number of respondents | Number of responses per respondent | Average burden time per response (hours) | Estimated burden hours |
|---|---|---|---|---|
| Key informant interview protocol: state and local administrator, staff, and partners [b] | 60 | 1 | 1 | 60 |
| Survey: State and local staff and partners | 60 | 1 | 0.17 | 10 |
| Program participant interview guide | 20 | 1 | 1 | 20 |
| Total | 140 | | | 90 |

[a] The study is scheduled to take three years.
[b] Assumes each visit will, on average, involve individual or group interviews with approximately 30 respondents. The team assumes the average burden time per response to be about 1 hour, although some meetings will be shorter and some will be longer.

**Molly Irwin,**
*Chief Evaluation Officer, U.S. Department of Labor.*

[FR Doc. 2018–27919 Filed 12–21–18; 8:45 am]
BILLING CODE 4510–HX–P

## DEPARTMENT OF LABOR

### Agency Information Collection Activities; Comment Request; National Database of Childcare Costs Submission for Review: National Database of Childcare Costs

**AGENCY:** Women's Bureau, DOL.

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The U.S. Department of Labor, Women's Bureau (WB) is soliciting comments concerning a proposed information collection request (ICR) titled, ''National Database of Childcare Costs''. This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

**DATES:** Comments are encouraged and will be accepted until February 25, 2019.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained without charge by contacting the U.S. Department of Labor, Women's Bureau, Room S–3002, 200 Constitution Avenue NW, Washington, DC 20210, (202)693–6710, *Womens.Bureau@dol.gov.* Comments in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *https://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Comments submitted by postal mail or delivery should be addressed to U.S. Department of Labor, Women's Bureau, Room S–3002, 200 Constitution Avenue NW, Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, contact Sarah Miller by telephone at (202)693–6716 (this is not a toll-free number) or by email at *miller.sarah@dol.gov.* For technical questions, contact: Liana Christin Landivar by telephone at (202)693–6713 (this is not a toll-free number) or by email at *landivar.liana.c@dol.gov.*

**SUPPLEMENTARY INFORMATION:** The DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the OMB for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed. This proposed information collection seeks to establish the National Database of Childcare Costs. State-administered Market Rate Surveys are conducted by state human services or workforce development offices as a requirement to receive Child Care and Development Block Grants (CCDBG). The surveys establish a benchmark of the local prices of various types of care (*e.g.,* center-based, home-based, family-provided) by age of children (*i.e.,* infants, preschool, and school-age children). These surveys are used to establish the maximum reimbursement rates for childcare subsidies. Market Rate Surveys sample all eligible centers and care providers and obtain the full market price of care. Because the state Market Rate Surveys establish the full market price of care in local areas, these data are ideal to examine local childcare prices. However, these data are not reported to the federal government and they are retained by the states.

This information collection would request Market Rate Survey data from all states and reconcile measures for uniformity across the states. Metrics would be made comparable and geography would be standardized to be able to combine these data for analysis with county characteristics available from the American Community Survey. The database would be evaluated to protect respondent confidentiality, implementing proper disclosure avoidance techniques in counties with small samples. The database would be made available to the public as a research tool to understand childcare prices at the county level and changes in childcare prices over time. Section 2 of Public Law 66–259 that established the Women's Bureau authorizes this information collection. *See* 29 U.S.C. 13.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should

mention ICR Reference Number 201811–1290–002.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. The DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

The DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; 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.

**Analysis**

*Agency:* DOL–WB.

*Type of Review:* New Collection.

*Collection Title:* National Database of Childcare Costs.

*ICR Reference Number:* 201811–1290–002.

*Affected Public:* State, Local, and Tribal Governments.

*Number of Respondents:* 51.

*Annual Frequency:* Once.

*Total Estimated Annual Responses:* 51.

*Estimated Average Time per Response:* 3 hours.

*Total Annual Burden Time:* 153 hours.

*Total Estimated Annual Other Cost Burden:* $0.

**Authority:** 44 U.S.C. 3506(c)(2)(A).

Dated: December 19, 2018.

**Patricia G. Greene,**

*Director, Women's Bureau.*

[FR Doc. 2018–27861 Filed 12–21–18; 8:45 am]

**BILLING CODE 4510–HD–P**

## DEPARTMENT OF LABOR

### Bureau of Labor Statistics

### Information Collection Activities; Comment Request

**AGENCY:** Bureau of Labor Statistics, Department of Labor.

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed reinstatement of the ''Current Population Survey (CPS) Disability Supplement,'' to be conducted in July 2019. A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

**DATES:** Written comments must be submitted to the office listed in the **ADDRESSES** section of this notice on or before February 25, 2019.

**ADDRESSES:** Send comments to Carol Rowan, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue NE, Washington, DC 20212. Written comments may also be transmitted by fax to 202–691–5111 (this is not a toll free number).

**FOR FURTHER INFORMATION CONTACT:** Carol Rowan, BLS Clearance Officer, 202–691–7628 (this is not a toll free number). (See **ADDRESSES** section.)

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The July 2019 CPS Disability Supplement will be conducted at the request of the Department of Labor's Chief Evaluation Office. The Disability Supplement will provide information on the low labor force participation rates for people with disabilities; the use of and satisfaction with programs that prepare people with disabilities for employment; the work history, barriers to employment, and workplace accommodations reported by persons with a disability; and the effect of financial assistance programs on the likelihood of working. Since the supplement was last collected in 2012, work patterns have changed, policies have changed, and assistive technologies have advanced. Having updated information will be valuable in determining how employment barriers have changed for people with disabilities.

Because the Disability Supplement is part of the CPS, the same detailed demographic information collected in the CPS will be available about respondents to the supplement. Thus, comparisons will be possible across respondent characteristics, including sex, race, ethnicity, age, and educational attainment. It will also be possible to create estimates for those who are employed, unemployed, and not in the labor force. Because the CPS is a rich source of information on the employment status of the population, it will be possible to examine in detail the nature of various employment and unemployment situations.

**II. Current Action**

Office of Management and Budget clearance is being sought for the CPS Disability Supplement. These data are necessary to provide information about the labor market challenges facing persons with a disability and will contribute to improvements in policies and programs designed to assist these individuals.

**III. Desired Focus of Comments**

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

*Title of Collection:* CPS Disability Supplement.

*OMB Number:* 1220–0186.

*Type of Review:* Reinstatement of a previously approved collection for which approval has expired.

*Affected Public:* Individuals or households.

*Total Respondents:* 55,000 respondents are expected to supply data for 106,000 individuals.

*Frequency:* 1.93.

*Total Responses:* 106,000.

*Average Time per Response:* 5 minutes.

*Estimated Total Burden Hours:* 8,833.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 18th day of December 2018.

**Mark Staniorski,**

*Division Chief, Division of Management Systems, Bureau of Labor Statistics.*

[FR Doc. 2018–27850 Filed 12–21–18; 8:45 am]

**BILLING CODE 4510–24–P**

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

**[Docket No. OSHA–2009–0026]**

### Curtis-Straus LLC: Application for Expansion of Recognition

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Notice.

**SUMMARY:** In this notice, OSHA announces the application of Curtis-Straus LLC for expansion of recognition as a Nationally Recognized Testing Laboratory (NRTL) and presents the agency's preliminary finding to grant the application.

**DATES:** Submit comments, information, and documents in response to this notice, or requests for an extension of time to make a submission, on or before January 10, 2019.

**ADDRESSES:** Submit comments by any of the following methods:

*Electronically:* You may submit comments and attachments electronically at: *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

*Facsimile:* If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

*Mail, hand delivery, express mail, messenger, or courier service:* When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2009–0026, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

*Instructions:* All submissions must include the agency name and OSHA docket number (OSHA–2009–0026). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *https://www.regulations.gov.* For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

*Docket:* To read or download comments or other material in the docket, go to *https://www.regulations.gov* or the OSHA Docket Office at the above address. All documents in the docket (including this **Federal Register** notice) are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office.

*Extension of comment period:* Submit requests for an extension of the comment period on or before January 10, 2019 to the Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–3653, Washington, DC 20210, or by fax to (202) 693–1644.

**FOR FURTHER INFORMATION CONTACT:** Information regarding this notice is available from the following sources:

*Press inquiries:* Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

*General and technical information:* Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, phone: (202) 693–2110 or email: *robinson.kevin@dol.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Notice of the Application for Expansion

OSHA is providing notice that Curtis-Straus LLC (CSL), is applying for expansion of recognition as a NRTL. CSL requests the addition of one test standard to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by the applicable test standard; and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by a NRTL for initial recognition and for an expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides a preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including CSL, which details the NRTL's scope of recognition. These pages are available from the OSHA website at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

CSL currently has one facility (site) recognized by OSHA for product testing and certification, with headquarters located at: Curtis-Straus LLC, One Distribution Circle, Suite #1, Littleton, MA 01460. A complete list of CSL's scope of recognition is available at *https://www.osha.gov/dts/otpca/nrtl/csl.html.*

#### II. General Background on the Application

CSL submitted an application, dated January 2, 2018 (OSHA–2009–0026–0079), to expand recognition to include one additional test standard. OSHA staff

performed a detailed analysis of the application packet and reviewed other pertinent information. OSHA did not perform any on-site reviews in relation to this application.

Table 1 lists the appropriate test standard found in CSL's application to expand for testing and certification of products under the NRTL Program.

TABLE 1—PROPOSED LIST APPROPRIATE TEST STANDARD FOR INCLUSION IN CSL'S NRTL SCOPE OF RECOGNITION

| Test standard | Test standard title |
|---|---|
| UL 962 ..... | Household and Commercial Furnishings. |

## III. Preliminary Findings on the Application

CSL submitted an acceptable application for expansion of the scope of recognition. OSHA's review of the application file, and pertinent documentation, indicates CSL can meet the requirements prescribed by 29 CFR 1910.7 for expanding recognition to include the addition of this one test standard for NRTL testing and certification listed above. This preliminary finding does not constitute an interim or temporary approval of CSL's application.

OSHA welcomes public comment as to whether CSL meets the requirements of 29 CFR 1910.7 for expansion of recognition as a NRTL. Comments should consist of pertinent written documents and exhibits. Commenters needing more time to comment must submit a request in writing, stating the reasons for the request. Commenters must submit the written request for an extension by the due date for comments. OSHA will limit any extension to 10 days unless the requester justifies a longer period. OSHA may deny a request for an extension if the request is not adequately justified. To obtain or review copies of the exhibits identified in this notice, as well as comments submitted to the docket, contact the Docket Office, Room N–2625, Occupational Safety and Health Administration, U.S. Department of Labor, at the above address. These materials also are available online at *http://www.regulations.gov* under Docket No. OSHA–2009–0026.

OSHA staff will review all comments to the docket submitted in a timely manner. After addressing the issues raised by these comments, the agency will make a recommendation to the Assistant Secretary for Occupational Safety and Health whether to grant CSL's application for expansion of the scope of recognition. The Assistant Secretary will make the final decision on granting the application. In making this decision, the Assistant Secretary may undertake other proceedings prescribed in Appendix A to 29 CFR 1910.7.

OSHA will publish a public notice of its final decision in the **Federal Register**.

## IV. Authority and Signature

Loren Sweatt, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on December 18, 2018.

**Loren Sweatt,**

*Deputy Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 2018–27856 Filed 12–21–18; 8:45 am]

**BILLING CODE 4510–26–P**

---

## LIBRARY OF CONGRESS

## Copyright Royalty Board

**[Docket No. CONSOLIDATED 2008–3 CRB DD (2007–2011 SRF)]**

## Distribution of the 2007, 2008, 2009, 2010, and 2011 Digital Audio Recording Technology Royalty Funds for the Sound Recordings Funds

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

**ACTION:** Notice announcing commencement of proceeding with request for Petitions to Participate.

**SUMMARY:** The Copyright Royalty Judges announce the commencement of a proceeding to determine the distribution of the digital audio recording technology royalty fees in the 2007, 2008, 2009, 2010, and 2011 Sound Recordings Funds. The Judges also announce the date by which a party who wishes to participate in this proceeding must file its Petition to Participate and the accompanying filing fee, if applicable.

**DATES:** Petitions to Participate and the filing fee, if applicable, are due no later than January 25, 2019.

**ADDRESSES:** Interested claimants must submit petitions to participate and the filing fee, if applicable, identified by docket number CONSOLIDATED 2008–3 CRB DD (2007–2011 SRF), by using the CRB's electronic filing application, eCRB, at *https://app.crb.gov/.* Claimants without access to the internet may file using any of the following methods:

*U.S. mail:* Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024–0977; or *Overnight service (only USPS Express Mail is acceptable):* Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024–0977; or

*Commercial courier:* Address package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM–403, 101 Independence Avenue SE, Washington, DC 20559–6000. Deliver to: Congressional Courier Acceptance Site, 2nd Street NE and D Street NE, Washington, DC; or

*Hand delivery:* Library of Congress, James Madison Memorial Building, LM–401, 101 Independence Avenue SE, Washington, DC 20559–6000.

*Instructions:* Unless submitting online, claimants must submit an original, two paper copies, and an electronic version on a CD. All submissions received must include the Copyright Royalty Board name and docket number. All submissions received will be posted without change on eCRB including any personal information provided.

*Docket:* For access to the docket to read background documents, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at *https://app.crb.gov/* and search for docket number CONSOLIDATED 2008–3 CRB DD (2007–2011 SRF). For documents not yet uploaded to eCRB (because it is a new system), go to the agency website at *https://www.crb.gov/* or contact the CRB Program Specialist.

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

**SUPPLEMENTARY INFORMATION:**

## Background

The Audio Home Recording Act of 1992 (AHRA), Public Law 102–563, requires manufacturers and importers to pay royalties on digital audio recording devices and media that are distributed in the United States. 17 U.S.C. 1003. These royalties are deposited with the Copyright Office for further distribution to eligible claimants. 17 U.S.C. 1005, 1007. Royalties are divided into two funds: the Sound Recordings Fund (66–2/3%) and the Musical Works Fund (33–1/3%). These fees in turn are allocated to specific subfunds. 17 U.S.C. 1006(b). The Sound Recordings Fund, which is the subject of this notice, is divided between the Copyright Owners

Subfund (60%) and the Featured Recording Artists Subfund (40%), after small portions are distributed to nonfeatured musicians and nonfeatured vocalists. 17 U.S.C. 1006(b)(1).

Distribution of the fees in the two subfunds may occur in one of two ways. The interested copyright parties within each subfund may negotiate the terms of a settlement as to the division of royalty funds. If, after any such agreements, funds remain in dispute, the Copyright Royalty Judges may conduct a proceeding to determine the distribution of the royalties that remain in controversy in each subfund. 17 U.S.C. 1006(c) & 1007(c).

The Judges have distributed 100% of the royalties for the Featured Recording Artists Subfund of the 2008 Sound Recordings Fund. *Distribution Order,* Docket No. 2009–3 CRB DD 2008 (June 24, 2009). However, the Judges have ordered only partial distributions of the 2007, 2008, 2009, 2010, and 2011 (from both the Copyright Owners Subfund and the Featured Recording Artists Subfund) because the interested copyright parties have not settled their disputes over remaining amounts. *See, e.g., Order Granting AARC's Request for Partial Distribution of 2011 DART Sound Recordings Funds;* Docket No. 2012–3 CRB DD 2011 (Sept. 20, 2012); *Order Granting in Part AARC's Supplemental Request for Partial Distribution of 2007, 2008 and 2009 DART Sound Recordings Fund Royalties,* Docket Nos. 2008–3 CRB DD 2007, 2009–3 CRB DD 2008; and 2010–5 CRB DD 2009 (March 8, 2012); *Order Granting AARC's Request for Partial Distribution of 2010 DART Sound Recordings Funds,* Docket No. 2011–6 CRB DD 2010 (Nov. 17, 2011); *Order Granting AARC's Request for Partial Distribution of 2008 DART Sound Recordings Fund/Copyright Owners Subfund Royalties;* Docket No. 2009–3 CRB DD 2008 (Aug. 19, 2009); *Distribution Order,* Docket No. 2008–3 CRB DD 2007 (Oct. 14, 2008).

Consistent with 17 U.S.C. 804(b)(8), the Judges determine that, for the reasons stated above, a controversy exists with respect to the distribution of the 2007, 2009, 2010, and 2011 DART Sound Recordings Fund royalties from the Copyright Owners Subfund and the Featured Recording Artists Subfund and, with respect to 2008, from the Copyright Owners Subfund.

**Commencement of Proceeding**

By this notice, the Judges announce the commencement of a proceeding to determine the final distribution of DART Sound Recordings Funds (from both the Copyright Owners Subfund and the Featured Recording Artists Subfund) for royalty years 2007, 2009, 2010, and 2011, and from the Copyright Owners Subfund for 2008.

**Petitions To Participate**

Petitions to Participate must provide all of the information required by 37 CFR 351.1(b)(2). Participants also must identify *by year* each subfund in the Sound Recordings Fund to which they are asserting a claim (*i.e.,* Copyright Owners, Featured Recording Artists, or both).

Petitions to Participate submitted by interested parties whose claims do not exceed $1,000 must contain a statement that the party will not seek a distribution of more than $1,000. 37 CFR 351.1(b)(4). No filing fee is required for such parties. Interested parties with claims exceeding $1,000, however, must submit a filing fee of $150 with their respective Petitions to Participate, or the petition will be rejected. CASH WILL NOT BE ACCEPTED. Parties filing online through eCRB must pay by credit card. Any party without access to the internet must pay the filing fee with a check or money order made payable to the ''Copyright Royalty Board'' and mailed or delivered with a paper claim form, as described in the ''Addresses'' section above. If a check is returned for lack of sufficient funds, the corresponding Petition to Participate will be dismissed.

Any participant that is an individual may represent herself or himself. All other participants must be represented by counsel. In accordance with 37 CFR 350.2 (Representation), only attorneys who are members of the bar in one or more states or the District of Columbia and in good standing will be allowed to represent parties before the Copyright Royalty Judges. The Judges will address further procedural matters, including scheduling, after Petitions to Participate have been filed.

**Intention To Conduct a Paper Proceeding**

In accordance with Section 803(b)(5)(B) of the Copyright Act, the Judges find it appropriate to conduct a paper proceeding in this matter in light of the relatively modest amount of royalties in dispute after previously approved partial distributions and the anticipated small number of non-settling claimants. In paper proceedings, the Judges enter an order scheduling the filing of a written direct statement by each participant, a response of an opposing participant, and one additional response from the participant. 17 U.S.C. 803(b)(5). The Judges make their determination on the basis of these filings. Any party wishing to comment on the Judges' intention to conduct a paper proceeding should include such comments in its Petition to Participate.

**Suzanne M. Barnett,**

*Chief U.S. Copyright Royalty Judge.*

[FR Doc. 2018–27797 Filed 12–21–18; 8:45 am]

BILLING CODE 1410–72–P

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### National Endowment for the Arts

### Arts Advisory Panel Meetings

**AGENCY:** National Endowment for the Arts, National Foundation on the Arts and the Humanities.

**ACTION:** Notice of meetings.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, as amended, notice is hereby given that 1 meeting of the Arts Advisory Panel to the National Council on the Arts will be held by teleconference or videoconference.

**DATES:** See the **SUPPLEMENTARY INFORMATION** section for individual meeting times and dates. All meetings are Eastern time and ending times are approximate:

**ADDRESSES:** National Endowment for the Arts, Constitution Center, 400 7th St. SW, Washington, DC 20506.

**FOR FURTHER INFORMATION CONTACT:** Further information with reference to these meetings can be obtained from Ms. Sherry Hale, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506; *hales@arts.gov,* or call 202/682–5696.

**SUPPLEMENTARY INFORMATION:** The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of July 5, 2016, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of title 5, United States Code.

The upcoming meeting is:

*International Activities: Performing Arts Global Exchange, U.S. Artist International, Performing Arts Discovery, Shakespeare in American Communities* (review of applications): This meeting will be closed.

*Date and time:* January 31, 2019; 2:00 p.m. to 4:00 p.m.

Dated: December 18, 2018.

**Sherry Hale,**

*Staff Assistant, National Endowment for the Arts.*

[FR Doc. 2018–27782 Filed 12–21–18; 8:45 am]

**BILLING CODE 7537–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 72–27; NRC–2018–0282]**

## Pacific Gas & Electric Company; Humboldt Bay Independent Spent Fuel Storage Installation; Renewal of Special Nuclear Materials License

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** License renewal application; receipt; notice of opportunity to request a hearing and to petition for leave to intervene.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is considering an application for the renewal of Special Nuclear Materials (SNM) License No. SNM–2514, which currently authorizes Pacific Gas & Electric Company (PG&E) to receive, possess, transfer, and store spent fuel from Humboldt Bay Nuclear Power Plant (HPNPP) in the Humboldt Bay Independent Spent Fuel Storage Installation (ISFSI). The renewed license would authorize PG&E to continue to store spent fuel in the Humboldt Bay ISFSI for an additional 40 years beyond the current license expiration date of November 17, 2025.

**DATES:** A request for a hearing or petition for leave to intervene must be filed by February 25, 2019.

**ADDRESSES:** Please refer to Docket ID NRC–2018–0282 or NRC Docket No. 72–27 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–2018–0282. 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 ''*ADAMS Public Documents*'' and then 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.* For the convenience of the reader, the ADAMS accession numbers are provided in a table in the ''Availability of Documents'' section of this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

**FOR FURTHER INFORMATION CONTACT:** Christopher Markley, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6293; email: *Christopher.Markley@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

The NRC has received, by letter dated July 10, 2018, an application from PG&E for renewal of SNM License No. SNM–2514 for the Humboldt Bay ISFSI for an additional 40 years (ADAMS Accession No. ML18215A202). The license currently authorizes PG&E to receive, possess, transfer, and store spent fuel and Greater Than Class C Waste (GTCC) from HBNPP in the Humboldt Bay ISFSI, located at the HBNPP site in Humboldt County, California until the license term expires on November 17, 2025. This license renewal, if approved, would authorize PG&E to continue to store spent fuel and GTCC Waste at the Humboldt Bay ISFSI for an additional 40 years beyond its initial expiration, under the provisions of part 72 of title 10 of the Code of Federal Regulations (10 CFR), ''Licensing Requirements for the Independent Storage of Spent Nuclear Fuel, High-Level Radioactive Waste, and Reactor-Related Greater Than Class C Waste.''

Following an NRC administrative completeness review, documented in a letter to PG&E dated November 14, 2018 (ADAMS Accession No. ML18319A147), the NRC staff has determined that the renewal application contains sufficient information for the NRC staff to begin its technical review and is acceptable for docketing. The application has been docketed in Docket No. 72–27, the existing docket for SNM License No. SNM–2514. If the NRC approves the renewal application, the approval will be documented in the renewal of SNM License No. SNM–2514. The NRC will approve the license renewal application if it determines that the application meets the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the NRC's regulations. These findings will be documented in a safety evaluation report. The NRC will complete an environmental evaluation, in accordance with 10 CFR part 51, to determine if the preparation of an environmental impact statement is warranted or if an environmental assessment and finding of no significant impact are appropriate. This action will be the subject of a subsequent notice in the **Federal Register.**

### II. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR part 2. The NRC's regulations are accessible electronically from the NRC Library on the NRC's website at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* A copy of the regulations is available at the NRC's Public Document Room, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d), the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order that may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise

statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section. Alternatively, a State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a hearing is granted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

**III. Electronic Submissions (E-Filing)**

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *http://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *http://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *http://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the

Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission, or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click cancel when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly-available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

**IV. Availability of Documents**

The documents identified in this **Federal Register** notice are accessible to interested persons in ADAMS under the accession numbers identified in the table below.

| Date | Document | ADAMS Accession No. |
|---|---|---|
| August 3, 2018 | Package: Humboldt Bay ISFSI—Transmittal of License Renewal Application | ML18215A202. |
| September 20, 2018 | Package: Request for Supplemental Information for the Technical Review of the Application for Renewal of the Humboldt Bay Independent Spent Fuel Storage Installation License No. SNM–2514 (CAC No. 001028)). | ML18267A191. |
| October 22, 2018 | Response to NRC Letter dated Sep. 20, 2018, "Request for Supplemental Information for the Technical Review of the Application for Renewal of the Humboldt Bay Independent Spent Fuel Storage Installation License No. SNM–2514 (CAC No. 001028). | ML18330A050. |
| November 14, 2018 | Letter to J. Welsch re: Application for Renewal of the Humboldt Bay Independent Spent Fuel Storage Installation License No. SNM–2514—Accepted for Review (EPID No. L–2018–RNW–0016). | ML18319A147. |

Dated at Rockville, Maryland, this 19th day of December 2018.

For the Nuclear Regulatory Commission.

**Christopher T. Markley,**

*Systems Performance Analyst, Renewals and Materials Branch, Division of Spent Fuel Management, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2018–27832 Filed 12–21–18; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Revised 660th Meeting of the Advisory Committee on Reactor Safeguards (ACRS)

In accordance with the purposes of Sections 29 and 182b of the Atomic Energy Act (42 U.S.C. 2039, 2232b), the Advisory Committee on Reactor Safeguards (ACRS) will hold meetings on February 6–9, 2019, Three White Flint North, 11601 Landsdown Street, North Bethesda, MD 20852.

**Wednesday, February 6, 2019, Conference Room 1C3 & 1C5, Three White Flint North, 11601 Landsdown Street, North Bethesda, MD 20852**

*8:30 a.m.–8:35 a.m.: Opening Remarks by the ACRS Chairman* (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

*8:35 a.m.–10:30 a.m.: Technology-Inclusive, Risk-Informed, Performance-Based Approach for Approving Non-Light-Water Reactors* (Open)—The Committee will have briefings by and discussion with representatives of the NRC staff regarding the subject topic.

*10:45 a.m.–12:00 p.m.: Non-Production & Utilization Facilities Rulemaking* (Open)—The Committee will have briefings by and discussion with representatives of the NRC staff regarding the subject draft final rulemaking.

*1:00 p.m.–2:30 p.m.: Interim Letter: Chapters 2 and 17 of the NRC Staff's Safety Evaluation Reports With Open Items Related to the Certification of the NuScale Small Modular Reactor* (Open/Closed)—The Committee will have briefings by and discussion with representatives of the NRC staff and NuScale regarding the safety evaluation associated with the subject design certification. [*Note:* This session may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4)]

*2:45 p.m.–4:15 p.m.: Review of AURORA–B for LOCA Scenarios* (Closed)—The Committee will have briefings by and discussion with representatives of the NRC staff and Framatome regarding the subject proprietary topical report. [*Note:* This session is closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4)]

*4:15 p.m.–6:00 p.m.: Preparation of ACRS Reports* (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports. [*Note:* A portion of this session may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4)]

**Thursday, February 7, 2019, Conference Room 1C3 & 1C5, Three White Flint North, 11601 Landsdown Street, North Bethesda, MD 20852**

*8:30 a.m.–10:00 a.m.: Future ACRS Activities/Report of the Planning and Procedures Subcommittee and Reconciliation of ACRS Comments and Recommendations* (Open/Closed)—The Committee will hear discussion of the recommendations of the Planning and Procedures Subcommittee regarding items proposed for consideration by the Full Committee during future ACRS meetings. [*Note:* A portion of this meeting may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel

rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy]

*10:15 a.m.–10:45 a.m.: Assessment of the Quality of Selected NRC Research Projects* (Open)—The Committee will have a discussion of the assessment of the quality of research projects.

*10:45 a.m.–12:00 p.m.: Preparation of ACRS Reports* (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports. [*Note:* A portion of this session may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4)]

*1:00 p.m.–6:00 p.m.: Preparation of ACRS Reports* (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports. [*Note:* A portion of this session may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4)]

**Friday, February 8, 2019, Conference Room 1C3 & 1C5, Three White Flint North, 11601 Landsdown Street, North Bethesda, MD 20852**

*8:30 a.m.–12:00 p.m.: Preparation of ACRS Reports* (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports. [*Note:* A portion of this session may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4)]

*1:00 p.m.–6:00 p.m.: Preparation of ACRS Reports/Retreat* (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports and retreat items. [*Note:* A portion of this session may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4)] [*Note:* A portion of this meeting may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy]

**Saturday, February 9, 2019, Conference Room 1C3 & 1C5, Three White Flint North, 11601 Landsdown Street, North Bethesda, MD 20852**

*8:30 a.m.–12:00 p.m.: Preparation of ACRS Reports/Retreat* (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports and retreat items. [*Note:* A portion of this session may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4)] [*Note:* A portion of this meeting may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy]

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on December 7, 2018 (83 FR 26506). In accordance with those procedures, oral or written views may be presented by members of the public, including representatives of the nuclear industry. Persons desiring to make oral statements should notify Quynh Nguyen, cognizant ACRS Staff (Telephone: 301–415–5844, Email: *Quynh.Nguyen@nrc.gov*), 5 days before the meeting, if possible, so that appropriate arrangements can be made to allow necessary time during the meeting for such statements. In view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the cognizant ACRS staff if such rescheduling would result in major inconvenience. The bridgeline number for the meeting is 866–822–3032, passcode 8272423#.

Thirty-five hard copies of each presentation or handout should be provided 30 minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the cognizant ACRS Staff one day before meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the cognizant ACRS Staff with a CD containing each presentation at least 30 minutes before the meeting.

In accordance with Subsection 10(d) of Public Law 92–463 and 5 U.S.C. 552b(c), certain portions of this meeting may be closed, as specifically noted above. Use of still, motion picture, and television cameras during the meeting may be limited to selected portions of the meeting as determined by the Chairman. Electronic recordings will be permitted only during the open portions of the meeting.

ACRS meeting agendas, meeting transcripts, and letter reports are available through the NRC Public Document Room at *pdr.resource@nrc.gov,* or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System (PARS) component of NRC's document system (ADAMS) which is accessible from the NRC website at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-collections/#ACRS/.*

Video teleconferencing service is available for observing open sessions of ACRS meetings. Those wishing to use this service should contact Ms. Paula Dorm, ACRS Audio Visual Technician (301–415–7799), between 7:30 a.m. and 3:45 p.m. (ET), at least 10 days before the meeting to ensure the availability of this service. Individuals or organizations requesting this service will be responsible for telephone line charges and for providing the equipment and facilities that they use to establish the video teleconferencing link. The availability of video teleconferencing services is not guaranteed.

Dated: December 19, 2018.

**Russell E. Chazell,**

*Federal Advisory Committee Management Officer, Office of the Secretary.*

[FR Doc. 2018–27846 Filed 12–21–18; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[NRC–2016–0268]**

## Spent Fuel Heat Generation in an Independent Spent Fuel Storage Installation

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Regulatory guide; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing Revision 2 to Regulatory Guide (RG) 3.54, ''Spent Fuel Heat Generation in an Independent Spent Fuel Storage Installation.'' Revision 2 provides methods acceptable to the Nuclear Regulatory Commission (NRC) staff for calculating spent nuclear fuel heat generation rates for use for an Independent Spent Fuel Storage Installation (ISFSI). The revision presents an up-to-date methodology for determining heat generation rates and provides greater flexibility (less restrictions). It also allows loading of higher burnup fuel by using more accurate methods for decay heat calculations.

**DATES:** Revision 2 to RG 3.54 is available on December 26, 2018.

**ADDRESSES:** Please refer to Docket ID NRC–2016–0268 when contacting the NRC about the availability of information regarding this document. You may obtain publically-available information related to this document, using the following methods:

- *Federal rulemaking website:* Go to *http://www.regulations.gov* and search

for Docket ID NRC–2016–0268. Address questions about NRC dockets to Krupskaya Castellon; telephone: 301–287–9221; email: *Krupskaya.Castellon@nrc.gov.* For technical questions, contact the individuals 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 Document collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. Revision 2 to Regulatory Guide 3.54 and the regulatory analysis may be found in ADAMS under Accession No. ML18228A808 and ML16139A219 respectively.

• *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.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

**FOR FURTHER INFORMATION CONTACT:** Alexis Sotomayor-Rivera, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–7265; email: *Alexis.Sotomayor-Rivera@nrc.gov* and Harriet Karagiannis, Office of Nuclear Regulatory Research, telephone: 301–415–2493; email: *Harriet.Karagiannis@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

**SUPPLEMENTARY INFORMATION:**

## I. Discussion

The NRC is issuing a revision to an existing guide in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information regarding methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the NRC staff uses in evaluating specific issues or postulated events, and data that the NRC staff needs in its review of applications for permits and licenses.

Revision 2 of RG 3.54 was issued with a temporary identification of Draft Regulatory Guide, DG–3050, to provide methods that are acceptable to the NRC staff for calculating spent nuclear fuel heat generation rates for use as design input for an independent spent fuel storage installation (ISFSI).

This revision also presents an up-to-date methodology for determining heat generation rates for both pressurized-water reactor (PWR) and boiling-water reactor (BWR) fuel and provides greater flexibility (fewer restrictions) than previous versions of this guide. It allows the loading of higher burnup fuel by using more accurate methods for decay heat calculations by covering a wider range of fuel characteristics, including operating history.

## II. Additional Information

The NRC published a notice of the availability of DG–3050 in the **Federal Register** on December 23, 2016 (81 FR 94431), for a 60 day public comment period. The public comment period closed on February 21, 2017. Public comments on DG–3050 and the staff responses to the public comments are available under ADAMS under Accession No. ML18228A811.

## III. Congressional Review Act

This RG is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

## IV. Backfitting and Issue Finality

This RG will provide guidance to applicants and licensees subject to Title 10 of the *Code of Federal Regulations* (CFR) Part 72, including applicants and holders of Certificates of Compliance (CoC), with respect to determining heat generation rates for spent fuel. Issuance of this RG will not constitute backfitting as defined in in 10 CFR 72.62(a), which is applicable to ISFSIs. Issuance of the RG will not constitute backfitting under 10 CFR 50.109, or otherwise be inconsistent with the issue finality provisions in 10 CFR part 52. The staff's position is based upon the following considerations.

1. The RG positions describe a methodology acceptable to the NRC staff, and expressly states that current licensees may continue to use guidance the NRC found acceptable for complying with the identified regulations as long as the licensee does not initiate, as a voluntary matter, a change to its current licensing basis. Thus, the guidance will not constitute backfitting as defined in 10 CFR 72.62(a).

2. The NRC has no intention of imposing the positions in the RG on existing CoCs, ISFSI or nuclear power plant licenses either now or in the future (absent a voluntary request for change from the licensee).

3. The matters addressed in the RG apply equally to both specific licensees under Part 72 as well as general licensees under who hold ISFSI licensees by virtue of their status as holders of Part 50 operating licenses or as holders of Part 52 combined licenses.

4. Backfitting and issue finality do not—with limited exceptions not applicable here—protect current or future applicants. Applicants and potential applicants are not, with certain exceptions, protected by the backfitting provisions in 10 CFR 72.62. This is because the backfitting provisions in Part 72 were not intended to apply to every NRC action which substantially changes the expectations of current and future applicants.

Dated at Rockville, Maryland, this 19th day of December 2018.

For the Nuclear Regulatory Commission.

**Thomas H. Boyce,**

*Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2018–27931 Filed 12–21–18; 8:45 am]

**BILLING CODE 7590–01–P**

---

# NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–250 and 50–251; NRC–2018–0276]**

## Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** License amendment application; opportunity to comment, request a hearing, and petition for leave to intervene; order imposing procedures.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of amendments to Renewed Facility Operating License Nos. DPR–31 and DPR–41, issued to Florida Power & Light Company, for operation of Turkey Point Nuclear Generating Unit Nos. 3 and 4, respectively. The proposed amendments would modify Paragraph 3.D, ''Transition License Conditions,'' of the Renewed Facility Operating Licenses to delete Implementation Item 22. For this license amendment request (LAR), the NRC proposes to determine that it involves no significant hazards consideration. Because this LAR contains sensitive unclassified non-safeguards information (SUNSI), an order imposes procedures to obtain

access to SUNSI for contention preparation.

**DATES:** Submit comments by January 25, 2019. Requests for a hearing or petition for leave to intervene must be filed by February 25, 2019. Any potential party as defined in § 2.4 of title 10 of the *Code of Federal Regulations* (10 CFR), who believes access to SUNSI is necessary to respond to this notice must request document access by January 7, 2019.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID INSERT: NRC–2018–0276. 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.
- *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:** Michael Wentzel, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–6459, email: *michael.wentzel@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Obtaining Information and Submitting Comments

### *A. Obtaining Information*

Please refer to Docket ID NRC–2018–0276 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0276.
- *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 ''License Amendment Request 265, Revise NFPA [National Fire Protection Association] 805 License Condition for Reactor Coolant Pump [RCP] Seals,'' ''Requested Approval for License Amendment Request 265, Revise NFPA 805 License Condition for Reactor Coolant Pump Seals,'' and ''Supplement to License Amendment Request 265, Revise NFPA 805 License Condition for Reactor Coolant Pump Seals'' are available in ADAMS under Accession Nos. ML18292A842, ML18297A032, and ML18338A053, respectively.
- *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–2018–0276 in your comment submission.

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 into ADAMS.

## II. Introduction

The NRC is considering issuance of amendments to Renewed Facility Operating License Nos. DPR–31 and DPR–41, issued to Florida Power & Light Company, for operation of Turkey Point Nuclear Generating Unit Nos. 3 and 4, respectively, located in Miami-Dade County, Florida.

The proposed amendments would modify Paragraph 3.D, ''Transition License Conditions,'' of the Renewed Facility Operating Licenses to delete Implementation Item 22. Deletion of Implementation Item 22 would eliminate the reliance on the Flowserve RCP Seal Topical Report as a condition of transition to an NFPA 805-based fire-protection program.

Before any issuance of the proposed license amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and NRC's regulations.

The NRC has made a proposed determination that the LAR involves no significant hazards consideration. Under the NRC's regulations 10 CFR 50.92 means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

*Response:* No.

The proposed change removes the Flowserve RCP Seal Topical Report Implementation Item 22 from Table S–3 and from the NFPA 805 Transition License Condition. This change revises the Probabilistic Risk Assessment (PRA) credit for RCP seals by using the guidance from WCAP–16175–P–A instead of the guidance from the Flowserve topical report. The WCAP–16175–P–A guidance reduced the time available to trip the RCPs in the event of a complete loss of RCP seal cooling and resulted in increased human error probabilities associated with failures to trip the RCPs within the allowed time. In addition, WCAP–16175–P–A guidance increased the RCP seal failure probabilities. The proposed change has been reviewed using the fire PRA model that was approved as part of Turkey Point's transition to NFPA 805. The results, which showed a small increase in plant risk, were found to be acceptable. Fire protection defense-in-depth and adequate safety margins are maintained with the changes proposed in this LAR.

As such, the proposed change cannot be an initiator of any previously evaluated accident, increase its likelihood or increase the likelihood of a malfunction of equipment required by NFPA 805 or supported equipment. Other than a reduced time available to trip the RCPs (in the event of a complete loss of RCP seal cooling) and the use of revised RCP seal failure probabilities, the proposed change to the manner in which the PRA credits RCP seals will not affect how the plants are designed or operated. The plants will continue to operate within the parameters assumed in applicable accident analyses. Hence no impact on the consequences of any previously evaluated accident will result from the proposed change.

Therefore, facility operation in accordance with the proposed changes would not

involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

*Response:* No.

The proposed change removes the Flowserve RCP Seal Topical Report Implementation Item 22 from Table S–3 and from the NFPA 805 Transition License Condition. This change revises the PRA credit for RCP seals by using the guidance from WCAP–16175–P–A instead of the guidance from the Flowserve topical report. The proposed change has been reviewed in the fire PRA model that was approved as part of Turkey Point's transition to NFPA 805 and the results were found to be acceptable. Fire protection defense-in-depth and adequate safety margins are maintained with the changes proposed in this LAR.

Other than a reduced time available to trip the RCPs (in the event of a complete loss of RCP seal cooling) and the use of revised RCP seal failure probabilities as described above, the proposed changes do not modify the manner in which the plants are designed or operated and thereby cannot introduce new failure modes, impact existing plant equipment in a manner not previously evaluated or initiate a new type of malfunction or accident. The proposed change will result in the revision of certain PRA probability values and as such, cannot adversely affect the ability of the plants to perform as originally designed, including their capability to withstand a worst case single failure.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

*Response*: No.

The proposed change removes the Flowserve RCP Seal Topical Report Implementation Item 22 from Table S–3 and from the NFPA 805 Transition License Condition. This change revises the PRA credit for RCP seals by using the guidance from WCAP–16175–P–A instead of the guidance from the Flowserve topical report. The proposed change has been reviewed in the fire PRA model that was approved as part of Turkey Point's transition to NFPA 805 and the results were found to be acceptable. Fire protection defense-in-depth and adequate safety margins are maintained with the changes proposed in this LAR.

The proposed change does not modify any setpoints for which protective actions associated with accident detection or mitigation are initiated. Other than a reduced time available to trip the RCPs (in the event of a complete loss of RCP seal cooling) and the use of revised RCP seal failure probabilities as described above, the proposed change does not affect the design of plant equipment nor the manner in which the plant is operated. The proposed change cannot adversely impact any Turkey Point safety limits or limiting safety settings.

Therefore, operation of the facility in accordance with the proposed change will not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the LAR involves a no significant hazards consideration.

The NRC is seeking public comments on this proposed determination that the LAR involves no significant hazards consideration. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day notice period if the Commission concludes the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final no significant hazards consideration determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

## III. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's website at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* Alternatively, a copy of the regulations is available at the NRC's Public Document Room, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (First Floor), Rockville, Maryland 20852. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d) the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR

2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to establish when the hearing is held. If the final determination is that the LAR involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the LAR involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. Alternatively, a State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a hearing is granted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

**IV. Electronic Submissions (E-Filing)**

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *http://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *http://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *http://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are

responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click cancel when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this action, see the application for license amendment dated October 17, 2018, as supplemented on October 24, 2018.

*Attorney for licensee:* Debbie Hendell, Managing Attorney—Nuclear, Florida Power & Light Company, 700 Universe Blvd. MS LAW/JB, Juno Beach, Florida 33408–0420.

*NRC Branch Chief:* Undine Shoop.

**Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation**

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request access to SUNSI. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication of this notice will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requester shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Deputy General Counsel for Hearings and Administration, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The email address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *RidsOgcMailCenter.Resource@nrc.gov,* respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1); and

(3) The identity of the individual or entity requesting access to SUNSI and the requester's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention.

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order[2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff after a determination on standing and requisite need, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requester may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

(3) Further appeals of decisions under this paragraph must be made pursuant to 10 CFR 2.311.

H. Review of Grants of Access. A party other than the requester may

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed within 5 days of the notification by the NRC staff of its grant of access and must be filed with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2. The attachment to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

*It is so ordered.*

Dated at Rockville, Maryland, this 18th day of December, 2018.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

**Attachment 1—General Target Schedule for Processing and Resolving Requests for Access to Sensitive Unclassified Non-Safeguards Information in This Proceeding**

| Day | Event/activity |
|---|---|
| 0 | Publication of **Federal Register** notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests. |
| 10 | Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: Supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding. |
| 60 | Deadline for submitting petition for intervention containing: (i) Demonstration of standing; and (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply). |
| 20 | U.S. Nuclear Regulatory Commission (NRC) staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents). |
| 25 | If NRC staff finds no "need" or no likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access. |
| 30 | Deadline for NRC staff reply to motions to reverse NRC staff determination(s). |
| 40 | (Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI. |
| A | If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff. |
| A + 3 | Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order. |
| A + 28 | Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of opportunity to request a hearing and petition for leave to intervene), the petitioner may file its SUNSI contentions by that later deadline. |
| A + 53 | (Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI. |
| A + 60 | (Answer receipt +7) Petitioner/Intervenor reply to answers. |
| >A + 60 | Decision on contention admission. |

[FR Doc. 2018–27844 Filed 12–21–18; 8:45 am]

BILLING CODE 7590–01–P

## RAILROAD RETIREMENT BOARD

### Proposed Collection; Comment Request

**SUMMARY:** In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

*Comments are invited on:* (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

[3] Requesters should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

*1. Title and purpose of information collection:* Application for Survivor Insurance Annuities; OMB 3220–0030.

Under Section 2(d) of the Railroad Retirement Act (RRA), monthly survivor annuities are payable to surviving widow(er)s, parents, unmarried children, and in certain cases, divorced spouses, mothers (fathers), remarried widow(er)s, and grandchildren of deceased railroad employees if there are no qualified survivors of the employee immediately eligible for an annuity. The requirements relating to the annuities are prescribed in 20 CFR 216, 217, 218, and 219.

To collect the information needed to help determine an applicant's entitlement to, and the amount of, a survivor annuity the RRB uses Forms AA–17, *Application for Widow(er)'s Annuity;* AA–17b, *Applications for Determination of Widow(er)'s Disability;* AA–18, *Application for Mother's/Father's and Child's Annuity;* AA–19, *Application for Child's Annuity;* AA–19a, *Application for Determination of Child's Disability;* AA–20, *Application for Parent's Annuity,* and electronic Forms AA–17cert, *Application Summary and Certification* and AA–17sum, *Application Summary.*

The on-line automated survivor annuity application (Forms AA–17, AA–18, AA–19, and AA–20) process obtains information about an applicant's marital history, work history, benefits from other government agencies, and Medicare entitlement for a survivor annuity. An RRB representative interviews the applicant either at a field office (preferred), an itinerant point, or by telephone. During the interview, the RRB representative enters the information obtained into an on-line information system. Upon completion of the interview, the system generates, for the applicant's review, either Form AA–17cert or AA–17sum, which provides a summary of the information that the applicant provided or verified. Form AA–17cert, *Application Summary and Certification,* requires a tradition pen and ink ''wet'' signature. Form AA–17sum, *Application Summary,* documents the alternate signing method called ''Attestation,'' which is an action taken by the RRB representative to confirm and annotate in the RRB records (1) the applicant's intent to file an application; (2) the applicant's affirmation under penalty of perjury that the information provided is correct; and (3) the applicant's agreement to sign the application by proxy. When the RRB representative is unable to contact the applicant in person or by telephone, for example, the applicant lives in another country, a manual version of the appropriate form is used. One response is requested of each respondent. Completion of the forms is required to obtain a benefit.

The RRB proposes significant changes to Form AA–17b in support of the RRB's Disability Program Improvement Plan (DPIP) to enhance and improve disability case processing and overall program integrity as recommended by the RRB's Office of Inspector General and the Government Accountability Office. Proposed changes to Form AA–17b include the addition of questions regarding the applicant's attempt to go back to work; education and training; additional scheduled medical care; daily activities, including any social and recreational activities and volunteer work; and possible use of a facilitator or attorney to either complete or aid in the completion of the application. Clarification of existing items and other non-burden impacting editorial and formatting changes to make the AA–17b consistent with other DPIP forms enhancements are also being proposed.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| AA–17 Application Process: | | | |
| AA–17cert | 900 | 20 | 300 |
| AA–17sum | 2,100 | 19 | 665 |
| AA–17b: | | | |
| (With assistance) | 250 | 45 | 188 |
| (Without assistance) | 20 | 55 | 18 |
| AA–19a: | | | |
| (With assistance) | 200 | 45 | 150 |
| (Without assistance) | 15 | 65 | 16 |
| Total | 3,485 | | 1,337 |

*2. Title and purpose of information collection:* Application for Spouse Annuity under the Railroad Retirement Act; OMB 3220–0042.

Section 2(c) of the Railroad Retirement Act (RRA), provides for the payment of annuities to spouses of railroad retirement annuitants who meet the requirements under the RRA. The age requirements for a spouse annuity depend on the employee's age, date of retirement, and years of railroad service. The requirements relating to the annuities are prescribed in 20 CFR 216, 218, 219, 232, 234, and 295.

To collect the information needed to help determine an applicant's entitlement to, and the amount of, a spouse annuity the RRB uses non-OMB Form AA–3, *Application for Spouse/Divorced Spouse Annuity,* and electronic OMB Forms AA–3cert, *Application Summary and Certification,* and AA–3sum, *Application Summary.*

The AA–3 application process gathers information from an applicant about their marital history, work history, benefits from other government agencies, and Medicare entitlement for a spouse annuity. An RRB representative interviews the applicant either at a field office (preferred), an itinerant point, or by telephone. During the interview, the RRB representative enters the information obtained into an on-line information system. Upon completion of the interview, the system generates, for the applicant's review, either Form AA–3cert or AA–3sum, which is a summary of the information that the applicant provided or verified. Form AA–3cert, *Application Summary and Certification,* requires a traditional pen and ink ''wet'' signature. Form AA–3sum, *Application Summary,* documents an alternate signing method called ''Attestation,'' which is an action taken by the RRB representative to confirm and annotate in the RRB records (1) the applicant's intent to file an application; (2) the applicant's affirmation under penalty of perjury that the information provided is correct; and (3) the applicant's agreement to sign the application by proxy. When the RRB

representative is unable to contact the applicant in person or by telephone, for example, the applicant lives in another country, a manual version of Form AA–3 is used. One response is requested of each respondent. Completion of the form is required to obtain a benefit.

The RRB proposes no changes to the forms in the information collection.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| Form AA–3cert (Ink Signature) | 6,400 | 30 | 3,200 |
| Form AA–3sum (Attestation) | 4,600 | 29 | 2,223 |
| Total | 11,000 | | 5,423 |

*Additional Information or Comments:* To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, contact Brian Foster at (312) 751–4826. Comments regarding the information collection should be addressed to Brian Foster, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–1275 or emailed to *Brian.Foster@rrb.gov.* Written comments should be received within 60 days of this notice.

**Brian D. Foster,**

*Records Officer.*

[FR Doc. 2018–27914 Filed 12–21–18; 8:45 am]

**BILLING CODE 7905–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–84846; File No. SR–BX–2014–048]**

## Self-Regulatory Organizations; Nasdaq BX, Inc.; Order Granting an Extension to Limited Exemptions From Rule 612(c) of Regulation NMS In Connection With the Exchange's Retail Price Improvement Program Until June 30, 2019

December 18, 2018.

On November 28, 2014, the Securities and Exchange Commission (''Commission'') issued an order pursuant to its authority under Rule 612(c) of Regulation NMS (''Sub-Penny Rule'') [1] that granted The NASDAQ OMX BX, Inc., n/k/a Nasdaq BX, Inc. (''BX'' or ''Exchange''), a limited exemption from the Sub-Penny Rule in connection with the operation of the Exchange's Retail Price Improvement Program (the ''RPI Program'').[2] The limited exemption was granted concurrently with the Commission's approval of the Exchange's proposal to adopt its RPI Program for a one-year pilot term.[3] On November 20, 2015, the Commission extended the temporary exemption until December 2016 concurrently with an immediately effective filing that extended the operation of the RPI Program until December 1, 2016.[4] On December 1, 2016, the Commission extended the temporary exemption until December 1, 2017 concurrently with an immediately effective filing that extended the operation of the RPI Program until December 1, 2017.[5] On December 1, 2017, the Commission extended the temporary exemption until June 30, 2018 concurrently with an immediately effective filing that extended the operation of the RPI Program until June 30, 2018.[6] On June 28, 2018, the Commission again extended the temporary exemption until December 31, 2018 concurrently with an immediately effective filing that extended the operation of the RPI Program until December 31, 2018.[7]

The Exchange now seeks to extend the exemption until June 30, 2019.[8] The Exchange's request was made in conjunction with an immediately effective filing that extends the operation of the RPI Program through the same date.[9] In its request to extend the exemption, the Exchange notes that given the gradual implementation of the RPI Program and the preliminary participation and results, extending the exemption would provide additional opportunities for greater participation and assessment of the results.[10] Accordingly, the Exchange has asked additional time to allow it and the Commission to analyze data concerning the RPI Program, which the Exchange committed to provide to the Commission.[11] For this reason and the reasons stated in the RPI Approval Order originally granting the limited exemption, the Commission, pursuant to its authority under Rule 612(c) of Regulation NMS, finds that pursuant to its authority under Rule 612(c) of Regulation NMS, extending the exemption is appropriate in the public interest and consistent with the protection of investors.

*Therefore, it is hereby ordered that,* pursuant to Rule 612(c) of Regulation NMS, the Exchange is granted a limited exemption from Rule 612 of Regulation NMS that allows the Exchange to accept and rank orders priced equal to or greater than $1.00 per share in increments of $0.001, in connection with the operation of its RPI Program, until June 30, 2019.

The limited and temporary exemption extended by this Order is subject to modification or revocation if at any time the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Securities Exchange Act of 1934. Responsibility for compliance with any applicable provisions of the Federal securities laws must rest with the persons relying on the exemptions that are the subject of this Order.

[1] 17 CFR 242.612(c).

[2] *See* Securities Exchange Act Release No. 73702, 79 FR 72049 (December 4, 2014) (SR–BX–2014–048) (''RPI Approval Order'').

[3] *See id.*

[4] *See* Securities Exchange Act Release No. 76490 (November 20, 2015), 80 FR 74165 (November 27, 2015) (SR–BX–2015–073).

[5] *See* Securities Exchange Act Release No. 79446 (December 1, 2016), 81 FR 88290 (December 7, 2016) (SR–BX–2016–065).

[6] *See* Securities Exchange Act Release No. 82192 (December 1, 2017), 82 FR 57809 (December 7, 2017) (SR–BX–2017–055).

[7] *See* Securities Exchange Act Release No. 83539 (June 28, 2018), 83 FR 31203 (July 3, 2018) (SR–BX–2018–026).

[8] *See* Letter from Jeffrey S. Davis, Vice President and Deputy General Counsel and Secretary, Nasdaq BX, Inc. to Eduardo A. Aleman, Assistant Secretary, Securities and Exchange Commission, dated December 11, 2018 (''BX Letter'').

[9] *See* SR–BX–2018–063.

[10] *See, e.g.,* BX Letter at 3; RPI Approval Order, *supra* note 2.

[11] *See, id.*

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Eduardo A. Aleman,**

*Deputy Secretary.*

[FR Doc. 2018–27821 Filed 12–21–18; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–84847; File No. SR–BX–2018–063]**

## Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Period for the Exchange's Retail Price Improvement Program Until June 30, 2019

December 18, 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 11, 2018, Nasdaq BX, Inc. (''BX'' or ''Exchange''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot period for the Exchange's Retail Price Improvement (''RPI'') Program (the ''Program''), which is set to expire on December 31, 2018, for an additional period to expire on June 30, 2019.

The Exchange has designated December 11, 2018 as the date the proposed rule change becomes effective.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqbx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this filing is to extend the pilot period of the RPI Program,[3] currently scheduled to expire on December 31, 2018, for an additional period to expire on June 30, 2019.

Background

In November 2014, the Commission approved the RPI Program on a pilot basis.[4] The Program is designed to attract retail order flow to the Exchange, and allow such order flow to receive potential price improvement. The Program is currently limited to trades occurring at prices equal to or greater than $1.00 per share. Under the Program, a new class of market participant called a Retail Member Organization (''RMO'') is eligible to submit certain retail order flow (''Retail Orders'')[5] to the Exchange. BX members (''Members'') are permitted to provide potential price improvement for Retail Orders in the form of non-displayed interest that is priced more aggressively than the Protected National Best Bid or Offer (''Protected NBBO'').[6]

The Program was approved by the Commission on a pilot basis running one-year from the date of implementation.[7] The Commission approved the Program on November 28, 2014.[8] The Exchange implemented the Program on December 1, 2014 and the pilot has since been extended for a one year period twice and for an additional six month period twice, with it now scheduled to end on December 31, 2018.[9]

Proposal To Extend the Operation of the Program

The Exchange established the RPI Program in an attempt to attract retail order flow to the Exchange by potentially providing price improvement to such order flow. The Exchange believes that the Program promotes competition for retail order flow by allowing Exchange members to submit Retail Price Improvement Orders (''RPI Orders'')[10] to interact with Retail Orders. Such competition has the ability to promote efficiency by facilitating the price discovery process and generating additional investor interest in trading securities, thereby promoting capital formation. The Exchange believes that extending the pilot is appropriate because it will allow the Exchange and the Commission additional time to analyze data regarding the Program that the Exchange has committed to provide.[11] As such, the Exchange believes that it is appropriate to extend the current operation of the Program.[12] Through this filing, the Exchange seeks to amend BX Rule 4780(h) and extend the current pilot period of the Program

[12] 17 CFR 200.30–3(a)(83).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 73702 (November 28, 2014), 79 FR 72049 (December 4, 2014) (''RPI Approval Order'') (SR–BX–2014–048).

[4] *See id.*

[5] A ''Retail Order'' is defined in BX Rule 4780(a)(2) by referencing BX Rule 4702, and BX Rule 4702(b)(6) says it is an order type with a non-display order attribute submitted to the Exchange by a RMO. A Retail Order must be an agency order, or riskless principal order that satisfies the criteria of FINRA Rule 5320.03. The Retail Order must reflect trading interest of a natural person with no change made to the terms of the underlying order of the natural person with respect to price (except in the case of a market order that is changed to a marketable limit order) or side of market and that does not originate from a trading algorithm or any other computerized methodology.

[6] The term Protected Quotation is defined in Chapter XII, Sec. 1(19) and has the same meaning as is set forth in Regulation NMS Rule 600(b)(58). The Protected NBBO is the best-priced protected bid and offer. Generally, the Protected NBBO and the national best bid and offer (''NBBO'') will be the same. However, a market center is not required to route to the NBBO if that market center is subject to an exception under Regulation NMS Rule 611(b)(1) or if such NBBO is otherwise not available for an automatic execution. In such case, the Protected NBBO would be the best-priced protected bid or offer to which a market center must route interest pursuant to Regulation NMS Rule 611.

[7] *See* RPI Approval Order, *supra* note 3 at 72053.

[8] *Id.* at 72049.

[9] *See* Securities Exchange Act Release No. 76490 (November 20, 2015), 80 FR 74165 (November 27, 2015) (SR–BX–2015–073); Securities Exchange Act Release No. 79446 (December 1, 2016), 81 FR 88279 (December 7, 2016) (SR–BX–2016–065); Securities Exchange Act Release No. 82192 (December 1, 2017), 82 FR 57809 (December 7, 2017) (SR–BX–2017–055); and Securities Exchange Act Release No. 83539 (June 28, 2018), 83 FR 31203 (July 3, 2018) (SR–BX–2018–026).

[10] A Retail Price Improvement Order is defined in BX Rule 4780(a)(3) by referencing BX Rule 4702 and BX Rule 4702(b)(5) says that it is as an order type with a non-display order attribute that is held on the Exchange Book in order to provide liquidity at a price at least $0.001 better than the NBBO through a special execution process described in Rule 4780.

[11] *See* RPI Approval Order, *supra* note 3 at 72051.

[12] Concurrently with this filing, the Exchange has submitted a request for an extension of the exemption under Regulation NMS Rule 612 previously granted by the Commission that permits it to accept and rank the RPI orders in sub-penny increments. *See* Letter from Jeffrey S. Davis, Vice President and Deputy General Counsel and Secretary, Nasdaq BX, Inc. to Eduardo A. Aleman, Assistant Secretary, Securities and Exchange Commission dated December 11, 2018.

until the earlier of approval of the filing to make the Program permanent or June 30, 2019.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[13] in general, and with Section 6(b)(5) of the Act,[14] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that extending the pilot period for the RPI Program is consistent with these principles because the Program is reasonably designed to attract retail order flow to the exchange environment, while helping to ensure that retail investors benefit from the better price that liquidity providers are willing to give their orders. Additionally, as previously stated, the competition promoted by the Program may facilitate the price discovery process and potentially generate additional investor interest in trading securities. The extension of the pilot period will allow the Commission and the Exchange to continue to monitor the Program for its potential effects on public price discovery, and on the broader market structure.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The proposed rule change extends an established pilot program for an additional period, to expire on June 30, 2019, thus allowing the RPI Program to enhance competition for retail order flow and contribute to the public price discovery process.

*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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[15] and Rule 19b–4(f)(6) thereunder.[16] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[17] and Rule 19b–4(f)(6) thereunder.[18]

A proposed rule change filed under Rule 19b–4(f)(6)[19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[20] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, because waiver would allow the pilot period to continue uninterrupted after its current expiration date of December 31, 2018, thereby avoiding any potential investor confusion that could result from temporary interruption in the Program. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[21]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2018–063 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2018–063. 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 offices of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2018–063, and should be submitted on or before January 16, 2019.

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78s(b)(3)(A)(iii).

[16] 17 CFR 240.19b–4(f)(6).

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has requested that the Commission waive the five-day pre-filing notice requirement, and the Commission has agreed to waive the requirement.

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

**Eduardo A. Aleman,**

*Deputy Secretary.*

[FR Doc. 2018–27822 Filed 12–21–18; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–84844; File No. SR–CboeBZX–2018–087]**

## Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule

December 18, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 3, 2018, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the fee schedule applicable to Members and non-Members[5] of the Exchange pursuant to BZX Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal are effective upon filing.

The text of the proposed rule change is available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend its fee schedule applicable to its equities trading platform (''BZX Equities'') to increase the rebate under the Non-Displayed Add Volume Tape A Tier 1, effective December 3, 2018.

The Exchange currently provides a standard rebate of $0.00150 per share for non-displayed orders that add liquidity. The Exchange also provides an enhanced rebate under Non-Displayed Add Volume Tape A Volume Tier, Tier 1 under Footnote 1 (''HV Volume Tier'') which is available for qualifying non-displayed orders that add liquidity (Tape A), (*i.e.,* orders which yield fee code HV). Particularly, under the HV Volume Tier, a Member may receive an enhanced rebate of $0.00260 per share where they add an ADV[6] greater than or equal to 0.20% of the TCV[7] as Non-Displayed orders that yield fee codes HI or HV.[8] The Exchange proposes to increase the HV Volume Tier rebate from $0.00260 per share to $0.00275 per share. The Exchange believes the proposed change will encourage Members to increase non-displayed add liquidity on the exchange. The Exchange also notes that another Exchange offers the same rebate amount for similar transactions.[9]

2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with the objectives of Section 6 of the Act,[10] in general, and furthers the objectives of Section 6(b)(4),[11] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule changes reflect a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange.

The Exchange believes increasing the rebate under the HV Volume Tier is reasonable because Members are provided an opportunity to receive an enhanced rebate for Non-Displayed orders that add liquidity and is a reasonable means to encourage Members to increase their liquidity on the Exchange. The Exchange also notes that another Exchange offers a similar rebate.[12] The Exchange also believes the proposed fee change is equitable and non-discriminatory because it applies uniformly to all Members.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

[22] 17 CFR 200.30–3(a)(12) and (59).

[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] A Member is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' See Exchange Rule 1.5(n).

[6] ''ADV'' means average daily volume calculated as the number of shares added or removed, combined, per day. ADAV and ADV are calculated on a monthly basis.

[7] ''TCV'' means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

[8] Fee code HI is appended to non-displayed orders that receive price improvement and add liquidity.

[9] *See* New York Stock Exchange Price List 2018, which provides that the equity per share credit for all Midpoint Passive Liquidity (''MPL'') orders that provide liquidity, other than MPL orders from Designated Market Makers (''DMMs''), will receive a rebate of $0.00275 per share if a Member adds an ADV greater than or equal to 0.14% Tape A NYSE consolidated average daily volume (''CADV''), excluding any liquidity added by a DMM.

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(4).

[12] *See* New York Stock Exchange Price List 2018, which provides that the equity per share credit for all MPL orders that provide liquidity, other than MPL orders from DMMs, will receive a rebate of $0.00275 per share if a Member adds an ADV greater than or equal to 0.14% Tape A CADV, excluding any liquidity added by a DMM.

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed change burdens competition, but instead, enhances competition as it is intended to increase the competitiveness of BZX by modifying pricing incentives in order to attract order flow and incentivize participants to increase their participation on the Exchange. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee structures to be unreasonable or excessive. The proposed change is intended to enhance the rebate offered for certain non-displayed liquidity added to the Exchange, which is intended to draw additional liquidity to the Exchange. The Exchange does not believe the proposed amendment would burden intramarket competition as it would be available to all Members uniformly.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

## 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) of the Act [13] and paragraph (f) of Rule 19b–4 thereunder.[14] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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 No. SR–CboeBZX–2018–087 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. SR–CboeBZX–2018–087. 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 will also 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 No. SR–CboeBZX–2018–087 and should be submitted on or before January 16, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**Eduardo A. Aleman,**

*Deputy Secretary.*

[FR Doc. 2018–27816 Filed 12–21–18; 8:45 am]

**BILLING CODE 8011–01–P**

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f).

[15] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–84845; File No. SR–BYX–2012–019]**

## Self-Regulatory Organization; Cboe BYX Exchange, Inc.; Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program

December 18, 2018.

On November 27, 2012, the Securities and Exchange Commission (''Commission'') issued an order pursuant to its authority under Rule 612(c) of Regulation NMS (''Sub-Penny Rule) [1] that granted the BATS BYX-Exchange, Inc. (k/n/a ''Cboe BYX'' or the ''Exchange'') a limited exemption from the Sub-Penny Rule in connection with the operation of the Exchange's Retail Price Improvement (''RPI'') Program (the ''Program''). The limited exemption was granted concurrently with the Commission's approval of the Exchange's proposal to adopt the Program for a one-year pilot term.[2] The exemption was granted coterminous with the effectiveness of the pilot Program and has been extended six times; [3] both the pilot Program and

[1] 17 CFR 242.612(c).

[2] *See* Securities Exchange Act Release No. 68303 (November 27, 2012), 77 FR 71652 (December 3, 2012) (''RPI Approval Order'') (SR–BXY–2012–019).

[3] *See* Securities Exchange Act Release Nos. 71249 (January 7, 2014), 79 FR 2229 (January 13, 2012) (SR–BYX–2014–001) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); 71250 (January 7, 2014), 79 FR 2234 (January 13, 2012) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program); 74111 (January 22, 2015), 80 FR 4598 (January 28, 2015) (SR–BYX–2015–05) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); and 74115 (January 22, 2015), 80 FR 4324 (January 27, 2015) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program); 76965 (January 22, 2016), 81 FR 4682 (January 27, 2016) (SR–BYX–2016–01) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); 76953 (January 21, 2016), 81 FR 4728 (January 27, 2016) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program); 78180 (June 28, 2016), 81 FR 43306 (July 1, 2016) (SR–BYX–2016–15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); 78178 (July 5, 2016), 81 FR 43689 (July 5, 2016) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program); 81368 (August 10, 2017), 82 FR 38960 (August 16, 2017) (SR–BatsBYX–2017–18) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); 81364 (August 8, 2018), 82 FR 38733

Continued

exemption are scheduled to expire on December 31, 2018.

The Exchange now seeks to extend the exemption until June 30, 2019.[4] The Exchange's request was made in conjunction with an immediately effective filing that extends the operation of the Program until June 30, 2019.[5] In its request to extend the exemption, the Exchange notes that the Program was implemented gradually over time. Accordingly, the Exchange has asked for additional time to allow itself and the Commission to analyze data concerning the Program, which the Exchange committed to provide to the Commission, as well as to allow additional opportunities for greater participation in the Program.[6] For this reason and the reasons stated in the Order originally granting the limited exemption, the Commission finds that extending the exemption, pursuant to its authority under Rule 612(c) of Regulation NMS, is appropriate in the public interest and consistent with the protection of investors.

*Therefore, it is hereby ordered,* that, pursuant to Rule 612(c) of Regulation NMS, the Exchange is granted a limited exemption from Rule 612(c) of Regulation NMS that allows it to accept and rank orders priced equal to or greater than $1.00 per share in increments of $0.001, in connection with the operation of its RPI Program.

The limited and temporary exemption extended by this Order is subject to modification or revocation if at any time the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Securities Exchange Act of 1934. Responsibility for compliance with any applicable provisions of the federal securities laws must rest with the persons relying on the exemptions that are the subject of this Order.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

**Eduardo A. Aleman,**

*Deputy Secretary.*

[FR Doc. 2018–27820 Filed 12–21–18; 8:45 am]

**BILLING CODE P**

## SOCIAL SECURITY ADMINISTRATION

**[Docket No: SSA–2018–0069]**

## Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes an extension and revisions of OMB-approved information collections, and one new information collection.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov*.

(SSA), Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov*, or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2018–0069].

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than February 25, 2019. Individuals can obtain copies of the collection instruments by writing to the above email address.

*1. Employer Verification of Records for Children Under Age Seven—20 CFR 404.801–404.803, 404.821–404.822—0960–0505.* SSA discovered as many as 70 percent of the wage reports we receive for children under age seven are actually the earnings of someone other than the child. To ensure we credit the correct person with the reported earnings, SSA verifies wage reports for children under age seven with the children's employers before posting to the earnings record. SSA uses Form SSA–L3231–C1, Request for Employer Information, for this purpose. The respondents are employers who report earnings for children under age seven.

*Type of Request:* Revision of an OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| SSA–L3231–C1 | 11,823 | 1 | 10 | 1,971 |

*2. Request for Reinstatement (Title XVI)—20 CFR 416.999–416.999d—0960–0744.* SSA uses Form SSA–372 to: (1) Inform previously entitled beneficiaries of the expedited reinstatement (EXR) requirements of Supplemental Security Income (SSI) payments under Title XVI of the Social Security Act (Act); and (2) document their requests for EXR. SSA requires this application for reinstatement of benefits for respondents to obtain SSI disability payments for EXR. When an SSA claims representative learns of individuals whose medical conditions no longer permit them to perform substantial gainful activity as defined in the Act, the claims representative gives the form to the previously entitled individuals (or mails it to those who request EXR over the phone). SSA employees collect

(August 15, 2017) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program); 83758 (August 1, 2018), 83 FR 38757 (August 7, 2018) (SR–CboeBYX–2018–015) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); 83756 (August 1, 2018), 83 FR 38748 (August 7, 2018) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program). The Exchange has filed to make the pilot program permanent. *See* Securities Exchange Act Release No. 83831 (August 13, 2018), 83 FR 41128 (August 17, 2018) (SR–CboeBYX–2018–014).

[4] *See* letter from Anders Franzon, Senior Vice President and Deputy General Counsel, Cboe BYX, to Brent J. Fields, Secretary, Commission, dated December 11, 2018.

[5] *See* SR–CboeBYX–2018–025.

[6] *See* RPI Approval Order, *supra* note 2, at 77 FR at 71657.

[7] 17 CFR 200.30–3(a)(83).

this information whenever an individual files for EXR payments. The respondents are applicants for EXR of SSI disability payments.

*Type of Request:* Revision of an OMB approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| SSA–372 | 2,000 | 1 | 2 | 67 |

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding these information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than January 25, 2019. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

*1. The Department of the Treasury's Pay.gov Collection Application for Benefit Overpayments—20 CFR 404.501, 404.502, 404.521, and 404.527—0960–NEW.* SSA will use the new internet *Pay.gov* Application for Overpayments to offer a new repayment option to beneficiaries and recipients to recover overpayments they incurred. *Pay.gov* is an online collection portal developed and maintained by the Department of the Treasury (Treasury). The internet remittance portal will offer beneficiaries and recipients another option to repay overpayments via credit card; debit card; and automated clearing house (ACH). The SSA application located on *SocialSecurity.gov* will request the overpaid individuals' Social Security Numbers (SSN) and dollar amount they wish to repay on their overpayment prior to sending them to Treasury's *Pay.gov* application which will request and process the payment information on SSA's behalf. The information SSA will collect is used to reconcile the *Pay.gov* transactions, and update the overpaid individuals' balances on their records. The respondents are individuals who have Title II or XVI overpayments, and who wish to voluntarily repay the overpayment online through *SocialSecurity.gov*.

*Type of Request:* Request for a new information collection.

| Modality of completion | Number of respondents | Frequency of response | Number of responses | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|---|
| Internet Application for *Pay.gov* | 424,126 | 12 | 5,089,512 | 10 | 848,252 |

*2. Surveys in Accordance with E.O. 12862 for the Social Security Administration—0960–0526.* Under the auspices of Executive Order 12862, Setting Customer Service Standards, SSA conducts multiple customer satisfaction surveys each year. These voluntary customer satisfaction assessments include paper, internet, and telephone surveys; mailed questionnaires; and customer comment cards. The purpose of these questionnaires is to assess customer satisfaction with the timeliness, appropriateness, access, and overall quality of existing SSA services and proposed modifications or new versions of services. The respondents are recipients of SSA services (including most members of the public), professionals, and individuals who work on behalf of SSA beneficiaries.

*Type of Request:* Extension of an OMB-approved information collection.

| | Number of respondents (burden for all activities within that year) | Frequency of response | Range of response times (minutes) | Burden (burden for all activities within that year; reported in hours) |
|---|---|---|---|---|
| Year 1 | 5,843,298 | 1 | 3–30 | 1,004,460 |
| Year 2 | 5,868,843 | 1 | 3–30 | 1,371,074 |
| Year 3 | 5,949,054 | 1 | 3–30 | 1,012,482 |
| Totals | 17,661,195 | | | 3,388,016 |

*3. Pain Report Child—20 CFR 404.1512 and 416.912—0960–0540.* Before SSA can make a disability determination for a child, we require evidence from SSI applicants or claimants to prove their disability. Form SSA–3371–BK provides disability interviewers, and SSI applicants or claimants in self-help situations, with a convenient way to record information about claimants' pain or other symptoms. The State disability determination services adjudicators and administrative law judges then use the information from Form SSA–3371–BK to assess the effects of symptoms on function for purposes of determining disability under the Act. The respondents are applicants for, or claimants of, SSI payments.

*Type of Request:* Revision of an OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| SSA–3371 | 250,000 | 1 | 15 | 62,500 |

*4. Replacement of Forms SSA–1099/SSA–1042S—20 CFR 401.45—0960–0583.* Title II beneficiaries use Forms SSA–1099 and SSA–1042S, Social Security Benefit Statement, to determine if their Social Security benefits are taxable, and the amount they need to report to the Internal Revenue Service. In cases where the original forms are unavailable (*e.g.,* lost, stolen, mutilated), an individual may use SSA's automated telephone application to request a replacement SSA–1099 and SSA–1042S. SSA uses the information from the automated telephone requests to verify the identity of the requestor and to provide replacement copies of the forms. SSA accepts information in other ways, however; the automated telephone options reduce requests to the National 800 Number Network (N8NN) and visits to local Social Security field offices (FO). The respondents are Title II beneficiaries who wish to request a replacement SSA–1099 or SSA–1042S via telephone.

*Type of Request:* Revision of an OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| Automated Telephone Requestors | 238,286 | 1 | 2 | 7,943 |
| N8NN | 458,442 | 1 | 3 | 22,922 |
| Calls to local FOs | 870,811 | 1 | 3 | 43,541 |
| Other (program service centers) | 69,207 | 1 | 3 | 3,460 |
| Totals | 1,636,746 | | | 77,866 |

*5. The Ticket to Work and Self-Sufficiency Program—20 CFR 411—0960–0644.* SSA's Ticket to Work (TTW) Program transitions Social Security Disability Insurance (SSDI) and SSI recipients toward independence by allowing them to receive Social Security payments while maintaining employment under the auspices of the program. SSA uses service providers, called Employment Networks (ENs), to supervise participant progress through the stages of TTW Program participation, such as job searches and interviews; progress reviews; and changes in ticket status. ENs can be private for-profit and nonprofit organizations, as well as state vocational rehabilitation agencies (VRs). SSA and the ENs utilize the TTW program manager to operate the TTW Program and exchange information about participants. For example, the ENs use the program manager to provide updates on tasks such as selecting a payment system, or requesting payments for helping the beneficiary achieve certain work goals. Since the ENs are not PRA-exempt, the multiple information collections within the TTW program manager require OMB approval. Most of the categories of information are necessary for SSA to: (1) Comply with the Ticket to Work legislation; and (2) provide proper oversight of the program. SSA collects this information through several modalities, including forms, electronic exchanges, and written documentation. The respondents are the ENs or state VRs, SSDI beneficiaries, and blind or disabled SSI recipients working under the auspices of the TTW Program.

*Type of Request:* Revision of an OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| (a) 20 CFR 411.140(d)(2)—Interactive Voice Recognition Telephone | 6,428 | 1 | 2.5 | 268 |
| (a) 20 CFR 411.140(d)(2)—Portal | 25,713 | 1 | 1.25 | 536 |
| (a) 20 CFR 411.140(d)(3); 411.325(a); 411.150(b)(3)—SSA–1365 | 948 | 1 | 15 | 237 |
| (a) 20 CFR 411.140(d)(3); 411.325(a); 411.150(b)(3)—SSA–1365 Portal | 3,792 | 1 | 11 | 695 |
| (a) 20 CFR 411.140(d)(3); 411.325(a); 411.150(b)(3)—SSA–1370 | 21,600 | 1 | 60 | 21,600 |
| (a) 20 CFR 411.140(d)(3); 411.325(a); 411.150(b)(3)—SSA–1370 Portal | 5,868 | 1 | 10 | 978 |
| (a) 20 CFR 411.166; 411.170(b)—Electronic File Submission | 40,324 | 1 | 5 | 3,360 |
| (b) 20 CFR 411.145; 411.325 | 2,494 | 1 | 15 | 624 |
| (b) 20 CFR 411.145; 411.325—Portal | 7,481 | 1 | 11 | 1,372 |
| (b) 20 CFR 411.535(a)(1)(iii)—Data Sharing/Portal | 8,505 | 1 | 5 | 709 |
| (c) 20 CFR 411.192(b)&(c) | 6 | 1 | 30 | 3 |
| (c) 20 CFR 411.200(b)—SSA–1375 | 120,000 | 1 | 15 | 30,000 |
| (c) 20 CFR 411.200(b)—Portal | 64,824 | 1 | 5 | 5,402 |
| (c) 20 CFR 411.210(b) | 41 | 1 | 30 | 21 |
| (c) 20 CFR 411.200(b) Wise Webinar Registration Page | 4,812 | 1 | 3 | 241 |
| (d) 20 CFR 411.365; 411.505; 411.515 | 6 | 1 | 10 | 1 |
| (e) 20 CFR 411.325(d); 411.415* | 1 | 1 | 480 | 8 |
| (f) 20 CFR 411.575—SSA-1389; SSA-1391; SSA-1398; SSA-1399 | 2,805 | 1 | 40 | 1,870 |
| (f) 20 CFR 411.575—Portal | 42,075 | 1 | 22 | 15,428 |
| (f) 20 CFR 411.560—SSA-1401 | 100 | 1 | 20 | 33 |

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| (g) 20 CFR 411.325(f) | 1,371 | 1 | 45 | 1,028 |
| (h) 20 CFR 411.435; 411.615; 411.625 | 2 | 1 | 120 | 4 |
| (i) 20 CFR 411.320—SSA-1394 | 52 | 1 | 10 | 9 |
| (i) 20 CFR 411.320—SSA-1394 Portal | 158 | 1 | 5 | 13 |
| Totals | 359,406 | | | 84,440 |

* **Note:** We have not received any responses since 2011.

*6. Promoting Opportunity Demonstration—0960–0809.* Section 823 of the Bipartisan Budget Act of 2015 required SSA to carry out the Promoting Opportunity Demonstration (POD) to test a new benefit offset formula for SSDI beneficiaries. Therefore, SSA is undertaking POD, a demonstration to evaluate the affect the new policy will have on SSDI beneficiaries and their families in several critical areas. We previously obtained OMB approval for this demonstration, and are in the midst of implementing the project. In this information collection request, we are seeking approval to add new questions to our follow-up surveys. Respondents are SSDI beneficiaries, who will provide written consent before agreeing to participate in the study and before we randomly assign them to one of the study treatment groups.

*Note:* We revised the burden information for this collection since we published the first **Federal Register** Notice on October 22, 2018 at 83 FR 53352. As part of our revisions to this collection, we are replacing the End of the Year Reporting Form with a new version which we will pre-fill with annual information based on the respondents' monthly earnings reporting. Since we will not require respondents to submit the new End of Year Reporting documentation unless they need to make corrections, we are updating the burden accordingly.

*Type of Request:* Revision of an OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Number of responses | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|---|
| Informed Consent Form | 16,500 | 1 | 16,500 | 10 | 2,750 |
| Baseline Survey | 16,500 | 1 | 16,500 | 20 | 5,500 |
| 12-Month Follow Up Survey | 6,000 | 1 | 6,000 | 32 | 3.200 |
| 24-Month Follow Up Survey | 12,000 | 1 | 12,000 | 27 | 5,400 |
| Interviews with Site Staff | 40 | 4 | 160 | 66 | 176 |
| Onsite Audit of Sample of Case Files | 8 | 2 | 16 | 20 | 5 |
| Semi-Structured Interviews with Treatment Group Subjects | 144 | 1 | 144 | 60 | 144 |
| Monthly Earnings and Impairment-Related Expenses Reporting Form (Paper) | 1,820 | 12 | 21,840 | 10 | 3,640 |
| Monthly Earnings and Impairment-Related Expenses Reporting Form (Internet) | 780 | 12 | 9,360 | 5 | 780 |
| End of Year Reporting Documentation | 2,615 | 1 | 2,615 | 8 | 348 |
| Totals | 56,407 | | 85,135 | | 21,943 |

*7. Protecting the Public and Our Personnel To Ensure Operational Effectiveness (RIN 0960–AH35), Regulation 3729I—20 CFR 422.905, 422.906—0960–0796.* SSA published regulations for the process we follow when we restrict individuals from receiving in-person services in our field offices and provide them, instead, with alternative services. We published these rules to create a safer environment for our personnel and members of the public who use our facilities, while ensuring we continue to serve the American people with as little disruption to our operations as possible. Under our regulations at 20 CFR 422.905, an individual for whom we restrict access to our facilities has the opportunity to appeal our decision within 60 days of the date of the restrictive access and alternative service notice. To appeal, restricted individuals must submit a written request stating why they believe SSA should rescind the restriction and allow them to conduct business with us on a face-to-face basis in one of our offices. There is no printed form for this request; rather, restricted individuals create their own written statement of appeal, and submit it to a sole decision-maker in the regional office of the region where the restriction originated. The individuals may also provide additional documentation to support their appeal. Under 20 CFR 422.906, if the individual does not appeal the decision within the 60 days; if we restricted the individual prior to the effective date of this regulation; or if the appeal results in a denial, the individual has another opportunity to request review of the restriction after a three-year period. To submit this request for review, restricted individuals may re-submit a written appeal of the decision. The same criteria apply as for the original appeal: (1) It must be in writing; (2) it must go to a sole decision-maker in the regional office of the region where the restriction originated for review; and (3) it may accompany supporting documentation. We make this periodic review available to all restricted individuals once every three years. Respondents for this collection are individuals appealing their restrictions from in-person services at SSA field offices.

*Type of Request:* Extension of an OMB-approved information collection.

| Regulation section | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| 20 CFR 422.905 | 75 | 1 | 15 | 19 |
| 20 CFR 422.906 | 75 | 1 | 20 | 25 |
| Totals | 150 | | | 44 |

Dated: December 18, 2018.

**Naomi Sipple,**

*Reports Clearance Officer, Social Security Administration.*

[FR Doc. 2018–27767 Filed 12–21–18; 8:45 am]

**BILLING CODE 4191–02–P**

## DEPARTMENT OF STATE

**[Public Notice 10625]**

### 30-Day Notice of Proposed Information Collection: Request To Change End User, End Use and/or Destination of Hardware

**ACTION:** Notice of request for public comment and submission to OMB of proposed collection of information.

**SUMMARY:** The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

**DATES:** Submit comments directly to the Office of Management and Budget (OMB) up to January 25, 2019.

**ADDRESSES:** Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Andrea Battista, who may be reached on 202–663–3136 or at *battistaal@state.gov.*

**SUPPLEMENTARY INFORMATION:**

- *Title of Information Collection:* Request to Change End User, End Use and/or Destination of Hardware.
- *OMB Control Number:* 1405–0173.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Directorate of Defense Trade Controls (DDTC).
- *Form Number:* DS–6004.
- *Respondents:* Business or Nonprofit Organizations.
- *Estimated Number of Respondents:* 500.
- *Estimated Number of Responses:* 500.
- *Average Time per Response:* 1 hour.
- *Total Estimated Burden Time:* 500 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

#### Abstract of Proposed Collection

The Request to Change End-User, End-Use and/or Destination of Hardware information collection is used to request DDTC approval prior to any sale, transfer, transshipment, or disposal, whether permanent or temporary, of classified or unclassified defense articles to any end-user, end-use or destination other than as stated on a license or other approval.

#### Methodology

Currently, there is no option of electronic submission of this information. Submissions are made via hardcopy documentation. Applicants are referred to ITAR § 123.9 for guidance on information to submit regarding the request to change end-user, end-use and/or destination of hardware. Upon implementation of DDTC's new case management system, The Defense Export Control and Compliance System (DECCS), a DS–6004 may be submitted electronically.

**Anthony M. Dearth,**

*Chief of Staff, Directorate of Defense Trade Controls, U.S. Department of State.*

[FR Doc. 2018–27778 Filed 12–21–18; 8:45 am]

**BILLING CODE 4710–25–P**

## SURFACE TRANSPORTATION BOARD

**[Docket No. AB 55 (Sub-No. 786X)]**

### CSX Transportation, Inc.—Abandonment Exemption—in Alachua County, Fla.

CSX Transportation, Inc. (CSXT) has filed a verified notice of exemption under 49 CFR pt. 1152 subpart F—*Exempt Abandonments* to abandon an approximately 0.23-mile rail line on its Deerhaven Subdivision, Jacksonville Division, between milepost ARB 738.42 and milepost ARB 738.65, the end of the line, in Alachua County, Fla. (the Line). The Line traverses U.S. Postal Service Zip Code 32609.

CSXT has certified that: (1) No local freight traffic has moved over the Line for two years; (2) any overhead traffic on the Line can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the Line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the Line is either pending with the Surface Transportation Board or any U.S. District Court or has been decided in favor of a complainant within the two-year period; and (4) the requirements at 49 CFR 1105.7 (service of environmental and historic report), 49 CFR 1105.12 (newspaper publication), and 49 CFR

1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received,[1] this exemption will be effective on January 25, 2019, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[3] and interim trail use/rail banking requests under 49 CFR 1152.29 must be filed by January 7, 2019. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 15, 2019, with the Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001.

A copy of any petition filed with Board should be sent to CSXT's representative, Louis E. Gitomer, Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

If the verified notice contains false or misleading information, the exemption is void ab initio.

CSXT has filed a combined environmental and historic report that addresses the effects, if any, of the abandonment on the environment and historic resources. OEA will issue an environmental assessment (EA) by December 31, 2018. Interested persons may obtain a copy of the EA by writing to OEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling OEA at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service at (800) 877–8339. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSXT shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by CSXT's filing of a notice of consummation by December 26, 2019, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available at *www.stb.gov.*

Decided: December 18, 2018.

By the Board, Allison C. Davis, Acting Director, Office of Proceedings.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2018–27685 Filed 12–21–18; 8:45 am]

**BILLING CODE 4915–01–P**

[1] The Board modified its OFA procedures effective July 29, 2017. Among other things, the OFA process now requires potential offerors, in their formal expression of intent, to make a preliminary financial responsibility showing based on a calculation using information contained in the carrier's filing and publicly available information. *See Offers of Financial Assistance,* EP 729 (STB served June 29, 2017); 82 FR 30,997 (July 5, 2017).

[2] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Serv. Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[3] Each OFA must be accompanied by the filing fee, which currently is set at $1,800. *See* 49 CFR 1002.2(f)(25).

## SURFACE TRANSPORTATION BOARD

**[Docket No. FD 36251]**

### Progressive Rail Incorporated—Lease Exemption With Interchange Commitment—Soo Line Railroad Company and Dakota, Minnesota & Eastern Railroad Corporation

Progressive Rail Incorporated (PGR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to (1) renew its lease from Soo Line Railroad Company (Soo Line) of two lines of railroad between Northfield, Minn., and Lakeville, Minn. (Lakeville Line), and between Rosemount, Minn., and Eagan, Minn. (Eagandale Line); and (2) lease from Soo Line and Dakota, Minnesota & Eastern Railroad Corporation (DM&E)[1] a line of railroad between Faribault, Minn., and Northfield, Minn. (Faribault Line).

The Lakeville Line extends approximately 21 miles from UP milepost 309.69 at Northfield through UP milepost 313.77 (CP milepost 52.90) to CP milepost 35.25 at Lakeville. The Lakeville Line also includes the 0.1-mile segment of track known as the Cannon Falls Branch between CP milepost 0.00 and CP milepost 0.10 at Northfield. The Eagandale Line extends approximately 12 miles from UP milepost 332.05 at Rosemount through UP milepost 333.85 (CP milepost 150.80) to CP milepost 160.70 at Eagan. The Faribault Line extends for approximately nine miles between UP milepost 300.50[2] at Faribault and UP milepost 309.69 at Northfield. According to PGR, DM&E owns the Faribault Line from Comus to Faribault, and Soo Line owns the Faribault Line from Comus to Northfield. PGR states that the Lakeville, Eagandale, and Faribault Lines (collectively, the Lines) total approximately 42 miles.

PGR states that it has entered into a new lease agreement with Soo Line and DM&E that renews PGR's lease of the Lakeville and Eagandale Lines for an additional 15 years and allows PGR to lease and operate the Faribault Line for a term of 15 years.

PGR states that it currently operates the Lakeville and Eagandale Lines pursuant to *Progressive Rail Inc.—Lease & Operation Exemption—Soo Line Railroad,* FD 34496 (STB served May 19, 2004) and the Faribault Line pursuant to *Progressive Rail Inc.—Acquisition & Operation Exemption—Rail Lines of Union Pacific Railroad,* FD 34476 (STB served Apr. 7, 2004). PGR states that it will continue to operate the Lines under the new lease agreement.

According to PGR, the new lease agreement includes an interchange commitment. As required under 49 CFR 1150.43(h)(1), PGR provided additional information regarding the interchange commitment.

PGR certifies that its projected revenues resulting from this transaction will not result in the creation of a Class I or Class II rail carrier, but states that its projected annual revenues will exceed $5 million following the transaction. Accordingly, PGR is required by Board regulations to send notice of the transaction to the national offices of the labor unions with employees on the affected lines, to post a copy of the notice at the workplace of the employees on the affected lines, and to certify to the Board that it has done so, at least 60 days before the exemption is to become effective. 49 CFR 1150.42(e). PGR filed its certification on November 15, 2018.

Concurrently with its verified notice, however, PGR filed a petition for partial

[1] Soo Line and DM&E are affiliated railroads under common control of Canadian Pacific Railway Company (CP). *Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R.,* FD 35081 (STB served Sept. 30, 2008).

[2] In its notice of exemption, the map at Exhibit A–1 referred to UP milepost 300.35. On December 19, 2018, PGR filed a supplement noting that the map should have referred to UP milepost 300.50.

waiver of the 60-day advance labor notice requirement to permit the exemption to take effect on January 9, 2019. PGR's waiver request will be addressed in a separate decision.

PGR states that it expects to consummate the transaction on or shortly after the effective date of this exemption. The Board will establish the effective date in its separate decision on the waiver request.

If the 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 January 2, 2019.

An original and 10 copies of all pleadings, referring to Docket No. FD 36251, 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 Bradon J. Smith, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606.

Board decisions and notices are available at *www.stb.gov.*

Decided: December 19, 2018.

By the Board, Allison C. Davis, Acting Director, Office of Proceedings.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2018–28027 Filed 12–21–18; 8:45 am]

**BILLING CODE 4915–01–P**

## SURFACE TRANSPORTATION BOARD

**[Docket No. EP 552 (Sub-No. 22)]**

### Railroad Revenue Adequacy—2017 Determination

**AGENCY:** Surface Transportation Board.

**ACTION:** Notice of decision.

**SUMMARY:** On December 21, 2018, the Board served a decision announcing the 2017 revenue adequacy determinations for the Nation's Class I railroads. Four carriers (BNSF Railway Company, Norfolk Southern Combined Railroad Subsidiaries, Soo Line Corporation, and Union Pacific Railroad Company) were found to be revenue adequate.

**DATES:** This decision is effective on December 21, 2018.

**FOR FURTHER INFORMATION CONTACT:** Pedro Ramirez, (202) 245–0333. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** The Board is required to make an annual determination of railroad revenue adequacy. A railroad is considered revenue adequate under 49 U.S.C. 10704(a) if it achieves a rate of return on net investment (ROI) equal to at least the current cost of capital for the railroad industry for 2017, determined to be 10.04% in *Railroad Cost of Capital—2017,* EP 558 (Sub-No. 21) (STB served Dec. 6, 2018). This revenue adequacy standard was applied to each Class I railroad. Four carriers (BNSF Railway Company, Norfolk Southern Combined Railroad Subsidiaries, Soo Line Corporation, and Union Pacific Railroad Company) were found to be revenue adequate for 2017.

The decision in this proceeding is posted on the Board's website at *www.stb.gov.* Copies of the decision may be purchased by contacting the Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238.

Decided: December 17, 2018.

By the Board, Board Members Begeman and Miller.

**Tammy Lowery,**

*Clearance Clerk.*

[FR Doc. 2018–27799 Filed 12–21–18; 8:45 am]

**BILLING CODE 4915–01–P**

## SUSQUEHANNA RIVER BASIN COMMISSION

### Projects Approved for Consumptive Uses of Water

**AGENCY:** Susquehanna River Basin Commission.

**ACTION:** Notice.

**SUMMARY:** This notice lists the projects approved by rule by the Susquehanna River Basin Commission during the period set forth in **DATES**.

**DATES:** October 1–31, 2018.

**ADDRESSES:** Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

**FOR FURTHER INFORMATION CONTACT:** Jason E. Oyler, General Counsel, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries may be sent to the above address.

**SUPPLEMENTARY INFORMATION:** This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22(e) and § 806.22 (f) for the time period specified above:

**Approvals By Rule Issued Under 18 CFR 806.22(f)**

1. Inflection Energy (PA), LLC; Pad ID: Hillegas Well Pad, ABR–201308017.R1; Upper Fairfield Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: October 11, 2018.
2. Inflection Energy (PA), LLC; Pad ID: Bennett Well Pad, ABR–201308015.R1; Eldred Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: October 19, 2018.
3. Cabot Oil & Gas Corporation; Pad ID: PavelskiJ Pad 1, ABR–201810001; Gibson Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: October 19, 2018.
4. Repsol Oil & Gas USA, LLC ; Pad ID: DCNR 594 (02 200), ABR–201810002; Liberty Township, Tioga County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: October 22, 2018.
5. Chief Oil & Gas LLC, Pad ID: HEMLOCK RIDGE ESTATES UNIT PAD; ABR–201810003; McNett Township, Lycoming County, Pa.; Consumptive Use of Up to 2.5000 mgd; Approval Date: October 24, 2018.
6. ARD Operating, LLC; Pad ID: Lycoming H&FC Pad F; ABR–201309015.R1; Cogan House Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: October 26, 2018.

**Authority:** Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: December 19, 2018.

**Jason E. Oyler,**

*Acting Secretary of the Commission.*

[FR Doc. 2018–27928 Filed 12–21–18; 8:45 am]

**BILLING CODE 7040–01–P**

## SUSQUEHANNA RIVER BASIN COMMISSION

### Projects Approved for Consumptive Uses of Water

**AGENCY:** Susquehanna River Basin Commission.

**ACTION:** Notice.

**SUMMARY:** This notice lists the projects approved by rule by the Susquehanna River Basin Commission during the period set forth in ''DATES.''

**DATES:** November 1–30, 2018.

**ADDRESSES:** Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

**FOR FURTHER INFORMATION CONTACT:** Jason E. Oyler, General Counsel, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email:

*joyler@srbc.net.* Regular mail inquiries may be sent to the above address.

**SUPPLEMENTARY INFORMATION:** This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22(e) and § 806.22 (f) for the time period specified above:

**Approvals By Rule Issued Under 18 CFR 806.22(f)**

1. Cabot Oil & Gas Corporation; Pad ID: FoltzJ P1, ABR–201311002.R1; Brooklyn Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.2500 mgd; Approval Date: November 9, 2018.

2. Repsol Oil & Gas USA, LLC; Pad ID: DCNR 594 (02–201), ABR–201811001; Liberty Township, Tioga County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: November 13, 2018.

3. Cabot Oil & Gas Corporation; Pad ID: AckerC P1, ABR–201311004.R1; Bridgewater Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.2500 mgd; Approval Date: November 13, 2018.

4. Repsol Oil & Gas USA, LLC ; Pad ID: CLDC (02 177), ABR–201811002; Ward Township, Tioga County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: November 19, 2018.

5. Cabot Oil & Gas Corporation; Pad ID: AndersonR P1, ABR–201311009.R1; Auburn Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.2500 mgd; Approval Date: November 19, 2018.

6. Chesapeake Appalachia, L.L.C.; Pad ID: Pond Family; ABR–201811004; Wilmot Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: November 21, 2018.

7. Cabot Oil & Gas Corporation; Pad ID: PowersM P1, ABR–201811003; Auburn Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: November 26, 2018.

8. SWEPI LP; Pad ID: Sherman 492W, ABR–201310001.R1; Sullivan Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 30, 2018.

9. Range Resources—Appalachia, LLC; Pad ID: State Game Lands 075A—East Pad, ABR–201311005.R1; Pine Township, Lycoming County, Pa.; Consumptive Use of Up to 1.0000 mgd; Approval Date: November 30, 2018.

**Authority:** Pub. L. 91–575, 84 Stat. 1509 et seq., 18 CFR parts 806, 807, and 808.

Dated: December 19, 2018.

**Jason E. Oyler,**

*Acting Secretary to the Commission.*

[FR Doc. 2018–27929 Filed 12–21–18; 8:45 am]

BILLING CODE 7040–01–P

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Notice of Final Federal Agency Actions on Proposed Highway in California

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of limitation on claims for judicial review of actions by the California Department of Transportation (Caltrans).

**SUMMARY:** The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans that are final. The actions relate to a proposed highway project, [Interstate 605 (I–605)/Katella Avenue Interchange] in the City of Los Alamitos, County of Orange, State of California. Those actions grant licenses, permits, and approvals for the project.

**DATES:** By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before May 28, 2019. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period applies.

**FOR FURTHER INFORMATION CONTACT:** For Caltrans: Smita Deshpande, Branch Chief, Generalist Branch—Division of Environmental Analysis, Caltrans District 12; 1750 East 4th Street, Suite 100, Santa Ana, CA 92705, 8:00 a.m. to 5:00 p.m., (657) 328–6151, *smita.deshpande@dot.ca.gov*. For FHWA, Larry Vinzant (916) 498–5040 or email *larry.vinzant@dot.gov*.

**SUPPLEMENTARY INFORMATION:** Effective July 1, 2007, FHWA assigned, and the Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that Caltrans has taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: Caltrans proposes to improve the I–605 and Katella Avenue interchange. The purpose of the project is to address existing and future mobility within the project area. The project seeks to improve both interchange traffic operations and pedestrian and bicycle facilities.

The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Environmental Assessment (EA) with Finding of No Significant Impact (FONSI) for the project, approved on November 8, 2018. The EA with FONSI, and other documents are available by contacting Caltrans at the addresses provided above. The Caltrans EA with FONSI can be viewed and downloaded from the project website at *www.dot.ca.gov/d12/DEA/605/0K870*. The notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. Council on Environmental Quality regulations;

2. National Environmental Policy Act (NEPA);

3. Moving Ahead for Progress in the 21st Century Act (MAP–21);

4. Department of Transportation Act of 1966;

5. Federal Aid Highway Act of 1970;

6. Clean Air Act Amendments of 1990;

7. Noise Control Act of 1970;

8. 23 CFR part 772 FHWA Noise Standards, Policies and Procedures;

9. Department of Transportation Act of 1966, Section 4(f);

10. Clean Water Act of 1977 and 1987;

11. Endangered Species Act of 1973;

12. Migratory Bird Treaty Act;

13. National Historic Preservation Act of 1966, as amended;

14. Historic Sites Act of 1935;

15. Executive Order 13112, Invasive Species; and

16. Title VI of the Civil Rights Act of 1964.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**Authority:** 23 U.S.C. 139(*l*)(1)

**Tashia J. Clemons,**

*Director, Planning and Environment, Federal Highway Administration, Sacramento, California.*

[FR Doc. 2018–27889 Filed 12–21–18; 8:45 am]

BILLING CODE 4910–RY–P

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

**[Docket No. DOT–OST–2018–0210]**

### Notice of Request for Comments: V2X Communications

**AGENCY:** Office of the Secretary, Department of Transportation (DOT).

**ACTION:** Notice of request for comment.

**SUMMARY:** Over the past several years, the Department of Transportation and its operating administrations have engaged in numerous activities related to connected vehicles, including vehicle-to-vehicle (V2V), vehicle-to-infrastructure (V2I), and vehicle-to-pedestrian (V2P) communications, collectively referred to as ''V2X'' communications. Recently, there have been developments in core aspects of the communication technologies that could be associated with V2X. This notice requests comment on how these developments impact both V2X in general and the Department's role in encouraging the integration of V2X.

**DATES:** You should submit your comments within 30 days after the date of publication in the **Federal Register**. See the **SUPPLEMENTARY INFORMATION** section on ''Public Participation,'' below, for more information about written comments.

**ADDRESSES:** Comments should refer to the docket number above and be submitted by one of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.

*Instructions:* For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

*Privacy Act:* Except as provided below, all comments received into the docket will be made public in their entirety. The comments will be searchable by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an associations, business, labor union, etc.). You should not include information in your comment that you do not want to be made public. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or at *https://www.transportation.gov/privacy.*

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to the street address listed above. Follow the online instructions for accessing the dockets.

**FOR FURTHER INFORMATION CONTACT:** Please contact us at *automation@dot.gov* or Sujeesh Kurup (202–366–9953) for policy issues or Timothy Mullins (202–366–9038) for legal issues.

**SUPPLEMENTARY INFORMATION:** Over the past several years, the Department of Transportation (Department or DOT) and its operating administrations have engaged in numerous activities related to connected vehicles, which generally encompass vehicle-to-vehicle (V2V), vehicle-to-infrastructure (V2I), and vehicle-to-pedestrian (V2P) communications, collectively known as ''V2X.'' These activities are based on the Department's view that V2X technologies have the potential for significant safety and mobility benefits, both on their own and as complementary technologies when combined with in-vehicle sensors supporting the integration of automated vehicles and other innovative applications such as platooning.

The agency's connected vehicle activities have primarily centered on utilizing Dedicated Short-Range Communications (DSRC), which is consistent with the longstanding and current Federal Communications Commission (FCC) allocation of the 5.9 GHz radiofrequency band, as discussed below. Most prominently, the National Highway Traffic Safety Administration (NHTSA), an operating administration of DOT, issued a notice of proposed rulemaking (NPRM) to mandate V2V communications for new light-duty vehicles and to standardize the format and performance requirements of V2V messages.[1] The NPRM identified DSRC as the primary communication medium, but also included provisions for other mediums if they could meet certain ''performance and interoperability requirements, which are based on the capabilities of today's DSRC-based V2V communications.''[2] In addition to the NHTSA NPRM, the Department, State and local governments, and industry are taking many other actions in developing and deploying V2X technologies. For example, General Motors recently announced that it will be expanding DSRC-based V2X deployment on future Cadillac vehicles, following-up the first U.S. production V2X deployment in the 2017 Cadillac CTS,[3] and Toyota announced it would begin offering DSRC-based V2V technology on selected models beginning in 2021.[4]

There has also been considerable progress by State and local governments in deploying V2X technology, in addition to DOT-funded deployment programs, such as the Ann Arbor Connected Vehicle Environment, Connected Vehicle Pilots Program, and the Advanced Transportation and Congestion Management Technologies Deployment Program. All told, the Department understands that by the end of 2018, there will be more than 18,000 vehicles deployed with aftermarket DSRC-based V2X communications devices and more than 1,000 infrastructure V2X devices installed at intersections and along roadways in 25 States. Significant work has also been done on the development of the ''Security Credential Management System'' (SCMS) for V2X communications, both by the Department and industry partners (specifically, the Crash Avoidance Metrics Partnership, LLC (CAMP)), and other private sector organizations.

In addition, there have been developments in core aspects of the communication technologies needed for V2X, which have raised questions about how the Department can best ensure that the safety and mobility benefits of connected vehicles are achieved without interfering with the rapid technological innovations occurring in both the automotive and telecommunications industries.

First, there has been progress in both Cellular-V2X (C–V2X) and ''5G'' communications, both of which may, or may not, offer both advantages and disadvantages over DSRC. C–V2X is based on the LTE (4G) ''release 14''

[1] NHTSA, ''Federal Motor Vehicle Safety Standards; V2V Communication,'' 82 FR 3854 (Jan. 12, 2017).

[2] *Id.* at 3881.

[3] General Motors, ''Cadillac to Expand Super Cruise Across Entire Lineup,'' Jun. 6, 2018, *available at https://media.gm.com/media/cn/en/gm/news.detail.html/content/Pages/news/cn/en/2018/June/0606_Cadillac-Lineup.html.*

[4] Toyota, ''Toyota and Lexus to Launch Technology to Connect Vehicles and Infrastructure in the U.S. in 2021,'' Apr. 6, 2018, *available at https://corporatenews.pressroom.toyota.com/releases/toyota+and+lexus+to+launch+technology+connect+vehicles+infrastructure+in+u+s+2021.htm.*

standards issued by the 3rd Generation Partnership Project (3GPP) [5] and is being explored by chip manufacturers.[6] Also referred to as ''LTE C–V2X,'' it is being evaluated by some auto manufacturers as an alternative to DSRC.[7] Standards organizations are also developing the next generation of cellular communications, generally called ''5G,'' including ''New Radio C–V2X'' (or NR C–V2X), which will focus on enhanced V2X services in the following four areas: (i) Vehicles Platooning; (ii) Advanced Driving; (iii) Extended Sensors; and (iv) Remote Driving.[8] Requirements for 5G-based NR C–V2X are expected to be solidified by December of 2019.[9]

Second, in response to interest on the part of certain stakeholders for additional spectrum to support Wi-Fi services and applications, the FCC released an NPRM in February 2013 to amend the Commission's rules governing the operation of Unlicensed National Information Infrastructure (U–NII) devices in the 5 GHz band. This NPRM sought public comment on whether the 5.9 GHz band allocated for DSRC might be shared with unlicensed devices—and principally Wi-Fi devices.[10] On June 7, 2016, FCC issued a ''Refresh of the Record'' for this NPRM asking for additional input as well as prototype devices that would support testing of sharing concepts.[11] To assess the feasibility of certain sharing concepts, the Department collaborated with FCC and the National Telecommunications and Information Administration (NTIA) in developing a three-phase spectrum sharing test plan, which remains ongoing.[12] In addition to these activities, there is the related question of whether the existing spectrum framework, focused upon DSRC, should be revised to allow alternative technologies, including those discussed above, to use the relevant spectrum band for transportation purposes.

In light of these developments, the Department is interested in learning more about recent developments in V2X technologies. In particular, the Department wants to hear from stakeholders, and the public generally, whether focusing on DSRC as the primary means of V2V communications is consistent with recent technological developments, as well as with the Department's general desire to remain technologically neutral and avoid interfering with the many innovations in transportation and telecommunication technologies. If technological developments support the use of alternatives to DSRC, the Department would also need to know how to ensure that these alternative technologies are interoperable with each other and DSRC.

We believe the below questions may help guide commenters, but commenters are also free to provide their views on the general issues surrounding V2X communications. To the extent possible, please provide data, technical information, or other evidence to support your comments.

1. Please provide information on what existing or future technologies could be used for V2X communications, including, but not limited to, DSRC, LTE C–V2X and 5G New Radio. What are the advantages and disadvantages of each technology? What is the timeframe for deployment of technologies not yet in production? Please provide data supporting your position.

2. Of the V2X communications technologies previously discussed, at present only DSRC is permitted to be used in the 5.9 GHz spectrum band for transportation applications. If that allocation were to be changed to allow any communication technology for transportation applications, could DSRC and other technologies (*e.g.,* C–V2X, 5G or any future technology) operate in the same spectrum band or even the same channel without interference? Why or why not? If there are any technical challenges to achieving this goal, what are they and how can they be overcome?

3. To what extent is it technically feasible for multiple V2X communications technologies and protocols to be interoperable with one another? Why or why not? Can this be done in a way that meets the performance requirements for safety of life applications, as they were discussed in the V2V NPRM? What additional equipment would be needed to achieve interoperability or changes in standards and specifications? What is the projected cost of any necessary changes? How soon can these changes and equipment prototypes be available for testing?

4. To what extent is it technically feasible for different generations of the same V2X communications technologies and protocols to be interoperable with one another? Why or why not? Can this be done in a way that meets the performance requirements for safety of life applications? What additional equipment or changes in standards and specifications would be needed to achieve interoperability? What is the projected cost of any necessary changes?

5. Even if they are interoperable across different technologies and generations of the same technology, would there be advantages if a single communications protocol were to be used for V2V safety communications? What about other V2X safety applications, such as those involving V2I and V2P communications?

6. How would the development of alternative communication technologies affect other V2I and V2P communications, such as those supporting mobility or environmental applications? Do these applications have the same or different interoperability issues as V2V safety communications? Do different V2X applications (*e.g.,* platooning) have different communication needs, particularly latency?

7. Do different communication technologies present different issues concerning physical security (*i.e.,* how to integrate alternative communication technologies into vehicle systems), message security (*i.e.,* SCMS design or other approaches), or other issues such as cybersecurity or privacy? Would these concerns be affected if multiple but still interoperable communication technologies are used rather than one?

8. How could communications technologies (DSRC, C–V2X, 5G or some other technology) be leveraged to

[5] For details on C–V2X, *see* 3GPP, ''Release 14,'' *http://www.3gpp.org/release-14.* For industry development of C–V2X definitions, *see* SAE, CV2X Direct Communication Task Force, *https://www.sae.org/works/committeeHome.do?comtID=TEV5GDC.*

[6] Qualcomm: *https://www.qualcomm.com/invention/5g/cellular-v2xHuawei: https://www.huawei.com/en/press-events/news/2018/6/Huawei-v2x-strategy-RSU-launch.*

[7] *http://5gaa.org/news/5gaa-audi-ford-and-qualcomm-showcase-c-v2x-direct-communications-interoperability-to-improve-road-safety-2/.*

[8] *https://portal.3gpp.org/desktopmodules/Specifications/SpecificationDetails.aspx?specificationId=3108.*

[9] *http://www.3gpp.org/ftp/Information/presentations/presentations_2018/RAN80_webinar_summary(brighttalk)extended.pdf.*

[10] *See* FCC, ''Unlicensed National Information Infrastructure (U–NII) Devices in the 5 GHz Band,'' 78 FR 21320 (Apr. 10, 2013).

[11] *See* FCC, ''Unlicensed National Information Infrastructure (U–NII) Devices in the 5 GHz Band,'' 81 FR 36501 (Jun. 7, 2016).

[12] *See* FCC, Public Notice, ''The Commission Seeks To Update and Refresh the Record in the 'Unlicensed National Information Infrastructure (U–NII) Devices in the 5 GHz Band' Proceeding,'' Jun. 1, 2016, *available at https://docs.fcc.gov/public/attachments/FCC-16-68A1.pdf; see also* FCC, ''U–NII–4–to–DSRC EMC Test and Measurement Plan, Phase I: FCC Laboratory Tests,'' Oct. 7, 2016, *available at https://transition.fcc.gov/oet/fcclab/DSRC-Test-Plan-10-05-2016.pdf;* FCC, U–NII–4 Prototype Device Testing Open House Summary,'' Oct. 21, 2016, *available at https://transition.fcc.gov/oet/fcclab/U-NII-4-DSRC-Open-House-Oct-21-2016-Summary.pdf;* DOT, ''USDOT Spectrum Sharing Analysis Plan: Effects of Unlicensed-National Information Infrastructure (U–NII) Devices on Dedicated Short-Range Communications (DSRC),'' Dec. 2017, *available at https://www.its.dot.gov/research_archives/connected_vehicle/dsrc_testplan.htm.*

support current and emerging automated vehicle applications? Will different communication technologies be used in different ways? How?

9. How could deployments, both existing and planned, assess communications needs and determine which technologies are most appropriate and whether and how interoperability could be achieved?

**Public Participation**

*How do I prepare and submit comments?*

Your comments must be written and in English. To ensure that your comments are filed correctly in the docket, please include the docket number of this document in your comments.

Please submit one copy (two copies if submitting by mail or hand delivery) of your comments, including the attachments, to the docket following the instructions given above under **ADDRESSES**. Please note, if you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using an Optical Character Recognition (OCR) process, thus allowing the agency to search and copy certain portions of your submissions.

*How do I submit confidential business information?*

Any submissions containing Confidential Information must be delivered to OST in the following manner:

- Submitted in a sealed envelope marked ''confidential treatment requested'';
- Accompanied by an index listing the document(s) or information that the submitter would like the Departments to withhold. The index should include information such as numbers used to identify the relevant document(s) or information, document title and description, and relevant page numbers and/or section numbers within a document; and
- Submitted with a statement explaining the submitter's grounds for objecting to disclosure of the information to the public.

OST also requests that submitters of Confidential Information include a non-confidential version (either redacted or summarized) of those confidential submissions in the public docket. In the event that the submitter cannot provide a non-confidential version of its submission, OST requests that the submitter post a notice in the docket stating that it has provided OST with Confidential Information. Should a submitter fail to docket either a non-confidential version of its submission or to post a notice that Confidential Information has been provided, we will note the receipt of the submission on the docket, with the submitter's organization or name (to the degree permitted by law) and the date of submission.

*Will the agency consider late comments?*

U.S. DOT will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, the agency will also consider comments received after that date.

*How can I read the comments submitted by other people?*

You may read the comments received at the address given above under COMMENTS. The hours of the docket are indicated above in the same location. You may also see the comments on the internet, identified by the docket number at the heading of this notice, at *http://www.regulations.gov.*

Issued in Washington, DC on December 12, 2018, under authority delegated at 49 U.S.C. 1.25a.

**Finch Fulton,**

*Deputy Assistant Secretary for Transportation Policy.*

[FR Doc. 2018–27785 Filed 12–21–18; 8:45 am]

**BILLING CODE 4910–9X–P**

---

## DEPARTMENT OF THE TREASURY

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Application for Extension of Time for Payment of Tax Due to Undue Hardship

**AGENCY:** Departmental Offices, U.S. Department of the Treasury.

**ACTION:** Notice.

**SUMMARY:** The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

**DATES:** Comments should be received on or before January 25, 2019 to be assured of consideration.

**ADDRESSES:** Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8100, Washington, DC 20220, or email at *PRA@treasury.gov.*

**FOR FURTHER INFORMATION CONTACT:** Copies of the submissions may be obtained from Jennifer Quintana by emailing *PRA@treasury.gov,* calling (202) 622–0489, or viewing the entire information collection request at *www.reginfo.gov.*

**SUPPLEMENTARY INFORMATION:**

**Internal Revenue Service (IRS)**

*Title:* Form 1127—Application for Extension of Time for Payment of Tax Due to Undue Hardship.

*OMB Control Number:* 1545–2131.

*Type of Review:* Extension without change of a currently approved collection.

*Description:* Under IRC 6161, individual taxpayers and business taxpayers are allowed to request an extension of time for payment of tax shown or required to be shown on a return or for a tax due on a notice of deficiency. In order to be granted this extension, they must file Form 1127, providing evidence of undue hardship, inability to borrow, and collateral to ensure payment of the tax.

*Form:* 1127.

*Affected Public:* Businesses or other for-profits, Individuals and Households.

*Estimated Number of Respondents:* 1,000.

*Frequency of Response:* On occasion.

*Estimated Total Number of Annual Responses:* 1,000.

*Estimated Time per Response:* 7.47 hours.

*Estimated Total Annual Burden Hours:* 7,470.

**Authority:** 44 U.S.C. 3501 *et seq.*

Dated: December 18, 2018.

**Spencer W. Clark,**

*Treasury PRA Clearance Officer.*

[FR Doc. 2018–27783 Filed 12–21–18; 8:45 am]

**BILLING CODE 4830–01–P**

---

## DEPARTMENT OF THE TREASURY

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Labeling and Advertising Requirements Under the Federal Alcohol Administration Act

**AGENCY:** Departmental Offices, U.S. Department of the Treasury.

**ACTION:** Notice.

**SUMMARY:** The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

**DATES:** Comments should be received on or before January 25, 2019 to be assured of consideration.

**ADDRESSES:** Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8100, Washington, DC 20220, or email at *PRA@treasury.gov.*

**FOR FURTHER INFORMATION CONTACT:** Copies of the submissions may be obtained from Jennifer Quintana by emailing *PRA@treasury.gov,* calling (202) 622–0489, or viewing the entire information collection request at *www.reginfo.gov.*

**SUPPLEMENTARY INFORMATION:**

**Tax and Trade Bureau (TTB)**

*Title:* Labeling and Advertising Requirements under the Federal Alcohol Administration Act.

*OMB Control Number:* 1513–0087.

*Type of Review:* Extension without change of a currently approved collection.

*Description:* The FAA Act, at 27 U.S.C. 205(e) and (f), specifically requires the Secretary to issue regulations regarding the labeling and advertising of wines, distilled spirits, and malt beverages to prohibit consumer deception and the use of misleading statements on labels and in advertising of alcohol beverages and to ensure that such labels and advertisements provide consumers with adequate information as to the identity and quality of such products. Under this authority, TTB has issued regulations in 27 CFR parts 4, 5, and 7 that require bottlers and importers to provide certain mandatory information on labels and in advertisements of alcohol beverages and to adhere to certain performance standards for statements made on labels and in advertisements of such products to ensure that consumers are not deceived or mislead about a product's identity and quality.

*Form:* None.

*Affected Public:* Businesses or other for-profits.

*Estimated Number of Respondents:* 11,300.

*Frequency of Response:* Annually.

*Estimated Total Number of Annual Responses:* 11,300.

*Estimated Time per Response:* 1 hour.

*Estimated Total Annual Burden Hours:* 11,300.

**Authority:** Authority: 44 U.S.C. 3501 et seq.

Dated: December 18, 2018.

**Spencer W. Clark,**

*Treasury PRA Clearance Officer.*

[FR Doc. 2018–27766 Filed 12–21–18; 8:45 am]

BILLING CODE 4810–31–P

## DEPARTMENT OF VETERANS AFFAIRS

### Veterans and Community Oversight and Engagement Board, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act the Veterans and Community Oversight and Engagement Board will meet on January 9–10, 2019. Details on times and locations for meetings are contained below. The meetings are open to the public.

The Board was established by the West Los Angeles Leasing Act of 2016 on September 29, 2016. The purpose of the Board is to provide advice and make recommendations to the Secretary of Veterans Affairs on: Identifying the goals of the community and Veteran partnership; improving services and outcomes for Veterans, members of the Armed Forces, and the families of such Veterans and members; and on the implementation of the Draft Master Plan approved by the Secretary on January 28, 2016, and on the creation and implementation of any successor master plans.

On Wednesday, January 9, 2019, the Board will convene an open session at 11301 Wilshire Boulevard, Building 500, Room 1281, Los Angeles, CA from 8:30 a.m. to 5:30 p.m. The agenda will include briefings from senior VA officials, to include training on federal advisory committees and ethics; and guidance to the Board members on their roles and responsibilities. The Board will receive an information briefing from the Greater Los Angeles Draft Master Plan Integrated Project Team, and an introductory information briefing from the Principal Developer recently selected by VA. A public comment session will occur from 4:00 p.m. to 5:00 p.m. followed by a wrap up of Public Comment session.

On Thursday, January 10, 2019, the Board will convene an open session at the same location as shown above from 8:00 a.m. to 4:30 p.m. The Board will receive additional briefings on the CHIP IN Act, Purple Line Expansion, and Breitburn/DAV Agreement. The Board's subcommittees on Outreach and Community Engagement with Services and Outcomes, and Master Plan with Services and Outcomes will meet to finalize reports on activities since the last meeting, followed by an out brief to the full Committee and update on draft recommendations considered for forwarding to the SECVA. Individuals wishing to make public comments should contact Chihung Szeto at (562) 708–9959 or at *Chihung.Szeto@va.gov* and are requested to submit a 1–2-page summary of their comments for inclusion in the official meeting record. In the interest of time, each speaker will be held to a 5-minute time limit.

Any member of the public seeking additional information should contact Mr. Eugene W. Skinner Jr. at (202) 631–7645 or at *Eugene.Skinner@va.gov.*

Dated: December 19, 2018.

**LaTonya L. Small,**

*Federal Advisory Committee Management Officer.*

[FR Doc. 2018–27923 Filed 12–21–18; 8:45 am]

BILLING CODE P

# FEDERAL REGISTER

Vol. 83 Wednesday,

No. 246 December 26, 2018


Part II

## Securities and Exchange Commission

17 CFR Parts 229, 230, 239, et al.

Modernization of Property Disclosures for Mining Registrants; Final Rule

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 229, 230, 239, and 249**

**[Release Nos. 33–10570; 34–84509; File No. S7–10–16]**

**RIN 3235–AL81**

## Modernization of Property Disclosures for Mining Registrants

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting amendments to modernize the property disclosure requirements for mining registrants, and related guidance, currently set forth in Item 102 of Regulation S–K under the Securities Act of 1933 and the Securities Exchange Act of 1934 and in Industry Guide 7. The amendments are intended to provide investors with a more comprehensive understanding of a registrant's mining properties, which should help them make more informed investment decisions. The amendments also will more closely align the Commission's disclosure requirements and policies for mining properties with current industry and global regulatory practices and standards. In addition, we are rescinding Industry Guide 7 and relocating the Commission's mining property disclosure requirements to a new subpart of Regulation S–K.

**DATES:** *Effective date:* The final rule amendments are effective February 25, 2019, except for the amendments to 17 CFR 229.801(g) and 229.802(g), which will be effective on January 1, 2021.

*Compliance date:* Registrants engaged in mining operations must comply with the final rule amendments for the first fiscal year beginning on or after January 1, 2021. Industry Guide 7 will remain effective until all registrants are required to comply with the final rules, at which time Industry Guide 7 will be rescinded.

**FOR FURTHER INFORMATION CONTACT:** Elliot Staffin, Special Counsel, in the Division of Corporation Finance, at (202) 551–3430, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** We are amending 17 CFR 229.102 (''Item 102 of Regulation S–K'') under the Securities Act of 1933 (''Securities Act'')[1] and the Securities Exchange Act of 1934 (''Exchange Act''),[2] adding new exhibit (96) to 17 CFR 229.601(b) (''Item 601 of Regulation S–K''), adding new 17 CFR part 229, subpart 229.1300 (''subpart 1300 of Regulation S–K''), amending 17 CFR 230.436 under the Securities Act, amending Form 1–A,[3] amending Form 20–F,[4] and rescinding 17 CFR 229.801(g) and 229.802(g) under the Securities Act and Exchange Act.

### Table of Contents

I. Introduction
A. Summary of, and Commenters' Principal Concerns Regarding, the Commission's Proposed Revisions to the Current Mining Property Disclosure Regime
B. Summary of Principal Changes to the Final Rules
II. Final Mining Property Disclosure Rules
A. Consolidation of the Mining Disclosure Requirements
1. Rule Proposal
2. Comments on the Rule Proposal
3. Final Rules
B. Overview of the Standard for Mining-Related Disclosure
1. The Threshold Materiality Standard
2. Treatment of Vertically-Integrated Companies
3. Treatment of Multiple Property Ownership
4. Treatment of Royalty Companies and Other Companies Holding Economic Interests in Mining Properties
5. Definitions of Exploration, Development and Production Stage
C. Qualified Person and Responsibility for Disclosure
1. The ''Qualified Person'' Requirement
2. The Definition of ''Qualified Person''
D. Treatment of Exploration Results
1. Rule Proposal
2. Comments on the Rule Proposal
3. Final Rules
E. Treatment of Mineral Resources
1. The Mineral Resource Disclosure Requirement
2. Definition of Mineral Resource
3. Classification of Mineral Resources
4. The Initial Assessment Requirement
5. USGS Circular 831 and 891
F. Treatment of Mineral Reserves
1. The Framework for Determining Mineral Reserves
2. The Type of Study Required To Support a Reserve Determination
G. Specific Disclosure Requirements
1. Requirements for Summary Disclosure
2. Requirements for Individual Property Disclosure
3. Requirements for Technical Report Summaries
4. Requirements for Internal Controls Disclosure
H. Conforming Changes to Certain Forms Not Subject to Regulation S–K
1. Form 20–F
2. Form 1–A
I. Transition Period and Compliance Date
III. Other Matters
IV. Economic Analysis
A. Baseline
1. Affected Parties
2. Current Regulatory Framework and Market Practices
B. Analysis of Potential Economic Effects
1. Broad Economic Effects of the Final Rules and Impact on Efficiency, Competition, and Capital Formation
2. Consolidation of the Mining Disclosure Requirements
3. The Standard for Mining-Related Disclosure
4. Qualified Person and Responsibility for Disclosure
5. Treatment of Exploration Results
6. Treatment of Mineral Resources
7. Treatment of Mineral Reserves
8. Specific Disclosure Requirements
9. Conforming Changes to Certain Forms Not Subject to Regulation S–K
V. Paperwork Reduction Act
A. Background
B. Summary of Collection of Information Requirements
C. Estimate of Potentially Affected Registrants
D. Estimate of Reporting and Cost Burdens
VI. Final Regulatory Flexibility Act Analysis
A. Need for, and Objectives of, the Final Rules
B. Significant Issues Raised by Public Comments
C. Small Entities Subject to the Final Rules
D. Reporting, Recordkeeping, and Other Compliance Requirements
E. Duplicative, Overlapping or Conflicting Federal Rules
F. Agency Action To Minimize Effect on Small Entities
VII. Statutory Authority

## I. Introduction

On June 16, 2016, the Commission proposed revisions to its disclosure requirements and related guidance under the Securities Act and Exchange Act for properties owned or operated by mining companies to provide investors with a more comprehensive understanding of a registrant's mining properties to help them make more informed investment decisions.[5] The Commission also proposed to modernize its disclosure requirements and policies for mining properties by more closely aligning them with current industry and global regulatory practices and standards.[6] The Commission's disclosure requirements are currently

[1] 15 U.S.C. 77a *et seq.*

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 239.90.

[4] 17 CFR 249.220f.

[5] *See* Modernization of Property Disclosures for Mining Registrants, Securities Act Release No. 33–10098 (June 16, 2016) [81 FR 41651] (''Proposing Release'').

[6] We proposed to modernize our disclosure requirements for mining properties following a request by some industry participants to revise Guide 7. *See* Petition for Rulemaking from Society for Mining, Metallurgy and Exploration, Inc. to Elizabeth M. Murphy, Secretary, U.S. Securities & Exchange Commission (Oct. 1, 2012), (''SME Petition for Rulemaking''), *http://www.sec.gov/rules/petitions/2012/petn4-654.pdf.* In accordance with 17 CFR 201.192 (Rule 192 of the Commission's Rules of Practice), the Secretary of the Commission will notify the petitioners of the action taken by the Commission following the publication of this release in the **Federal Register**.

found in Item 102 of Regulation S–K, and the related guidance appears in Industry Guide 7.[7]

We received over 60 comment letters on the proposed revisions [8] primarily from participants in, or representatives of, the mining industry, including mining companies,[9] mining standards groups,[10] mining consulting groups,[11] professional and trade associations,[12] law firms,[13] mining royalty companies,[14] and individual geologists and mining engineers.[15] We also received comments from several groups expressing various environmental or sustainability concerns in connection with the mining industry.[16]

Most commenters supported modernizing the Commission's property disclosure requirements for mining registrants by more closely aligning them with current industry and global regulatory practices and standards,[17] as embodied by the Committee for Reserves International Reporting Standards (''CRIRSCO'').[18] Numerous industry commenters,[19] however, expressed concern that the proposed rules deviated, in certain respects, from the CRIRSCO standards [20] or the various international, CRIRSCO-based disclosure codes.

As explained below, in a number of instances, we have revised the proposed requirements in line with commenters' suggestions to be more consistent with the CRIRSCO standards and improve the comparability of mining property disclosures, which should help decrease, relative to the proposed rules, the expected compliance costs and burden of the final rules and enhance investor understanding of registrants' mining operations. In other instances, we have not changed the proposed requirements because we believe that those requirements are necessary to protect investors. Overall, we believe that the final rules reflect an appropriate consideration of the extent to which the final rules promote efficiency, competition, and capital formation in addition to the protection of investors.[21] The final rules will modernize the Commission's mining property disclosure regime by amending or removing requirements that may have placed U.S. mining registrants at a competitive disadvantage [22] and by adding other requirements that will help investors make more informed investment decisions about those registrants.

### *A. Summary of, and Commenters' Principal Concerns Regarding, the Commission's Proposed Revisions to the Current Mining Property Disclosure Regime*

In light of global developments in the mining industry's disclosure standards and industry participants' concerns, we proposed to align the Commission's disclosure rules for properties owned or operated by mining companies with the CRIRSCO-based codes in several respects. For example, we proposed to require a registrant with material mining operations to disclose, in addition to its mineral reserves, mineral resources that

[7] *See* U.S. Sec. & Exch. Comm'n. Industry Guide 7: Description of Property By Issuers Engaged or to Be Engaged in Significant Mining Operations (''Guide 7'').

[8] *See* Comments on Proposed Rule: Modernization of Property Disclosures for Mining Registrants, U.S. Sec. & Exch. Comm'n, *https://www.sec.gov/comments/s7-10-16/s71016.htm.*

[9] *See, e.g.,* letters from Alliance Resource Partners, L.P. (Sept. 23, 2016) (''Alliance''); AngloGold Ashanti Limited (Aug. 22, 2016) (''AngloGold''); BHP Billiton (Sept. 23, 2016) (''BHP''); Cloud Peak Energy Inc. (Sept. 22, 2016) (''Cloud Peak''); Coeur Mining, Inc. (Aug. 19, 2016) (''Coeur''); Energy Fuels Inc. (Sept. 29, 2016) (''Energy Fuels''); Freeport-McMoRan Inc. (Sept. 23, 2016) (''FCX''); Gold Resource Corporation (Aug. 26, 2016) (''Gold Resource''); Newmont Mining Corporation (Sept. 26, 2016) (''Newmont''); Northern Dynasty Minerals Ltd. (Aug. 15, 2016) (''Northern Dynasty''); Randgold Resources Ltd. (Sept. 26, 2016) (''Randgold''); Rio Tinto plc (Sept. 26, 2016) (''Rio Tinto''); Ur-Energy Inc. (Sept. 26, 2016) (''Ur-Energy''); and Vale S.A. (Aug. 26, 2016) (''Vale'').

[10] *See, e.g.,* letters from Australasian Institute of Mining and Metallurgy (Sept. 26, 2016) (''AusIMM''); Canadian Institute of Mining, Metallurgy and Petroleum (Aug. 26, 2016) (''CIM''); Comissao Brasileira de Recursos e Reservas (Sept. 5, 2016) (''CBRR''); Committee for Mineral Reserves International Reporting Standards (Sept. 23, 2016) (''CRIRSCO''); Joint Ore Reserves Committee of Australasia (Sept. 26, 2016) (''JORC''); SAMCODES Standards Committee (Sept. 22, 2016) (''SAMCODES 1'') and (Sept. 26, 2016) (''SAMCODES 2''); and Society for Mining, Metallurgy and Exploration, Inc. (Aug. 4, 2016) (''SME 1'') and Aug. 25, 2016) (''SME 2'').

[11] *See, e.g.,* letters from Amec Foster Wheeler (Sept. 26, 2016) (''Amec''); CPM Group (Aug. 24, 2016) (''CPM''); Golder Associates, Inc. (Sept. 26, 2016) (''Golder''); and SRK Consulting (U.S.), Inc. (Aug. 19, 2016) (''SRK 1'') and Sept. 26, 2016 (''SRK 2'').

[12] *See, e.g.,* letters from American Institute of Professional Geologists (Aug. 22, 2016) (''AIPG''); Mining and Metallurgical Society of America (Sept. 26, 2016) (''MMSA''); and National Mining Association (Sept. 23, 2016) (''NMA 1'') and Sept. 29, 2017 (''NMA 2 and SME 3''). The latter letter from NMA was co-signed by SME and was submitted at the meeting between representatives of the National Mining Association and Ur-Energy and staff of the Commission's Division of Corporation Finance on October 10, 2017. That letter is available at: *https://www.sec.gov/comments/s7-10-16/s71016-2633677-161226.pdf. See also* letters from National Society of Professional Engineers (Aug. 16, 2016) (''NSPE''); National Stone, Sand & Gravel Association (Sept. 26, 2016) (''NSSGA 1'') and (Apr. 28, 2017) (''NSSGA 2''); Prospectors & Developers Association of Canada (Oct. 12, 2016) (''PDAC''); and U.S. Chamber of Commerce (Sept. 26, 2016) (''Chamber'').

[13] *See, e.g.,* letters from Andrews Kurth Kenyon LLP (Sept. 26, 2016) (''Andrews Kurth''); Cleary Gottlieb Steen & Hamilton LLP (Sept. 30, 2016) (''Cleary Gottlieb''); Crowell & Moring LLP (Sept. 16, 2016) (''Crowell and Moring''); Davis Polk & Wardwell LLP (Sept. 26, 2016) (''Davis Polk''); Dorsey & Whitney LLP (Sept. 26, 2016) (''Dorsey & Whitney''); Shearman & Sterling LLP (Sept. 26, 2016) (''Shearman & Sterling''); Sullivan & Cromwell LLP (Aug. 15, 2016) (''Sullivan & Cromwell''); Troutman Sanders LLP (Sept. 26, 2016) (''Troutman Sanders''); and Vinson & Elkins LLP (Sept. 26, 2016) (''Vinson & Elkins'').

[14] *See, e.g.,* letters from Natural Resource Partners L.P. (Sept. 26, 2016) (''NRP''); and Royal Gold, Inc. (Sept. 26, 2016) (''Royal Gold'').

[15] *See, e.g.,* letters from Ted Eggleston, Ph.D. (Aug. 19, 2016) (''Eggleston''); Douglas H. Graves, P.E. (Sept. 21, 2016) (''Graves''); Keith Laskowski (Aug. 26, 2016) (''Laskowski''); Michael Moats (Aug. 31, 2016) (''Moats''); Dr. Pierre Mousset-Jones (June 20, 2016) (''Mousset-Jones''); and Dana Willis, P.G. (Aug. 4, 2016) (''Willis'').

[16] *See, e.g.,* letters from Carbon Tracker Initiative (Aug. 26, 2016) (''Carbon Tracker''); Center for Science in Public Participation (Sept. 22, 2016) (''CSP²''); Columbia Water Center (Sept. 26, 2016) (''Columbia Water''); Earthworks (and 21 other environmental advocates) (Sept. 26, 2016) (''Earthworks *et al.*''); Montana Trout Unlimited (Sept. 25, 2016) (''Montana Trout''); and Sustainability Accounting Standards Board (Aug. 26, 2016) (''SASB'').

[17] *See, e.g.,* letters from Andrews Kurth, AngloGold, AusIMM, CIM, CSP², Cleary Gottlieb, Coeur, Columbia Water, CBRR, CRIRSCO, Davis Polk, Dorsey & Whitney, Earthworks *et al.,* Golder, Graves, JORC, MMSA, Montana Trout, Newmont, PDAC, Randgold, Rio Tinto, SME 1, Chamber, Ur-Energy, Vale, and Willis.

[18] CRIRSCO is an international initiative to standardize definitions for mineral resources, mineral reserves, and related terms for public disclosure. CRIRSCO has representatives from professional societies involved in developing mineral reporting guidelines in Australasia (Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (JORC)), Brazil (Brazilian Commission for Mineral Resources and Reserves (CBRR)), Canada (Canadian Institute of Mining Metallurgy and Petroleum (CIM)), Chile (Minera Comision), Europe (Pan-European Reserves and Resources Reporting Committee (PERC)), Indonesia (the KCMI Joint Committee (KOMPERS)), Kazakhstan (Kazakhstan Association for Public Reporting on Exploration Results, Mineral Resources and Mineral Reserves (KAZRC)), Mongolia (Mongolian Professional Institute of Geosciences and Mining (MPIGM)), Russia (National Association for Subsoil Examination (NAEN)), South Africa (South African Code for Reporting of Exploration Results, Mineral Resources and Mineral Reserves (SAMREC)), and the USA (Society for Mining, Metallurgy and Exploration, Inc. (SME)). CRIRSCO's website is located at: *http://www.crirsco.com.*

[19] *See, e.g.,* letters from Amec, AIPG, Andrews Kurth, AngloGold, AusIMM, BHP, Chamber , CIM, Cleary & Gottlieb, Coeur, CRIRSCO, Davis Polk, Dorsey & Whitney, Eggleston, Energy Fuels, FCX, Gold Resource, Golder, Graves, JORC, Newmont, NMA 1, NMA 2 and SME 3, Northern Dynasty, NSSGA 1 and 2, PDAC, Randgold, Rio Tinto, SAMCODES 1 and 2, Shearman & Sterling, SME 1, SRK 1, Ur-Energy, Vale, and Willis.

[20] The CRIRSCO standards are found in its International Reporting Template. *See, e.g.,* Committee for Mineral Reserves International Reporting Standards, CRIRSCO International Reporting Template, cl. 18 (2013), *http://www.crirsco.com/templates/international_reporting_template_november_2013.pdf.*

[21] *See* Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)]. *See also infra* Section IV.

[22] *See, e.g., infra* Section II.E.1.iii (discussing the treatment of mineral resources).

have been determined based upon information and supporting documentation by one or more qualified persons. We proposed to use the CRIRSCO standards' classification scheme regarding mineral resources and reserves, and proposed substantially similar definitions of many of the technical terms used under the CRIRSCO-based codes, such as the definition of the various categories of mineral resources and mineral reserves, qualified person, pre-feasibility study, and feasibility study. We also proposed to permit the qualified person to use the results of either a pre-feasibility study or a final feasibility study to support a determination of reserves in most situations.

Further, we proposed to establish a single set of rules for mining property disclosure by rescinding Guide 7, replacing it with a new subpart of Regulation S–K, and amending Item 102 of Regulation S–K to refer to the new subpart. The proposed mining property disclosure rules would require a registrant with material mining operations to provide both summary disclosure concerning its properties in the aggregate as well as more detailed disclosure about individually material properties.

While most commenters supported the Commission's goal of modernizing its mining property disclosure requirements in light of global standards, numerous commenters expressed concern that the proposed rules deviated from the CRIRSCO standards in several respects. Their principal concerns included that:

- Requiring both mineral resource and reserve estimates to be based on a price, which may not exceed the average price for the preceding 24 months, except when a contract has defined the price, would diverge from global industry practice, which permits the qualified person to use any reasonable and justifiable price, and which is typically a price based on forward-looking pricing forecasts;
- The proposed summary and individual property disclosure requirements are overly prescriptive, burdensome to meet, and do not account for the diversity of operations within the mining industry;
- Prohibiting the use of inferred resources in a quantitative assessment of resources would be inconsistent with the CRIRSCO standards, and in particular Canadian mining disclosure requirements, which permit the inclusion of inferred resources to demonstrate the potential economic viability of a deposit;
- Requiring the use of a feasibility study, rather than a pre-feasibility study, to support a determination of reserves in high risk situations would run counter to the CRIRSCO-based codes, which leave the decision of what type of technical report is required to support the determination of reserves, including in high risk situations, to the discretion and judgment of the competent or qualified person;
- The proposed prohibition against disclaimers would be contrary to the CRIRSCO-based codes, and in particular the Canadian requirements, which permit disclaimers in certain circumstances;
- Prohibiting the use of historical estimates would be contrary to the Canadian and Australian approaches, which allow such use, and might preclude the consummation of some mergers, acquisitions or business combinations because there would not be enough time to verify an estimate provided by the target company;
- Requiring all applicable mining property disclosure from a royalty, streaming, or other similar company would be burdensome for such companies because they generally have no rights beyond receiving royalties and lack access to the technical data and other information available to the owner or operator, and which is necessary to comply with the mining property disclosure requirements; and
- The proposed rules could compel a registrant to disclose its exploration results before they become material to investors, which would run counter to the CRIRSCO-based codes.

Many commenters maintained that, unless the Commission revised the proposed rules, their adoption would result in mining registrants incurring an unnecessarily heavy compliance burden, increase the costs of compliance for mining registrants that also report in CRIRSCO-based jurisdictions, and result in inconsistent disclosure that could cause investor confusion and diminish comparability. Some commenters also maintained that, if adopted, the proposed rules would continue to place U.S. registrants at a significant competitive disadvantage and leave in place significant barriers to entry for foreign mining companies that would otherwise list or raise capital in the United States.

We have carefully considered all of the comments received on the proposed rules. As discussed below, the final rules reflect changes from the rule proposal that were made in response to many of these comments.

*B. Summary of Principal Changes to the Final Rules*

The final rules include several revisions to more closely align the Commission's mining property disclosure requirements with the CRIRSCO standards and thereby help decrease, relative to the proposed rules, the compliance burden and costs for the many registrants that are subject to one or more of the CRIRSCO-based codes while still providing important investor protections. For example, the final rules:

- Require a qualified person to use a price for each commodity that provides a reasonable basis for establishing the prospects of economic extraction when assessing mineral resources, and that provides a reasonable basis for establishing that the project is economically viable when determining mineral reserves, which may be a historical or forward-looking price, as long as the qualified person discloses and explains, with particularity, his or her reasons for using the selected price, including the material assumptions underlying the selection;
- Eliminate the proposed quantitative presumptions regarding when a registrant's mining operations, and when a change in previously reported estimates of mineral resources or mineral reserves, are deemed to be material;
- Eliminate the proposed summary disclosure provision requiring specific items of information in tabular format about a registrant's top 20 properties and, instead, adopt a more principles-based approach by requiring the registrant to provide investors with an overview of its properties and mining operations;
- Reduce the number of summary and individual property disclosure provisions requiring tables from seven, as proposed, to two, and permit other required disclosure to be in either narrative or tabular format;
- Permit, but not require, a registrant to file a technical report summary to support its disclosure of exploration results;
- Provide that a qualified person will not be subject to expert liability under Section 11 of the Securities Act for findings and conclusions regarding certain aspects of specified modifying factors discussed in the technical report summary or other parts of the registration statement that the qualified person has indicated are based on information provided by the registrant;
- Permit a qualified person to determine mineral resources and reserves at any specific point of reference, which must be disclosed in the technical report summary, rather than at three points of reference;
- Exclude geothermal energy from the definition of mineral resource;
- Require a qualified person to apply relevant technical and economic factors likely to influence the prospect of economic extraction, rather than all modifying factors, when determining mineral resources;
- Permit a qualified person in the technical report summary to disclose mineral resources as including mineral reserves as long as he or she also discloses mineral resources as excluding mineral reserves; [23]
- Permit a qualified person to include inferred resources in an economic analysis that the qualified person opts to include in an initial assessment as long as certain conditions are met;
- Define mineral reserve to include diluting materials and allowances for losses that may occur when the material is mined or extracted;

[23] However, as proposed, the final rules prohibit a registrant from including mineral reserves when disclosing mineral resource estimates in a prospectus or other Commission filing.

• Permit a qualified person to conduct either a pre-feasibility or final feasibility study to support a determination of mineral reserves even in high risk situations;

• Permit the use of historical estimates of mineral resources or reserves in Commission filings pertaining to mergers, acquisitions, or business combinations if the registrant is unable to update the estimate prior to the completion of the relevant transaction, provided that the registrant discloses the source and date of the estimate, and does not treat the estimate as a current estimate; and

• Permit a registrant holding a royalty or similar interest to omit any information required under the summary and individual property disclosure provisions to which it lacks access and which it cannot obtain without incurring an unreasonable burden or expense.

We also are clarifying our position on a few issues raised by commenters that were not fully addressed in the Proposing Release. For example:

• Multiple qualified persons may prepare a technical report summary if certain conditions are met;

• If a qualified person is employed by a third-party firm, that firm may sign the technical report summary and provide the written consent required for an expert under the Securities Act;

• A registrant's disclosure of information regarding its exploration activity and exploration results is voluntary until such information becomes material to investors; and

• A registrant and its qualified person may disclose exploration targets in Commission filings if accompanied by certain specified cautionary and explanatory statements.

In addition, we are adopting a two-year transition period so that a registrant will not have to comply with the new rules until its first fiscal year beginning on or after January 1, 2021, although a registrant may voluntarily comply with the new rules prior to the compliance date, subject to the Commission's completion of necessary EDGAR reprogramming changes.

## II. Final Mining Property Disclosure Rules

### *A. Consolidation of the Mining Disclosure Requirements*

#### 1. Rule Proposal

The combination of the overlapping structure of the current disclosure regime for mining registrants (in Item 102 of Regulation S–K and Industry Guide 7) and the brevity of Guide 7, which has led to a significant amount of staff interpretive guidance through the comment process, may have created some regulatory uncertainty among mining registrants, particularly new registrants.[24] To help address this uncertainty, we proposed to rescind Guide 7 and create new subpart 1300 of Regulation S–K that would govern disclosure for registrants with mining operations. In addition, we proposed to amend Item 102 of Regulation S–K to replace the instruction that directed issuers to the information called for in Guide 7 with a new instruction requiring all mining registrants to refer to and, if required, provide the disclosure under new subpart 1300 of Regulation S–K. We also proposed to provide the same instruction on Form 20–F [25] and Form 1–A.[26]

#### 2. Comments on the Rule Proposal

Many commenters stated that they supported the Commission's proposal to rescind Guide 7 and replace it with a single set of disclosure standards as long as those standards are consistent with the CRIRSCO standards.[27] Several commenters also reiterated that the Commission's current disclosure regime for mining properties has caused uncertainty for mining registrants.[28] Two commenters, however, urged the Commission to withdraw its proposal and, instead, make more modest revisions to Guide 7 out of concern that the proposed rules were overly prescriptive and deviated from the CRIRSCO standards in several key respects.[29]

Regarding the content of the new mining property disclosure rules, some commenters recommended that the Commission specifically incorporate the CRIRSCO template by reference.[30] Other commenters requested that the Commission adopt Canada's legal instrument, NI–43–101, establishing mining property disclosure requirements, or recognize the use of Canada's Form 43–101F as the basis for a mining registrant's technical reports.[31] A few commenters stated that the Commission's mining property disclosure rules should follow Australia's JORC or South Africa's SAMCODES on the grounds that Canada's NI 43–101 is too prescriptive.[32]

#### 3. Final Rules

We are adopting final rules that will rescind Guide 7, as proposed, and codify the Commission's mining property disclosure requirements in new subpart 1300 of Regulation S–K.[33] We are also amending Item 102 of Regulation S–K, as proposed, to state that registrants engaged in mining operations must refer to and, if required, provide the disclosure under subpart 1300 of Regulation S–K [34] in addition to any non-mining property disclosure required by Item 102.[35] Having one source for mining disclosure obligations should facilitate mining registrants' compliance with their disclosure requirements by reducing the complexity resulting from the existing disclosure structure. Moreover, consolidating the mining property disclosure requirements into Regulation S–K should eliminate the uncertainty noted by several commenters concerning the Commission's current mining property disclosure regime.[36]

Many commenters supported our proposal to consolidate the Commission's mining property disclosure requirements under a single set of rules as long as the final rules align with the CRIRSCO standards.[37] As discussed throughout this release, the final rules include revisions that will substantially more closely align the Commission's mining property disclosure requirements with the CRIRSCO standards as compared to the proposed rules.[38] The final rules also

[24] *See* Proposing Release, *supra* note 5, at Section II.A.

[25] Foreign private issuers use Form 20–F to file their Exchange Act registration statements and annual reports, and also refer to Form 20–F when filing their Securities Act registration statements on Forms F–1 and F–4. *See* 17 CFR 249.220f.

[26] Form 1–A is the offering statement used by issuers that are eligible to engage in securities offerings under Regulation A. *See* 17 CFR 230.251–230.263.

[27] *See* letters from AIPG, Amec, AngloGold, BHP, CBRR, Coeur, Eggleston, Golder, MMSA, Midas Gold Corp. (June 23, 2016) (''Midas''), Randgold, Rio Tinto, SAMCODES 1 and 2, Ur-Energy, Vale and Willis.

[28] *See* letters from Amec, BHP, Crowell & Moring, Eggleston, Golder, Midas, Rio Tinto and SRK 1.

[29] *See* letter from NMA 2 and SME 3.

[30] *See, e.g.,* letters from AIPG and Rio Tinto.

[31] *See, e.g.,* letters from AIPG, Coeur, Gold Resource, Graves, SME 1, SRK 1, and Willis.

[32] *See, e.g.,* letters from JORC, Randgold, and SAMCODES 2.

[33] 17 CFR 229.1300 through 229.1305. Subpart 1300 will apply to registration statements under the Securities Act and the Exchange Act as well as to annual reports under the Exchange Act.

[34] Instruction 3 to Item 102 of Regulation S–K [17 CFR 229.102]. We are similarly amending Form 20–F and Form 1–A to provide the same instruction and reference to Regulation S–K subpart 1300. *See infra* Section II.H.

[35] Registrants that have material non-mining operations will continue to provide non-mining property disclosures under Item 102 of Regulation S–K.

[36] *See supra* note 28. For this reason, we continue to believe that codification of our mining property disclosure requirements is a better approach than revising Guide 7, as suggested by two commenters. *See* letter from NMA 2 and SME 3. Moreover, we note that the final rules are less prescriptive and conform more closely to CRIRSCO standards than the proposed rules.

[37] *See supra* note 27.

[38] Some commenters noted that, although the proposed rules differed from the CRIRSCO standards in certain respects, they did generally align with the CRIRSCO standards in several other respects. *See, e.g.,* letter from AusIMM (''Most of the CRIRSCO Standard definitions have been

Continued

emphasize transparency, materiality, and competence—the three governing principles of the CRIRSCO standards.[39] We therefore believe that the final rules are responsive to commenters' overarching concern that the Commission's mining property disclosure requirements be substantially more consistent with current industry standards.

We do not believe it would be appropriate, however, to incorporate by reference or otherwise adopt in its entirety on a going forward basis the CRIRSCO international template, Canada's NI 43–101, or another specific CRIRSCO-based code or guide, as requested by some commenters. Granting such a request would effectively bind the Commission's rules both to current and future iterations and interpretations of the CRIRSCO standards, codes or guides, over which the Commission would have little to no control or influence. It also would ignore the need to adopt mining property disclosure rules that are consistent with the unique purposes and characteristics of the U.S. federal securities laws.[40]

*B. Overview of the Standard for Mining-Related Disclosure*

1. The Threshold Materiality Standard

i. Rule Proposal

Item 102 of Regulation S–K currently requires registrants to disclose information about principal mines, other materially important physical properties, and significant mining operations. Guide 7 only applies to registrants engaged or to be engaged in significant mining operations. However, Guide 7 does not define ''significant'' mining operations while Item 102 does not specify the particular quantitative factors to be considered in determining the materiality of a mine.

For registrants that have one or more principal mines or other materially important properties but lack significant mining operations, Item 102 requires less detailed information. For registrants that have significant mining operations, Guide 7 calls for more extensive disclosures. However, although both Item 102 and Guide 7 refer to ''significant'' mining operations, the staff historically has advised registrants to apply a materiality standard in determining what disclosures to provide, and has used 10% of a registrant's total assets as the benchmark for determining the materiality of a registrant's mining operations.

In order to clarify the mining property disclosure standard, we proposed that a registrant would be required to provide the disclosure under new subpart 1300 of Regulation S–K if its mining operations are material to its business or financial condition.[41] The Commission also proposed specific steps a registrant would have to take when determining the materiality of its mining operations.[42]

The Commission further proposed that a registrant's mining operations are presumed to be material if its mining assets constitute 10% or more of its total assets. The proposed rules also instructed, however, that if a registrant's mining assets fall below the 10% total assets threshold, it would need to consider if there are other factors, quantitative or qualitative, which would render its mining operations material.[43]

ii. Comments on the Rule Proposal

Many commenters supported the Commission's proposal to require disclosure if a registrant determines that its mining operations are material to its business or financial condition.[44] Some commenters supported the proposed provision that a registrant's mining operations are presumed to be material if they consist of 10% or more of its total assets, but only if the provision is a presumption and not a bright line test, and not exclusive of other factors.[45]

Some commenters supported using a quantitative measure for determining the materiality of a registrant's mining operations for purposes of the proposed rules, but recommended that the Commission adopt the U.S. GAAP thresholds for segment reporting under Accounting Standards Codification (''ASC'') 280,[46] rather than the proposed 10% asset metric.[47] Those commenters preferred this particular U.S. GAAP approach because of their concern that large companies may not meet the proposed 10% asset test or because, in their view, the U.S. GAAP approach is more suitable and equitable.[48]

Other commenters recommended that the Commission avoid a specific materiality test and instead adopt the approach taken in Canada's Companion Policy 43–101CP.[49] That approach requires an issuer to ''determine materiality in the context of the issuer's overall business and financial condition taking into account qualitative and quantitative factors, assessed in respect of the issuer as a whole.'' [50] Another commenter [51] opposed ''special materiality tests (such as 10% of total assets)'' and advocated instead using the standards for materiality established by the U.S. Supreme Court in *TSC* v. *Northway* [52] and *Basic* v. *Levinson*.[53]

incorporated in the release as they were in the 2014 SME Guide'').

[39] *See* CRIRSCO International Reporting Template, *supra* note 20, at cl. 3 (''The main principles governing the operation and application of the Template are transparency, materiality and competence. Transparency requires that the reader of a Public Report is provided with sufficient information, the presentation of which is clear and unambiguous, so as to understand the report and not to be misled. Materiality requires that a Public Report contains all the relevant information which investors and their professional advisers would reasonably require, and reasonably expect to find in a Public Report, for the purpose of making a reasoned and balanced judgement regarding the Exploration Results, Mineral Resources or Mineral Reserves being reported. Competence requires that the Public Report be based on work that is the responsibility of suitably qualified and experienced persons who are subject to an enforceable professional code of ethics and rules of conduct'').

[40] *See, e.g.,* consideration of the qualified person as an expert under Section 11 of the Securities Act in Section II.C.1. below.

[41] As proposed, the term ''material'' would have the same meaning as under 17 CFR 230.405 [Securities Act Rule 405] and 17 CFR 240.12b–2 [Exchange Act Rule 12b–2].

[42] *See* Proposing Release, *supra* note 5, at Section II.B.1.

[43] *See id.*

[44] *See, e.g.,* letters from AngloGold, CBRR, CIM, Eggleston, Midas, Rio Tinto, SRK 1 and Vale.

[45] *See, e.g.,* letters from CBRR, Midas, and SRK 1.

[46] Accounting Standards Code (''ASC'') 280 requires an enterprise to report separately information concerning an operating segment if any of the following quantitative thresholds are met: (i) Its reported revenue, including both sales to external customers and intersegment sales or transfers, is 10% or more of the combined revenue, internal and external, of all operating segments; (ii) the absolute amount of its reported profit or loss is 10% or more of the greater, in absolute amount, of either the combined reported profit of all operating segments that did not report a loss, or the combined reported loss of all operating segments that did report a loss; or (iii) its assets are 10% or more of the combined assets of all operating segments. Under ASC 280, information about operating segments that do not meet any of the quantitative thresholds may also be considered reportable, and separately disclosed, if management believes that information about the segment would be useful to readers of the financial statements. *See* ASC 280–10–50–12.

[47] *See* letters from Alliance, SAMCODES 1 and SME 1; *see also* letter from JORC (stating that materiality should be determined under GAAP without specifying the particular GAAP provision) and letter from SRK 1 (stating that the actual and projected expenditures, revenues and income as well as the amount of capital raised or planned to be raised have a direct impact on materiality, and that if any of those amounts comprise 10% or more of a registrant's value, they should be considered material).

[48] *See* letters from JORC, SAMCODES 1, and SME 1.

[49] *See* letters from CIM, Eggleston, and Vale.

[50] National Instrument Companion Policy 43–101CP, pt. General Guidance (4), *https://www.bcsc.bc.ca/Securities_Law/Policies/Policy4/PDF/43-101CP__CP___February_25__2016/*. That document then lists several factors that are likely to support the conclusion that a property is material. *See id.* at (5).

[51] *See* letter from Chamber.

[52] 426 U.S. 438 (1976).

[53] 485 U.S. 224 (1988).

Several commenters specifically addressed the Commission's proposal to require the aggregation of all mining properties, regardless of size or type of commodity produced, when assessing the materiality of a registrant's mining operations.[54] A number of commenters generally supported this proposal, with one noting that aggregation of the mining properties represents the actual composition of the registrant's value,[55] and two others concurring so long as the aggregation correlated to the segment disclosure mandated under the accounting framework.[56] Two commenters supported the aggregation of assets based on shared infrastructure and product integration, but only if the assets are in the same geographic region,[57] with one also asserting that very different commodities, such as coal and metalliferous metals, should not be aggregated.[58] Another commenter, however, opposed the aggregation of assets because ''it does not allow investors to determine the significance of a property, or understand that asset.'' [59]

Several commenters addressed the Commission's proposal, as part of the materiality determination, to require a registrant to include for each property all related activities from exploration through extraction to the first point of material external sale, including processing, transportation and warehousing.[60] One commenter supported this proposal because it is required by Canada's NI43–101, is the benchmark for mineral project reporting, and provides investors with the information they need to understand the project.[61] Another commenter generally supported using the first point of material external sale as the appropriate cut-off because this is generally where a mining company loses control of the product.[62]

Another commenter, however, did not support the first point of material external sale as the appropriate cut-off because it believed that a registrant's materiality determination should account for costs associated with mine reclamation on the grounds that reclamation constitutes one of the greatest environmental and social liabilities mining registrants should disclose to investors.[63]

iii. Final Rules

We are adopting the proposed provision that a registrant must provide the disclosure specified in subpart 1300 of Regulation S–K if its mining operations are material to its business or financial condition.[64] We are also adopting the provision, as proposed, that for purposes of subpart 1300, the term *material* has the same meaning as under Securities Act Rule 405 or Exchange Act Rule 12b–2.[65] Commenters generally supported basing the Commission's mining property disclosure threshold on whether a registrant's mining operations are material to its business or financial condition.[66] Establishing materiality as the threshold for disclosure is consistent with the CRIRSCO standards, which lists materiality as one of the three governing principles underlying those standards.[67] Moreover, by providing that materiality is to be determined pursuant to Securities Act Rule 405 and Exchange Act Rule 12b–2, we are clarifying that, although, as described below, a registrant must consider certain factors when determining the materiality of its mining operations, the ultimate governing considerations in this regard are the general principles reflected in those rules.[68]

In a change from the proposed rules, and as suggested by one commenter,[69] we are not including an instruction to the materiality provision stating that a registrant's mining operations are presumed to be material if they consist of 10% or more of its total assets. Even as a presumption, we are concerned that such an instruction could become a *de facto* threshold. We also believe that an assessment that takes into consideration all relevant facts and circumstances will lead to better materiality determinations. For similar reasons, we are not adopting a quantitative measure of materiality based on the reportable segment disclosure thresholds in U.S. GAAP. Rather than referring to a specific U.S. GAAP provision, we believe it is appropriate to rely on a more principles-based approach to the materiality provision.

Consistent with comments received,[70] we are adopting the proposed provision that, when determining whether its mining operations are material, a registrant must:

- Consider both quantitative and qualitative factors, assessed in the context of the registrant's overall business and financial condition;
- Aggregate mining operations on all of its mining properties, regardless of the stage of the mining property, and size or type of commodity produced, including coal, metalliferous minerals, industrial materials, and mineral brines;[71] and
- Include, for each property, as applicable, all related activities from exploration through extraction to the first point of material external sale, including processing, transportation, and warehousing.[72]

[54] *See* letters from Alliance, Amec, AngloGold, CBRR, Eggleston, Midas, Rio Tinto, and SRK 1.

[55] *See* letter from SRK 1; *see also* letter from CBRR.

[56] *See* letters from Alliance and AngloGold. Another commenter stated that no commodity should be excluded, but suggested that only commodities from material properties should be included in technical reports although ''[n]on-material mines could be aggregated for annual disclosures.'' Letter from Eggleston.

[57] *See* letter from Rio Tinto; *see also* letter from Amec (opposing the aggregation of assets in different countries, and recommending that the Commission follow the guidance in the Canadian Companion Policy 43–101CP, which states that a property includes multiple claims that are contiguous or in such close proximity that any underlying mineral deposits would likely be developed using common infrastructure).

[58] *See* letter from Amec.

[59] Letter from Midas.

[60] *See, e.g.,* letters from Amec, CBRR, Earthworks, Eggleston, Midas and SRK.

[61] Letter from Midas.

[62] Letter from SRK 1. This commenter recommended that, ''for companies that have significant downstream processing, there should be a requirement to calculate the materiality based on the point in the supply chain where that raw material would be purchased if the company did not own the mining assets.'' *Id.* Another commenter stated that exploration through the first point of external sale is appropriate, but noted that not all properties will include all activities. *See* letter from Eggleston. *See also* letter from CBRR (stating that ''comprehensive, end-to-end reporting can assist the investors with the relevant information in order to understand mineral projects for exploration and development stage issuers'' but, for production stage registrants, ''the materiality criteria should be applied and exploration results are not necessarily relevant'').

[63] *See* letter from Earthworks. Two other commenters stressed the importance of considering environmental and sustainability factors in the materiality determination. *See* letters from CSP[2] and Montana Trout.

[64] 17 CFR 229.1301(b) [Item 1301(b) of Regulation S–K].

[65] *Id; see also supra* note 41 and accompanying text. Pursuant to Securities Act Rule 405 and Exchange Act Rule 12b–2, a matter is material if there is a substantial likelihood that a reasonable investor would attach importance to it in determining whether to buy or sell the securities registered. This definition is consistent with the U.S. Supreme Court's holding in TSC Industries v. Northway, Inc., 426 U.S. 438, 449 (1976), that a fact is material if there is a substantial likelihood that the fact would have been viewed by a reasonable investor as having significantly altered the ''total mix'' of information made available.

[66] *See, e.g.,* letters from AngloGold, CBRR, SRK 1, and Rio Tinto.

[67] *See* CRIRSCO's International Reporting Template, *supra* note 20, at cl. 3.

[68] *See supra* note 65.

[69] *See* letter from Chamber.

[70] *See supra* note 44 and accompanying text.

[71] As explained in Section II.E.1., below, we are removing geothermal energy from the scope of these rules, and have therefore eliminated geothermal energy from the list of commodities required to be aggregated.

[72] *See* 17 CFR 229.1301(c) [Item 1301(c) of Regulation S–K].

Although some commenters sought to exclude certain commodities or properties in the aggregation process,[73] we continue to believe, and agree with those commenters who asserted, that the aggregation of all mining properties, regardless of the mined commodity, is necessary to gauge accurately the materiality of a registrant's mining operations.[74] For example, the exclusion from the aggregation process of properties that a registrant believes are not individually material[75] would overlook and improperly remove from the scope of the mining property disclosure rules a registrant that owns two or more properties, neither of which is individually material, but which, when considered in the aggregate and in the context of the registrant's overall business, constitute material mining operations. Therefore, the final rules require such a registrant to provide summary disclosure of its overall mining operations,[76] although it will not be subject to the more extensive disclosure requirements for individual material properties.

Most commenters who addressed the issue supported requiring, as part of the materiality determination, the inclusion for each property of all related activities from exploration through extraction to the first point of material external sale, including processing, transportation, and warehousing.[77] Such inclusion is consistent with the ''end-to-end reporting'' required under the CRIRSCO-based codes.[78] In this regard, we are not adopting the suggestion of one commenter to specify reclamation of the mine as the end point to be considered in the materiality provision. Mine reclamation and closure plans are important considerations that must be addressed by the qualified person, under the CRIRSCO-based codes. However, those plans are usually prepared as part of the assessment of technical and economic factors relevant to the reasonable prospects of economic extraction when determining mineral resources, or when applying all applicable modifying factors to resources for the purpose of assessing the economic viability of a project when determining mineral reserves. Also, mine reclamation costs are included in capital and operating costs during feasibility studies to estimate mineral reserves. The final rules follow this approach[79] and therefore do not specifically include reclamation as the end point in the materiality determination. However, we believe that mining properties that are at the reclamation stage are still considered mining properties and should be included in evaluations of the materiality of mining operations.

Similar to a proposed instruction to the materiality provision, we are adopting a provision stating that the term ''mining operations'' includes operations on all mining properties that a registrant:

- Owns or in which it has, or it is probable that it will have, a direct or indirect economic interest;
- Operates, or it is probable that it will operate, under a lease or other legal agreement that grants the registrant ownership or similar rights that authorize it, as principal, to sell or otherwise dispose of the mineral; or
- Has, or it is probable that it will have, an associated royalty or similar right.[80]

Commenters did not object to including within the definition operations on mining properties that a registrant owns or operates pursuant to a lease or other similar agreement. Moreover, although several commenters objected to the scope of the proposed disclosure required of royalty or other similar right holders, only a few commenters recommended their complete exclusion from the proposed rules.[81]

2. Treatment of Vertically-Integrated Companies

i. Rule Proposal

As noted in the Proposing Release, some companies have material mining operations that are secondary to or in support of their main non-mining business.[82] For example, a metal manufacturer may operate iron ore or coal mines to supply raw material for its primary business. Yet neither Guide 7 nor Item 102 addresses whether or when a vertically-integrated manufacturer[83] is required to provide mining disclosure.

In order to clarify the treatment of vertically-integrated manufacturers, the Commission explained that proposed new subpart 1300 of Regulation S–K would apply to all registrants with mining operations, including vertically-integrated manufacturers. Specifically, a mining operation owned by a registrant to support its primary business could be material and require disclosure. The fact that the registrant's primary business operation is something other than minerals extraction would not be determinative of whether disclosure would be required under the proposed subpart.[84]

ii. Comments on the Rule Proposal

Most commenters that addressed the issue supported the Commission's proposal to require vertically-integrated companies, such as manufacturers, to provide the disclosure under proposed subpart 1300 of Regulation S–K.[85] One commenter agreed that the proposed rules should apply to a vertically-integrated company if its mine is material, but disagreed that the mine's providing a competitive advantage should be a criterion for disclosure.[86]

iii. Final Rules

As proposed, and consistent with comments received,[87] new subpart 1300 of Regulation S–K will apply to all registrants with material mining operations, including vertically-integrated manufacturers. Like a company whose primary business is mining, such a vertically-integrated company will be required to assess relevant quantitative and qualitative factors to determine if its mining operations are material. For example, the bauxite mining operations of an aluminum manufacturer, whose primary business is manufacturing, not mining, could require disclosure if its bauxite mining operations are material, even though they are not the registrant's primary operations, or the primary source of the registrant's revenues. Factors to be considered in such a materiality determination could include if the manufacturer derives a

[73] *See, e.g.,* letters from Amec and Eggleston.

[74] *See, e.g.,* letters from CBRR and SRK 1.

[75] *See* letter from Eggleston.

[76] *See infra* Section II.G.1; *see also* 17 CFR 229.1301(d) [Item 1301(d) of Regulation S–K].

[77] *See supra* notes 61–62 and accompanying text.

[78] *See, e.g.,* letter from Midas.

[79] *See* 17 CFR 229.601(b)(96)(iii)(B)(*17*) [Item 601(b)(96)(iii)(B)(*17*) of Regulation S–K], which requires the qualified person to describe the factors pertaining to environmental compliance, permitting, and local individuals or groups, which are related to the project, including ''[m]ine closure plans, including remediation and reclamation plans, and the associated costs.'' 17 CFR 229.601(b)(96)(iii)(B)(*17*)(*v*).

[80] 17 CFR 229.1301(a) [Item 1301(a) of Regulation S–K].

[81] *See infra* Section II.B.4.

[82] *See* Proposing Release, *supra* note 5, at Section II.B.1.i.

[83] A vertically-integrated manufacturer is a company that owns part of its supply chain. In this context, it refers to a registrant that has mining operations to supply raw material to its manufacturing business.

[84] *See* Proposing Release, *supra* note 5, at Section II.B.1.i.

[85] *See* letters from Amec, AngloGold, CBRR, Midas, Rio Tinto, and SRK 1. AngloGold stated that ''[i]f the mining component of a vertically-integrated company is material to its operations, such as a secure source of supply, perceived cost advantage etc., then the same disclosures as mining companies should be required in order to provide a complete set of information to enable an investor to determine an investment decision.''

[86] *See* letter from Eggleston.

[87] *See supra* note 85 and accompanying text.

competitive advantage from, or substantially relies upon, its ability to source that particular mineral from its mining operations.

Requiring disclosure of mining operations by vertically-integrated manufacturers is consistent with the disclosure currently provided in Commission filings and should not significantly alter existing disclosure practices. In addition, this treatment of vertically-integrated companies is consistent with the CRIRSCO-based codes, which require disclosure for material mining properties and do not provide exemptions for vertically-integrated companies.

3. Treatment of Multiple Property Ownership

i. Rule Proposal

As noted in the Proposing Release, it is common for registrants to own multiple mining properties.[88] In some instances, a registrant will have multiple properties that all involve exploration, development, or extraction of the same mineral. In other situations, the registrant's operations will primarily involve exploration, development, or extraction of one mineral from several properties, but the registrant also will own one or more ancillary properties where it explores, develops, or extracts small amounts (relative to the predominant mineral) of a different mineral.

The primary focus of the current rules and guidance is on individually significant or material properties. Neither Item 102 nor Guide 7 provides guidance concerning when or what disclosure is required when a registrant owns multiple or ancillary mining properties. To clarify the disclosure that is required in these circumstances, we proposed that a registrant with multiple properties would be required to consider all of its mining properties in the aggregate, as noted above,[89] as well as individually, regardless of size or commodity produced, when assessing whether it must provide the mining disclosure required by new subpart 1300 of Regulation S–K.[90] We also proposed that a registrant with multiple properties, none of which is individually material, but which in the aggregate constitute material mining operations, would have to provide summary disclosure concerning its combined mining activities rather than provide disclosure for individual properties.[91] We further proposed that, to the extent that an individual property is material to its operations, a registrant would be required to provide detailed disclosure about that property. As proposed, such individual property disclosure would be in addition to the required summary disclosure if the registrant owns two or more individual properties.[92] Finally, we explained that, under the proposed rules, a registrant could be required to provide disclosure for a particular property, depending on the facts and circumstances, even if ancillary to the registrant's predominant commodity.[93]

ii. Comments on the Rule Proposal

As discussed above, commenters generally supported requiring a registrant to consider all of its mining properties in the aggregate as well as individually, regardless of size or commodity produced, when assessing whether its mining properties are material, although some of the commenters stated that there should be limits on such aggregation.[94] Commenters similarly generally supported the proposal to require summary disclosure of their properties in the aggregate,[95] although some commenters conditioned their support consistent with their conditional support of the proposed disclosure threshold based on materiality.[96] The commenters that opposed the proposed summary disclosure requirements did so largely because they viewed those requirements as being ''out of line with current industry standards.'' [97]

iii. Final Rules

We are adopting the proposed treatment of multiple property ownership.[98] In the event that none of a registrant's mining properties is individually material, it will need to provide only summary disclosure. If the registrant has individually material mining properties, it must provide more detailed disclosure concerning those properties in addition to summary disclosure.[99] If a registrant has only one mining property, following a determination that its mining operations are material, the registrant will be required to provide only the individual property disclosure.[100]

We also are adopting the proposed treatment of ancillary properties, which, depending on the facts and circumstances, could give rise to disclosure obligations. For example, a property on which a registrant explores, develops or extracts a relatively small amount of a particular mineral, compared to its predominant mineral, could be material based upon the amount of actual and projected expenditures on the property as compared to its expenditures on other properties.[101]

In response to the concern expressed by some commenters that the proposed summary disclosure requirements were too prescriptive,[102] and as discussed in greater detail below,[103] we have significantly revised the proposed summary disclosure requirements to make them less prescriptive. For example, instead of the proposed requirement to provide specific items of information concerning a registrant's top 20 properties (by asset value) in tabular format, the final rules take a more principles-based approach and require the registrant to provide an overview of its mining properties and operations in either narrative or tabular format.[104] When presenting the overview, the registrant should include the amount and type of disclosure concerning its mining properties that is material to an investor's understanding

[88] *See* Proposing Release, *supra* note 5, at Section II.B.1.ii.

[89] *See id.* at Section II.B.1.i.

[90] *See id.* at Section II.B.1.ii.

[91] *See id.* at Section II.G.1.

[92] *See id.* at Section II.G.2.

[93] *See id. at* Section II.B.1.ii.

[94] *See supra* notes 56–58 and accompanying text.

[95] *See, e.g.,* letter from CBRR; *see also* letter from Vale (stating that because under the CRIRSCO standards, a public report should contain ''all the relevant information which investors and their professional advisers would reasonably require, and reasonably expect to find in a public report . . . it is appropriate to require any registrant with economic interests in multiple mining properties, none of which may be individually material, to provide summary disclosure of its mining operations,'' but also stating that qualified persons should be allowed ''to use their judgment to determine the best presentation of summary disclosure, including whether to aggregate interrelated mining operations or to group mines and plants by geographic region or commodity'').

[96] *See, e.g.,* letters from Alliance and AngloGold (conditioning support of the proposed approach regarding multiple properties as long as that approach aligns with a materiality determination based on financial segment disclosure); *see also* letter from Rio Tinto (similarly conditioning support as long as aggregation of properties do not cross national or regional boundaries).

[97] *See, e.g.,* letter from SRK 1; *see also* letter from Midas (stating that ''[o]nly material properties should require disclosure, and then in a comprehensive technical report as in NI 43–101'').

[98] 17 CFR 229.1301(d), which references 17 CFR 229.1303 [Item 1303 of Regulation S–K]. The latter provision sets forth the specific requirements for summary disclosure.

[99] 17 CFR 229.1301(d), which references 17 CFR 229.1304 [Item 1304 of Regulation S–K]. The latter provision provides the specific disclosure requirements for individually material properties.

[100] 17 CFR 229.1303(a)(2) [Item 1303(a)(2) of Regulation S–K].

[101] Commenters did not oppose the proposed treatment of ancillary properties.

[102] *See, e.g.,* letter from Vale; *see also* letter from Amec.

[103] *See infra* Section II.G.1.

[104] 17 CFR 229.1303(b)(2) [Item 1303(b)(2) of Regulation S–K].

of the registrant's properties and mining operations in the aggregate.[105]

As discussed in greater detail below,[106] we also have made the disclosure requirements for individually material properties less prescriptive and aligned them more closely with the CRIRSCO standards. For example, among several other revisions, we have:

- reduced the number of required tables from five to two;[107]
- replaced the proposed requirement to present mineral resource and reserve disclosure at three separate points of reference with the requirement to present the disclosure at one specific point of reference selected by the qualified person;[108] and
- replaced the requirement to present mineral reserve disclosure as net of diluting materials and allowances for losses that may occur when the mineral resource is mined or extracted with the requirement to disclose reserves as including such diluting materials and allowances for losses.[109]

In light of these revisions, we believe the final rules concerning summary and individual property disclosure will provide clear and consistent standards for registrants to apply in determining the scope of their disclosure obligations without unduly burdening registrants. We also believe that the final rules will help ensure that investors receive all material information about registrants' mining operations and associated risks.

4. Treatment of Royalty Companies and Other Companies Holding Economic Interests in Mining Properties

i. Rule Proposal

As noted in the Proposing Release,[110] some registrants are royalty companies, which are companies that do not own or operate a property, but rather own the right to receive payments, called a royalty right, from the owner or operator of a property.[111] In addition, some registrants hold other economic interests, similar to royalty rights, also without owning or operating a property.[112] Because neither Item 102 nor Guide 7 addresses whether royalty or similar companies must provide disclosure about the mining operations and properties underlying their economic interest, the staff has provided comments in the filing review process to help guide registrants in determining whether and how such companies should provide mining disclosure.

Consistent with prior staff comments, we proposed to require a royalty company or other registrant holding a similar economic interest to provide all applicable mining disclosure if the underlying mining operations that generate the royalty or other payment are material to the royalty or similar company's operations as a whole. As proposed, and similar to a producing mining company (that owns or operates properties), a royalty or similar company would have to assess both quantitative and qualitative factors to determine whether the underlying mining operations are material.[113] Upon an affirmative materiality determination, the proposed rules would require a royalty or similar company to provide disclosure only for those underlying properties, or portions of underlying properties, that generate the registrant's royalties or similar payments, and only for the reserves and production that generated its payments in the reporting period.[114]

The proposed rules would require a royalty or similar company to describe the material properties that generate its royalties or similar payments and file a technical report summary for each such property. As proposed, such a registrant would not be required to submit a separate technical report summary about a property covered by a current technical report summary filed by the producing mining registrant. In that situation, the royalty or similar company could incorporate by reference[115] the producing registrant's previously filed technical report summary.[116]

We based this approach to royalty and other similar companies on our belief that investors in royalty and other similar companies need information about the material mining properties that generate the payments to the registrant, including mineral reserves and production, to be able to assess the amounts, soundness, and sustainability of future payments. We also recognized, however, that because a royalty or other similar company may not have access to information about portions of the mining property that do not contribute to the registrant's revenue stream, it should not be required to disclose information concerning the non-contributing portions.[117]

ii. Comments on the Rule Proposal

Many commenters generally supported the Commission's proposal to require a royalty company, or a company holding a similar economic interest in another company's mining operations, to provide all applicable mining disclosure if the underlying mining operations are material to its operations as a whole.[118] For example, one commenter stated that, in principle, a royalty company should be required to provide disclosures similar to those provided by the underlying mining company, but noted that such a requirement could give rise to difficulties when the royalty company is a registrant with the Commission but the underlying mining company is not, and when the property that is the subject of the royalty arrangement is not material to the underlying mining company, but the royalty stream is material to the royalty company.[119] In those circumstances, the required disclosure may not be readily available to the royalty company.[120]

Another commenter noted that the Commission's proposed disclosure for royalty companies is consistent with current guidance as it would only be required with respect to portions of the underlying mining properties that contribute to the royalty company's revenue stream.[121] Like the previous commenter, this commenter stated that the ability of royalty companies to comply with the proposed disclosure obligations, even as circumscribed, may be limited by their inability to access the requisite information and supporting documentation by the underlying mining company's qualified

[105] 17 CFR 1303(b)(2)(iii) [Item 1303(b)(2)(iii) of Regulation S–K].

[106] *See infra* Section II.G.2.

[107] 17 CFR 229.1304(d)(1) [Item 1304(d)(1) of Regulation S–K], which requires a summary of all mineral resources or reserves as of the end of the most recently completed fiscal year presented in two separate tables (one for resources, the other for reserves).

[108] *See id.*

[109] *See* the definition of mineral reserve in 17 CFR 229.1300 [Item 1300 of Regulation S–K].

[110] *See* Proposing Release, *supra* note 5, at Section II.B.1.iii.

[111] A royalty, in this context, is typically a payment to the royalty right holder from the property owner or operator in return for: (i) Providing upfront capital; (ii) paying part of amount due landowners or mineral right holders; or (iii) converting a participating interest in a joint venture into a royalty right. Such payment is most often based on a percentage of the minerals, revenues, or profits generated from the property.

[112] Examples include the right to purchase all or a portion of minerals from a mine under a metal purchase agreement (a ''stream'' agreement) or a working interest in the underlying property.

[113] *See* Proposing Release, *supra* note 5, at Section II.B.1.iii.

[114] *See id.*

[115] *See* 17 CFR 230.411, 17 CFR 240.12b–32, which permit any document filed with the Commission under any act administered by the Commission to be incorporated by reference as an exhibit to a statement or report filed with the Commission by the same or any other person, and require that the registrant clearly identify in the reference the document from which the material is taken.

[116] *See* Proposing Release, *supra* note 5, at Section II.B.1.iii.

[117] *See id.*

[118] *See* letters from Amec, AngloGold, CBRR, Davis Polk, Dorsey & Whitney, Eggleston, Midas, MMSA, Newmont, Rio Tinto, and SAMCODES 2.

[119] *See* letter from AngloGold.

[120] *See id.*

[121] *See* letter from Davis Polk.

person. Moreover, even if the royalty company has access to appropriate supporting documentation, this commenter stated that the operating mining company's qualified person may be unwilling to consent to its use by the royalty company for liability reasons. Accordingly, this commenter recommended that the Commission clarify that the disclosure obligations of a royalty company are limited to information that is known or reasonably available to it.[122]

Regarding the proposed provision requiring a royalty company to file a technical report summary if the owner or operator of the underlying mining operations has not done so, one commenter supported applying the proposed rules to royalty companies, but recommended that the Commission provide a limited exemption similar to the exemption under Canada's NI 43–101.[123] Two other commenters stated that a royalty company should be required to file summaries of current technical reports by an operating company but only for material properties.[124] Those commenters also indicated that a royalty company may not have access to all of the information required to complete a technical report at the level of detail required by the owner of the underlying mine. Therefore, one of the commenters recommended that the Commission allow such a royalty company to prepare an abbreviated report [125] while the other commenter recommended that the royalty company be permitted to reference the operating company's technical reports.[126]

Numerous other commenters opposed the Commission's proposal to require a royalty company to provide all applicable mining disclosure if the underlying mining operations are material to the royalty company.[127] Most of these commenters stated that because royalty holders generally have no executive or operational interest or other participation in the mineral properties to which the royalties relate, they typically have no access to the underlying mining operations or to the extensive technical data and other information available to the operator.[128]

According to one of those commenters, because, typically, the information a royalty holder is entitled to receive is limited to mill production, marketing, and sales data that is used to confirm the calculation of royalty payments, a royalty company generally lacks sufficient information to prepare a current technical report summary.[129] That commenter further objected to the proposed provision that would allow a royalty company to incorporate by reference a technical report summary previously filed by the owner or operator of the underlying property because it would impose potential Securities Act or Exchange Act liability on the royalty company for a third party's technical or other information regarding which the royalty company lacked responsibility or the ability to review or verify. According to the commenter, in order for a royalty company to verify a technical report summary or provide a technical report summary of its own, the royalty company would need to acquire extensive information and access rights from the owner or operator of a mineral property, which the commenter believed the owner or operator would not be willing to provide due to the proprietary nature of much of the information. Moreover, even if the owner or operator were willing to provide the information, the royalty company would be required to re-negotiate its royalty agreement, which would disadvantage a U.S. royalty company compared to its foreign competitors.

iii. Final Rules

We continue to believe that investors in royalty, streaming, and other registrants holding a similar economic interest in mining operations need information about the material mining properties that generate the payments to the registrant, including mineral reserves and production, to be able to assess the amounts, soundness, and sustainability of future payments. For the royalty or similar company and its investors, the mining property underlying the royalty or similar payments is the primary or only source of revenues and cash flow. As such, we believe that royalty companies and other companies holding similar economic interests should provide similar disclosure as provided by registrants conducting the underlying mining operations.

Accordingly, the final rules will require a royalty or other similar company to provide applicable mining disclosure if the mining operations that generate the royalty or other payment are material to the royalty or similar company's operations as a whole, subject to that information being known or reasonably available to the registrant.[130] Thus, a royalty or similar company will have to assess both quantitative and qualitative factors to determine whether the underlying mining operations are material.[131] Also as proposed, upon an affirmative materiality determination, the final rules will require a royalty or similar company to provide summary disclosure [132] and the disclosure required for individually material properties,[133] but only for those underlying properties, or portions of underlying properties, that generate the registrant's royalties or similar

[122] *Id.* Two other commenters made a similar recommendation. *See* letters from Dorsey & Whitney and Newmont. Another commenter urged the Commission to adopt special rules for royalty companies that would recognize their potential inability to provide detailed disclosure regarding the underlying property. This commenter stated that, at a minimum, a royalty company should be able to rely on information provided by the operator while disclaiming liability for that information. *See* letter from MMSA.

[123] *See* letter from Amec. Canada's NI 43–101 exempts a royalty company from having to file a technical report if: The owner or operator of the underlying mine is a reporting issuer in a Canadian jurisdiction or is a producing issuer whose securities trade on a specified exchange and that discloses mineral resources and reserves under an acceptable foreign code; the owner or operator has disclosed the scientific and technical information that is material to the royalty company; and the royalty company identifies in its disclosure document the source of the scientific and technical information. *See* Canada's National Instrument (''NI'') 43–101 (''Standards of Disclosure for Mineral Projects''), NI 43–101 (2011) 34 OSCB 7043 pt. 9.2 (Can.), *http://web.cim.org/standards/documents/Block484_Doc111.pdf.* Canada's NI 43–101 also exempts a royalty company from having to file a technical report or from complying with disclosure items requiring data verification, inspection of documents, or personal inspection of the property if the royalty company has requested but has not received access to the necessary data from the owner or operator and is not able to obtain the necessary information from the public domain. *See id.* at pt. 9.2(2). *But see* letter from SME 2 (stating that neither the Canadian approach nor the Commission's incorporation by reference proposal is workable because of ''the U.S securities law liability regime and the litigation environment in the U.S.'').

[124] *See* letters from Eggleston and Rio Tinto.

[125] *See* letter from Eggleston.

[126] *See* letter from Rio Tinto.

[127] *See* letters from AIPG, Alliance, Crowell & Moring, Laskowski, NRP, Royal Gold, SME 2, SRK 2, and Vinson & Elkins.

[128] *See, e.g.,* letters from Crowell & Moring, NRP, Royal Gold, SME 2, and Vinson & Elkins.

[129] *See* letter from SME 2; *see also* letter from NRP (''along with royalty payments, the company receives only monthly production reports and ''certain other limited economic and mining information that enables NRP to evaluate its royalty business and make periodic reports to its common unitholders'').

[130] 17 CFR 229.1301(a)(3) [Item 1301(a)(3) of Regulation S–K].

[131] 17 CFR 1301(c)(1) [Item 1301(c)(1) of Regulation S–K]. As we noted in the Proposing Release, because a registrant with royalty or other similar economic interests does not own or operate the producing property, revenues are often a more relevant benchmark than assets for determining materiality. *See* Proposing Release, *supra* note 5, at Section II.B.1.iii.

[132] 17 CFR 229.1303(a)(1)(iii) [Item 1303(a)(1)(iii) of Regulation S–K].

[133] 17 CFR 229.1304(a)(1)(iii) [Item 1304(a)(1)(iii) of Regulation S–K].

payments, and only for the reserves and production that generated its payments in the reporting period.[134]

In addition, as proposed, the final rules will also require the royalty or similar company to file a technical report summary for each material underlying property as an exhibit to the Commission filing.[135] However, as proposed, the final rules will not require a royalty or similar company to submit a separate technical report summary about a property that is covered by a current technical report summary filed by the producing mining registrant. In that event, the royalty or similar company should refer to the producing registrant's previously filed technical report summary in its filing with the Commission.[136] The purpose of this provision is to inform an investor or other interested party as to where to find detailed information about the underlying property. In a change from the proposed rules, such a reference will not be deemed to incorporate into the royalty company's or other similar company's filing the technical report summary previously filed by the mining registrant, absent an express statement that the company intends to incorporate it by reference.[137] We agree with commenters that it would not be appropriate to impose potential liability under the Securities Act or Exchange Act on a royalty company through the company's incorporation by reference of a third party owner's technical report summary if the royalty company has not been able to review and verify the information contained in the summary because of its lack of access to such information under its existing royalty agreement.[138]

As mentioned by many commenters,[139] we are cognizant that a royalty or similar company may lack, and may have difficulty obtaining, access to the information and supporting documentation required to comply with the Commission's disclosure requirements concerning the underlying mining properties. We therefore emphasize that what is true generally for our public company disclosure requirements applies to a royalty company's disclosure obligations regarding the underlying mining properties as well. Specifically, the required information concerning the underlying mining properties need be given only insofar as it is known or reasonably available to the registrant.[140] In order to underscore this basic tenet, in a change from the proposed rules, the final rules provide that a registrant that has a royalty, streaming, or other similar right, but which lacks access to any of the information about the underlying properties specified in either the summary disclosure provision (Item 1303 of Regulation S–K) or the individual property provision (Item 1304 of Regulation S–K) may omit such information, provided that the registrant:

- Specifies the information to which it lacks access;
- Explains that it does not have access to the required information because:
  - Obtaining the information would result in an unreasonable effort or expense; or
  - It requested the information from a person possessing knowledge of the information, who is not affiliated with the royalty company or similar registrant, and who denied the request; and
- Provides all required information that it does possess or which it can acquire without unreasonable effort or expense.[141]

The final rules further provide that a royalty company or similar registrant is not required to file a technical report summary for an underlying property if the registrant lacks access to the technical report summary because of substantially similar reasons.[142] For example, if the underlying property holder is private, and denies access to relevant information about the property, under the final rules, the royalty company will not be obligated to prepare a technical report summary. Overall, we believe that the adopted treatment of royalty and other similar companies will provide investors with information relevant to assessing investments in those companies without unduly burdening registrants.

5. Definitions of Exploration, Development and Production Stage

i. Rule Proposal

As noted in the Proposing Release,[143] Guide 7 defines the stages used to describe mining operations as ''exploration stage,''[144] ''development stage,''[145] and ''production stage,''[146] but applies these definitions to the registrant as a whole and not on a property-by-property basis. As such, Guide 7 does not provide guidance as to when and how the definitions of exploration, development, and production stage apply to registrants that own properties in different stages. To address this ambiguity and to help ensure that investors receive disclosure that accurately reflects a registrant's operational status, we proposed to revise the Guide 7 definitions so that they apply to individual properties, as follows:

- An ''exploration stage property'' is a property that has no mineral reserves disclosed;
- A ''development stage property'' is a property that has mineral reserves disclosed, but with no material extraction; and
- A ''production stage property'' is a property with material extraction of mineral reserves.[147]

We also proposed to revise the Guide 7 definitions as they apply to issuers to recognize that issuers may have properties in differing stages, as follows:

- An ''exploration stage issuer'' is one that has no material property with mineral reserves;
- A ''development stage issuer'' is one that is engaged in the preparation of mineral reserves for extraction on at least one material property; and
- A ''production stage issuer'' is one that is engaged in material extraction of mineral reserves on at least one material property.[148]

We further proposed to specify that a registrant that does not have reserves on any of its properties, even if it has mineral resources or exploration results, or even if it is engaged in extraction

[134] 17 CFR 229.1303(b)(2)(iv) [Item 1303(b)(2)(iv) of Regulation S–K] and 17 CFR 229.1304(d)(3) [Item 1304(d)(3) of Regulation S–K].

[135] 17 CFR 229.1302(b)(2) [Item 1302(b)(2) of Regulation S–K].

[136] 17 CFR 229.1302(b)(3)(i) [Item 1302(b)(3)(i) of Regulation S–K].

[137] *Id.*

[138] *See, e.g.,* letter from SME 2.

[139] *See supra* note 128 and accompanying text.

[140] This is consistent with 17 CFR 230.409 [Securities Act Rule 409] and 17 CFR 240.12b–21 [Exchange Act Rule 12b–21], the general rules governing the situation when required information is unknown or not reasonably available.

[141] 17 CFR 229.1303(a)(3) [Item 1303(a)(3) of Regulation S–K] and 17 CFR 229.1304(a)(2) [Item 1304(a)(2) of Regulation S–K].

[142] 17 CFR 229.1302(b)(3)(ii) [Item 1302(b)(3)(ii) of Regulation S–K] (conditioning omission of the technical report summary on a lack of access because obtaining the information would result in an unreasonable burden or expense; or because the registrant requested the technical report summary from the owner, operator, or other person possessing the technical report summary, who is not affiliated with the registrant, and who denied the request).

[143] *See* Proposing Release, *supra* note 5, at Section II.B.2.

[144] As defined by Guide 7, exploration stage ''includes all issuers engaged in the search for mineral deposits (reserves) which are not in either the development or production stage.'' Guide 7, *supra* note 7, ¶ (a)(4)(i).

[145] As defined by Guide 7, development stage ''includes all issuers engaged in the preparation of a determined commercially minable deposit (reserves) for its extraction which are not in the production stage.'' Guide 7, *supra* note 7, ¶ (a)(4)(ii).

[146] As defined by Guide 7, production stage ''includes all registrants engaged in the exploitation of a mineral deposit (reserve).'' Guide 7, *supra* note 7, ¶ (a)(4)(iii).

[147] *See* Proposing Release, *supra* note 5, at Section II.B.2.

[148] *See id.*

without first disclosing mineral reserves, cannot characterize itself as a development or production stage company.[149] Finally, we proposed to require a company to identify an individual property with no mineral reserves as an exploration stage property, even if it has other properties in development or production.[150]

ii. Comments on the Rule Proposal

Commenters expressed varying degrees of support for the Commission's proposed definitions of exploration, development and production stage as applied, respectively, to properties and issuers.[151] One commenter stated that both sets of definitions would be operable for the company and supported the proposed restriction on the use of the terms ''development and production stage companies.'' [152]

Another commenter supported the proposed definitions of exploration stage and development stage properties, but stated that the definition of production stage property should be revised to include ''current'' or ''on-going'' as opposed to past production.[153] This commenter further recommended that the Commission define a development stage issuer as one having at least one development stage property comprising more than 10% of the issuer's assets, and a production stage issuer as having at least one producing mine comprising more than 10% of the issuer's assets.[154]

While a third commenter generally found the two sets of definitions to be adequate, it stated that at least one material property should be enough to justify the production stage if it represents more than 50% of the registrant's asset value.[155] This commenter also believed that if a registrant has disclosed mineral resources, it should be able to characterize itself as a development stage company.[156]

One commenter supported the proposed definitions of exploration, development, and production stage issuers because they are substantially similar to the Guide 7 definitions.[157] The commenter suggested that the proposed definitions as applied to issuers should be used for accounting purposes only (*i.e.,* for the purposes of financial statement characterization), but did not think the proposed definitions would be useful as applied to properties.[158] In contrast, a different commenter supported having a set of definitions of exploration, development, and production stage applied to properties, but opposed having a corresponding set of definitions applied to issuers.[159]

Two other commenters opposed the proposed definitions.[160] One believed that both sets of definitions were too prescriptive for the mining industry and stated that because many mining operations have portions that are in the exploration, development, and production stages, it will be extremely difficult to attach a single label to a property.[161] In addition, that commenter did not believe it would be useful to define an issuer based on the characteristics of all of its mining properties, and further noted that a registrant is not required to characterize itself as being a particular type of issuer under the Canadian rules.[162] The other commenter asserted that the proposed sets of definitions were unnecessary, would add complexity and confusion, and be of limited value to issuers and investors.[163] A third commenter strongly opposed the definition of production stage because it depends on whether the company has mineral reserves and not on whether it is in production.[164]

iii. Final Rules

We are adopting the definitions of ''exploration stage property,'' ''development stage property,'' ''production stage property,'' ''exploration stage issuer,'' ''development stage issuer,'' and ''production stage issuer,'' as proposed.[165] Similar to a proposed instruction, we are also adopting a provision stating that a registrant must identify an individual property with no mineral reserves as an exploration stage property, even if it has other properties in development or production. The provision further states that a registrant that does not have reserves on any of its properties, even if it has mineral resources or exploration results, or even if it is engaged in extraction without first disclosing mineral reserves, cannot characterize itself as a development or production stage company.[166]

We believe that these adopted definitions and related provision will resolve the ambiguities in the Guide 7 definitions. Under the definitions, a registrant will be able to characterize its properties separately, but will be limited in when and how it can characterize its operational stage. Specifically, a registrant will not be able to characterize itself as a development stage issuer unless it is engaged in the preparation of mineral reserves for extraction on at least one material property. We believe this will benefit investors by providing them with clearer, more accurate and consistent disclosure about the type of company and level of risk involved. In particular, prohibiting a registrant without any mineral reserves from characterizing itself as a production or development stage issuer will help eliminate the possibility that such a registrant, by definition a company in a higher risk operational stage, will incorrectly characterize itself as being in a lower risk stage, thereby potentially misleading or confusing investors.

We do not believe it would be appropriate to adopt definitions of development stage issuer and production stage issuer that are based on a specific quantitative measure (*i.e.,* the development stage or production stage property must comprise more than 10% of the issuer's assets).[167] We

[149] As we noted in the Proposing Release, there are registrants that start development or production without first disclosing mineral reserves. Such practices increase the business' risks due to the absence of the detailed technical and economic analysis required to disclose reserves, thus increasing the degree of uncertainty surrounding the quantities and quality of the mineral to be extracted. *See* Proposing Release, *supra* note 5, at 29, n. 65.

[150] *See* Proposing Release, *supra* note 5, at Section II.B.2.

[151] *See, e.g.,* letters from Alliance, AngloGold, CBRR, Midas, Rio Tinto, SME 1, and SRK 1.

[152] *See* letter from AngloGold (supporting that a registrant lacking mineral reserves on any of its properties, even if it has mineral resources or exploration results, or even if it is engaged in extraction without first disclosing mineral reserves, cannot characterize itself as a development or production stage company).

[153] *See* letter from Midas.

[154] *See id.*

[155] Letter from CBRR.

[156] *See id.*

[157] *See* letter from SME 1.

[158] *Id.*

[159] *See* letter from SRK 1 (stating that ''[t]echnical disclosure should be dictated by property stage and materiality'' and ''[a] company's production status should not impact disclosure as there are many mining companies with immaterial small scale production or reserves that would classify them as production stage or development stage, but most of their value is in an exploration stage project'').

[160] *See* letters from Amec and Eggleston.

[161] *See* letter from Amec.

[162] *See id.*

[163] *See* letter from Eggleston.

[164] *See* letter from Energy Fuels. This commenter did not address the proposed definitions of exploration stage and development stage. The commenter described itself as the second largest uranium producer in the United States, but said that it does not currently own, and never has owned, any mineral reserves as defined by Guide 7. Most of its production at its largest facility has come from inferred mineral resources. The commenter stated that not being able to refer to itself as a production stage company is potentially misleading to investors.

[165] Definitions of specified terms used in subpart 1300 are located in 17 CFR 229.1300.

[166] 17 CFR 229.1304(c)(1) [Item 1304(c)(1) of Regulation S–K].

[167] *See* letter from Midas.

believe the less prescriptive approach of the final rules, which bases those definitions on the principle of materiality, is more consistent with the adopted disclosure threshold of materiality, which requires the consideration of both quantitative and qualitative factors, and is therefore preferable to a bright-line test. For the same reasons, we do not believe it would be appropriate to adopt a definition of a production stage issuer specifying that one material property will suffice provided that it represents more than 50% of the registrant´s asset value.[168]

We also do not believe it would be appropriate to define a production stage issuer as an issuer that is in production even if it has no mineral reserves,[169] or to define a development stage issuer as a company that has disclosed mineral resources, but not reserves.[170] We are concerned that such an approach would diminish the real difference in risk between a mining project for which only resources have been disclosed, and a more advanced project involving the affirmative determination of reserves, which could lead to investor confusion. Moreover, as a commenter noted, when applied to properties, such an approach would run counter to the definitions of ''development stage'' and ''production stage'' that are widely accepted in the industry.[171]

*C. Qualified Person and Responsibility for Disclosure*

1. The ''Qualified Person'' Requirement

i. Rule Proposal

We proposed that every disclosure of mineral resources, mineral reserves, and material exploration results reported in a registrant's filed registration statements and reports must be based on, and accurately reflect information and supporting documentation prepared by, a ''qualified person,'' [172] as defined by the proposed rules.[173] We proposed the qualified person [174] requirement to align the Commission's mining property disclosure rules with the CRIRSCO standards and to remedy a perceived gap in the current reporting regime.

All of the CRIRSCO-based codes require any public report [175] about a company's exploration results, mineral resources, and mineral reserves to be based on and fairly reflect information and supporting documentation prepared by a ''competent'' or ''qualified person.'' [176] The purpose of this requirement is to ensure that a registrant's public declaration of exploration results, mineral resources, and mineral reserves is supported by the findings of a mineral industry professional having the relevant level of expertise.[177] In contrast, neither Guide 7 nor Item 102 requires a registrant's disclosure of mineral reserves to be based on the findings of an appropriately experienced professional.[178] While an author of a study or technical report that forms the basis of mineral reserves disclosure in a Securities Act registration statement must consent to the use of its name as an expert,[179] there is no requirement to use an expert for reserves disclosure and, if one is used, there are no substantive requirements for that expertise.

In connection with the qualified person requirement, we proposed that the registrant must:

- Be responsible for determining that the person meets the qualifications specified under the proposed subpart's definition of ''qualified person'' and that the disclosure in the filing accurately reflects the information provided by the qualified person;
- Obtain a dated and signed technical report summary from the qualified person, which identifies and summarizes for each material property the information reviewed and conclusions reached by the qualified person about the registrant's exploration results, mineral resources or mineral reserves;
- File the technical report summary with respect to every material mining property as an exhibit to the relevant registration statement or other Commission filing when the registrant is disclosing for the first time mineral reserves, mineral resources, or material exploration results or when there is a material change in the mineral reserves, mineral resources, or exploration results from the last technical report filed for the property;
- Prior to filing the technical report summary as part of a registration statement or report, obtain the written consent of the qualified person to the use of the qualified person's name or any quotation from, or summarization of the technical report summary;
- Identify the qualified person who prepared the technical report summary in the filed registration statement or report; and
- State whether the qualified person is an employee of the registrant, and if the qualified person is not an employee of the registrant:
  - Name the qualified person's employer;
  - Disclose whether the qualified person or the qualified person's employer is an affiliate of the registrant or another entity that has an ownership, royalty or other interest in the property that is the subject of the technical report summary; and
  - If the qualified person or the qualified person's employer is an affiliate, disclose the nature of the affiliation.[180]

In the Proposing Release, we explained that if the filing that requires the technical report summary is a Securities Act registration statement, the qualified person would be deemed an ''expert'' who must provide his or her written consent as an exhibit to the filing pursuant to Securities Act Rule 436.[181] In such situations, the qualified

[168] *See* letter from CBRR.

[169] *See* letter from Energy Fuels.

[170] *See* letter from CBRR.

[171] *See* letter from SRK 1.

[172] *See* Proposing Release, *supra* note 5, at Section II.C.1. The proposed provision specified that the qualified person requirement would apply to the disclosure required by the proposed summary disclosure provision (Item 1303) and the proposed individual property disclosure provision (Item 1304).

[173] *See infra* Section II.C.2. for a discussion of the proposed definition of qualified person.

[174] While we referred to the qualified person in the singular throughout the Proposing Release, we noted that it is common for a registrant to have more than one qualified person prepare a technical report for a mining property or project. We also noted that, as proposed, the registrant's responsibilities regarding the qualified person would apply to each qualified person so engaged. *See* Proposing Release, *supra* note 5, at 33, n. 74.

[175] As used in the CRIRSCO-based codes, ''public report'' includes all communication by a company to investors on exploration results, mineral resources, and mineral reserves. For example, Australia's JORC Code defines public s report as: ''. . . reports prepared for the purpose of informing investors or potential investors and their advisers on Exploration Results, Mineral Resources or Ore Reserves. They include, but are not limited to, annual and quarterly company reports, press releases, information memoranda, technical papers, website postings and public presentations.'' Joint Ore Reserves Committee, the JORC Code, pt. 6 (2012), *http://www.jorc.org/docs/JORC_code_2012.pdf.*

[176] *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, cl. 8; Canada's NI 43–101, *supra* note 123, at pt. 2.1; JORC Code, *supra* note 175, at pt. 9.

[177] The competent or qualified person requirement supports the ''competence'' principle, one of the three governing principles that underlie the CRIRSCO standards. *See supra* note 39. All of the CRIRSCO-based codes define competence to mean that technical work should be done by a professional with requisite expertise. *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 3; JORC Code, *supra* note 175, at pt. 9; *see also* Society for Mining, Metallurgy & Exploration, SME Guide for Reporting Exploration Results, Mineral Resources and Mineral Reserves, pt. 3 (July 2017) (''SME Guide''), *https://www.smenet.org/SME/media/Publications-Resources/SMEGuideReporting_082017.pdf.*>

[178] Guide 7 only calls for disclosure of the name of the person estimating the reserves and the nature of his or her relationship to the registrant. *See* Guide 7, *supra* note 7, at ¶ (b)(5)(ii). In addition, if a registrant supplementally provides a copy of a technical report to staff, Guide 7 specifies that the copy include the name of its author and the date of its preparation, if known to the registrant. *See* Guide 7, *supra* note 7, at ¶ (c)(2).

[179] *See* 17 CFR 230.436 [Securities Act Rule 436]; *see also* 17 CFR 229.601(b)(23)(i) [Item 601(b)(23)(i) of Regulation S–K].

[180] *See* Proposing Release, *supra* note 5, at Section II.C.1.

[181] *See id.* A registrant would also have to file the written consent as an exhibit to an Exchange Act

person would be subject to liability as an expert for any untrue statement or omission of a material fact contained in the technical report summary under Section 11 of the Securities Act.[182]

ii. Comments on the Rule Proposal

Numerous commenters supported the Commission's proposal that every disclosure of mineral resources, mineral reserves and material exploration results reported in a registrant's filed registration statements and reports must be based on, and accurately reflect information and supporting documentation prepared by, a ''qualified person.'' [183] One commenter stated that investors would benefit from the qualified person requirement because it would provide the appropriate level of assurance and disclosure about both a registrant's operations and developing opportunities.[184] Other commenters maintained that the qualified person requirement would mitigate the risks associated with including disclosure about a registrant's mineral resource and exploration results in Commission filings.[185] Some commenters explained that the qualified person requirement would result in more accurate and reliable reports, foster proper risk level identification, and ensure that all aspects of industry standards are being assessed and implemented, which would assist investors in understanding each stage of a project.[186] Other commenters emphasized that adoption of the qualified person requirement would be a significant step in aligning the Commission's rules with the CRIRSCO standards and global industry practice.[187]

Many commenters also supported the Commission's proposal to make the registrant responsible for determining that the qualified person meets the qualifications specified under the new subpart's definition of ''qualified person.'' [188] One commenter stated that the registrant, through its board of directors, is ultimately responsible for the information disclosed by it and attributed to the qualified person.[189] A second commenter indicated that, in the case of a qualified person employed by a registrant, the registrant is in the best position to evaluate the qualified person's credentials and determine if he or she meets the requisite qualifications.[190] Other commenters stated that the responsibility for determining who is a qualified person should be a joint decision by the registrant and the named qualified person since the qualified person is responsible for preparing the technical report and knows what type of information he or she is qualified to provide an opinion on.[191] One commenter opposed imposing the responsibility for verifying the qualifications of the qualified person on the registrant because such verification would be based on personal information not readily available to the public.[192]

Many commenters supported the Commission's proposal to require a registrant to obtain a technical report summary for each material property from the qualified person, which identifies and summarizes the information reviewed and conclusions reached by the qualified person about the registrant's exploration results, mineral resources, or mineral reserves, before the registrant can disclose those results, resources, or reserves in Commission filings.[193] Two commenters noted that the technical report summary proposal is a requirement under all CRIRSCO codes,[194] with one maintaining that the requirement would not be a significant burden for issuers because many mining companies, including U.S. registrants that are cross-listed, are already required in CRIRSCO-based jurisdictions to prepare technical reports either for public filing or for internal use.[195] Another commenter stated that the technical report summary requirement ensures that facts, forward-looking statements and cautionary language considered to be material by the qualified persons involved are fully disclosed and in full context.[196] A fourth commenter indicated that technical reports have proven to be a useful method of providing transparency to the mining industry and have enhanced the confidence of investors.[197]

Some commenters recommended that our disclosure framework follow the format of Canada's NI 43–101F1 so that technical report summaries under the Commission's rules would be interchangeable with those filed under the Canadian reporting regime.[198] For similar reasons, some commenters stated that the technical report summary should follow the CRIRSCO Table 1 format of the registrant's home listing jurisdiction.[199]

Several commenters expressly supported the filing of a summarized technical report rather than an unabridged report.[200] One commenter, however, recommended requiring the filing of both the summarized technical report and the full technical report [201] while another commenter stated that an unabridged technical report should be required when a project advances to the development stage.[202]

Many commenters supported the Commission's proposal to require the filing of a technical report summary for a material property when the registrant first discloses mineral resources, mineral reserves, or material exploration results, or when there is a material change in the previously disclosed resources, reserves and exploration results.[203] Commenters stated that a requirement imposing more frequent filing would be unduly burdensome and costly.[204]

Some commenters stated that the proposed requirement to file a technical report summary for material properties would be a significant burden for smaller companies.[205] A few of these commenters suggested that the Commission could alleviate this burden by: Conforming the technical report summary to Table 1 of the CRIRSCO

registration statement or report when the Exchange Act filing is automatically incorporated into a previously filed Securities Act registration statement.

[182] 15 U.S.C. 77k(a)(4).

[183] *See* letters from AIPG, Amec, AngloGold, BHP, CBRR, Columbia Water, Earthworks, Eggleston, FCX, Gold Resource, Golder, Midas, Mousset-Jones, Newmont, NSPE, Northern Dynasty, Rio Tinto, SAMCODES 1, SME 1, SRK 1, Ur-Energy, Vale, and Willis.

[184] *See* letter from Rio Tinto.

[185] *See, e.g.,* letters from AngloGold, BP, and Gold Resource.

[186] *See, e.g.,* letters from CBRR, Eggleston, Midas, SRK 1, and Willis.

[187] *See, e.g.,* letters from AIPG and SME 1.

[188] *See* letters from AngloGold, CBRR, Eggleston, Gold Resource, Golder, MMSA, Rio Tinto, SME 1, and Vale.

[189] *See* letter from AngloGold.

[190] *See* letter from Vale.

[191] *See* letters from Amec, Eggleston, and Rio Tinto.

[192] *See l*etter from SRK 1.

[193] *See* letters from AngloGold, CBRR, CSP², Coeur, Eggleston, Gold Resource, Golder, Northern Dynasty, Rio Tinto, SME 1, Vale, and Willis.

[194] *See* letters from Rio Tinto and SRK 1.

[195] *See* letter from SRK 1.

[196] *See* letter from Golder.

[197] *See* letter from Eggleston.

[198] *See* letters from Coeur, Gold Resource, SME 1, and Willis.

[199] *See, e.g.,* letters from AngloGold and Rio Tinto.

[200] *See* letters from CSP², Eggleston, Gold Resource, Golder, and SRK 1. On a related point, four commenters stated that the name ''technical report summary'' was confusing as it suggested that there existed an unabridged technical report. *See* letters from Coeur, Eggleston, Northern Dynasty, and SME 1.

[201] *See* letter from Columbia Water.

[202] Letter from CSP².

[203] *See* letters from AngloGold, CBRR, CSP², Eggleston, Golder, Midas, Northern Dynasty, Rio Tinto, SRK 1, and Vale.

[204] *See, e.g.,* letters from AngloGold, Golder, Midas, and SRK 1.

[205] *See, e.g.,* letters from AngloGold, Eggleston, and Gold Resource.

International Reporting Template;[206] not requiring the filing of the technical report summary more frequently than under the CRIRSCO-based codes;[207] not requiring the disclosure of exploration results; or minimizing the required use of an independent qualified person.[208] One commenter also stated that the Commission could reduce the compliance burden by allowing all Canadian registrants, and not just those that file under the MJDS, to report under Canada's NI 43–101, and by considering a similar accommodation for foreign issuers that report under the other CRIRSCO-based codes.[209]

Some commenters opposed a requirement to file a technical report summary as an exhibit to a Commission filing because they believed it would be burdensome for registrants that are not subject to similar requirements in other jurisdictions.[210] Other commenters opposed the technical report summary filing requirement because it would compel the disclosure of information that is proprietary and competitively sensitive.[211]

Several commenters supported the Commission's proposal to have each qualified person date and sign the technical report summary prepared by him or her.[212] According to the commenters, this requirement would help establish the document's legitimacy[213] as well as a reference date for the report.[214] One commenter noted that the proposed requirement to have a qualified person date and sign the technical report summary is a requirement under all of the CRIRSCO-based codes.[215]

In addition, many commenters supported the Commission's proposal to require a registrant to obtain the written consent of each qualified person who prepared a technical report summary to the use of the qualified person's name or any quotation from, or summarization of the technical report summary in the registration statement or report.[216] One commenter indicated that the written consent requirement ''is very important to ensure that a QP's descriptions, summaries, results, conclusions and recommendations are construed accurately and appropriately by a registrant'' and ''also provides the QP with an additional opportunity to access the quality control and quality assurance of a registrant's disclosure as they pertain to the QP.''[217]

In connection with the proposed written consent requirement, some commenters noted that registrants frequently hire multiple qualified persons for a particular mining project.[218] Those commenters recommended that the final rules clarify that multiple qualified persons may prepare a technical report summary and, in such a situation, a registrant must have each qualified person identify the particular parts of the technical report summary for which he or she is responsible, date and sign each part, and provide his or her written consent for the use of his or her name and reference to those parts of the technical report summary prepared by each qualified person.[219]

Some commenters opposed the proposed requirement to have the qualified person sign the technical report summary on an individual basis.[220] These commenters objected on the grounds that liability concerns are more pronounced in the United States and such a requirement would place a qualified person in a position similar to an executive or financial officer of the registrant.

Numerous other commenters maintained that the Commission should not subject qualified persons to expert liability under Section 11 of the Securities Act.[221] Those commenters opposed such expert liability on the grounds that: Ultimate responsibility for a public report concerning a registrant's exploration results, mineral resources, or mineral reserves rests with the registrant, acting through its board of directors;[222] the proposed requirements for qualified persons, such as membership in a professional organization that requires compliance with standards of competence and ethics, and the written consent provisions, would provide adequate safeguards to ensure the reliability of supporting documentation by a qualified person;[223] the Section 11 liability regime is unique and would impose significant costs on individuals that are not yet subject to it;[224] imposing Section 11 liability on qualified persons would likely have a chilling effect on the willingness of individuals to serve in that role and thereby increase the cost of hiring a qualified person, and could deter registrants from hiring qualified persons;[225] and the naming of individual professionals in Commission filings is not required with respect to accounting, auditing, and legal matters or in the determination of oil and gas reserves and, in any event, is not important to the protection of investors.[226]

Some commenters that expressed concerns about Section 11 liability requested that the Commission explore alternatives to the individual signing requirement, such as permitting the firm employing the qualified person to sign the technical report summary, which would be consistent with the Commission's treatment of auditors and its treatment of engineering firms under the Commission's oil and gas rules.[227] Those commenters further noted that not requiring an individual qualified person to sign the technical report summary would be consistent with the Commission's treatment of audit engagement partners whereby the naming or signature of the individual audit engagement partner is not required in Commission filings.[228]

[206] *See* letter from AngloGold.

[207] *See* letters from AngloGold and Midas.

[208] *See* letter from Gold Resource.

[209] *See* letter from Northern Dynasty.

[210] *See* letters from Alliance, Chamber, Davis Polk, and FCX. Davis Polk and the Chamber believed that, because only Canada and Australia impose a similar requirement, the proposed technical report summary requirement would ''result in an incremental reporting burden in the United States relative to most other jurisdictions.''

[211] *See* letters from Alliance and FCX.

[212] *See, e.g.,* letters from AngloGold, CSP², Eggleston, Golder, and SRK 1.

[213] *See* letter from SRK 1.

[214] *See* letters from Golder and SRK 1. Golder indicated that the dating requirement would protect the qualified person by establishing the effective or cutoff dates of data and observations used and alleviate other timing-related issues.

[215] *See* letter from Rio Tinto.

[216] *See* letters from AngloGold, Eggleston, Midas, Newmont, Northern Dynasty, Rio Tinto, SRK 1, Vale, and Willis.

[217] Letter from SRK 1.

[218] *See* letters from Coeur, Eggleston, Energy Fuels, Golder, MMSA, SME 1, Ur-Energy, Vale, and Willis; *see also* letter from Newmont (recommending the use by the qualified person of a ''sub-certifications control process accompanied by disclosure of the areas and personnel relied upon'').

[219] *See, e.g.,* letters from Coeur, MMSA, and SME 1.

[220] *See* letters from Andrews Kurth, Gold Resource, and NMA 1.

[221] *See* letters from AusIMM, Chamber, Cleary & Gottlieb, Cloud Peak, Davis Polk, FCX, JORC, MMSA, NSSGA, SAMCODES 1, Shearman & Sterling, Sullivan & Cromwell, and Ur-Energy.

[222] *See, e.g.,* letters from AusIMM, FCX, JORC, SAMCODES 1, and Shearman & Sterling.

[223] *See* letters from Davis Polk, Shearman & Sterling, and Sullivan & Cromwell.

[224] *See id.; see also* letter from Andrews Kurth.

[225] *See* letters from Andrews Kurth, Chamber, Davis Polk, FCX, MMSA, NSSGA, Shearman & Sterling, and Ur-Energy.

[226] *See* letter from FCX.

[227] *See* letters from Gold Resource and NMA 1. *See also* letter from SME 1 (suggesting a sub-certification procedure to deal with the liability concerns regarding qualified persons).

[228] *See* letters from Gold Resource and NMA 1. An audit engagement partner is, however, required to be named on PCAOB Form AP. *See* Public Company Accounting Oversight Board; Order Granting Approval of Proposed Rules To Require Disclosure of Certain Audit Participants on a New PCAOB Form and Related Amendments to Auditing Standards, Exchange Act Release No. 34–77787 (May 9, 2016) [81 FR 29925].

On a related issue, many commenters recommended that the Commission adopt the approach under Canada's NI 43–101 or another CRIRSCO-based code and permit a qualified person to disclaim liability if relying on a report, opinion or statement of another expert who is not a qualified person, or on information provided by the issuer, concerning legal, political, environmental, or tax matters relevant to the technical report.[229] According to these commenters, a limited disclaimer is necessary because the consideration of all applicable modifying factors in the determination of reserves, or all relevant technical and economic factors in the determination of resources, is typically beyond the scope and knowledge of a single individual. Commenters maintained that without a limited disclaimer provision, and particularly in light of concerns about Section 11 liability, the Commission would be imposing liability on qualified persons for opinions and conclusions outside of their fields of expertise, which would discourage individuals from acting as qualified persons under the Commission's rules, and potentially discourage registrants from hiring qualified persons.[230]

Other commenters, however, supported the Commission's proposal to preclude a qualified person from disclaiming responsibility if relying on a report, opinion, or statement of another expert who is not a qualified person.[231] One commenter stated that such a provision ''is key to obtaining reliable and accurate information'' on a project.[232]

Many commenters supported the Commission's proposal to require a registrant to identify the qualified person who prepared the technical report summary, disclose whether the qualified person is an employee of the registrant, identify the qualified person's employer if other than the registrant, and disclose whether the qualified person or the qualified person's employer is an affiliate of the registrant or another issuer that has an ownership or similar interest in the subject mining property.[233] Commenters stated that such disclosure would be consistent with the CRIRSCO standards' transparency obligations.[234] One commenter, however, opposed a requirement to name a qualified person's employer, as this may have changed since it prepared the technical report summary.[235] Instead, that commenter suggested that a registrant state whether the qualified person is independent of the registrant and, if not, provide an explanation for the lack of independence.

In response to whether, as an alternative to the rule proposal, we should require a registrant to state whether its qualified person is independent, numerous commenters answered in the affirmative, but also recommended that, consistent with Canada's NI 43–101, the final rules require an independent qualified person only under certain circumstances (*e.g.,* for the first-time disclosure of mineral resources and mineral reserves and for 100% or greater changes to previously disclosed resources and reserves) with an exception for producing issuers.[236] Those commenters also recommended adopting Canada's NI 43–101's definition of independence and related guidance. Most of those commenters opposed requiring a registrant to obtain an independent review of a technical report prepared by a qualified person that is an employee or affiliate of the registrant.[237]

Other commenters opposed any provision that would require a registrant to hire an independent qualified person or to conduct an independent review.[238] One commenter also opposed any provision that would require the registrant to state whether the qualified person is independent.[239] According to that commenter, there is very little difference between an employee and a consultant who is paid by the company and both could be unduly influenced. To guard against such undue influence, this commenter recommended requiring a qualified person to be a member of a professional organization that can sanction ''those that transgress.''[240]

One commenter did not believe that naming a qualified person would add value to the registrant's Commission filings. This commenter noted that many outside specialists assist it with various estimations and evaluations used in its Form 10–K annual report, and ''assistance regarding reserve estimations is not exceptionally greater than any other area of consultation or professional guidance.''[241] This commenter did state, however, that if the Commission requires the naming of a qualified person, it would be appropriate for a registrant to disclose whether the qualified person is independent using the definition of independence under Canada's NI 43–101.

iii. Final Rules

We are adopting the requirement, as proposed, that a registrant's disclosure of exploration results, mineral resources, or mineral reserves in Commission filings must be based on and accurately reflect information[242] and supporting documentation prepared by a qualified person,[243] as defined in subpart 1300 of Regulation S–K.[244] Adopting this requirement will more closely align the Commission's mining property disclosure regime with the CRIRSCO standards.[245]

The Securities Act and the Exchange Act both provide that the registration statements and periodic reports required under those statutes shall contain such information and documents as the Commission may require, as necessary or appropriate in the public interest and

[229] *See* letters from AIPG, Amec, BHP, CIM, Cleary Gottlieb, Cloud Peak, Coeur, CRIRSCO, Davis Polk, Eggleston, Energy Fuels, FCX, Gold Resource, Graves, Midas, MMSA, Newmont, NMA, Northern Dynasty, PDAC, Randgold, Rio Tinto, Shearman & Sterling, SME 1, SRK 1, Ur-Energy, Vale, and Willis.

[230] *See, e.g.,* letters from CIM, Davis Polk, Eggleston, FCX, Shearman & Sterling, SME 1, and Ur-Energy.

[231] *See* letters from Columbia, CSP², and Montana Trout.

[232] *See* letter from CSP².

[233] *See* letters from AngloGold, CBRR, CIM, Coeur, Eggleston, Gold Resource, Golder, Midas, MMSA, Northern Dynasty, Rio Tinto, SAMCODES 2, SME 1, SRK 1, Vale, and Willis.

[234] *See, e.g.,* letters from Eggleston and Vale. As previously noted, transparency is one of the three governing principles underlying the CRIRSCO standards. *See supra* note 39.

[235] *See* letter from Amec.

[236] *See* letters from Amec, CIM, Coeur, Eggleston, Gold Resource, Midas, MMSA, Newmont, Northern Dynasty, SAMCODES 2, SME 1, SRK 1, Vale, and Willis. Another commenter supported requiring a registrant to state whether its qualified person is independent, but did not mention the circumstances under Canada's NI 43–101 that would limit when an independent qualified person is required. *See* letter from Golder.

[237] *See* letters from AngloGold, Eggleston, Gold Resource, Golder, Midas, Northern Dynasty and SRK 1.

[238] *See* letters from AngloGold, BHP, CRIRSCO, FCX, JORC, and Rio Tinto.

[239] *See* letter from AngloGold.

[240] *Id.*

[241] Letter from Alliance.

[242] As used in subpart 1300 of Regulation S–K, the term ''information'' prepared by a qualified person includes the findings and conclusions of a qualified person relating to material exploration results or estimates of mineral resources or mineral reserves. *See* 17 CFR 229.1302(a)(1) [Item 1302(a)(1) of Regulation S–K].

[243] *id.* Like the proposed provision, the final rule refers to Item 1303, the summary disclosure provision, and Item 1304, the individual property disclosure provision, to specify the disclosure to which the qualified person requirement applies.

[244] We define ''qualified person'' in Item 1300 of Regulation S–K. *See infra* Section II.C.2.

[245] This requirement is consistent with the ''competence'' principle underlying the CRIRSCO standards, which requires that each person who has prepared the technical report summary meets the definition of qualified person and is, therefore, competent to make the findings and conclusions contained in the technical report summary.

for the protection of investors.[246] We believe that the requirement that a registrant's disclosure of mineral resources, mineral reserves, and material exploration results in Commission filings be based on and fairly reflect information and supporting documentation prepared by a ''qualified person'' will further the protection of investors by helping to make the determination and reporting of estimates of mineral resources and reserves or exploration results more reliable. This is particularly important since we are adopting rules that, for the first time, will allow a registrant with material mining operations to disclose mineral resources in its Commission filings. As commenters noted, the qualified person requirement will help to mitigate any risks associated with the disclosure of mineral resources or exploration results, which reflect a lower level of certainty about the economic value of mining properties than is reflected in the disclosure of mineral reserves.[247] Requiring that the disclosure of exploration results, mineral resources, and mineral reserves in Commission filings be based on the work of a person having the requisite professional credentials and experience should help to foster proper risk assessment and disclosure, which is key to an investor's understanding of each stage of a mining project.[248] Moreover, by adopting the qualified person requirement, the Commission will be strengthening its mining property disclosure requirements in a manner consistent with most foreign jurisdictions' mining disclosure requirements, thus promoting uniformity and comparability, which should benefit both registrants and investors.

We also are adopting the requirement that the registrant is responsible for determining that the qualified person meets the specified qualifications, and that the disclosure in the registrant's filing accurately reflects information provided by the qualified person.[249] Although we acknowledge that the qualified person has a role to play in establishing that he or she possesses the requisite credentials and experience,[250] placing the ultimate responsibility on the registrant is consistent with the registrant's duty under federal securities laws to ensure that the information in a Commission filing is accurate and free of material misstatements or omissions.

We are adopting the requirement that a registrant must obtain a dated and signed technical report summary from the qualified person, which identifies and summarizes the information reviewed and conclusions reached by the qualified person about the registrant's mineral resources or mineral reserves determined to be on each material property.[251] We also are adopting the requirement that a registrant must file the technical report summary as an exhibit to the relevant Commission filing when disclosing mineral reserves or mineral resources for the first time or when there is a material change in the mineral reserves or mineral resources from the last technical report summary filed for the property.[252]

We believe that the technical report summary filing requirement will not only help ensure that the registrant's disclosure in the Commission filing is accurate and reliable, it will also enhance investor understanding of a registrant's material mining properties. Specifically, the technical report summary will provide investors with a summary of the scientific and technical information that is the basis for the registrant's disclosure of mineral resources, mineral reserves, and exploration results, which should enable investors to better assess the value of the registrant's material mining properties. Moreover, to the extent that the data in the technical report summary constitutes part of the information used by the board of directors and management for corporate planning purposes (*e.g.,* deciding which mining projects to pursue) and, once the mining project is underway, to help assess the operational performance of the mine, requiring this information to be filed will enable investors to better understand the corporate decision-making of the mining registrant.

As commenters noted, mining companies, including U.S. registrants that are cross-listed, are already required in jurisdictions with CRIRSCO-based codes to obtain technical reports either for public filing or for internal use.[253] We agree with commenters that stated that such reports enhance transparency in the industry to the benefit of investors.[254] Moreover, as noted by some commenters, the requirement to have the technical report summary dated and signed will help to establish the authenticity and relevance of the document.[255]

As proposed, the final rules require the registrant to file the technical report summary as an exhibit, rather than in the body of the annual report or registration statement, in order to separate the underlying scientific and technical information in the technical report summary from the narrative disclosure concerning the registrant's operations.[256] We believe this will result in clearer and more accessible disclosure for investors, enabling them to understand the disclosure more effectively from both an operational and technical viewpoint.

A few commenters objected to the required filing of the technical report summary based on their belief that, because only Canada and Australia have a similar technical report filing requirement, the Commission's filing requirement will be burdensome for mining registrants that are not listed in those countries.[257] While we acknowledge that the final rules will impose a new compliance burden for some registrants, as explained above, we believe the filing of a technical report summary will provide important benefits to investors. In response to commenters' concerns, we are adopting measures that we believe will limit this compliance burden by requiring technical report summaries only for material properties, and by requiring the filing of those documents only when a registrant first discloses mineral resources or mineral reserves, or when there is a material change in the mineral reserves or mineral resources from the last technical report summary filed for the property.

In addition, in a change from the proposed rules, as further discussed below,[258] while exploration results, if disclosed, must be based on the findings and conclusions of a qualified person, we are not mandating that a registrant

[246] *See* Securities Act Section 7(a) [15 U.S.C. 77g(a)]; Exchange Act Sections 12(b)(1),)12(g)(1), 13(a) [15 U.S.C. 78l(b)(1), 78l(g)(1), 78m(a)].

[247] *See supra* note 185 and accompanying text.

[248] *See supra* note 186 and accompanying text.

[249] 17 CFR 229.1302(a)(2) [Item 1302(a)(2) of Regulation S–K]. This requirement is consistent with the CRIRSCO standards. *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 8; JORC Code, *supra* note 175, at pt. 9.

[250] *See supra* note 191 and accompanying text.

[251] 17 CFR 229.1302(b)(1) [Item 1302(b)(1) of Regulation S–K].

[252] 17 CFR 229.1302(b)(2)(i) [Item 1302(b)(2)(i) of Regulation S–K].

[253] *See, e.g.,* letters from Rio Tinto and SRK 1.

[254] *See, e.g.,* letter from Eggleston.

[255] *See, e.g.,* letters from Golder and SRK 1.

[256] The staff currently has the ability to request a copy of a technical report as supplemental material, where it is deemed appropriate, during the course of its review of a registration statement or report. *See* 17 CFR 230.418 [Securities Act Rule 418]; 17 CFR 240.12b–4 [Exchange Act Rule 12b–4]. Securities Act Rule 418(a)(6) specifically authorizes the staff, ''where reserve estimates are referred to in a document,'' to request ''a copy of the full report of the engineer or other expert who estimated the reserves.'' 17 CFR 230.418(a)(6).

[257] *See* letters from Chamber, Davis Polk, and FCX.

[258] *See infra* Section II.D.

obtain a dated and signed technical report summary from a qualified person to support the disclosure of exploration results. Under the final rules, a registrant may elect to obtain a technical report summary in connection with the disclosure of exploration results on a material property and file it as an exhibit to the relevant Commission filing, but it is not required to do so.[259] We believe that this elective treatment will help to mitigate the concern of some commenters that opposed the technical report summary filing requirement because it would compel the disclosure of proprietary and competitively sensitive information.[260]

Some commenters indicated that the proposed disclosure of certain specified information in the technical report summary, such as pricing assumptions or cash flow analysis, could reveal proprietary and commercially sensitive information.[261] As discussed below,[262] the final rules do not exclude pricing assumptions and cash flow analysis from the technical report summary because we believe that such exclusion would omit material information about a registrant's mineral resource or reserve estimates that is necessary for an investor to assess the registrant's current and prospective mining operations.

Consistent with the suggestion of some commenters,[263] the final rules clarify that a registrant may use multiple qualified persons to prepare a technical report summary. First, the final rules provide that if a registrant has relied on more than one qualified person to prepare the information and documentation supporting its disclosure of exploration results, mineral resources or mineral reserves, the registrant's responsibilities as specified in 17 CFR 229.1302 (Item 1302 of Regulation S–K) pertain to each qualified person.[264] Second, the final rules state that if more than one qualified person has prepared the technical report summary, each qualified person must date and sign the technical report summary, and the technical report summary must clearly delineate the section or sections of the summary prepared by each qualified person.[265]

We also are adopting the proposed requirement that a registrant obtain the written consent of each qualified person who prepared a technical report summary to the use of the qualified person's name or any quotation from, or summarization of, the technical report summary in the relevant registration statement or report, and to the filing of the technical report summary as an exhibit to the registration statement or report.[266] The written consent would only pertain to the particular section or sections of the technical report summary prepared by each qualified person.

Adoption of the written consent requirement will align the Commission's mining disclosure rules with the CRIRSCO-based codes, which impose a similar written consent requirement.[267] It also will help ensure that the qualified person's findings and conclusions are not included in a Commission filing without that person's actual knowledge.

In addition, requiring the registrant to obtain the qualified person's written consent is consistent with the Commission's approach to the use of an expert's report in Securities Act filings.[268] In this regard, as proposed, the final rules provide that, for Securities Act filings, the registrant must file the written consent as an exhibit to the registration statement.[269] Because a mining registrant is currently required to file the written consent of the mining engineer, geologist, or other expert upon whom it has relied when filing a Securities Act registration statement, the adopted written consent requirement should not impose an additional burden.[270] For Exchange Act reports, the registrant is not required to file the written consent obtained from the qualified person, but should retain the written consent for as long as it is relying on the qualified person's information and supporting documentation for its current estimates regarding mineral resources, mineral reserves, or exploration results.[271]

In a clarification of the proposed rules, the final rules provide that a third-party firm comprising mining experts, such as professional geologists or mining engineers, may sign the technical report summary instead of, and without naming, its employee, member, or other affiliated person who prepared the summary.[272] If a third-party firm signs the technical report summary, the final rules further provide that the third-party firm must provide the written consent.[273] This is consistent with current practice, pursuant to which the third-party firm that employs or controls the expert upon whom the registrant has relied typically files the written consent instead of the individual expert. It is also consistent with the treatment of other written consents provided by auditors and engineering experts, whether in oil, natural gas, or mining.

We are adopting these third-party firm signature and written consent provisions to assuage some of the concerns raised by commenters in connection with the potential Section 11 liability of qualified persons. Because the third-party firm that signs the technical report summary and provides the written consent will be treated as the expert upon whom the registrant has relied when making its mining property disclosures,[274] and because the third-party firm is not required to name the individual employee, member or other affiliated person who prepared the various sections of the technical report summary, the third-party firm will incur potential liability under Section 11 rather than the unnamed individual. Thus, qualified persons who are employed or otherwise affiliated with third-party firms will not automatically be exposed to potential Section 11 liability as a result of their participation in the preparation of supporting

[259] *See* Item 1302(b)(1) of Regulation S–K.

[260] *See supra* note 211 and accompanying text; *see also infra* Section II.D.

[261] *See, e.g.,* letters from BHP and SME 1.

[262] *See infra* Sections II.E.4., II.F.1., and II.G.3.

[263] *See, e.g.,* letters from Coeur, MMSA, and SME 1.

[264] 17 CFR 229.1302(a)(3) [Item 1302(a)(3) of Regulation S–K].

[265] 17 CFR 229.1302(b)(1)(i) [Item 1302(b)(1)(i) of Regulation S–K].

[266] 17 CFR 229.1302(b)(4)(i) [Item 1302(b)(4)(i) of Regulation S–K].

[267] *See, e.g.,* Canada's NI 43–101, *supra* note 123, at pt. 8.3; JORC Code, *supra* note 175, at pt. 9; SAMREC Committee, The South African Code for the Reporting of Exploration Results, Mineral Resources and Mineral Reserves: SAMREC Code, pt. 8 (2016) (''SAMREC Code''), *https://www.samcode.co.za/samcode-ssc/about-samcodes*; SME Guide, *supra* note 177, at pt. 8.

[268] *See, e.g.,* Securities Act Rule 436.

[269] 17 CFR 229.1302(b)(4)(iv) [Item 1302(b)(4)(iv) of Regulation S–K].

[270] As discussed below, current practice has permitted a third-party firm employing the individual mining expert to provide the written consent.

[271] *See* Item 1302(b)(4)(iv). A registrant may be required to furnish supplementally a written consent obtained in connection with an Exchange Act report at the request of Commission staff during a review of the Exchange Act filing. In addition, consistent with current practice, a registrant must file the qualified person's written consent as an exhibit to an Exchange Act report that is being incorporated by reference into a Securities Act registration statement.

[272] 17 CFR 229.1302(b)(1)(ii) [Item 1302(b)(1)(ii) of Regulation S–K].

[273] 17 CFR 229.1302(b)(4)(iii) [Item 1302(b)(4)(iii) of Regulation S–K].

[274] A registrant that receives a technical report summary signed by a third-party firm is nevertheless subject to its responsibilities regarding the qualified person under subpart 1300 of Regulation S–K. *See* Item 1302(a) of Regulation S–K. Therefore, if a registrant receives a technical report summary signed by a third-party firm, it should consult with the firm and confirm that each individual employee, member, or other person affiliated with the third-party firm who prepared the technical report summary meets the specified qualifications under the definition of qualified person. *See* 17 CFR 229.1300.

documentation for registrants that are subject to our final rules. The final rules should therefore mitigate concerns expressed by some commenters that potential Section 11 liability may reduce the willingness of some individuals to serve as qualified persons.[275]

If the qualified person is an employee of the registrant, however, he or she must provide the written consent on an individual basis.[276] This is consistent with current practice concerning other experts who are employees of the registrant. For example, when a legal opinion is provided by a registrant's in-house counsel, the individual counsel typically provides the written consent.

The final rules do not provide a complete exemption for qualified persons from expert liability under Section 11 of the Securities Act. While we acknowledge the concerns raised by commenters in this regard,[277] not imposing Section 11 liability would be a departure from the current requirement that imposes such liability on the named person that prepares the reserve estimates.[278] It also would be at odds with the express design of the statute, which specifically posits engineers or ''any person whose profession gives authority to a statement made by him'' as potentially subject to Section 11 liability, and would greatly diminish the protection afforded investors under the Securities Act.[279]

However, we recognize that in preparing complex reports of this nature, the qualified person will, when necessary, rely on information and input from others, including the registrant. For example, while the qualified person typically estimates capital and operating costs for the mining project,[280] he or she typically relies on the registrant to provide other economic information regarding macroeconomic trends, data, and assumptions, and interest rates, all of which are material to the economic analysis required to support the qualified person's reserve estimate.[281]

There are other required matters in the technical report summary that may fall outside the expertise of the qualified person, and regarding which the registrant may provide assistance. For example, the qualified person may require assistance from the registrant when considering the following aspects of some of the modifying factors:

- Marketing information and plans within the control of the registrant;[282]
- legal matters outside the expertise of the qualified person, such as statutory and regulatory interpretations affecting the mine plan;[283]
- environmental matters outside the expertise of the qualified person;[284]
- accommodations the registrant commits or plans to provide to local individuals or groups in connection with its mine plans;[285] and
- governmental factors outside the expertise of the qualified person.[286]

Because the qualified person may require assistance from the registrant on these matters, the final rules provide that the qualified person may indicate in the technical report summary that the qualified person has relied on information provided by the registrant in preparing its findings and conclusions regarding those modifying factors.[287] The final rules also provide that, in a separately captioned section of the technical report entitled ''Reliance on Information Provided by the Registrant,'' the qualified person must: Identify the categories of information provided by the registrant; identify the particular portions of the technical report summary that were prepared in reliance on information provided by the registrant pursuant to paragraph (f)(1) of this section, and the extent of that reliance; and disclose why the qualified person considers it reasonable to rely upon the registrant for any of the information specified according to this rule.[288] We believe that this disclosure will help investors and other interested persons understand the source and reliability of the information pertaining to those factors. We also note that this disclosure is consistent with the disclosure recommended when a qualified or competent person relies on information provided by the registrant under the CRIRSCO standards.[289]

Where the registrant has provided the information relied upon by the qualified person when addressing these modifying factors, we believe that it would be appropriate for the registrant, rather than the qualified person, to be subject to potential Section 11 liability pertaining to a discussion of these matters in the technical report summary or other part of the registration statement.[290] In these situations, requiring the qualified person to certify this information may not be necessary for investor protection given that the registrant remains liable for the contents of the registration statement and consequently will be incentivized to exercise due care in the preparation of this information. Accordingly, the final rules provide that any description in the technical report summary or other part of the registration statement of the procedures, findings, and conclusions reached about matters identified by the qualified person as having been based on information provided by the registrant pursuant to this section, shall not be considered a part of the registration statement prepared or certified by the qualified person within the meaning of Sections 7 and 11 of the Securities Act.[291] We have limited this accommodation to the above described aspects of certain modifying factors because we believe that these aspects are most likely to fall outside of the qualified person's expertise and for which he or she is most likely to require assistance from the registrant.

We also recognize that the qualified person may hire on his or her own third-party specialists who are not qualified persons. For this reason, the final rules provide that a qualified person may include in the technical

[275] *See supra* note 225 and accompanying text.

[276] *See* Item 1302(b)(4)(iii) of Regulation S–K.

[277] *See supra* note 221.

[278] *See* Guide 7, *supra* note 7, at ¶ (b)(5)(ii) (calling for the name of the person making the estimates and the nature of his relationship to the registrant).

[279] *See* 15 U.S.C. 77k(a)(4) (referring to ''every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him'').

[280] *See* 17 CFR 229.601(b)(96)(iii)(B)(*18*) [Item 601(b)(96)(iii)(B)(*18*) of Regulation S–K].

[281] *See* 17 CFR 229.601(b)(96)(iii)(B)(*19*) [Item 601(b)(96)(iii)(B)(*19*) of Regulation S–K].

[282] *See* 17 CFR 229.601(b)(96)(iii)(B)(*16*) [Item 601(b)(96)(iii)(B)(*16*) of Regulation S–K].

[283] *See, e.g.,* 17 CFR 229.601(b)(96)(iii)(B)(*3*) and (*17*) [Items 601(b)(96)(iii)(B)(*3*) and 601(b)(96)(iii)(B)(*17*) of Regulation S–K].

[284] *See* Item 601(b)(96)(iii)(B)(*17*) of Regulation S–K.

[285] *See id.*

[286] *See, e.g.,* Items 601(b)(96)(iii)(B)(*3*) and (*17*) of Regulation S–K.

[287] 17 CFR 229.1302(f)(1) [Item 1302(f)(1) of Regulation S–K].

[288] 17 CFR 229.1302(f)(2) [Item 1302(f)(2) of Regulation S–K].

[289] *See, e.g.,* SME Guide For Reporting Exploration Information, Mineral Resources, And Mineral Reserves (2017) (2017 SME Guide), Appendix C.

[290] Some commenters indicated that liability for mining property disclosure in a Commission filing should fall primarily on the registrant. *See* letter from BHP (stating that because a public report is the responsibility of the company acting through its board of directors, which should act as an assurance element for investors, any potential liability imposed on a qualified person should not be broader than that of the company's principal executive and financial officers); *see also* letter from Cloud Peak.

[291] 17 CFR 229.1302(f)(3) [Item 1302(f)(3) of Regulation S–K]; *see also* 17 CFR 230.436(h) [Securities Act Rule 436(h)]. For the reasons discussed herein, we find that these provisions are necessary and appropriate in the public interest and consistent with the protection of investors. See 15 U.S.C. 77z–3.

report summary information and documentation provided by a third-party specialist who is not a qualified person, such as an attorney, appraiser, and economic or environmental consultant, upon which the qualified person has relied in preparing the technical report summary.[292] However, unlike the case with certain information provided by the registrant, the final rules provide that the qualified person may not disclaim responsibility for any information and documentation prepared by a third-party specialist upon which the qualified person has relied, or any part of the technical report summary based upon or related to that information and documentation.[293] Although many commenters suggested that we permit such disclaimers,[294] doing so could undermine the quality of the technical report summary, as neither the qualified person nor the third-party specialist would be accountable for material misstatements or omissions in such information and documentation. This is in contrast to the situation in which the registrant retains Section 11 liability for the information that it provides to the qualified person and which may be disclaimed by the qualified person. We understand the concern of commenters that, by prohibiting disclaimers of responsibility, a qualified person could become liable for material misstatements or omissions of fact in the technical report summary that are attributed to the third-party specialist upon whom the qualified person has relied.[295] However, under the final rules, the qualified person will be able to determine whether and under what terms it engages the third-party specialist, which should help the qualified person mitigate any attendant risks.

Although we are not providing a complete exemption from Section 11 liability for qualified persons or otherwise permitting them to disclaim information provided by a third-party specialist, there are limitations on the extent of liability the qualified person will incur, particularly when other qualified persons are involved in preparation of the technical report summary, as the final rules now expressly permit. Under Section 11, a qualified person, as an expert, would have an affirmative defense against liability for such misstatements or omissions made on the authority of another expert if the qualified person ''had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert.'' [296] In addition, the written consent requirement, which requires a qualified person to provide a consent only regarding the section or sections of the technical report summary prepared by that person, would further serve to limit the qualified person's liability under Section 11 for material misstatements or omissions made by other contributing qualified persons.

The final rules provide that a registrant is not required to file a written consent of any third-party specialist upon which a qualified person has relied.[297] This is consistent with other Commission rules, which do not require a registrant to provide the written consent of a secondary specialist upon which a consenting expert has relied.[298]

As proposed, the final rules require the registrant to state whether each qualified person who prepared the technical report summary is an employee of the registrant.[299] If the qualified person is not an employee of the registrant, the final rules require the registrant to name the qualified person's employer, disclose whether the qualified person or the qualified person's employer is an affiliate of the registrant or another entity that has an ownership, royalty or other interest in the property that is the subject of the technical report summary, and if an affiliate, describe the nature of the affiliation.[300] The terms ''affiliate'' and ''affiliated'' have the same meaning as in Securities Act Rule 405 or Exchange Act Rule 12b–2.[301]

This provision will provide investors with relevant information to assess the reliability of the disclosure and align the Commission's mining rules with most of the CRIRSCO-based codes, which impose a similar identification requirement.[302] Although several commenters also recommended that we require a registrant to state whether its qualified person satisfies the independence requirement of Canada's NI 43–101,[303] we do not believe an independence requirement is appropriate for the reasons stated in the Proposing Release.[304] First, we believe that our approach will help to limit the compliance burdens on registrants. Second, we believe that other aspects of the final rules, such as disclosure of the qualified person's credentials and his or her affiliated status with the registrant or another entity having an ownership or similar interest in the subject property, along with the application of potential expert liability in Securities Act filings, should provide adequate safeguards for investors. Finally, our approach is consistent with most of the CRIRSCO-based codes, which permit a qualified person to be an employee or other affiliate of the registrant as long as the registrant discloses its relationship with the qualified person.[305]

2. The Definition of ''Qualified Person''

i. Rule Proposal

We proposed to define a ''qualified person'' as a person who is a mineral industry professional with at least five years of relevant experience in the type of mineralization and type of deposit under consideration and in the specific type of activity that person is

[292] 17 CFR 229.1302(b)(6)(i) [Item 1302(b)(6)(i) of Regulation S–K].

[293] 17 CFR 229.1302(b)(6)(ii)] [Item 1302(b)(6)(ii) of Regulation S–K].

[294] *See supra* note 229 and accompanying text.

[295] *See supra* note 230 and accompanying text.

[296] *See* Section 11(b)(3) of the Securities Act [15 U.S.C. 77k(b)(3)]. One commenter stated that the Commission ''does not specify how a Qualified Person might establish a due diligence defense'' under Section 11 of the Securities Act. *See* letter from Chamber. We typically do not indicate how persons may establish defenses under the Securities Act, and we refrain from doing so here.

[297] 17 CFR 229.1302(b)(6)(iii) [Item 1302(b)(6)(iii) of Regulation S–K].

[298] *See* 17 CFR 230.436(f) [Securities Act Rule 436(f)] (''Where the opinion of one counsel relies upon the opinion of another counsel, the consent of the counsel whose prepared opinion is relied upon need not be furnished'').

[299] 17 CFR 229.1302(b)(5) [Item 1302(b)(5) of Regulation S–K].

[300] *See id.*

[301] *See id.*

[302] *See, e.g.,* JORC Code, *supra* note 175, at pt. 9; *see also* the Pan-European Reserves and Resources Reporting Committee, PERC Reporting Standard pt. 3.5 (2017) (''PERC Reporting Standard''), *http://www.vmine.net/PERC/documents/PERC%20REPORTING%20STANDARD%202017.pdf.* A limited exception to this is Canada, which requires a registrant to file a technical report summary prepared by an independent qualified person in certain circumstances: When becoming a first-time registrant; when supporting the first time reporting of mineral resources, mineral reserves, or a preliminary economic assessment of a material property; or when reporting a 100% or greater change in the total mineral resources or reserves on a material property, when compared to the last disclosure. *See* Canada's NI 43–101, *supra* note 123, at pt. 5.3 (Can.).

[303] *See supra* note 236 and accompanying text.

[304] *See* Proposing Release, *supra* note 5, at Section II.C.1. For similar reasons, we also do not believe it would be appropriate to require an independent review of a technical report prepared by a qualified person that is an employee or affiliate of the registrant.

[305] *See id.*

undertaking on behalf of the registrant. In addition, the proposed definition requires a qualified person to be an eligible member or licensee in good standing of a recognized professional organization at the time the technical report is prepared.[306]

Under the proposed rules, a ''recognized professional organization,'' would have to be either recognized within the mining industry as a reputable professional association,[307] or be a board authorized by U.S. federal, state or foreign statute to regulate professionals in the mining, geoscience, or related field. Furthermore, the organization must:

- Admit eligible members primarily on the basis of their academic qualifications and experience;
- Establish and require compliance with professional standards of competence and ethics;
- Require or encourage continuing professional development;
- Have and apply disciplinary powers, including the power to suspend or expel a member regardless of where the member practices or resides; and
- Provide a public list of members in good standing.[308]

As we explained in the Proposing Release, this proposed definition is similar to the definition of competent or qualified person under the CRIRSCO-based codes.[309] It differs, however, from those codes in at least one respect. Although CRIRSCO provides some guidance about what constitutes a ''recognized professional organization,'' [310] most of the CRIRSCO-based codes require that a competent or qualified person be a member of one or more ''approved'' organizations identified in an appendix to the code.[311] This list is updated periodically by the various code regulators. We did not propose a similar ''approved list'' approach because of our belief that a more principles-based approach provides flexibility.[312]

We also proposed detailed instructions to the definition of ''qualified person'' to assist registrants in applying the definition. The proposed instructions describe the specific types and amount of experience necessary for various types of mining activities and mineral deposits.[313]

ii. Comments on the Rule Proposal

Numerous commenters supported the Commission's proposal to require the qualified person to be an individual person.[314] Commenters noted that this requirement is consistent with the CRIRSCO standards and indicated that it helps ensure that the qualified person assumes the appropriate personal responsibility for his or her findings and conclusions.[315] One commenter, however, maintained that professional associations have no ability to sanction a company and most have no mechanism for corporate membership.[316] Another stated that if a firm can meet all the qualifications required under the qualified person definition and has quality controls recognized by professional boards or state regulatory agencies in place, the firm should be allowed to meet the qualified person definition.[317]

Many commenters also generally supported the Commission's proposed definition of ''qualified person'' as an individual person who is a mineral industry professional with at least five years of relevant experience in the type of mineralization and type of deposit under consideration and in the specific type of activity that person is undertaking on behalf of the registrant.[318] Those commenters noted that the proposed five year minimum experience requirement is consistent with the minimum experience requirement under the CRIRSCO-based codes.[319] Other commenters recommended that the qualified person have at least seven years of postgraduate experience in the mineral industry with at least three years in positions of responsibility (defined as requiring independent judgment).[320] Two commenters, however, stated that the provision requiring at least five years of relevant experience in the particular type of mineralization and deposit under consideration is too restrictive.[321]

Several commenters recommended adding an educational requirement to the definition (*e.g.,* the attainment of a bachelor's or equivalent degree in an area of geoscience, metallurgy, or mining engineering).[322] Two of those commenters stated that, alternatively, a university degree in civil or chemical engineering would qualify if the person also had the requisite post-graduate experience in the minerals industry.[323] In contrast, three commenters opposed an educational requirement because the recognized professional organizations include such a requirement in their membership criteria.[324]

A majority of commenters addressing the issue generally supported the Commission's proposal to require a qualified person to be an eligible member or licensee in good standing of a recognized professional organization at the time the technical report is

[306] *See* Proposing Release, *supra* note 5, at Section II.C.2.

[307] The ''reputable professional association'' standard is also used in Canada's NI 43–101. *See* the definition of ''professional association'' in Canada's NI 43–101, *supra* note 123, at pt. 1.1.

[308] *See* Proposing Release, *supra* note 5, at Section II.C.2.

[309] The CRIRSCO standards require that a competent or qualified person have at least five years of relevant experience ''in the style of mineralization and type of deposit under consideration and in the activity which that person is undertaking'' and be a member or licensee in good standing of a recognized professional organization. *See* CRIRSCO International Reporting Template, *supra* note 20, at pt. 11; JORC Code, *supra* note 175, at pt. 11; *see also* SAMREC Code, pt. 10 (2016); PERC Reporting Standard, *supra* note 302, at pt. 3.1. The recognized professional organizations under CRIRSCO standards have and apply disciplinary powers to members and most require professional development to maintain such membership.

[310] *See* CRIRSCO International Reporting Template, *supra* note 20, at cl. 11 (stating that the organization of which a competent person is a member must have ''enforceable disciplinary processes including the powers to suspend or expel a member'').

[311] *See, e.g.,* JORC Code, *supra* note 175, at pt. 11; SAMREC Code, *supra* note 267, at pt. 9; SME Guide, *supra* note 177, at pt. 9; and PERC Reporting Standard, *supra* note 302, at pt. 3.1.

[312] *See* Proposing Release, *supra* note 5, at Section II.C.1.

[313] *See id.*

[314] *See* letters from Amec, AngloGold, CIM, CSP², Earthworks, Eggleston, Golder, Midas, MMSA, Rio Tinto, SAMCODES 2, SME 1, SRK 1, Ur-Energy, and Vale.

[315] *See, e.g.,* letters from AngloGold, Golder, Midas, and SME 1.

[316] *See* letter from Rio Tinto.

[317] *See* letter from Alliance.

[318] *See* letters from AIPG, AngloGold, AusIMM, BHP, CBRR, CIM, Coeur, Eggleston, FCX, Golder, JORC, Midas, MMSA, Rio Tinto, SAMCODES 1, SME 1, SRK 1, Vale, and Willis.

[319] *See* letters from CBRR, Eggleston, Midas, SAMCODES 1, and SRK 1.

[320] *See* letters from AIPG, Coeur, and SME 1. *See also* letter from MMSA (recommending requiring a minimum of 10 years of practical experience in geosciences including at least five years in positions of responsibility).

[321] *See* letters from Alliance and Amec. Amec preferred the definition of qualified person under NI 43–101, which requires a qualified person to have ''at least five years of experience in mineral exploration, mine development or operation or mineral project assessment, or any combination of these, that is relevant to his or her professional degree or area of practice'' as well as ''experience relevant to the subject matter of the mineral project and the technical report.''

[322] *See* letters from AIPG, Alliance, Amec, CIM, Coeur, CRIRSCO, Graves, MMSA, Rio Tinto, SME 1, and Willis.

[323] *See* letters from Coeur and Willis. Another commenter stated that a qualified person should simply hold a university degree or equivalent accreditation relevant to his or her area of practice. Such a flexible definition would allow a non-geoscientist, such as a biochemist or botanist, to be accepted as a qualified person to undertake the specialized baseline studies supporting permit applications, particularly environmental permits. *See* letter from Amec.

[324] *See* letters from AusIMM, JORC, and SAMCODES 1. Another commenter, SRK 1, agreed that most professional organizations impose a minimum education requirement but suggested that the Commission could also provide for such a requirement in the definition of qualified person.

prepared.[325] Several commenters generally agreed with the Commission's proposed criteria defining a ''recognized professional organization.'' [326] One commenter suggested adding a requirement that the organization have ''one or more membership categories requiring attainment of a position of responsibility that requires the exercise of independent judgment and a favorable confidential peer evaluation of the individual's character, professional judgment, experience, and ethical fitness.'' [327]

Some commenters stated that the Commission should define a recognized professional organization as encouraging but not requiring continuing professional development.[328] According to these commenters, a strict continuing professional development requirement is not necessary, particularly if the member is a full-time practitioner.[329] Other commenters stressed the importance of requiring the recognized professional organization to have the jurisdiction to discipline the qualified person, no matter where the person resides or practices or where the deposit is located.[330]

Most commenters that addressed the ''qualified person'' definition stated that the Commission should adopt and publish an approved list of ''recognized professional organizations'' similar to the approach under the CRIRSCO-based codes.[331] Commenters recommended that the Commission reference the list of approved organizations set forth in an Appendix to Canada's NI 43–101 CP (Companion Policy),[332] the list of approved organizations maintained by the SME,[333] or the approved organization list published by the Australian Securities Exchange (''ASX'').[334] According to commenters, referencing such lists would not only help achieve a level of consistency with the CRIRSCO-based codes regarding which groups constitute recognized professional organizations, it also would lessen the Commission's administrative burden of having to verify and update the list of approved organizations.[335]

Two commenters, however, supported the Commission's proposed approach requiring an organization to meet specified factors before it could qualify as a recognized professional organization rather than using a list of approved organizations,[336] preferring it as more flexible [337] and as ''a better and more practical alternative.'' [338]

iii. Final Rules

We are adopting the definition of qualified person, as proposed.[339] We are also adopting, as proposed, the specific criteria that qualify an organization to be a recognized professional organization.[340]

Adoption of the qualified person definition will align the Commission's rules with the CRIRSCO standards and, as commenters noted, help ensure that the qualified person assumes the appropriate personal responsibility for his or her findings and conclusions.[341] Although some commenters recommended adding to the requirement,[342] adoption of the ''at least five years of relevant experience'' requirement will provide further consistency with the CRIRSCO-based codes.[343]

Similar to proposed instructions, we are adopting a definition of the term ''relevant experience'' for purposes of determining whether a party is a qualified person. This definition is substantially similar to guidance provided under the CRIRSCO-based codes. For that reason, most commenters that addressed the issue found the proposed instructions to be adequate.[344] As one commenter explained, the proposed instructions ''are well aligned to established CRIRSCO template guidance.'' [345]

This definition first provides that the term ''relevant experience'' means, for purposes of determining whether a party is a qualified person, that the party has experience in the specific type of activity that the person is undertaking on behalf of the registrant. For example, if the qualified person is preparing or supervising the preparation of a technical report concerning exploration results, the relevant experience must be in exploration. If the qualified person is estimating, or supervising the estimation of mineral resources, the relevant experience must be in the estimation, assessment, and evaluation of mineral resources and associated technical and economic factors likely to influence the prospect of economic extraction. Similarly, if the qualified person is estimating, or supervising the estimation of, mineral reserves, the relevant experience must be in engineering and other disciplines required for the estimation, assessment, evaluation and economic extraction of mineral reserves.[346]

This definition next provides that a qualified person must also have relevant experience in evaluating the specific type of mineral deposit under consideration (*e.g.,* coal, metal, base metal, industrial mineral, or mineral brine). What constitutes relevant experience in this regard is a facts and circumstances determination. For example, experience in a high-nugget, vein-type mineralization such as tin or tungsten would likely be relevant experience for estimating mineral resources for vein-gold mineralization whereas experience in a low grade disseminated gold deposit likely would not be relevant.[347]

This definition also explains that it is not always necessary for a person to have five years' experience in each and every type of deposit in order to be an

[325] *See* letters from AIPG, Amec, AngloGold, AusIMM, BHP, CBRR, CIM, Coeur, CRIRSCO, Eggleston, Golder, JORC, Midas, MMSA, Mousset-Jones, NSPE, Rio Tinto, SAMCODES 1, SME 1, SRK 1, Vale, and Willis.

[326] *See, e.g.,* letters from AIPG, AngloGold, CBRR, CIM, Rio Tinto, and SRK 1.

[327] Letter from SME 1.

[328] *See* letters from Amec, CBRR, Midas, Rio Tinto, SRK 1, and Vale.

[329] *See, e.g.,* letters from Midas and SRK 1. MMSA, however, indicated that continuing professional development should be compulsory.

[330] *See* letters from Amec, Coeur, MMSA, and Willis.

[331] *See* letters from AIPG, Amec, AusIMM, BHP, CBRR, CIM, CRIRSCO, Eggleston, Graves, JORC, Midas, SAMCODES 1, SME 1, SRK 1, and Vale.

[332] *See* letters from AIPG, CIM, Graves, SME 1, SRK 1, and Vale.

[333] *See* letters from AusIMM, CBRR, Graves, JORC, and SME 1.

[334] *See* letter from BHP.

[335] *See, e.g.,* letters from AIPG, Graves, and SME 1.

[336] *See, e.g.,* letters from Alliance and Golder.

[337] *See* letter from Alliance.

[338] *See* letter from Golder.

[339] *See* 17 CFR 229.1300.

[340] *See id.* For an organization to be a recognized professional organization, it must: Be either an organization recognized within the mining industry as a reputable professional association, or a board authorized by U.S. federal, state or foreign statute to regulate professionals in the mining, geoscience or related field; admit eligible members primarily on the basis of their academic qualifications and experience; establish and require compliance with professional standards of competence and ethics; require or encourage continuing professional development; have and apply disciplinary powers, including the power to suspend or expel a member regardless of where the member practices or resides; and provide a public list of members in good standing. With respect to the first requirement, one commenter opposed allowing a state board to authorize a recognized professional organization. *See* letter from Mousset-Jones. We continue to believe that this criterion is appropriate because, as one commenter noted, in the United States, it is typically a board authorized by state statute that regulates professionals in the mining, geoscience, engineering, geology or related field. *See* letter from NSPE.

[341] *See supra* note 315 and accompanying text.

[342] *See* letters from AIPG, Coeur, MMSA, and SME 1.

[343] *See, e.g.,* letters from CBRR, Eggleston, Midas, SAMCODES 1, and SRK 1.

[344] *See* letters from AngloGold, CBRR, Eggleston, Midas, Rio Tinto, and SRK 1.

[345] Letter from Rio Tinto.

[346] *See* the definition of ''relevant experience'' in 17 CFR 229.1300.

[347] *See* paragraph (1) of the definition of ''relevant experience'' in 17 CFR 229.1300.

eligible qualified person if that person has relevant experience in similar deposit types. For example, a person with 20 years' experience in estimating mineral resources for a variety of metalliferous hard-rock deposit types may not require as much as five years of specific experience in porphyry-copper deposits to act as a qualified person. Relevant experience in the other deposit types could count towards the experience in relation to porphyry-copper deposits.[348]

This definition further provides that, in addition to experience in the specific type of mineralization, if the qualified person is engaged in evaluating exploration results or preparing mineral resource estimates, the qualified person must have sufficient experience with the sampling and analytical techniques, as well as extraction and processing techniques, relevant to the mineral deposit under consideration. ''Sufficient experience'' in this context means that level of experience necessary to be able to identify, with substantial confidence, problems that could affect the reliability of data and issues associated with processing.[349]

Finally, this definition provides that, for a qualified person applying the modifying factors to convert mineral resources to mineral reserves, he or she must have both sufficient knowledge and experience in the application of these factors to the mineral deposit under consideration, as well as experience with the geology, geostatistics, mining, extraction, and processing that is applicable to the type of mineral and mining under consideration.[350]

These detailed provisions regarding the meaning of ''relevant experience'' will help assure that the qualified person has the appropriate level of experience for both the type of activity and type of mineral deposit involved to make accurate assessments about the registrant's exploration results, mineral resources, and mineral reserves. At the same time, we believe that the adopted definition of ''qualified person,'' taken together with these related provisions, will provide sufficient flexibility in terms of the required level of experience and professional standing. Moreover, because the CRIRSCO-based codes provide similar guidance for the type of experience required for a competent or qualified person, the adopted definition of qualified person and related provisions should not significantly alter existing disclosure practices for registrants subject to those codes.[351]

The final rules do not require a qualified person to have attained a specific minimum education level because, as several commenters noted, the recognized professional organizations typically address such a requirement in their membership criteria.[352] Although one commenter suggested adding other criteria to the definition of ''recognized professional organization,'' [353] we believe our less prescriptive approach, which establishes the minimum criteria that an organization must meet to be considered a recognized professional association, is the better approach. Consistent with the proposed rules, the final rules include requiring or encouraging continuing professional development as one of the defining criteria of a recognized professional organization. Like most commenters that addressed the issue,[354] we agree that it is better to leave the treatment of continuing professional development to the professional organizations who are more knowledgeable about whether industry developments require additional training of their members.[355]

We are not publishing an approved list of ''recognized professional organizations.'' We continue to believe that our principles-based approach, which some commenters preferred because of its flexibility,[356] provides assurance that the qualified person has the appropriate level of professional expertise to support the disclosure of exploration results, mineral resources, or mineral reserves without unduly restricting the pool of eligible qualified persons. Although we acknowledge that the ''approved organization'' approach may be initially easier to apply, it could also become outdated as circumstances change, which could adversely affect the quality of disclosure.[357]

*D. Treatment of Exploration Results*

1. Rule Proposal

Neither Guide 7 nor Item 102 addresses the disclosure of exploration results in Commission filings.[358] In contrast, the CRIRSCO-based codes permit the disclosure of exploration results, which are defined as data and information generated by mineral exploration programs that might be of use to investors but which do not form part of a disclosure of mineral resources or mineral reserves.[359]

We proposed to require that a registrant disclose its exploration activity and its material exploration results for each of its material properties for its most recently completed fiscal year.[360] Similar to the CRIRSCO-based codes, we proposed to define exploration results as data and information generated by mineral exploration programs (*i.e.,* programs consisting of sampling, drilling, trenching, analytical testing, assaying, and other similar activities undertaken to locate, investigate, define or delineate a mineral prospect or mineral deposit) that are not part of a disclosure of mineral resources or reserves. We further proposed an instruction explaining that when determining whether exploration results are material, a registrant should consider their importance in assessing the value of a material property or in deciding whether to develop the property.[361]

In addition, we proposed to prohibit the use of exploration results, by themselves, to derive estimates of tonnage, grade, and production rates, or in an assessment of economic viability because of the level of risk associated with exploration results.[362] As we explained, exploration results, by themselves, are inherently speculative in that they do not include an assessment of geologic and grade or quality continuity and overall geologic uncertainty. Therefore, we indicated that exploration results are insufficient to support disclosure of estimates of tonnage, grade, or other quantitative

[348] *See* Note 1 to paragraph (1) of the definition of ''relevant experience'' in 17 CFR 229.1300.

[349] *See* paragraph (2) of the definition of ''relevant experience'' in 17 CFR 229.1300.

[350] *See* paragraph (3) of the definition of ''relevant experience'' in 17 CFR 229.1300.

[351] *See, e.g.,* CIM Standing Committee on Reserve Definitions, CIM Definition Standards—For Mineral Resources and Mineral Reserves 2 (2014) (''CIM Definition Standards''), *https://mrmr.cim.org/media/1016/cim_definition_standards_20142.pdf;* JORC Code, *supra* note 175, at pt. 11; SAMREC Code, *supra* note 267, at pt. 10; and SME Guide, *supra* note 177, at pt. 9.

[352] *See supra* note 324 and accompanying text.

[353] *See* letter from SME 1.

[354] *See* letters from Amec, CBRR, Midas, Rio Tinto, SRK 1, and Vale.

[355] *See, e.g.,* letter from Rio Tinto.

[356] *See* letters from Alliance and Golder.

[357] We also do not believe it would be appropriate to reference a specific approved list of recognized professional organizations adopted under one of the CRIRSCO-based codes, as suggested by some commenters. *See supra* notes 332–334. This would effectively bind the Commission's rules to a current and future standard adopted by a third-party entity over which the Commission would have little to no control or influence.

[358] Accordingly, the staff does not currently request disclosure of exploration results. If a registrant voluntarily provides exploration results, the staff will review, and if appropriate, issue comments on, such disclosure.

[359] *See, e.g.,* JORC Code, *supra* note 175, at pts. 18–19; SAMREC Code, *supra* note 267, at pt. 20; PERC Reporting Standard, *supra* note 302, at pt. 6; and SME Guide, *supra* note 177, at pts. 33–34.

[360] *See* Proposing Release, *supra* note 5, at Section II.D.

[361] *See id.*

[362] *See id.*

estimates.[363] As proposed, tonnage and grade estimates would only be part of mineral resource and reserve estimates, which must include an assessment of geologic and grade or quality continuity and overall geologic uncertainty.[364]

2. Comments on the Rule Proposal

Several commenters generally supported requiring the disclosure of material exploration results on material properties.[365] One commenter stated that exploration results on material properties are the basis for valuing the property and, hence, should be disclosed in a technical report specific to the property in question.[366] Another commenter stated that exploration results are ''important information for investors, particularly in respect of exploration or development companies, where exploration results might be all or a significant portion of the information on the company's properties.'' [367] A third commenter stated that disclosure of material exploration results for material properties should be required for exploration stage registrants, but not for large production stage registrants, because the same level of exploration results might not be deemed material.[368] A fourth commenter supported the required disclosure of material exploration results for material properties as long as the exploration information required to be disclosed is consistent with the CRIRSCO definitions.[369]

Many other commenters opposed requiring the disclosure of material exploration results on a registrant's material properties.[370] Most of those commenters expressed concern that requiring the disclosure of material exploration results could compel the disclosure of commercially sensitive information and the potential violation of confidentiality agreements with joint venture partners and other mining operators (*e.g.,* on adjacent properties).[371] Several of those commenters asserted that compulsory disclosure of exploration results would be inconsistent with the CRIRSCO-based codes, which permit or encourage but do not require such disclosure.[372] One of the commenters stated that, under the CRIRSCO standards, disclosure of exploration results is voluntary until such information becomes material to investors.[373] Because the rule proposal would require the disclosure of material exploration results on a material property on a yearly basis, this commenter expressed concern that a registrant might be compelled to disclose its exploration results in most instances even before those exploration results would be considered material to investors.[374] Other commenters expressed concern that investors would misconstrue the significance of exploration results.[375] For example, one commenter stated that the disclosure of material exploration results ''is very likely to mislead investors into thinking that a property is more economically viable than it may actually be given the low level of certainty of exploration results.'' [376]

Because of the above concerns, most of the commenters that addressed the issue recommended that the Commission permit, but not require, the disclosure of material exploration results on material properties.[377] In this regard, some commenters distinguished between exploration or development stage issuers, on the one hand, and production stage issuers, on the other.[378] These commenters stated that because exploration results may be the only available information for certain exploration or development stage issuers, the disclosure of exploration results would be material for investors in these types of issuers. For production stage issuers, however, the disclosure of exploration results would generally result in immaterial information that would be costly and burdensome to prepare.

A number of commenters also opposed the Commission's proposed prohibition of the use of exploration results to derive estimates of tonnage and grade because, under the CRIRSCO standards, qualified persons and registrants are allowed to disclose exploration targets, which are quantitative estimates of the ranges of tonnage and grade of a mineral deposit, which is the target of exploration.[379] These commenters recommended that the Commission permit the disclosure of exploration targets, as defined under the CRIRSCO standards,[380] which would allow a registrant to provide a range of estimates of tonnage and grade, while also requiring the registrant to provide ''cautionary language of equal prominence that the potential quantity and grade is conceptual in nature, that there has been insufficient exploration to define the mineralization as a mineral resource and that it is uncertain if further exploration will result in the target delineated as a mineral resource.'' [381]

Commenters that addressed the proposed definition of exploration results had varied opinions. One commenter supported without elaboration the Commission's proposed definition of exploration results.[382] Another commenter generally agreed with the proposed definition of exploration results, indicating that they ''are correctly defined as not forming part of a mineral resource or mineral reserve,'' but suggested adding to the definition information generated by ''geophysical and geochemical surveys, remote sensing information, bulk sampling, test mining (not for commercial purposes).'' [383]

A third commenter, however, opposed the proposed definition because it does not include all techniques typically employed by exploration geologists and therefore

[363] *See id.*

[364] *See id.* Similar restrictions on the use of exploration results exist under the CRIRSCO standards. *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 18, which states that ''[i]t should be made clear in public reports that contain Mineral Exploration Results that it is inappropriate to use such information to derive estimates of tonnage and grade.''

[365] *See* letters from BHP, Eggleston, Midas, Rio Tinto, and SAMCODES 2.

[366] *See* letter from Eggleston.

[367] Letter from Midas.

[368] *See* letter from Rio Tinto; *see also* letter from BHP (agreeing with the proposed material exploration results disclosure requirement because it is a common practice promoted in other jurisdictions for small to medium-sized listed companies to disclose material exploration results).

[369] *See* letter from SAMCODES 2.

[370] *See* letters from Alliance, AngloGold, Cloud Peak, CIM, Cleary & Gottlieb, Coeur, Davis Polk, FCX, Gold Resource, Newmont, NMA 1, Royal Gold, SME 1, SRK 1, Vale, and Willis.

[371] *See* letters from Alliance, Cleary & Gottlieb, Cloud Peak, CIM, Davis Polk, FCX, Gold Resource, Newmont, NMA 1, Royal Gold, SME 1, and Vale.

[372] *See, e.g.,* letters from CIM, Cleary & Gottlieb, Gold Resource, SME 1, and Vale.

[373] *See* letter from SME 1.

[374] *See id.*

[375] *See* letters from Alliance, AngloGold, and SRK 1.

[376] Letter from Alliance.

[377] *See* letters from AngloGold, Cleary & Gottlieb, Cloud Peak, CIM, Coeur, Davis Polk, FCX, Gold Resource, Newmont, Royal Gold, SME 1, SRK 1, Vale, and Willis.

[378] *See* letters from Amec, Cleary & Gottlieb, and Vale. Another commenter agreed that exploration results ''may be all or a significant portion of the available information regarding the properties of an exploration or development-stage mining company,'' but nevertheless recommended the voluntary disclosure of exploration activity and exploration results, including by exploration or development stage companies. Letter from FCX.

[379] Letter from CIM. *See also* letters from Amec, AngloGold, BHP, CBRR, Coeur, CRIRSCO, JORC, SAMCODES 1, SME 1, SRK 1, Vale, and Willis.

[380] Under the CRIRSCO standards, an exploration target is a statement or estimate of the exploration potential of a mineral deposit in a defined geological setting where the statement or estimate, quoted as a range of tons and a range of grade or quality, relates to mineralization for which there has been insufficient exploration to estimate mineral resources. CRIRSCO International Reporting Template, *supra* note 20, at cl. 17.

[381] *Id.; see also* letter from CIM.

[382] *See* letter from AngloGold.

[383] Letter from Midas.

recommended adding to the definition ''[a]ll industry standard activities of geologic exploration.'' [384] A fourth commenter objected to the part of the proposed definition that excludes exploration results from forming part of a declaration of mineral resources or mineral reserves because exploration results are the basis of the mineral resource and mineral reserve estimates.[385]

3. Final Rules

We continue to believe that the disclosure of exploration results, to the extent that they are material, will provide investors with a more comprehensive picture of a registrant's mining operations and help them make more informed investment decisions. However, we also recognize the concern of commenters that, because we proposed to require annual disclosure of material exploration results on a material property, a registrant might misinterpret the requirement as compelling it to disclose its exploration results in most instances, even before those exploration results would be considered material to investors.[386] Such a result would conflict with the approach under the CRIRSCO standards, pursuant to which ''the release of exploration results [is] optional, and an issuer is only required to provide full disclosure of exploration results when considered appropriate and material to the investor.'' [387]

The approach we are adopting regarding the disclosure of exploration results is substantially similar to the CRIRSCO approach. To make this clear, the final rules provide that if the registrant is disclosing exploration activity or exploration results for its most recently completed fiscal year, it must then provide the specified disclosure, as discussed below.[388] This approach recognizes that the disclosure of exploration activity and exploration results is voluntary and largely within the discretion of the registrant until such activity and the concomitant results become material for investors. Once the exploration activity and related results become material, under the final rules they must be disclosed.[389] When determining whether exploration results and related exploration activity are material, the registrant should consider all relevant facts and circumstances, such as the importance of the exploration results in assessing the value of a material property or in deciding whether to develop the property, and the particular stage of the property.[390]

A company engaged in mining activities frequently uses exploration results, prior to a determination of mineral resources, to assess the economic potential of its property as part of its decision to develop a property. In addition, a company uses exploration results to determine whether mineral resources exist and to estimate the mineral resources. To the extent that mineral resources (and mineral reserves estimated from them) on a particular property are material, depending on the facts and circumstances, the exploration results that led to the estimation of those mineral resources could also be material.

The registrant will be required to make a good faith determination regarding the materiality of its exploration activity and exploration results at the end of each completed fiscal year. In this regard, we are providing some guidance for a registrant's materiality determination regarding exploration results and related exploration activity.[391] Because materiality is a facts-and-circumstances determination, what is material for one registrant may not be material for another. For example, as commenters have noted,[392] investors may be more likely to find material the exploration activity and exploration results of an exploration-stage issuer since such information may comprise most, if not all, of the information regarding mining assets available for that registrant. In contrast, investors may be less likely to find material the exploration activity and exploration results of a production-stage issuer where the primary activity and investor interest are regarding the reserves being extracted and their economic value.

As previously noted, one factor to be considered when determining the materiality of a registrant's exploration activity and concomitant exploration results is the importance of that information in assessing the value of a material property or in deciding whether to develop the property.[393] For example, exploration results that have significantly affected the registrant's analysis or estimates of the life of a material mining project would likely be considered material, thus triggering a disclosure obligation. In contrast, exploration results in the early stages of exploration activity may not rise to the level of material information if they do not affect the registrant's decision to develop the property. Similarly, an exploration result may not be material if the registrant has determined that other features of the property make the development of the property unlikely.

Requiring the disclosure of exploration results only when they have become material to investors will more closely align our disclosure rules with the CRIRSCO standards,[394] which should help limit the final rules' compliance costs. Furthermore, although some commenters expressed concern that investors would misconstrue the significance of exploration results, we believe this risk will be mitigated by precluding the use of exploration results alone, without due consideration of geologic uncertainty and economic prospects, to serve as a basis for disclosure of tonnage, grade, and production rates, or in an assessment of economic viability.

In a change from the proposed rules, if a registrant discloses exploration results, the final rules do not require the registrant to file a technical report summary to support such disclosure, even though the disclosure itself must still be based on information and supporting documentation by a qualified person.[395] This elective treatment of technical report summaries for exploration results should also help limit compliance costs for the registrant and could reduce the potential for investor confusion regarding the significance of the disclosed results, about which some commenters expressed concern.[396] Furthermore, making the technical report summary optional for exploration results should also mitigate the concern of some

[384] Letter from SRK 1.

[385] *See* letter from Amec. Because ''exploration results do not become something other than exploration results once a [m]ineral [r]esource or [m]ineral [r]eserve is declared,'' the commenter preferred the definition of ''exploration information'' under Canada's NI 43–101. That definition provides that exploration information ''means geological, geophysical, geochemical, sampling, drilling, trenching, analytical testing, assaying, mineralogical, metallurgical, and other similar information concerning a particular property that is derived from activities undertaken to locate, investigate, define, or delineate a mineral prospect or mineral deposit.'' Canada's NI 43–101, *supra* note 123, at pt. 1.1.

[386] *See, e.g.,* letter from SME 1.

[387] *Id.*

[388] 17 CFR 229.1304(g)(1) and (2) [Item 1304(g)(1) and (2) of Regulation S–K].

[389] 17 CFR 229.1304(g)(4) [Item 1304(g)(4) of Regulation S–K], which states that a registrant must disclose exploration results and related exploration activity for a material property under this section if they are material to investors.

[390] *See id.*

[391] *See id.*

[392] *See supra* note 378 and accompanying text.

[393] *See* Proposing Release, *supra* note 5, at Section II.D.

[394] *See* letter from SME 1.

[395] *See* Item 1302(b)(1) of Regulation S–K.

[396] *See supra* note 375 and accompanying text.

commenters[397] who believed that requiring the disclosure of exploration results would result in the disclosure of proprietary and commercially sensitive information. This is because such information is more likely to be found in the technical report summary's detailed disclosure requirements for exploration activity and exploration results (compared to the disclosure required in the narrative part of the Commission filing).

We are adopting the definition of exploration results, as proposed.[398] Although some commenters objected to the definition because it does not include all activities related to exploration programs,[399] the specific activities mentioned are intended to be illustrative of exploration activities and are not meant to exclude other activities. In this regard, we note that the definition includes ''other similar activities undertaken to locate, investigate, define or delineate a mineral prospect or mineral deposit.''[400] Moreover, the specific activities mentioned in the definition are substantially similar to the activities mentioned in the definition of ''exploration information'' under Canada's NI 43–101.[401]

While some commenters objected to the definition of exploration results as referencing data and information ''that are not part of a disclosure of mineral resources or reserves,''[402] this part of the definition is consistent with the definition of exploration results under the CRIRSCO-based codes.[403] This language is not meant to deny the connection between, and continuum of, exploration results, mineral resources and mineral reserves, which a successful mining project will reveal. Rather, it is meant to underscore the geologic and economic uncertainties underlying exploration results, compared to the levels of certainty required to arrive at estimates of mineral resources and reserves, which only additional work by the qualified person can resolve.

Because of the low level of certainty underlying exploration results, we are adopting the proposed restriction that a registrant must not use exploration results alone to derive estimates of tonnage, grade, and production rates, or in an assessment of economic viability. This restriction is generally consistent with the CRIRSCO standards[404] although, as some commenters stated,[405] those standards permit the disclosure of exploration targets, which are expressed as a range of tonnages and grades. Noting that the Proposing Release did not discuss exploration targets, these commenters requested that we specifically include exploration targets as a permitted item of disclosure under the Commission's rules.[406]

We recognize that, as commenters indicated, it is common practice for mining companies to discuss their exploration activities in terms of an exploration target.[407] As one commenter noted, placing exploration results within the context of an exploration target helps determine the materiality of those results.[408] Moreover, as several commenters indicated, exploration targets are typically discussed in a technical report summary, particularly where the targets are in proximity to mineral resources and reserves and, thus, may be material to investors.[409]

Therefore, in response to commenters, the final rules provide that a registrant may disclose an exploration target for one or more of its properties that is based upon and accurately reflects information and supporting documentation of a qualified person.[410] This change will also more closely align our rules with industry practice and global standards. The final rules also provide that a qualified person may include a discussion of an exploration target in a technical report summary.[411] Further, similar to the definition under the CRIRSCO standards,[412] the final rules define an exploration target to mean a statement or estimate of the exploration potential of a mineral deposit in a defined geological setting where the statement or estimate, quoted as a range of tonnage and a range of grade (or quality), relates to mineralization for which there has been insufficient exploration to estimate a mineral resource.[413]

However, we also recognize that the disclosure of exploration targets poses the potential for investor confusion in that an investor might misconstrue an exploration target as an estimate of a mineral resource or mineral reserve. Therefore, the final rules provide that any substantive disclosure of an exploration target must be provided in a separate section of the Commission filing or technical report summary that is clearly captioned as a discussion of an exploration target. That section must include a clear and prominent statement that:

- The ranges of potential tonnage and grade (or quality) of the exploration target are conceptual in nature;
- There has been insufficient exploration of the relevant property or properties to estimate a mineral resource;
- It is uncertain if further exploration will result in the estimation of a mineral resource; and
- The exploration target therefore does not represent, and should not be construed to be, an estimate of a mineral resource or mineral reserve.[414]

This requirement is similar to the cautionary language required for the disclosure of an exploration target under the CRIRSCO-based codes.[415] Several commenters recommended that we require such disclosure of cautionary statements in conjunction with the disclosure of exploration targets.[416]

The final rules further require that any such disclosure of an exploration target must also include:

- A detailed explanation of the basis for the exploration target, such as the conceptual geological model used to develop the target;
- An explanation of the process used to determine the ranges of tonnage and grade, which must be expressed as approximations;
- A statement clarifying whether the exploration target is based on actual exploration results or on one or more proposed exploration programs, which should include a description of the level of exploration activity already completed, the proposed exploration activities designed to test the validity of the exploration target, and the timeframe in which those activities are expected to be completed; and
- A statement that the ranges of tonnage and grade (or quality) of the exploration

[397] *See* letters of Alliance and FCX.

[398] See the definition of ''exploration results'' in 17 CFR 229.1300.

[399] *See* letters from Amec and SRK 1.

[400] *See* 17 CFR 229.1300.

[401] *See supra* note 385 and accompanying text.

[402] *See* letters from Amec and Eggleston.

[403] *See, e.g.,* JORC Code, *supra* note 175, at pt. 18; SAMREC Code, *supra* note 267, at pt. 20; PERC Reporting Standard, *supra* note 302, at pt. 6; and SME Guide, *supra* note 177, at pt. 33.

[404] *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 18; and PERC Reporting Standard, *supra* note 302, at pt. 6.

[405] *See supra* note 379 and accompanying text.

[406] *See, e.g.,* letters from CBRR, CIM, CRIRSCO, and SME 1.

[407] *See, e.g.,* letter from SME 1.

[408] *See* letter from AngloGold.

[409] *See, e.g.,* letters from CIM, Coeur, SME 1, Vale, and Willis.

[410] 17 CFR 229.1302(c)(1) [Item 1302(c)(1) of Regulation S–K]. *See also* 17 CFR 229.1304(g)(5) [Item 1304(g)(5) of Regulation S–K] (providing that a registrant may disclose an exploration target when discussing exploration results or exploration activity related to a material property as long as the disclosure is in compliance with the requirements of § 229.1302(c)).

[411] *See* 17 CFR 229.1302(c)(1).

[412] *See* CRIRSCO International Reporting Template, *supra* note 20, at cl. 17; *see also* JORC Code, *supra* note 175, at pt. 17; and SAMREC Code, *supra* note 270, at pt. 21.

[413] *See* the definition of ''exploration target'' in 17 CFR 229.1300.

[414] 17 CFR 229.1302(c)(2) [Item 1302(c)(2) of Regulation S–K].

[415] *See, e.g.,* JORC Code, *supra* note 175, at pt. 17; and SAMREC Code, *supra* note 270, at pt. 22.

[416] *See, e.g.,* letters from CBRR, CIM, and SME 1.

target could change as the proposed exploration activities are completed.[417]

These disclosure requirements will help investors understand the conceptual basis and limitations of an exploration target, which should help mitigate the potential for investor confusion about the target. These disclosure requirements are also similar to the requirements for exploration target disclosure under the CRIRSCO-based codes.[418] Several commenters recommended that we require similar disclosure of explanatory statements in conjunction with the disclosure of exploration targets.[419]

We did not propose, and we are not requiring, the disclosure of exploration results by a registrant that has material mining operations in the aggregate but no individual properties that are material.[420] If a company has determined that it lacks material mining properties, we believe it is unlikely that such a company would have exploration results that are material. While a company with no material properties could voluntarily elect to disclose exploration results for its properties, we do not believe investors would benefit from a requirement to disclose exploration results under those circumstances.

*E. Treatment of Mineral Resources*

1. The Mineral Resource Disclosure Requirement

i. Rule Proposal

The determination of mineral resources is the second step, after mineral exploration, that geoscientists and engineers use to assess the value of a mining property.[421] Most foreign mining codes require the disclosure of material mineral resources.[422] In contrast, Item 102 and Guide 7 preclude the disclosure of mineral resources in Commission filings except in certain instances.[423] According to industry representatives, this restriction has limited the completeness and relevance of the disclosures in SEC filings, and has caused confusion among mining companies and their investors.[424]

We proposed to require a registrant with material mining operations to disclose specified information in its Securities Act and Exchange Act filings concerning any mineral resources, as defined in the proposed rules, that have been determined based on information and supporting documentation from a qualified person.[425] As proposed, a registrant with material mining operations that has multiple properties would have to provide both summary disclosure about its mineral resources for all properties and more detailed disclosure concerning its mineral resources for each material property.[426]

Under the proposed rules, while a registrant could not disclose that it has determined that a mineral deposit constitutes a mineral resource or mineral reserve unless that determination is based upon information and supporting documentation[427] prepared by a qualified person, there would be no requirement that a registrant make such an affirmative determination. For example, a registrant could choose not to engage a qualified person to conduct the analyses and prepare the documentation necessary to support a determination that a mineral deposit is a mineral resource or reserve. In that case, under the proposed rules, in the absence of such information and supporting documentation, the registrant would be deemed not to have any mineral resources, and as such, would not be required to disclose mineral resources in a filing. If, however, the registrant did make the determination that it had mineral resources based upon information and supporting documentation prepared by a qualified person (*e.g.,* as part of its efforts to attract investors or secure project financing), then under the proposed rules the registrant would be required to disclose such mineral resources. This approach is consistent with the CRIRSCO-based codes.[428]

As previously noted, Item 102 and Guide 7 preclude the disclosure of estimates other than reserves in SEC filings unless such information is required to be disclosed by foreign or state law or if obtained and reported in the context of an acquisition, merger, or business combination. Since we proposed to require the disclosure of estimates for mineral resources in addition to mineral reserves by a registrant with material mining operations, the foreign or state law or business transaction exception would no longer be necessary. Therefore, we also proposed to eliminate this exception.[429]

ii. Comments on the Rule Proposal

Numerous commenters supported the Commission's proposal to require a registrant with material mining operations to disclose determined mineral resources in addition to mineral reserves.[430] For example, one commenter stated that the requirement would align the Commission's disclosure rules with the CRIRSCO standards, provide a level playing field for U.S. mining registrants, and provide investors with important information about the mining registrant and its assets.[431]

Another commenter stated that shareholders and potential investors

[417] 17 CFR 229.1302(c)(3) [Item 1302(c)(3) of Regulation S–K].

[418] *See, e.g.,* JORC Code, *supra* note 175, at pt. 17; and SAMREC Code, *supra* note 267, at pt. 22.

[419] *See supra* note 416 and accompanying text.

[420] An example of such a registrant would be an industrial minerals company that has more than 50 properties none of which is individually material. Under the final rules, such a company would be required to provide summary disclosure concerning its mineral resources and mineral reserves. *See infra* Section II.G.1 and 17 CFR 229.1303.

[421] First, mining professionals use exploration results to determine if a mineral deposit is present. Next, they estimate mineral resources, which are the portions of the mineral deposit that have prospects of economic extraction. The last step is the determination of mineral reserves, which are the economically mineable portions of the mineral resources.

[422] *See, e.g.,* JORC Code, *supra* note 175, at pts. 14 and 20; SAMREC Code, *supra* note 267, at pts. 3 and 24; SME Guide, *supra* note 177, at pts. 17 and 35; and PERC Reporting Standard, *supra* note 302, at pts. 2.8 and 7.

[423] Both Guide 7 and Item 102 permit the disclosure of non-reserve deposits, such as mineral resources, if such information is required to be disclosed by foreign or state law or if such estimates previously have been provided to a person (or any of its affiliates) that is offering to acquire, merge, or consolidate with the registrant, or otherwise to acquire the registrant's securities. *See* Instruction 3 to paragraph (b)(5) of Guide 7 and Instruction 5 to Item 102 of Regulation S–K. Only Canada has adopted a mining disclosure code as a matter of law. Other foreign mining codes have been adopted as listing standards for foreign securities exchanges or as guidelines by foreign securities commissions. *See* Proposing Release, *supra* note 5, Section 5, note 14 and accompanying text.

[424] *See* SME Petition for Rulemaking, *supra* note 6, at 1–2.

[425] *See* Proposing Release, *supra* note 5, at Section II.E.

[426] *See* Proposing Release, *supra* note 5, at Sections II.G.1–2.

[427] For both the proposing and final rules, ''information and supporting documentation'' means an initial assessment for mineral resource determination and a preliminary or final feasibility study for mineral reserve determination, each as prepared by a qualified person or persons. *See* Proposing Release, *supra* note 5 and *infra* at Sections II.E.3. II.E.4., and II.F.2.

[428] Similarly, other significant mining jurisdictions do not require a registrant to make the determination that it has mineral resources or reserves, as defined by those codes. The regulatory frameworks do, however, require disclosure of mineral resources and mineral reserves once the registrant has made the determination that it has them and they are material. *See, e.g.,* Australian Security Exchange Listing Rules (July 2014), r 5.7, 5.8, 5.9 (''ASX Listing Rules''), *https://www.asx.com.au/documents/rules/Chapter05.pdf* (providing guidance for disclosure of exploration results, mineral resources and mineral reserves for ''material mining projects'').

[429] *See* Proposing Release, *supra* note 5, at Sections II.E., VIII.

[430] *See* letters from Amec, AngloGold, BHP, CBRR, CIM, Eggleston, FCX, Gold Resource, Midas, Newmont, Northern Dynasty, Rio Tinto, SAMCODES 2, SRK 1, and Vale.

[431] *See* letter from Midas.

should be made aware of a company's mineral resources because such resources are recognized internationally as assets of a mineral property and can materially change the valuation of the company.[432] This commenter also stated that U.S. companies have been put at a disadvantage by not being able to disclose the potential value of their properties through the disclosure of mineral resources.[433] A third commenter indicated that the ''resource component is useful to investors in understanding the potential asset life and forward development options still under development.'' [434] Because of the widespread disclosure of mineral resources under the CRIRSCO-based codes, several commenters saw little to no risk to investors from the Commission's proposal to require a registrant with material mining operations to disclose mineral resources.[435]

One commenter acknowledged that there is a minor risk that investors could interpret mineral resources as mineral reserves (*i.e.,* that they imply economic viability).[436] This commenter, however, further stated that because of the widespread reporting of resources in CRIRSCO jurisdictions, most investors understand the difference between resources and reserves. Moreover, this commenter believed that the Commission could mitigate any risk from resource disclosure by requiring disclaimers as under Canada's NI 43–101, such as ''mineral resources are not mineral reserves and do not have demonstrated economic viability.'' [437]

A number of commenters in the industrial minerals or aggregates industry were critical of the proposed mineral resource disclosure requirement. One such commenter opposed a requirement to disclose mineral resource information on the grounds that because resources are marginally economic and of lower certainty, reporting resources ''could mislead investors with limited knowledge of the mining industry into believing that a mining operation has a larger number of future saleable tons than would likely be the case.'' [438] Another commenter disagreed with the Commission's statement that mining companies and their investors consider mineral resource estimates to be material and fundamental information about a company and its projects. That commenter described the statement as an overgeneralization that does not apply to the aggregates business.[439]

Several commenters expressly supported the Commission's proposal to require any disclosure of mineral resources in Commission filings to be based on information and supporting documentation of a qualified person.[440] Some of these commenters stated that they did not know of any circumstance that would justify the public disclosure of mineral resources without the determination and approval of a qualified person.[441] One commenter, however, opposed the required disclosure of mineral resources even if supported by a qualified person's information and documentation.[442] According to this commenter, the costs of preparing such disclosure may be significant whereas the benefits of such disclosure may be limited because of the inherent uncertainties in resource estimation. For this reason, this commenter recommended that the Commission make the disclosure of mineral resources optional even if supported by a qualified person.[443]

iii. Final Rules

As proposed, the final rules provide that a registrant with material mining operations must disclose specified information in its Securities Act and Exchange Act filings concerning mineral resources that have been determined to exist based on information and supporting documentation from a qualified person.[444] We continue to believe that requiring a mining registrant with material mining operations to disclose mineral resources in addition to mineral reserves will provide investors with important information concerning the registrant's operations and prospects. The importance of this information is demonstrated by the fact that most foreign mining codes require the disclosure of mineral resources; mining companies, including U.S. registrants, routinely disclose mineral resource information on their websites; and many mining company analysts consider mineral resource information as an important factor in their valuations and recommendations.[445] Requiring the disclosure of mineral resources will also help place U.S. registrants on a level playing field with Canadian mining registrants and non-U.S. mining companies that are subject to one or more of the other CRIRSCO-based mining codes. For these reasons, numerous commenters supported the required disclosure of determined mineral resources in Commission filings.[446]

Requiring disclosure of mineral resources in Commission filings could increase the reporting costs for those mining companies that do not currently disclose mineral resource information. We believe, however, that any such increase would be modest as most mining companies already assess mineral resources in order to determine reserves.[447]

As some commenters noted, requiring the disclosure of mineral resources could also increase the possibility that investors may misunderstand the economic value of a mining company, given that mineral resources are less certain than mineral reserves.[448] As discussed below, however, we believe that this risk is limited by the definition of the term mineral resource, by requiring disclosure of the particular class of mineral resource, and by requiring an initial assessment for mineral resource disclosure.

We also believe that there are important potential benefits to investors from the disclosure of mineral resources, including more comprehensive and potentially more accurate disclosure of mineral reserves. Given that mineral reserve estimates are based on estimates of mineral resources,

[432] *See* letter from Northern Dynasty; *see also* letter from SRK 1 (stating that disclosed mineral resources ''are an industry standard evaluation of a potential or actual mining property'' that ''are commonly used by registrants and investors alike to evaluate and compare specific properties as to their potential economic value'').

[433] *See* letter from Northern Dynasty.

[434] Letter from Rio Tinto.

[435] *See* letters from AngloGold, Eggleston, Rio Tinto, and SRK 1. Another commenter stated that it did not anticipate any risks from the required disclosure of mineral resources as long as the Commission adopted the CRIRSCO template and accompanying definitions. *See* letter from CBRR.

[436] *See* letter from Midas.

[437] *Id.*

[438] Letter from Alliance.

[439] *See* letter from NSSGA.

[440] *See, e.g.,* letters from Amec, AngloGold, Eggleston, Gold Resource, Midas, Northern Dynasty, and SRK 1.

[441] *See, e.g.,* letters from Eggleston, Midas, and SRK 1.

[442] *See* letter from Davis Polk.

[443] *See id.*

[444] 17 CFR 229.1303(b)(3) [Item 1303(b)(3) of Regulation S–K] and 229.1304(d)(1) [Item 1304(d)(1) of Regulation S–K].

[445] *See, e.g.,* SME Petition for Rulemaking, *supra* note6; letters from Northern Dynasty and SRK 1; CRIRSCO International Reporting Template, *supra* note 20, at cl. 21; and JORC Code, *supra* note 175, at pt. 20.

[446] *See supra* note 430.

[447] Best practice in mining engineering is to first determine the quantity and quality of the material of economic interest (*i.e.,* mineral resource estimation), prior to engineering and economic evaluation, to determine if any or all of that material can be extracted economically (*i.e.,* mineral reserve estimation). *See, e.g.,* Alan C. Noble, *Mineral Resource Estimation,* in 1 SME Mining Engineering Handbook 203 (P. Darling, ed., 2011), which states ''[t]he ore reserve estimate follows the resource estimate.''

[448] *See* letters from Alliance and Midas.

we believe that the required rigor surrounding the disclosure of mineral resources as well as the attendant scrutiny from the qualified person, particularly regarding mineral resource classification, is likely to lead to more reliable mineral reserves disclosure.[449]

We recognize that some industry participants, such as those in the industrial minerals and aggregates business, view mineral resources as less important to their business than other mining registrants and therefore have opposed a requirement to disclose mineral resources.[450] As previously explained, however, like the proposed rules, the final rules do not impose an affirmative obligation to determine mineral resources.[451] If an aggregates or other mining company does not want to incur the expense of hiring a qualified person to determine the existence of mineral resources, it need not do so. In that case, however, the company would not be able to declare that it has mineral resources in a Commission filing.

Once a registrant with material mining operations does determine that it has mineral resources, based on information and supporting documentation of a qualified person, then, because of their importance to the potential valuation of the company and to investors,[452] we do not believe that the registrant should have the option, as one commenter suggested,[453] of not disclosing the mineral resources in a Commission filing, or of otherwise being excepted from disclosing them. In this regard we note that the approach we are taking is consistent with the regulatory frameworks of the CRIRSCO-based codes, which, without exception, require disclosure of mineral resources (and mineral reserves) once the registrant has made the determination that it has them and they are material.[454]

2. Definition of Mineral Resource

i. Rule Proposal

We proposed to define ''mineral resource'' as a concentration or occurrence of material of economic interest in or on the earth's crust in such form, grade or quality, and quantity that there are reasonable prospects for its economic extraction.[455] We further proposed to define the term ''material of economic interest,'' as used in the definition of mineral resource, to include mineralization, including dumps and tailings,[456] geothermal fields, mineral brines, and other resources extracted on or within the earth's crust. As proposed, the term ''material of economic interest'' would not include oil and gas resources resulting from oil and gas producing activities, as defined in Regulation S–X,[457] gases (*e.g.,* helium and carbon dioxide), or water.[458]

The proposed rules further specified that, when determining the existence of a mineral resource, a qualified person must be able to estimate or interpret the location, quantity, grade or quality continuity, and other geological characteristics of the mineral resource from specific geological evidence and knowledge, including sampling.[459] In addition, when determining the existence of a mineral resource, as proposed, the qualified person must conclude that there are reasonable prospects for economic extraction of the mineral resource based on an initial assessment that he or she conducts by qualitatively applying the modifying factors likely to influence the prospect of economic extraction.[460]

Similar to the CRIRSCO-based codes, we proposed to state in connection with the definition of mineral resource that it is not to be merely an inventory of all mineralization[461] drilled or sampled.[462] A mineral resource is instead a reasonable estimate of mineralization, taking into account relevant factors such as cut-off grade,[463] likely mining dimensions, location or continuity, which, with the assumed and justifiable technical and economic conditions, is likely to, in whole or in part, become economically extractable.[464]

We further proposed to include within the definition of mineral resource non-solid matter, such as geothermal fields and mineral brines, in addition to mineralization, even though the CRIRSCO-based codes restrict mineral resources to solid matter.

ii. Comments on the Rule Proposal

Several commenters generally supported the Commission's proposal to define ''mineral resource'' as a concentration or occurrence of material of economic interest in or on the earth's crust in such form, grade or quality, and quantity that there are reasonable prospects for its economic extraction.[465] Some commenters supported the proposed definition because it is aligned or consistent with the CRIRSCO standards.[466] Another commenter indicated the proposed definition was reasonable because it included the requirement that there are ''reasonable prospects for economic extraction'' as under the CRIRSCO jurisdictions.[467] In contrast, although agreeing that mineral resources must have reasonable prospects for their economic extraction, one commenter opposed the proposed definition on the grounds that a qualified person will not be able to assure that all modifying factors can be accommodated for eventual economic extraction.[468]

Several commenters recommended that the Commission revise the definition of mineral resource by requiring that there be reasonable prospects for *eventual* economic extraction, as under the CRIRSCO standards.[469] As one commenter explained, under the proposed definition, ''there is an implication that a mineral resource has reasonable prospects for economic extraction today'' whereas ''[i]n many cases, mineral resources are identified that may not have reasonable prospects today, but with improved prices, technology, may be economic tomorrow.''[470] Some commenters

[449] *See, e.g.,* letter from Northern Dynasty (stating that because mineral resources, if rigorously estimated, can materially change the valuation of a company, shareholders and potential investors should be made aware of those assets).

[450] *See supra* notes 438–439 and accompanying text.

[451] *See supra* Section II.E.1.i.

[452] *See, e.g.,* letter from Northern Dynasty.

[453] *See* letter from Davis Polk.

[454] *See supra* note 428 and accompanying text.

[455] *See* Proposing Release, *supra* note 5, at Section II.E.1.

[456] The term ''dumps'' refers to stockpiles of mined material. The term ''tailings'' refers to a mixture of fine mineral matter and process effluents generated by mineral processing plants.

[457] *See* 17 CFR 210.4–10(a)(16)(i) [Rule 4–10(a)(16)(i) of Regulation S–X].

[458] *See* Proposing Release, *supra* note 5, at Section II.E.1.

[459] *See id.*

[460] *See id.*

[461] The term ''inventory of mineralization'' means an estimate of the total quantity of mineralization based on the available evidence.

[462] *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 21; JORC Code, *supra* note 175, at pt. 20; and SAMREC Code, *supra* note 267, at pt. 24.

[463] The term cut-off grade refers to the grade (the concentration of metal or mineral in rock) at which the destination of the material changes during mining. For establishing prospects of economic extraction, it is the grade that distinguishes between the material that is uneconomic and the material that is economic and therefore going to be mined and processed. Terms with similar meanings include net smelter return, pay limit and break-even stripping ratio. *See* the definition of cut-off grade in 17 CFR 229.1300.

[464] *See* Proposing Release, *supra* note 5, at Section II.E.1.

[465] *See, e.g.,* letters from AngloGold, Eggleston, Midas, Northern Dynasty, and Rio Tinto.

[466] *See* letters from AngloGold, CBRR, and Rio Tinto.

[467] *See* letter from Midas.

[468] *See* letter from SRK 1.

[469] *See* letters from Amec, AngloGold, BHP, Eggleston, Energy Fuels, Rio Tinto, and Vale.

[470] Letter from Eggleston; *see also* letter from Energy Fuels; letter from Vale (explaining that

further recommended that the Commission provide interpretive guidance on the meaning of the term ''eventual.'' [471]

Several commenters supported the proposed definition's inclusion of dumps and tailings.[472] One commenter explained that mine dumps and tailings are a significant source of metals and, in some cases, are the only identified mineral resource on a property.[473] Another commenter stated that, in addition to dumps and tailings, the definition of mineral resource should specifically include ''slag heaps (dumps), stockpiles, heap or dump leach pads, and backfill materials.'' [474]

Some commenters generally supported the proposed definition's inclusion of mineral brines.[475] Two of those commenters conditioned their support on the Commission's adoption of significant additional guidance regarding mineral brines.[476] Two commenters also supported the proposed inclusion of geothermal energy.[477] One of the commenters conditioned support on the Commission's adoption of separate rules for geothermal energy with additional guidance.[478]

In contrast, several commenters expressly opposed the inclusion of mineral brines and geothermal energy in the definition of mineral resource.[479] One commenter explained that extraction of mineral brines and geothermal energy ''requires the pumping of fluids rather than digging of solid materials'' and, like water and gases, which the proposed definition would exclude, involves scientific and engineering principles that are substantially different from those used to estimate solid mineral resources.[480] Regarding geothermal energy, this commenter stated that there is no internationally accepted standard protocol to estimate and report the potential for geothermal energy.[481]

Some commenters believed that disclosure of mineral brines should be regulated under the oil and natural gas rules.[482] A few commenters recommended regulating disclosure of geothermal energy under its own set of rules.[483]

Several commenters supported the proposed exclusion of oil and gas resources resulting from oil and gas producing activities, as defined in Regulation S–X, gases (*e.g.,* helium and carbon dioxide), and water from the definition of mineral resource.[484] As one commenter explained, the above substances are not traditional or industry standard commodities considered as ''mining operations.'' [485]

Many commenters supported requiring in the definition of mineral resource that a qualified person estimate or interpret the location, quantity, grade or quality continuity, and other geological characteristics of the mineral resource from specific geological evidence and knowledge, including sampling.[486] Commenters noted that the proposed requirement is in alignment with CRIRSCO standards [487] and is the current industry standard.[488] One commenter stated that a qualified person should also consider non-geologic factors, such as processing, mining method costs, and economic evaluation, when determining the reasonable prospects for a mineral resource's economic extraction.[489]

iii. Final Rules

We are adopting the definition of mineral resource, as proposed, to mean a concentration or occurrence of material of economic interest in or on the Earth's crust in such form, grade or quality, and quantity that there are reasonable prospects for economic extraction.[490] As commenters noted, this definition is consistent with the requirement under the CRIRSCO-based codes that, in order for a deposit, in whole or part, to be determined to be a mineral resource, there must be reasonable prospects for its economic extraction.[491]

In order to classify a deposit as a resource, a qualified person must establish that there are reasonable prospects of economic extraction by estimating or interpreting key geological characteristics from specific geological evidence. We believe that requiring an analysis based on specific geological evidence to establish prospects of economic extraction provides an appropriate standard, and importantly, one that is more exacting than what we are requiring for the disclosure of exploration results. A qualified person should have a higher level of confidence to determine that a deposit is properly classified as a mineral resource (which is an estimate of tonnage and grade that has reasonable prospects of economic extraction) than to report exploration results (which may not indicate the existence of any tonnage with reasonable prospects of economic extraction) because of the relatively greater weight that investors are likely to place on estimates of mineral resources. This in turn should help mitigate the uncertainty inherent in the determination of mineral resources. Moreover, because the CRIRSCO-based codes impose a substantially similar requirement, we do not believe this aspect of the definition of mineral resources would significantly alter existing disclosure practices of registrants subject to these codes.[492]

We are not modifying the proposed definition of mineral resource to mean that there must be reasonable prospects for its *eventual* economic extraction.[493] Because a qualified person must consider relevant technical and economic factors likely to influence the prospect of economic extraction, including pricing for the resource that could be based on forward-looking price

''[t]he word ''eventual'' indicates timing for economic extraction, and timing may vary depending on the commodity or mineral'').

[471] *See* letters from SME 1 and Vale.

[472] *See* letters from Amec, AngloGold, Eggleston, Midas, Northern Dynasty, Rio Tinto, and SRK 1.

[473] *See* letter from Eggleston.

[474] Letter from Amec.

[475] *See* letters from Eggleston, Northern Dynasty, and Rio Tinto.

[476] *See* letters from Eggleston and Rio Tinto.

[477] *See* letters from Eggleston and Northern Dynasty.

[478] *See* letter from Eggleston.

[479] *See* letters from Amec, CBRR, CRIRSCO, Davis Polk, SAMCODES 2, SME 1, and SRK 1.

[480] *See* letter from SME 1; *see also* letter from Amec (stating that the definition of mineral resource should exclude mineral brines because ''[m]ineral brine reservoirs are dynamic systems, and the methodology for estimation of brine resources and brine reserves is significantly different to that used in Mineral Resource and Mineral Reserve estimates, since brine resource and brine reserve estimates also require temporal measurements of fluid flow and brine chemistry'').

[481] *See* letter from SME 1.

[482] *See, e.g.,* letters from Rio Tinto and SRK 1; *see also* letter from SAMCODES 2 (stating that disclosure of both mineral brines and geothermal energy should be regulated under oil and natural gas rules).

[483] *See* letters from Amec and SRK 1; *see also* letter from MMSA (recommending the adoption of separate rules for both geothermal energy and mineral brines because ''these commodities do not closely correspond with solid minerals'').

[484] *See* letters from Amec, AngloGold, CBRR, Eggleston, Rio Tinto, and SRK 1.

[485] *See* letter from SRK 1.

[486] *See* letters from Amec, AngloGold, Eggleston, Midas, Northern Dynasty, Rio Tinto, and SRK 1.

[487] *See* letters from AngloGold, Eggleston, and Rio Tinto.

[488] *See* letter from SRK 1.

[489] *See* letter from CBRR.

[490] *See* the definition of ''mineral resource'' in 17 CFR 229.1300.

[491] *See, e.g.,* letters from CBRR and Midas. *See infra* note 493 and accompanying text for why we are not adopting the modifier ''eventual'' as used in the CRIRSCO definition of mineral resource.

[492] As discussed below, in a change from the proposed rules, the final rules require a qualified person to consider relevant technical and economic factors likely to influence the prospect of economic extraction, rather than applicable modifying factors, at the resource determination stage in order to more closely align the final rules with the CRIRSCO standards. *See infra* Section II.E.4.

[493] *See, e.g.,* letters from Eggleston and Vail.

forecasts,[494] when determining whether mineral resources exist on a property, we believe it is clear from the definition of mineral resource that the reasonable prospects for economic extraction will occur over a timeline.

To be clear, by requiring that there be reasonable prospects for a mineral resource's economic extraction, we do not mean that the extraction must occur immediately. Rather, we expect that it will occur over a temporal period, which will vary depending on the mineral or commodity being mined. As noted by the CRISCRO-based codes, for coal, iron ore, bauxite or other bulk minerals and commodities, it may be reasonable to consider economic extraction as occurring over a time period of 50 or more years when determining whether the deposit is a mineral resource. However, for smaller mineral deposits, it would likely be reasonable to consider economic extraction as occurring over a much shorter time period, for example, no more than 10–15 years.[495] Under the final rules, the qualified person will choose the appropriate temporal period when determining whether mineral resources exist and, if the property is material, must explain its choice in the technical report summary.[496]

The final rules provide that the term ''material of economic interest,'' when used in the context of mineral resource determination, includes mineralization, including dumps and tailings, mineral brines, and other resources extracted on or within the earth's crust.[497] Most commenters[498] that addressed the issue supported including dumps and tailings within the definition because it reflects industry practice and is consistent with the CRIRSCO-based codes.[499] The inclusion of dumps and tailings in the definition of mineral resource reflects the fact that, under certain circumstances, these byproducts from older mining operations possess value.

The final rules do not exclude mineral brines from the definition of mineral resource[500] because we continue to believe that, by definition, extracting minerals, such as lithium, from mineral brines constitutes mining.[501] While such extraction may involve the consideration and application of additional factors, the scientific and engineering principles used to characterize mineral brine and resources and reserves are substantially similar to those used to characterize solid mineral resources and reserves. We also note that, although the CRIRSCO-based codes define a mineral resource as ''solid material,'' at least one CRIRSCO-based jurisdiction has determined that disclosure regarding the mining of mineral brines should be regulated under the same set of rules governing mineral resources.[502] Moreover, including minerals extracted from mineral brines within the definition will provide registrants with a workable, reasonable, and consistent framework for disclosure related to these activities while providing investors with useful and reliable information about the properties containing the mineral brines.[503]

In a change from the proposed rules, the adopted definition of mineral resource does not include geothermal energy.[504] We have been persuaded to exclude geothermal energy from the definition of mineral resource due to the lack of consensus regarding how to regulate the disclosure of geothermal energy resources.[505]

The adopted definition of mineral resource also excludes oil and gas resources resulting from oil and gas producing activities, as defined in Rule 4–10(a)(16)(i) of Regulation S–X,[506] gases (*e.g.,* helium and carbon dioxide), and water.[507] Most commenters that addressed the issue supported the exclusion of oil and gas resources because their exclusion is consistent with industry practice.[508] Also consistent with industry practice, we are excluding gases (such as helium and carbon dioxide) and water because the scientific and engineering principles used to estimate these resources are substantially different from those used to estimate mineral resources.

As proposed, the final rules provide that a mineral resource is a reasonable estimate of mineralization, taking into account relevant factors such as cut-off grade, likely mining dimensions, location or continuity that, with the assumed and justifiable technical and economic conditions, is likely to, in whole or in part, become economically extractable. It is not merely an inventory of all mineralization drilled or sampled.[509]

Several commenters supported requiring in the definition of mineral resource that a qualified person estimate or interpret the location, quantity, grade or quality continuity, and other geological characteristics of the mineral resource from specific geological evidence and knowledge, including sampling.[510] As commenters noted, this requirement is in alignment with CRIRSCO standards[511] and is the current industry standard.[512] Accordingly, its adoption should help promote uniformity in the disclosure of mineral resources. Although some commenters suggested that we expand the definition to include other specific factors to consider at the resource determination stage,[513] we believe that such expansion would increase the prescriptive nature of subpart 1300 and could thereby increase the compliance burden of the final rules without providing significant additional benefits for investors.

3. Classification of Mineral Resources

i. Rule Proposal

We proposed to adopt the CRIRSCO-based classification of mineral resources[514] by requiring a registrant

[494] *See infra* Section II.E.4.

[495] *See, e.g.,* JORC Code, *supra* note 175, at pt. 20; and SME Guide, *supra* note177, at pt. 35.

[496] *See infra* Section II.E.4.

[497] *See* the definition of ''material of economic interest'' in 17 CFR 229.1300.

[498] *See supra* note 472.

[499] *See, e.g.,* JORC Code, *supra* note 175, at pt. 20; SAMREC Code, *supra* note 267, at pt. 24; PERC Reporting Standard, *supra* note 302, at pt. 7.4; and SME Guide, *supra* note 177, at pt. 35.

[500] *See supra* note 479 and accompanying text.

[501] Mining can be defined as the ''[p]rocess of obtaining useful minerals from the earth's crust.'' Lewis & Clark, Elements of Mining 20 (1964).

[502] *See* Ontario Securities Commission (OSC), *Mineral Brine Projects and National Instrument 43–101 Standards of Disclosure for Mineral Projects,* Notice 43–704 (July 22, 2011) (''In our view mineral brine projects are mineral projects as defined in NI 43–101'').

[503] *See, e.g.,* OSC Notice 43–704 (''We also think that it is in the public interest for mineral brine projects to be subject to the requirements of NI 43–101. NI 43–101 provides a proper and rigorous disclosure framework for mineral projects hosted in a brine'').

[504] *See* the definition of ''material of economic interest'' referenced in the definition of mineral resource in 17 CFR 229.1300.

[505] *See, e.g.,* letter from SME 1. For example, the Australian Geothermal Energy Association's Geothermal Code Committee concluded that JORC was a better model for the Australian Geothermal Reporting Code than the Society of Petroleum Engineers' Resources Management System, which is favored by some U.S. industry groups. *See, e.g.,* J.V. Lawless, M. Ward and G. Beardsmore, *The Australian Code for Geothermal Reserves and Resources Reporting: Practical Experience,* Proceedings of the World Geothermal Congress (2010).

[506] 17 CFR 210.4–10(a)(16)(i).

[507] *See* the definition of ''material of economic interest'' referenced in the definition of mineral resource in 17 CFR 229.1300.

[508] *See supra* note 484.

[509] *See* the definition of ''mineral resource'' in 17 CFR 229.1300; *see also* 17 CFR 229.1302(d)(1)(i)(A) [Item 1302(d)(1)(i)(A) of Regulation S–K].

[510] *See* letters from Amec, AngloGold, Eggleston, Midas, Northern Dynasty, Rio Tinto, and SRK 1.

[511] *See* letters from AngloGold, Eggleston, and Rio Tinto.

[512] *See* letter from SRK 1.

[513] *See, e.g.,* letter from Amec.

[514] *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 21; JORC Code,

with material mining operations to classify its mineral resources into inferred, indicated, and measured mineral resources, in order of increasing confidence based on the level of underlying geological evidence.[515] We further proposed to define each of those subcategories of mineral resources.

a. Inferred Mineral Resources

Similar to the CRIRSCO-based codes,[516] we proposed to define ''inferred mineral resource'' as that part of a mineral resource for which quantity and grade or quality are estimated on the basis of limited geological evidence and sampling.[517] As the proposed rules explained, ''limited geological evidence'' means evidence that is only sufficient to establish that geological and grade or quality continuity is more likely than not. The proposed rules further provided that the level of geological uncertainty associated with an inferred mineral resource is too high to apply modifying factors in a manner useful for evaluation of economic viability.[518] Because an inferred mineral resource has the lowest level of geological confidence of all mineral resources, under the proposed rules it may not be considered when assessing the economic viability of a mining project and may not be converted to a mineral reserve.[519]

We further proposed to establish the level of certainty that a qualified person must strive to achieve when determining the existence of an inferred mineral resource. As proposed, the qualified person must have a reasonable expectation that the majority of inferred mineral resources could be upgraded to indicated or measured mineral resources with continued exploration. In addition, the qualified person should be able to defend the basis of this expectation before his or her peers.[520]

b. Indicated and Measured Mineral Resources

We proposed to define ''indicated mineral resource'' as that part of a mineral resource for which quantity and grade or quality are estimated on the basis of adequate geological evidence and sampling.[521] As the proposed rules explained, ''adequate geological evidence'' means evidence that is sufficient to establish geological and grade or quality continuity with reasonable certainty. This means that the level of geological certainty associated with an indicated mineral resource is sufficient to allow a qualified person to apply modifying factors in sufficient detail to support mine planning and evaluation of the economic viability of the deposit.[522] We also proposed to explain that an indicated mineral resource has a lower level of confidence than that applicable to a measured mineral resource and may only be converted to a probable mineral reserve.[523]

We proposed to define ''measured mineral resource'' as that part of a mineral resource for which quantity and grade or quality are estimated on the basis of conclusive geological evidence and sampling.[524] As the proposed rules explained, ''conclusive geological evidence'' means evidence that is sufficient to test and confirm geological and grade or quality continuity. This means that the level of geological certainty associated with a measured mineral resource is sufficient to allow a qualified person to apply modifying factors in sufficient detail to support detailed mine planning and final evaluation of the economic viability of the deposit.[525] We also proposed to provide that, because a measured mineral resource has a higher level of confidence than that applying to either an indicated mineral resource or an inferred mineral resource, it may be converted to a proven mineral reserve or to a probable mineral reserve.[526]

c. Considerations of Geologic Uncertainty

We proposed to require that the qualified person quantify the uncertainty associated with each class of mineral resources by disclosing the uncertainty associated with the production estimates derived from each class of mineral resources.[527] While a qualified person would be permitted to develop mineral resource estimates using any generally accepted method, including geostatistics, simulation, or inverse distance, under the proposed rules, he or she would also be required to estimate the uncertainty associated with each class of mineral resource, expressed in a prescribed format that depended upon the specific classification of the resource.

As we explained in the Proposing Release,[528] for indicated and measured mineral resources, the qualified person would be required to provide the confidence limits of relative accuracy,[529] at a specific confidence level, of the preliminarily estimated production quantities per period from the resource.[530] This approach for reporting the level of uncertainty is consistent with what many have suggested in the mining engineering literature to be best practice.[531] When proposing this approach, we did not impose any restrictions on the acceptable confidence limits of relative accuracy or confidence level required to disclose indicated or measured mineral resources. In that regard, we recognized that the natural variability of geologic characteristics is different for different deposits.

*supra* note 175, at pt. 20; SAMREC Code, *supra* note 267, at pt. 24; and PERC Reporting Standard, *supra* note 302, at pt. 7.2.

[515] *See* Proposing Release, *supra* note 5, at Section II.E.2.

[516] *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 22; JORC Code, *supra* note 175, at pt. 21; SAMREC Code, *supra* note 267, at pt. 25; and PERC Reporting Standard, *supra* note 302, at pt. 7.5.

[517] *See* Proposing Release, *supra* note 5, at Section II.E.2.

[518] *See id.*

[519] *See id.*

[520] *See id.*

[521] *See id.*

[522] *See id.*

[523] *See id.*

[524] *See id.*

[525] *See id.*

[526] *See id.*

[527] We proposed to require this quantification of uncertainty in the ''initial assessment'' prepared by the qualified person. We proposed to define ''initial assessment'' as a preliminary technical and economic study of the economic potential of all or parts of mineralization to support the disclosure of mineral resources. *See* Proposing Release, *supra* note 5, at Section II.E.2. An initial assessment is different from a pre-feasibility study in that a pre-feasibility study is used to determine whether all or part of a mineral resource can be converted into a mineral reserve. We discuss the initial assessment requirement in detail in Section II.E.4 below.

[528] *See* Proposing Release, *supra* note 5, at Section II.E.2.

[529] The term ''confidence limits of relative accuracy'' refers to the values on both sides of zero (the average relative accuracy for unbiased mineral resource estimates) that show, for a specified probability (the confidence level), the range in which the relative accuracy lies. For example, if a report says the confidence limits of relative accuracy for a mineral resource is ±10% at 90% confidence for annual production quantities, it means there is a nine out of ten chance that the actual annual production quantities will be between 90% and 110% of the planned quantities.

[530] Using this approach, the geologic uncertainty associated with indicated and measured mineral resources is stated by keeping any two of the three relevant variables (confidence limits of relative accuracy, confidence level, and production periods) constant while varying the third. For example, the risk could be stated as ±15% at 90% confidence for monthly, quarterly, or annual production estimates, or ±10% or ±15% at 90% confidence for annual production estimates.

[531] The mining engineering literature makes clear that specifying the confidence limits of relative accuracy, at a specific confidence level, of production quantities per period is the best way to quantify uncertainty associated with resources. *See, e.g.,* E.H. Isaaks, and R.M. Srivastava, *An Introduction to Applied Geostatistics* 489–513 (1990); and M.E. Rossi, and C.V. Deutsch, *Mineral Resource Estimation* 209–222 (2014). *See generally* P.R. Stephenson, *Mineral Resource Classification. How the Viability of Your Project May Hang On a Qualified Person's Judgment* (2011); and P. Stoker and C. Moorhead, *Confidence in Resource Estimates—Beyond Classification* (2009).

We further proposed that, when estimating the geologic uncertainty associated with indicated and measured mineral resources, the qualified person would be required to consider the limitations of the data, assumptions, and models used to determine the resource estimates. This is because the numerical estimates of uncertainty from geostatistics or simulation do not account for risk factors associated with the input such as, but not limited to, drilling or sampling methods, laboratory assaying methods, outlier treatment, assumptions made during modeling of domains and geologic controls, compositing (averaging grades over similar sampling volumes or lengths), and establishing upper limits of grades. Consequently, such numerical estimates may underestimate the uncertainty associated with the mineral resources.

Regarding inferred mineral resources, we proposed to require qualified persons to state the minimum percentage of inferred mineral resources they believe will be converted to indicated and measured mineral resources with further exploration.[532] As we explained, because inferred resources have such a low level of confidence, it would be inappropriate for a qualified person to use them in production estimates for a period equal to or shorter than a year. Differences between actual and estimated production for such periods would have such high standard deviations that they would not provide an appropriate basis for investment decisions.[533]

ii. Comments on the Rule Proposal

Many commenters supported the Commission's proposal to require a registrant to classify its mineral resources into inferred, indicated, and measured mineral resources because such a requirement would be consistent with the CRIRSCO standards.[534] Other commenters supported the classification requirement as long as the definitions of inferred, indicated and measured mineral resources are identical to those under the CRIRSCO-based codes.[535]

One commenter saw little value in the classification of mineral resources. According to that commenter, ''[b]ecause resources are considered economically marginal and of lower certainty to begin with, dividing resources into low, middle, and high level of certainty offers little value'' and ''tends to give additional credibility to the resources as a whole that may not be warranted.'' [536]

a. Inferred Mineral Resources

Some commenters supported requiring a registrant with material mining operations to disclose inferred resources, despite limited geologic evidence underlying those resources, on the grounds that such a requirement is consistent with CRIRSCO [537] or industry standards.[538] Other commenters, however, recommended permitting rather than requiring the disclosure of inferred resources.[539] According to one of those commenters, an optional approach is warranted because of the high level of geologic uncertainty associated with that class of mineral resource.[540]

Several commenters supported defining ''inferred mineral resource'' as that part of a mineral resource for which quantity and grade or quality are estimated on the basis of limited geological evidence and sampling.[541] Other commenters, however, objected to the proposed definition of inferred resource because it is not identical to the CRIRSCO definition.[542] For example, one commenter objected to the proposed definition of ''limited geological evidence'' as evidence that is only sufficient to establish that geological and grade or quality continuity is more likely than not. Instead, that commenter recommended substituting the CRIRSCO definition of inferred mineral resource, which includes the requirement that ''[g]eologic evidence is sufficient to imply but not verify geological and grade or quality continuity.'' According to that commenter, by using the CRIRSCO definition, ''the assumptions underlying the estimates of inferred mineral resources are more clearly defined.'' [543]

One commenter supported the Commission's proposed prohibition regarding the use of inferred resources in economic assessments of mining properties.[544] This commenter indicated that using inferred resources in this way could mislead registrants and investors on the economic potential of the property.[545]

Many other commenters opposed the Commission's proposal to prohibit the use of inferred resources to make a determination about the potential economic viability of extraction.[546] Commenters stated that this prohibition would be inconsistent with the CRIRSCO-based codes, which permit the inclusion of inferred resources in a scoping study or a preliminary economic assessment (as permitted under Canada's NI 43–101) as long as cautionary disclaimers regarding the geologically speculative nature of inferred resources and the corresponding high level of risk associated with them are provided.[547] According to several of these commenters, adoption of this prohibition would place U.S. registrants at a significant disadvantage and deprive investors of information they have found relevant to their investment decisions.[548]

Commenters generally agreed with the Commission's proposal to preclude the conversion of inferred resources into a mineral reserve because of the high level of geologic uncertainty associated with inferred resources.[549] In response to our request for comment about whether we should require a registrant to use a legend or cautionary language when disclosing inferred resources, while commenters supported such use in a preliminary economic assessment or scoping study to warn of a high level of geologic uncertainty,[550] a few commenters opposed the use of cautionary language in the reporting of inferred resources because such language is already captured in the

[532] We proposed to require uncertainty estimates for inferred mineral resources to be stated in the form ''the qualified person expects at least z% of inferred mineral resources to convert to indicated or measured mineral resources with further exploration and analysis.'' *See* Proposing Release, *supra* note 5, at note 180 and accompanying text.

[533] Possible sources of uncertainty that affect the reporting of inferred resources may include sampling or drilling methods, data processing and handling, geologic modeling and estimation.

[534] *See* letters from Amec, AngloGold, BHP, CBRR, Eggleston, FCX, Midas, Rio Tinto, SAMCODES 2, SRK 1, and Vale.

[535] *See, e.g.,* letters from Amec, CIM, Coeur, Northern Dynasty, and SAMCODES 2.

[536] Letter from Alliance.

[537] *See, e.g.,* letters from AngloGold, Midas, and Rio Tinto.

[538] *See* letter from SRK 1.

[539] *See* letters from CBRR, Eggleston, and Gold Resource.

[540] *See* letter from Gold Resource.

[541] *See, e.g.,* letters from AngloGold, Eggleston, Gold Resource, and Rio Tinto.

[542] *See supra* note 535.

[543] Letter from CIM.

[544] *See* letter from Gold Resource.

[545] *See id.*

[546] *See* letters from Amec, AngloGold, BHP, CBRR, Coeur, CRIRSCO, Eggleston, Energy Fuels, JORC, Midas, MMSA, NMA, Northern Dynasty, Randgold, SAMCODES 2, SME 1, SRK 1, Ur-Energy, Vale, and Willis.

[547] *See* letters from Amec, Coeur, CRIRSCO, Eggleston, Energy Fuels, JORC, Midas, MMSA, NMA, Northern Dynasty, SME 1, SRK 1, Ur-Energy, Vale and Willis.

[548] *See* letters from Coeur, NMA, Northern Dynasty, SME 1, Ur-Energy, and Vale.

[549] *See* letters from Amec, AngloGold, CBRR, Eggleston, Gold Resource, Rio Tinto, SAMCODES 1, SRK 1, and Vale.

[550] *See, e.g.,* letters from CBRR, Coeur, Northern Dynasty, SRK 1, and Vale.

definition.[551] Another commenter supported providing an appropriate cautionary statement to accompany the reporting of inferred resources, but asserted that a cautionary statement should be required for all mineral resource and mineral reserve statements because they are estimates based on various assumptions that may or may not be met at a particular time.[552]

b. Indicated and Measured Mineral Resources

Several commenters supported the Commission's proposal to define ''indicated mineral resource'' as that part of a mineral resource for which quantity and grade or quality are estimated on the basis of adequate geological evidence and sampling.[553] Those commenters stated that the proposed definition aligned with the CRIRSCO definition of indicated mineral resource.[554] The commenters also supported the proposed definition of ''adequate geological evidence'' as evidence that is sufficient to establish geological and grade or quality continuity with reasonable certainty. Two of those commenters further agreed that the definition of ''adequate geologic evidence'' should be based on a qualified person's ability to apply modifying factors in sufficient detail to support mine planning and evaluation of the economic viability of the deposit.[555]

Other commenters urged the Commission to adopt verbatim the CRIRSCO definition of indicated mineral resource, which includes the provision that ''[g]eologic evidence is derived from adequately detailed and reliable exploration, sampling and testing and is sufficient to assume geological and grade or quality continuity between points of observation.'' [556] Commenters stated that the CRIRSCO definition ''is more specific'' [557] than the Commission's proposed definition and is the industry standard.[558] In opposing the proposed definition of indicated mineral resource, one of those commenters further explained that a qualified person will not be able to assure that all modifying factors can be accommodated for eventual economic extractions.[559]

Some commenters supported the Commission's proposal to define ''measured mineral resource'' as that part of a mineral resource for which quantity and grade or quality are estimated on the basis of conclusive geological evidence and sampling.[560] Those commenters further supported the proposed definition of ''conclusive geological evidence'' as evidence that is sufficient to test and confirm geological and grade or quality continuity, which means that the level of geological certainty associated with a measured mineral resource is sufficient to allow a qualified person to apply modifying factors in sufficient detail to support detailed mine planning and final evaluation of the economic viability of the deposit.[561] Those commenters stated that the proposed definition of measured mineral resource is consistent with the CRIRSCO standards.[562]

Other commenters recommended that the Commission adopt the CRIRSCO definition of measured mineral resource instead of the proposed definition.[563] Commenters stated that the CRIRSCO definition is the industry standard,[564] did not favor use of the term ''conclusive geological evidence'' because, in their view, it sets an unrealistic standard,[565] and maintained that a qualified person would not be able to assure that all modifying factors could be accommodated for eventual economic extraction.[566] One of the commenters recommended replacing the term ''conclusive'' with ''a high level of confidence.'' [567]

c. Considerations of Geologic Uncertainty

Many commenters opposed the Commission's proposal to quantify the level of risk associated with indicated and measured mineral resources based on the confidence limits of relative accuracy at a particular confidence level for production estimates for periods of one year or less.[568] While acknowledging that the use of confidence limits of relative accuracy is considered best practice in the industry, one commenter opposed mandating such a requirement because, depending on the deposit, a quantitative assessment of risk may not be necessary and, in any event, may not be available to the company.[569] Instead, this commenter recommended relying on the application of the CRIRSCO definitions of inferred, indicated, and measured mineral resource, each of which requires a certain level of geological evidence, and requiring the qualified person to disclose the basis for the classification.[570]

A second commenter stated that qualitative risk assessments (*e.g.,* low, medium, high) are more likely to provide investors with a sense of the risks inherent in mineral resource and reserve estimates than numerical risk assessments that inherently fail to account for the underlying geological uncertainties, estimates and interpretations.[571] A third commenter stated that quantitative estimation of uncertainties is burdensome and, in most cases, the costs outweigh the benefits. That commenter recommended that the Commission follow CRIRSCO's approach, which encourages but does not require the quantitative estimation of uncertainties.[572]

Many commenters opposed the Commission's proposal to require a qualified person to describe the level of risk associated with an inferred mineral resource based on the minimum percentage that he or she estimates would convert to indicated or measured mineral resources with further exploration.[573] Commenters stated that there is no realistic way to quantify such an estimate with any degree of accuracy,[574] such a requirement would be impractical and burdensome for small mining companies,[575] and such a

[551] *See* letters from AngloGold and Rio Tinto. Another commenter opposed the use of cautionary statements regarding inferred resources because ''[r]equiring prescriptive statements is not beneficial to the industry.'' Letter from Amec.

[552] *See* letter from Eggleston.

[553] *See* letters from AngloGold, CBRR, Midas, Northern Dynasty, and Rio Tinto.

[554] *See, e.g.,* letters from CBRR, Midas, and Rio Tinto.

[555] *See* letters from AngloGold and Northern Dynasty.

[556] *See* letters from Amec, CIM, Coeur, SRK 1, and Willis.

[557] *See* letter from Willis.

[558] *See* letters from SRK 1 and Willis.

[559] *See* letter from SRK 1.

[560] *See* letters from AngloGold and CBRR.

[561] *See id.*

[562] *See id.*

[563] *See* letters from Amec, Coeur, Northern Dynasty, Rio Tinto, and SRK 1.

[564] *See* letters from Coeur and SRK 1.

[565] *See* letters from Amec, Midas, Rio Tinto, and SRK 1.

[566] *See id.*

[567] *See* letter from SRK 1.

[568] *See* letters from AIPG, Amec, AngloGold, BHP, CBRR, Cloud Peak, Eggleston, FCX, Gold Resource, JORC, Midas, MMSA, Northern Dynasty, NSSGA, Rio Tinto, SAMCODES 1 and 2, SRK 1, Ur-Energy, and Vale.

[569] *See* letter from SAMCODES 1.

[570] *See id.*

[571] *See* letter from AIPG. Several other commenters recommended that the Commission permit a qualified person to provide a qualitative discussion of the uncertainties involved in resource determination in lieu of a quantitative assessment based on the confidence limits of relative accuracy. *See* letters from Cloud Peak, Gold Resource, Midas, Northern Dynasty, Rio Tinto, and SRK 1.

[572] *See* letter from Vale; *see also* letters from Eggleston and MMSA.

[573] *See* letters from Amec, CBRR, Eggleston, Gold Resource, JORC, Midas, MMSA, Northern Dynasty, Rio Tinto, Royal Gold, SRK 1, Ur-Energy, and Vale.

[574] *See, e.g.,* letters from Amec, Eggleston, Gold Resource, Northern Dynasty, SRK 1, and Vale.

[575] *See* letter from MMSA.

requirement is not imposed by other jurisdictions.[576]

Some commenters noted that, consistent with the CRIRSCO-based codes, the proposed definition of inferred mineral resource included the requirement that the qualified person have a reasonable expectation that the majority of inferred mineral resources could be upgraded to indicated or measured mineral resources with continued exploration. Those commenters suggested that this proposed requirement would act as a substitute for the proposed quantification in that, if the qualified person cannot meet this expectation with regard to part of a deposit, that part could not be classified as inferred resources.[577]

iii. Final Rules

We are adopting the proposed requirement that a registrant with material mining operations classify its mineral resources into inferred, indicated, and measured mineral resources, in order of increasing confidence based on the level of underlying geological evidence.[578] We believe this classification requirement will improve the accuracy of a registrant's mining disclosure in Commission filings, and thereby benefit investors, because it is based upon an assessment of ''geologic uncertainty,'' which is the risk related to the quality, quantity and location of the mineral in the ground. Geologic uncertainty directly affects two very significant estimates, production quantities per period and related cash flows, which are crucial to a registrant's determination, and an investor's understanding, of mineral resource disclosure. We, therefore, believe that the final rules should require, and not merely allow, the classification of mineral resources.[579]

As several commenters noted, requiring the classification of mineral resources into inferred, indicated, and measured mineral resources is consistent with the CRIRSCO standards and prevailing industry practice.[580] Thus, adoption of this classification requirement will more closely align the Commission's mining property disclosure rules with global industry practice and promote uniformity in mining property disclosure.

a. Inferred Mineral Resources [581]

We are adopting the definition of ''inferred mineral resource,'' largely as proposed.[582] In a slight change from the proposed rules, the adopted definition of inferred mineral resource provides that the level of geological uncertainty associated with an inferred mineral resource is too high to apply relevant technical and economic factors likely to influence prospects of economic extraction in a manner useful for evaluation of economic viability.[583] In response to commenters, the final rules use the term ''relevant technical and economic factors'' instead of ''modifying factors,'' as proposed, in order to more closely align the definition of inferred resources with that under the CRIRSCO-based codes.

As some commenters noted, the adopted definition of inferred mineral resource is generally consistent with the definition under the CRIRSCO-based codes.[584] The central tenet under both definitions is that inferred mineral resources are estimates of quantity and grade or quality based on limited geological evidence and sampling.[585] Although our definition of ''limited geological evidence'' differs slightly from the definition of geologic evidence in the CRIRSCO definition of inferred mineral resource,[586] its meaning is substantially similar to the CRIRSCO definition.

As commenters noted, it is consistent with the CRIRSCO standards to require the disclosure of inferred resources, which have been determined by a qualified person, in the Commission filings of a registrant with material mining operations.[587] Although some commenters recommended that we permit rather than require the disclosure of inferred resources in Commission filings because they have the lowest level of geologic confidence,[588] we believe that inferred mineral resources are nonetheless important to an investor's understanding of a registrant's mining operations because they may be converted into indicated or measured mineral resources with further exploration.

Additionally, the definition of inferred mineral resource will reduce any potential investor misunderstanding of the nature of a registrant's mining operations by providing appropriate context for and limitations on the disclosure of inferred resources. First, the definition clearly highlights for investors that inferred mineral resources have the highest degree of uncertainty, allowing investors to take this factor into account when assessing a registrant's disclosure. Second, the definition prohibits a registrant from using inferred mineral resources as a basis to determine mineral reserves. Rather, inferred resources will first have to meet the definitional requirements of, and be converted into, measured or indicated mineral resources, before they will be eligible to be considered as potential mineral reserves under the final rules. This will help limit the incentive for a registrant to be aggressive in disclosing inferred mineral resources because such disclosure would not increase the likelihood that such resources would ultimately be deemed to be mineral reserves.

b. Indicated and Measured Mineral Resources

We are adopting the proposed definition of indicated mineral resource.[589] This definition provides

[576] *See* letter from Vale.

[577] *See* letters from Amec, Eggleston, Northern Dynasty, Rio Tinto, and Ur-Energy.

[578] *See, e.g.,* 17 CFR 229.1302(d)(1)(iii)(A) [Item 1302(d)(1)(iii)(A) of Regulation S–K]; 17 CFR 229.1303(b)(3); and 17 CFR 229.1304(d)(1).

[579] Depending on the particular classes of resources that are determined (*e.g.,* if most or all of the determined resources are inferred resources), a registrant should consider whether appropriate risk factor disclosure is needed to explain to investors the limitations and risks of the resource determination.

[580] *See* letters from AngloGold, BHP, Eggleston, Midas, Rio Tinto, and SAMCODES 2.

[581] *See also* Section II.E.4.c. below for our discussion concerning the inclusion of inferred mineral resources in a quantitative assessment of the potential economic viability of a deposit.

[582] *See* the definition of ''inferred mineral resource'' in 17 CFR 229.1300 to mean that part of a mineral resource for which quantity and grade or quality are estimated on the basis of limited geological evidence and sampling.

[583] *See id.* As proposed, the final rules also explain that, because an inferred mineral resource has the lowest level of geological confidence of all mineral resources, which prevents the application of the modifying factors in a manner useful for evaluation of economic viability, an inferred mineral resource may not be considered when assessing the economic viability of a mining project, and may not be converted to a mineral reserve. *See id.*

[584] *See supra* note 541 and accompanying text.

[585] *See, e.g.,* the CRIRSCO International Reporting Template, *supra* note 20, at cl. 22; JORC Code, *supra* note 175, at pt. 21; and SAMREC Code, *supra* note 267, at pt. 25.

[586] When used in the context of mineral resource determination, ''limited geological evidence'' means evidence that is only sufficient to establish that geological and grade or quality continuity is more likely than not. *See* the definition of ''limited geological evidence'' in 17 CFR 229.1300. Under CRIRSCO's definition of inferred mineral resource, the requisite evidence is defined to mean geologic evidence that is sufficient to imply but not verify geological and grade or quality continuity. *See* CRIRSCO International Reporting Template, *supra* note 20, at cl. 22. We believe our articulation of the requisite evidence is more appropriate because it provides a clearer description of the low level of evidence that may support a determination of inferred mineral resources.

[587] *See supra* note 537 and accompanying text.

[588] *See, e.g.,* letter from Gold Resource.

[589] *See* 17 CFR 229.1300, which defines an indicated mineral resource as that part of a mineral resource for which quantity and grade or quality are estimated on the basis of adequate geological evidence and sampling. When used in the context

that the level of geological certainty associated with an indicated mineral resource is sufficient to allow a qualified person to apply modifying factors in sufficient detail to support mine planning and evaluation of the economic viability of the deposit.[590] The definition further explains that an indicated mineral resource has a lower level of confidence than that applying to a measured mineral resource and may only be converted to a probable mineral reserve.[591] As those commenters that supported the proposed definition noted,[592] this definition of indicated mineral resource is consistent with the comparable definition and guidance under the CRIRSCO-based codes.[593]

We are also adopting the proposed definition of measured mineral resource.[594] This definition provides that the level of geological certainty associated with a measured mineral resource is sufficient to allow a qualified person to apply modifying factors in sufficient detail to support detailed mine planning and final evaluation of the economic viability of the deposit.[595] The adopted definition also explains that a measured mineral resource has a higher level of confidence than that applying to either an indicated mineral resource or an inferred mineral resource, and may be converted to a proven mineral reserve or to a probable mineral reserve.[596]

Although some commenters opposed the use of the term ''conclusive evidence'' because they believed that it set an unrealistic standard,[597] we believe the term is appropriate because, as other commenters noted,[598] it is consistent with the CRIRSCO standards and conveys that the level of evidence is sufficiently high enough to enable a qualified person to conclude that he or she may proceed with detailed mine planning and final evaluation of the economic viability of the deposit using measured mineral resources. The term is not meant to convey that there is no uncertainty in the estimate. But rather, as is the case with the CRIRSCO-based codes, the term means there is no reasonable doubt, in the opinion of the qualified person estimating mineral resources, that the tonnage and grade of the deposit can be estimated to such accuracy that any variation from the estimate would have an insignificant effect on the potential economic viability.[599]

Because the definitions of ''indicated mineral resource'' and ''measured mineral resource'' are substantially similar to the corresponding CRIRSCO-based definitions, their adoption will more closely align the Commission's mining property disclosure requirements with the foreign mining code provisions, which would benefit both registrants and investors by promoting uniformity in mining disclosure standards. For those mining registrants that are dual-listed and already subject to the CRIRSCO-based requirements, such alignment should help to limit any potential additional costs imposed by the new requirement under the final rules to disclose indicated and measured mineral resources. In addition, some registrants, even if not currently subject to the CRIRSCO-based requirements, nonetheless apply substantially similar definitions of indicated and measured mineral resources as part of the process of determining mineral reserves,[600] and should therefore benefit from their familiarity with the adopted definitions.

c. Considerations of Geologic Uncertainty

In a change from the proposed rules, the final rules do not require that the qualified person quantify and disclose the uncertainty associated with indicated and measured mineral resources in terms of the uncertainty associated with the production estimates derived from them by providing the confidence limits of relative accuracy, at a specific confidence level, of the preliminarily estimated production quantities per period from the resource.[601] Although this approach for reporting the level of uncertainty is consistent with best practice in the industry,[602] we acknowledge that, for the reasons several commenters stated, requiring this approach in all instances could be impractical or inappropriate, unduly burdensome, and costly for many registrants.[603]

In lieu of a provision mandating a quantitative assessment of risk regarding indicated and measured mineral resources, we are requiring the qualified person to disclose the criteria used to classify a resource as indicated or measured and to justify the classification.[604] This disclosure must include a discussion of the uncertainty in the indicated or measured mineral resource estimates, the sources of the uncertainty, and how those sources were considered in the estimates.[605] This approach is consistent with commenters' suggestion that we permit a qualitative discussion of the uncertainties involved in resource determinations in lieu of a quantitative assessment.[606] While the final rules do not require a qualified person to use estimates of confidence limits derived from geostatistics or other numerical methods to support the disclosure of uncertainty surrounding mineral resource classification, if the qualified person chooses to use such confidence limit estimates, the final rules instruct that he or she should consider the limitations of these methods and adjust the estimates appropriately to reflect

of mineral resource determination, the term ''adequate geological evidence'' means evidence that is sufficient to establish geological and grade or quality continuity with reasonable certainty. *See id.*

[590] *See id.*

[591] *See id.*

[592] *See supra* note 553 and accompanying text.

[593] *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 23; JORC Code, *supra* note 175, at pt. 22; and SAMREC Code, *supra* note 267, at pt. 27.

[594] *See* 17 CFR 229.1300, which defines a measured mineral resource to mean that part of a mineral resource for which quantity and grade or quality are estimated on the basis of conclusive geological evidence and sampling. When used in the context of mineral resource determination, the term ''conclusive geological evidence'' means evidence that is sufficient to test and confirm geological and grade or quality continuity. *See* the definition of ''conclusive geological evidence'' in 17 CFR 229.1300.

[595] *See* the definition of ''measured mineral resource'' in 17 CFR 229.1300.

[596] *See id.*

[597] *See supra* note 565 and accompanying text.

[598] *See supra* note 560 and accompanying text.

[599] *See, e.g.,* JORC Code, *supra* note 175, at pt. 23 (stating that ''[m]ineralisation may be classified as a Measured Mineral Resource when the nature, quality, amount and distribution of data are such as to leave no reasonable doubt, in the opinion of the Competent Person determining the Mineral Resource, that the tonnage and grade of the mineralisation can be estimated to within close limits, and that any variation from the estimate would be unlikely to significantly affect potential economic viability'').

[600] As previously explained, the best practice in mining engineering is to determine mineral resources, prior to engineering and economic evaluation, to determine if any or all of those resources can be classified as mineral reserves. *See supra* note 447 and accompanying text. The predominant approach in the mining engineering literature is that mineral resource classification should be based on the estimator's judgment of the uncertainty in estimates due to the geologic uncertainty. *See, e.g.,* JORC Code, *supra* note 175, at pt. 24; and SAMREC Code, *supra* note 267, at pt. 29. This is consistent with the adopted definitions of mineral resource classifications.

[601] *See* 17 CFR 229.601(b)(96)(iii)(B)(*11*)(*v*) [Item 601(b)(96)(iii)(B)(*11*)(*v*) of Regulation S–K].

[602] *See supra* note 531 and accompanying text.

[603] *See, e.g.,* letters from CBRR, MMSA, Rio Tinto, and Vale.

[604] 17 CFR 229.601(b)(96)(iii)(B)(*11*)(*iv*) [Item 601(b)(96)(iii)(B)(*11*)(*iv*) of Regulation S–K].

[605] *See* Item 601(b)(96)(iii)(B)(*11*)(*v*) of Regulation S–K.

[606] *See supra* notes 570–572 and accompanying text.

sources of uncertainty that are not accounted for by these methods.[607]

The adopted approach is similar to the approach under the CRIRSCO-based codes, which encourages but does not require a quantitative assessment of risk regarding indicated or measured mineral resource estimates, and leaves the decision whether to use estimates of confidence limits to the discretion of the qualified person.[608] The qualified person may use estimates of confidence limits when assessing the level of uncertainty regarding his or her mineral resource estimates if he or she believes that such use would be practical and helpful. If, however, the qualified person determines that the use of estimates of confidence limits would be inappropriate or impractical, he or she may refrain from undertaking such a quantitative assessment of risk regarding his or her indicated or measured mineral resource estimates.

For similar reasons, the final rules do not require a qualified person to state the minimum percentage of inferred mineral resources he or she believes will be converted to indicated and measured mineral resources with further exploration. Many commenters objected to the proposed requirement because they believed that it would be impractical and burdensome.[609] We have been persuaded that such a requirement may not be necessary because the final rules require the qualified person to have a reasonable expectation that the majority of inferred mineral resources could be upgraded to indicated or measured mineral resources with continued exploration.[610] As some commenters suggested, this required expectation will act as a substitute for the proposed quantification in that, if the qualified person cannot meet this expectation with regard to part of a deposit, that part cannot be classified as inferred resources.[611] Further, the provision requiring the qualified person to be able to defend the basis for his or her reasonable expectation before his or her peers[612] will also help to dissuade the determination and disclosure of unreasonable inferred mineral resource estimates.

Similar to the approach adopted regarding indicated and measured resources, in lieu of a provision requiring a quantitative assessment of risk regarding inferred resources, we are requiring the qualified person to disclose the criteria used to classify a resource as inferred and to justify the classification.[613] This disclosure must include a discussion of the uncertainty in the inferred resource estimates, the sources of the uncertainty, and how those sources were considered in the estimates. This approach is again consistent with commenters' suggestion that we permit a qualitative discussion of the uncertainties involved in resource determination. We believe that such a required qualitative discussion of the criteria used to classify and justify a deposit, in whole or part, as inferred resources would serve to inform investors about the reliability of the disclosure without unduly burdening registrants.

Regardless of whether the qualified person provides a qualitative or quantitative assessment of risk, under the final rules the qualified person must adequately explain his or her reasons for classifying a mineral resource as inferred, indicated, or measured and that his or her classification is consistent with the definitions of inferred, indicated, and measured mineral resources. In this regard, the final rules require the qualified person to list all of the factors considered regarding the level of uncertainty and explain how those factors contributed to the final conclusion about the level of uncertainty underlying the resource estimates.[614]

4. The Initial Assessment Requirement

i. Rule Proposal

We proposed that a registrant's disclosure of mineral resources must be based upon a qualified person's ''initial assessment'' supporting the determination of mineral resources.[615] We proposed to define an ''initial assessment'' as a preliminary[616] technical and economic study of the economic potential of all or parts of mineralization to support the disclosure of mineral resources. As proposed, the initial assessment must be prepared by a qualified person and must include appropriate assessments of reasonably assumed modifying factors together with any other relevant operational factors that are necessary to demonstrate, at the time of reporting, that there are reasonable prospects for economic extraction.[617] Also as proposed, an initial assessment is required for disclosure of mineral resources but cannot be used as the basis for disclosure of mineral reserves.[618]

As we explained in the Proposing Release, an initial assessment is not a scoping[619] or conceptual study as

[607] *See* Item 601(b)(96)(iii)(B)(*11*)(*v*) of Regulation S–K. For example, if a qualified person uses geostatistics or simulation to estimate the uncertainty associated with a particular mineral resource as ''±15% relative accuracy at 90% confidence level for annual production quantities,'' then he or she, after determining that the risks associated with external risk factors are negligible, may report the numerically derived estimate without adjusting for any external risks. On the other hand, if the qualified person first determines that the risk factors external to the calculation are not negligible, then he or she should adjust the confidence limits to be wider than ±15% or use a confidence level less than 90% to account for the risk factors external to the calculation. In such case, the specific confidence limits (*e.g.,* ±25%) or confidence level (*e.g.* 80%) that would be appropriate will depend on the nature and significance of the risk factors external to the calculation of confidence limits obtained using numerical methods (*e.g.,* kriging or conditional simulation).

[608] *See, e.g.,* JORC Code, *supra* note 175, at pt. 25 (''Competent Persons are encouraged, where appropriate, to discuss the relative accuracy and confidence level of the Mineral Resource estimates with consideration of at least sampling, analytical and estimation errors. The statement should specify whether it relates to global or local estimates, and, if local, state the relevant tonnage. Where a statement of the relative accuracy and confidence level is not possible, a qualitative discussion of the uncertainties should be provided in its place'').

[609] *See supra* note 573 and accompanying text.

[610] 17 CFR 229.1302(d)(1)(iii)(B)(*1*) [Item 1302(d)(1)(iii)(B)(*1*) of Regulation S–K].

[611] *See supra* note 577 and accompanying text.

[612] *See* Item 1302(d)(1)(iii)(B)(*2*) of Regulation S–K [Item 1302(d)(1)(iii)(B)(*2*) of Regulation S–K].

[613] *See* Item 601(b)(96)(iii)(B)(*11*)(*iv*) of Regulation S–K.

[614] *See* Item 601(b)(96)(iii)(B)(*11*)(*v*) of Regulation S–K. In deciding between inferred and indicated mineral resources, the qualified person should note that our definitions provide that the level of geological uncertainty associated with inferred mineral resources is too high to apply relevant technical and economic factors likely to influence the prospect of economic extraction in a manner useful for evaluation of economic viability whereas the level of geological uncertainty associated with indicated mineral resources is sufficient to allow a qualified person to apply modifying factors in sufficient detail to support mine planning and evaluation of the economic viability of the deposit. Similarly, in deciding between indicated and measured mineral resources, the qualified person should note that our definitions provide that the level of geological certainty associated with an indicated mineral resource is sufficient to allow a qualified person to apply modifying factors in sufficient detail to support mine planning whereas the level of geological uncertainty associated with measured mineral resources allows it to be used for ''detailed'' mine planning. This guidance is consistent with the CRIRSCO standards. See CRIRSCO International Reporting Template, *supra* note 20, at cl. 25.

[615] *See* Proposing Release, *supra* note 5, at Section II.E.3.

[616] As used in this context, the term ''preliminary'' refers to a less rigorous study than what is required for feasibility studies, as defined and discussed in Section II.G.2., below.

[617] *See* Proposing Release, *supra* note 5, at Section II.E.3.

[618] *See id.*

[619] A scoping study is ''an order of magnitude technical and economic study of the potential viability of Mineral Resources. It includes appropriate assessments of realistically assumed Modifying Factors together with any other relevant operational factors that are necessary to

defined in some of the CRIRSCO-based codes[620] or a preliminary economic assessment as defined in Canada's NI 43–101.[621] The purpose of an initial assessment is narrower than those studies as it would be done solely to support disclosure of mineral resources and not to determine whether to proceed with further work leading to preparing a pre-feasibility study for reserve determination.

As proposed, at a minimum, the qualified person's initial assessment must include a qualitative evaluation of modifying factors to establish the economic potential of the mining property or project (*i.e.,* that there are reasonable prospects for economic extraction of the mineral resource.) As we explained in the Proposing Release, requiring a well-defined and specific technical study to support disclosure of mineral resources would provide greater assurance to investors that mineral resource disclosure is reliable.[622]

a. Cut-Off Grade and Price Estimation

We proposed instructions to the initial assessment requirement designed to elicit material information concerning the basis for the qualified person's conclusion that there are reasonable prospects for economic extraction. The first proposed instruction was that an initial assessment must include cut-off grade estimation, based on assumed unit costs for surface or underground operations and estimated mineral prices.[623] As we explained, cut-off grade refers to the grade at which the destination of the material changes during mining. For purposes of the initial assessment, cut-off grade distinguishes between material that is going to the waste dump and material that is going to the processing plant (in surface mining) or between material that is not mined and material mined to be processed (in underground mining).

As part of the proposed initial assessment, the qualified person would need to assume the cost to mine a typical unit of the specific material involved. We did not propose to require the qualified person to estimate all specific operating and capital costs in detail in order to estimate unit cost as part of the initial assessment.[624] Rather, for the initial assessment, the proposed rule requires the qualified person to make assumptions about the two key determinants of cut-off grade estimation—operating costs and commodity prices. As we explained, any cut-off grade estimation that is not based upon, or does not disclose, these two assumptions may not fully meet the standard required to demonstrate reasonable prospects of economic extraction.[625]

As proposed, a qualified person must base the unit cost estimate used in cut-off grade estimation in an initial assessment on assumed unit costs derived, for example, from historic data or factoring, for either underground or surface mining. In addition, the qualified person must make and disclose an assumption about whether the deposit will be mined with underground or surface mining methods.[626]

When estimating mineral prices for the cut-off grade estimation, we proposed to require the qualified person to use a commodity price that is no higher than the average spot price during the 24-month period prior to the end of the last fiscal year, determined as an unweighted arithmetic average of the daily closing price for each trading day within such period, unless prices are defined by contractual arrangements.[627] For purposes of consistency, we proposed that qualified persons use this same ceiling for all other commodity price estimates in the proposed mining disclosure for both mineral resources and reserves.[628]

When explaining our reasons for proposing the 24-month trailing average price requirement, we stated our belief that the qualified person must use commodity price estimates that are reasonable and justifiable and represent long term[629] market trends in mineral resource and reserve estimation. However, we also noted that most foreign jurisdictions allow the qualified person to use any reasonable and justifiable price, which is based on the qualified person's or management's view of long term market trends.[630]

b. Qualitative Assessment of Factors and Permitted Assumptions

A second proposed instruction requires the qualified person to provide a qualitative assessment of all other relevant modifying factors to establish economic potential and justify why he or she believes that all issues can be resolved with further exploration and analysis.[631] We proposed to provide the minimum requirements for various factors that the qualified person must evaluate when preparing an initial assessment, pre-feasibility study, or feasibility study in a single table to facilitate a comparison of the modifying factors evaluation requirement across the three key technical studies proposed to be used for mineral resource and reserve disclosure. According to the proposed presentation, the modifying factors evaluative process becomes more exacting as mining property assessment progresses from mineral resource estimation to mineral reserve estimation.[632]

As proposed, at the initial assessment stage, a qualified person would be

demonstrate at the time of reporting that progress to a Pre-Feasibility Study can be reasonably justified.'' JORC Code, *supra* note 175, at pt. 38 and SME Guide, *supra,* note 177, at pt. 50.

[620] *See, e.g.,* JORC Code, *supra* note 175, at pt. 38 and SME Guide, *supra* note 177, Table 2, at 68–69 (providing requirements for scoping, pre-feasibility, and feasibility studies).

[621] *See* Canada's NI 43–101 *supra* note 123, at pt. 1.1 (defining a preliminary economic assessment to mean ''a study, other than a pre-feasibility or feasibility study, that includes an economic analysis of the potential viability of mineral resources'').

[622] *See* Proposing Release, *supra* note 5, at Section II.E.3.

[623] *See id.*

[624] If the qualified person decides to include economic analysis in the initial assessment, then the proposed rules would require the inclusion of detailed cost estimates. *See* Proposing Release, *supra* note 5, at note 190 and accompanying text.

[625] *See* Proposing Release, *supra* note 5, at Section II.E.3.

[626] *See id.*

[627] *See id.*

[628] *See id.*

[629] ''Long term'' in this context refers to the life of the mine. *See, e.g.,* David Humphreys, *Pricing and Trading in Metals and Minerals,* 1 *SME Mining Engineering Handbook,* at 49 (stating that the assumed commodity price should be ''the expected annual average price to be achieved for the mined product during each year of the project's life'').

[630] For example, the JORC Code and Canada's NI 43–101 and CIM Standards call for the qualified person to report the assumptions underlying price estimates and do not prescribe a specific price model. *See, e.g.,* JORC Code, *supra* note 175, Table 1, at 32 (requiring the qualified person to report ''[t]he derivation of assumptions made of metal or commodity price(s), for the principal metals, minerals and co-products'' under revenue factors). *See also* ASX Listing Rules-Guidance Note 31 pt. 2.4 (''ASX also notes that to the extent that an estimate of mineral resources or ore reserves involves a representation about future matters, it must be based on reasonable grounds—meaning that the price, capital expenditure and operational expenditure assumptions used to calculate the estimates must also be objectively reasonable . . .''). Canada's NI 43–101 requires that a registrant disclosing mineral resources or reserves must disclose ''the key assumptions, parameters, and methods used to estimate the mineral resources and mineral reserves.'' Canada's NI 43–101, *supra* note 123, at pt. 3.4(c). The CIM Best Practice Guidelines lists [commodity] prices as one such key assumption but provides no guidance on how prices should be determined except that ''if commodity prices used differ from current prices . . ., an explanation should be given, including the effect on the economics of the project if current prices were used.'' CIM Estimation of Mineral Resources and Mineral Reserves Best Practice Guidelines 30 (2003).

[631] *See* Proposing Release, *supra* note 5, at Section II.E.3 (discussing Table 1).

[632] The modifying factors and requirements in proposed Table 1 were modeled on accepted industry practice and supported by the relevant mining engineering literature. *See, e.g.,* Richard L. Bullock, *Mineral Property Feasibility Studies,* 1 *SME Mining Engineering Handbook,* at 227–261.

required to evaluate, at a minimum, the following factors:

- Site infrastructure (*e.g.,* whether access to power and site is possible);
- Mine design and planning (*e.g.,* what is the broadly defined mining method);
- Processing plant (*e.g.,* whether all products used in the preliminary economic assessment can be processed with methods consistent with each other);
- Environmental compliance and permitting (*e.g.,* what are the required permits and corresponding agencies and whether significant obstacles exist to obtaining those permits); and
- Any other reasonably assumed modifying factors, including socio-economic factors, necessary to demonstrate reasonable prospects for economic extraction.

Another proposed instruction to the initial assessment requirement refers the qualified person to proposed Table 1 for the assumptions permitted to be made when preparing the initial assessment. These include assumptions concerning infrastructure location and the required plant area, type of power supply, site access roads and camp or town site, production rates, processing method and plant throughput, post-mining land uses, and plans for tailings disposal, reclamation, and mitigation.[633]

c. Optional Economic (Cash Flow) Analysis

We explained in the Proposing Release that an initial assessment, the singular goal of which is to demonstrate reasonable prospects of economic extraction, not economic viability, need not contain the quantitative analysis required to demonstrate the economic feasibility of mining projects. To demonstrate such economic feasibility, estimates of future cash flows are necessary because capital expenditures, operating costs, and revenues vary over the life of a mine due to variations in mining conditions. We stated, however, that if the qualified person chose to demonstrate the economic potential of the mining property beyond the minimum requirements of an initial assessment by including a cash flow analysis, we believed such analysis could benefit investors, subject to appropriate restrictions.

One proposed instruction to the initial assessment requirement addresses the option of providing cash flow analysis as part of the initial assessment. This instruction states that, while a qualified person may include cash flow analysis in an initial assessment to demonstrate economic potential, the qualified person may not use inferred mineral resources in such cash flow analysis.[634] Moreover, if the qualified person includes cash flow analysis in the initial assessment, then operating and capital cost estimates must have an accuracy level of at least approximately ±50% [635] and a contingency level of no greater than 25% of the direct estimate.[636] The proposed instruction also provided that the qualified person must state the accuracy and contingency levels in the initial assessment.[637]

We also proposed, to the extent a qualified person wants to include an economic analysis in an initial assessment, he or she would only be permitted to use a cash flow analysis. All other quantitative analyses would be prohibited. We based this prohibition on our belief that other quantitative measures of economic potential that omit cash flows could be potentially misleading.[638]

ii. Comments on the Rule Proposal

Several commenters supported the Commission's proposal to require that a registrant's disclosure of mineral resources be based upon a qualified person's initial assessment, which supports the determination of mineral resources, including that the qualified person consider applicable modifying factors and relevant operational factors at the resource evaluation stage.[639] Many other commenters either offered only conditional support for or opposed the Commission's proposed initial assessment requirement because they believed it went beyond what is required under the CRIRSCO standards at the resource determination stage. For example, some commenters stated that, while there should be some form of documentation required by a qualified person to support the disclosure of mineral resources in Commission filings, it should be consistent with what is allowed under the CRIRSCO-based codes, and should not be termed ''an initial assessment'' in order to avoid investor confusion.[640] One commenter recommended that the required initial assessment take the form of a ''conceptual study,'' as defined under the CRIRSCO standards, which would include the consideration of applicable modifying factors.[641] Another commenter stated that the assessment of modifying factors as set forth in proposed Table 1 was overly prescriptive, but also agreed that the qualified person should ''apply the CRIRSCO principles for the qualitative assessment of modifying factors'' when determining mineral resources.[642] In lieu of the proposed initial assessment requirement, that commenter, as well as others, recommended allowing a report that conforms to JORC Table 1 on an ''if not why not basis.'' [643]

In explaining its opposition to the proposed initial assessment requirement, one commenter maintained that, under CRIRSCO, at the resource determination stage, all that is required is that the qualified person demonstrate that there are reasonable prospects for eventual economic extraction. That commenter stated that it is best left to the discretion of the qualified person to determine the most appropriate methodology for identifying, estimating, and disclosing mineral resources.[644]

a. Cut-Off Grade and Price Estimation

Most commenters that addressed the issue supported the proposed requirement that a qualified person's documentation in support of resource determination and disclosure include cut-off grade estimation based on assumed unit costs for surface or

[633] *See* Proposing Release, *supra* note 5, at Section II.E.3 (discussing Table 1).

[634] *See* Proposing Release, *supra* note 5, at Section II.E.3.

[635] The phrase ''accuracy level of at least approximately ±50%'' means that the qualified person must have a reasonable basis to believe that assumptions underlying the estimate will result in actual costs with a substantial likelihood of being within 50% and 150% of the estimate.

[636] The term ''contingency'' is used to address the level of confidence in the cost estimates. It generally means the amount ''set aside for any additional, unforeseen costs associated with unanticipated geologic circumstances or engineering conditions.'' Scott A. Stebbins, *Cost Estimating for Underground Mines,*1 *SME Mining Engineering Handbook,* at 270. Thus, a contingency level of ≤25% means the contingency cannot be more than 25% of the direct cost estimate.

[637] *See* Proposing Release, *supra* note 5, at Section II.E.3.

[638] *See id.*

[639] *See* letters from CBRR (recommending that the initial assessment include material risk analysis, but that more comprehensive risk analysis should not be required because the more detailed analysis would be expected in a separate report); Columbia, CSP², Gold Resource (recommending that the initial assessment include a discussion of the material risks associated with the mineral resource determination); and Montana Trout.

[640] *See, e.g.,* letters from AngloGold, BHP, JORC, and Rio Tinto.

[641] *See* letter from AngloGold.

[642] *See* letter from BHP. In contrast, five other commenters indicated that proposed Table 1 would be useful. *See* letters from AngloGold, Midas, MMSA, NSSGA, and Northern Dynasty.

[643] *See* letters from BHP, JORC, and Rio Tinto. Such a report requires an estimate of mineral resources to be supported by a discussion of factors enumerated in that table, and if certain factors have been omitted, there must be a reasonable explanation of why they have been excluded. As one commenter explained, such a report would entail a qualitative assessment of modifying factors as well as a discussion of the assumptions underlying cut-off estimates. *See* letter from Rio Tinto.

[644] *See* letter from Eggleston.

underground operations.[645] One commenter recommended requiring that, consistent with current industry practice, the determination of the cut-off grade include estimates of processing costs, metallurgical recovery, and general and administrative costs.[646] Another commenter recommended using the term ''cut-off'' instead of ''cut-off grade'' because the criteria used may be grade, but could also be net smelter return or include quality or metallurgical characteristics.[647]

Many commenters opposed the proposed requirement that, when estimating mineral prices for the purpose of cut-off grade estimation or cash flow analysis for both mineral resource and reserve determination, the qualified person must use a commodity price that is no higher than the average spot price during the 24-month period prior to the end of the last fiscal year, determined as an unweighted arithmetic average of the daily closing price for each trading day within such period, unless prices are defined by contractual arrangements. While commenters generally agreed that cut-off estimation should be based on estimated prices, most commenters that addressed the issue opposed the proposed 24-month trailing average pricing model on the grounds that it is unrealistic and inconsistent with pricing requirements, guidance, and practice under the CRIRSCO-based codes, which permit prices to be based on forward-looking pricing forecasts. Consequently, according to those commenters, compliance with the historical-based pricing requirement would be costly and unduly burdensome for companies dual-listed in the United States and one or more of the CRIRSCO jurisdictions.[648]

According to those commenters, the prevailing industry practice in the CRIRSCO-based jurisdictions is to use forward-looking pricing forecasts when estimating mineral resources and reserves. The forecasted prices ''are typically based on consensus projections that are derived from an average of the short-term and an average of the long-term prices provided by numerous financial institutions that are independent of the companies that report mineral resources and reserves.'' [649] Because most mining companies base their mineral resource and reserve estimates on these consensus prices, investors can then compare similar mineral projects in different parts of the world. The proposed required use of a two-year trailing average price would not allow for this comparability. The commenters claimed this would force unrealistically optimistic price assumptions in a declining market and unrealistically pessimistic prices in a rising market.[650]

One commenter estimated that the proposed 24-month pricing model, if adopted, would result in a 40 percent reduction in mineral resources reported to the Commission compared to other jurisdictions.[651] Another commenter stated that the proposed historical pricing model would create timing concerns because registrants would not be able to conduct a rigorous reserve analysis between the end of the fiscal year and the filing deadline for Form 10–K annual reports. Accordingly, ''registrants would be forced, as a practical matter, months before the end of the reporting period, to make a very conservative estimate of what the actual mandated ceiling price will be, which may lead to overly conservative reserve and resource estimates.'' [652] One other commenter stated that the 24-month period is too short because pricing for coal can vary and fluctuate widely in a relatively short period of time and over multiple markets.[653]

Many commenters recommended that, in lieu of the 24-month trailing average price requirement, and consistent with the CRIRSCO-based codes, the Commission require that, when estimating prices for the purpose of both mineral resource and reserve disclosure, the qualified person use any reasonable and justifiable price, which is typically based on the qualified person's or management's view of long-term market trends, as long as the qualified person provides justification for, and discloses all material assumptions concerning the price used.[654] Some commenters further noted that such a requirement would be consistent with certain financial reporting requirements for the mining industry under U.S. GAAP.[655]

In contrast, one commenter recommended using a 36-month average because the commenter believed it is less volatile and, therefore more appropriate than the proposed 24-month period.[656] Another commenter also preferred the use of a 36-month period but only as a ''fallback position'' in the event that an issuer is not permitted to engage in forward-looking analysis of the price.[657] One commenter recommended that the Commission adopt a 12-month trailing average price model for mineral resource and reserve determination and disclosure because it would reflect mineral resource and reserve estimates based on current market conditions.[658]

Most of the commenters that addressed the pricing issue opposed the Commission's proposal to require the use of the same pricing standard for both mineral resource and mineral reserve determination.[659] Those commenters maintained that commodity prices used to estimate mineral resources are typically higher than the prices used to estimate mineral reserves because of the longer period it takes to effect commodity production from resources compared to reserves. According to commenters, using the same price standard for resources and reserves would result in an underestimation of a registrant's resources, which would put a U.S. registrant at a significant disadvantage relative to registrants not subject to the proposed rules.[660] A few commenters recommended using a price estimate for resources determination that is a set

[645] *See* letters from AngloGold, CBRR, Eggleston, Golder, Midas, Northern Dynasty, and SRK 1. One commenter, however, opposed requiring an initial assessment using assumed unit costs for operations that would include pricing and other cash flow information on the grounds that this information is proprietary, commercially sensitive, and confidential. *See* letter from Alliance.

[646] *See* letter from SRK 1.

[647] *See* letter from Amec. The commenter also stated that a qualified person should be allowed to make the determination of assumed unit costs based on benchmarking to similar deposit types and types of operations in the particular jurisdiction.

[648] *See* letters from AIPG, Alliance, Amec, AngloGold, BHP, CBRR, Chamber, CIM, Cleary & Gottlieb, Cloud Peak, Coeur, CRIRSCO, Davis Polk, Dorsey & Whitney, Eggleston, Energy Fuels, FCX, Golder, Graves, JORC, MMSA, Newmont, NMA 1, Northern Dynasty, PDAC, Randgold, Rio Tinto, Royal Gold, SAMCODES 1 and 2, Shearman & Sterling, SME 1, Ur-Energy, Vale, and Willis.

[649] Letter from CIM.

[650] *See id; see also* letter from SME 1.

[651] *See* letter from BHP.

[652] Letter from FCX.

[653] *See* letter from Alliance.

[654] *See, e.g.,* letters from AIPG, Amec, CBRR, Chamber , Cleary & Gottlieb, Cloud Peak, Davis Polk, Eggleston, Energy Fuels, FCX, JORC, Newmont, SAMCODES 1, Shearman & Sterling, SME 1, and Vale.

[655] *See* letter from AIPG (''U.S. GAAP requires that estimated future cash flows from mineral properties be used in determining the value of mining assets in a purchase price allocation and in testing mining assets for impairment. The estimated future cash flows are based on management's projections using projected sales prices reflecting the current and future forecasted prices. The forecasted prices should be consistent with the length of the mine life''). *See also* FCX, Newmont, SME 1, and Vale.

[656] *See* letter from Gold Resource.

[657] *See* letter from Eggleston.

[658] *See* letter from Andrews & Kurth.

[659] *See* letters from Amec, AngloGold, BHP, CBRR, CIM, Coeur, Eggleston, Energy Fuels, FCX, Golder, JORC, Midas, MMSA, Newmont, NMA 1, Northern Dynasty, Randgold, Rio Tinto, Royal Gold, SAMCODES 1, SME 1, SRK 1, Vale, and Willis.

[660] *See, e.g.,* letter from Vale; *see also* letter from SME 1.

percentage (ranging from 5% to 20%) higher than the price used for reserve estimation.[661]

An additional commenter believed that the research it conducts to estimate future commodity prices is sensitive intellectual property that is not required to be disclosed under the CRIRSCO template or JORC.[662] This commenter suggested that the Commission permit a registrant to discuss the methodology used to estimate its pricing model without requiring disclosure of the price itself. Alternatively, this commenter requested that a registrant be allowed to compare its forward-looking pricing to that produced by an industry recognized expert and comment on whether there is a material difference between the forward-looking pricing models.[663]

One commenter requested that the Commission allow a registrant to keep its future price assumptions confidential when reporting resources and reserves if those assumptions are commercially sensitive.[664] As conditions to keeping its price assumptions confidential, a registrant would have to disclose the methodology for estimating mineral resources and reserves, and state whether those resources and reserves would be extractable if commodity prices were not greater than a certain historical price. This commenter suggested using a 36-month average trailing price for this purpose rather than a 24-month average trailing price because it is less volatile.[665]

b. Qualitative Assessment of Factors and Permitted Assumptions

One commenter opposed requiring the determination of mineral resources to include appropriate assessments of reasonably assumed modifying factors because it believed that the term ''modifying factors'' should be used exclusively when converting mineral resources to mineral reserves.[666] That commenter recommended substituting the phrase ''technical and economic factors'' for ''modifying factors'' in order to be consistent with the CRIRSCO standards. That commenter also believed that the proposed initial assessment requirement may create an expectation of a much more detailed and formal evaluation of the technical and economic factors than what is currently industry-accepted practice.[667] A second commenter similarly indicated that because consideration of all applicable modifying factors is only appropriate at the reserve determination stage, requiring an assessment of the modifying factors at the resource evaluation stage could confuse investors into mistakenly believing that resources are reserves.[668]

Some commenters stressed the importance of considering environmental factors at the initial assessment stage.[669] According to two of those commenters, such consideration should include whether the company's operations will generate acid-mine drainage, which often requires post-project collection and treatment of pollution in perpetuity and results in considerable environmental and financial liability.[670] Another commenter recommended that the initial assessment discuss a mining project's water requirements and address how water availability for the region is predicted to change in the future, whether from increased incidents of drought, competing demands from nearby agricultural users, or groundwater drawdowns.[671]

c. Optional Economic (Cash Flow) Analysis

Some commenters maintained that the Commission should align itself with Canada's NI 43–101 and permit the disclosure of an economic assessment of resources, with cash flow analysis, including permitting the use of inferred resources as long as appropriate disclaimers are given, in addition to requiring disclosure of material assumptions and qualitative assessment of relevant technical and economic factors likely to affect prospects of economic extraction, if a registrant discloses mineral resource estimates.[672] Those commenters recommended that the Commission not use the term ''initial assessment'' and instead name the documentation to support a mineral resource estimate a ''resource study'' and name the report describing economic potential of mineral resources either a scoping study or preliminary economic assessment.[673] Commenters stated that, because inferred mineral resources are permitted to be included in economic analyses in preliminary economic assessments under Canada's NI 43–101 and in scoping studies under other CRIRSCO-based codes, U.S. registrants would be placed at a competitive disadvantage were the Commission to adopt the proposed prohibition of inferred mineral resources in economic assessments.[674]

iii. Final Rules

We are adopting the proposed requirement that a registrant's disclosure of mineral resources be based upon a qualified person's ''initial assessment'' supporting the determination of mineral resources.[675] The final rules define an initial assessment, as proposed, to mean a preliminary technical and economic study of the economic potential of all or parts of mineralization to support the disclosure of mineral resources.[676] However, in a change from the proposed rules, as a result of comments received, the final rules do not require the qualified person's initial assessment to include a qualitative evaluation of the modifying factors to establish the economic potential of the mining property or project. Rather, consistent with the suggestion of some commenters,[677] the final rules provide that, at a minimum, the initial assessment must include the qualified person's qualitative evaluation of relevant technical and economic factors likely to influence the prospect of economic extraction to establish the economic potential of the mining property or project.[678] To reflect this change, we have revised the proposed definition of initial assessment to provide that the initial assessment must include appropriate assessments of reasonably assumed technical and economic factors, together with any other relevant operational factors, that are necessary to demonstrate at the time

[661] *See, e.g.,* letters from SRK 1, Eggleston and Newmont.

[662] *See* letter from BHP.

[663] *See id.*

[664] *See* letter from Vale; *see also* letter from MMSA (requesting generally that the Commission allow for exemptions from the required disclosure ''to protect trade secrets, confidential information, product pricing, and marketing information that is vital for a company to maintain its competitive advantage or that could represent violations in anti-trust or other legislation in the country of operation'').

[665] *See* letter from Vale.

[666] *See* letter from Amec.

[667] *See id.*

[668] *See* letter from Eggleston; *see also* letter from Energy Fuels (opposing the proposed initial assessment requirement because it attempts to treat a mineral resource as a ''mineral reserve currently in the making,'' which would send the wrong message to investors); and SAMCODES 2 (stating that ''[i]t is good practice to undertake a high-level ''initial assessment'' to support the claim of reasonable prospects for economic extraction, but it is not necessary to have to disclose the process and modifying/operational factors that were applied.).

[669] *See* letters from Columbia, CSP[2], and Montana Trout.

[670] *See* letters from CSP[2] and Montana Trout.

[671] *See* letter from Columbia.

[672] *See, e.g.,* letters from Coeur, Midas, SME 1, and Willis.

[673] *See* letters from Coeur, SME 1, and Willis.

[674] *See, e.g.,* letters from Coeur and SME 1.

[675] 17 CFR 229.1302(d)(1) [Item 1302(d)(1) of Regulation S–K].

[676] *See* the definition of ''initial assessment'' in 17 CFR 229.1300.

[677] *See, e.g.,* letter from Amec.

[678] *See* 17 CFR 229.1302(d)(1)(i)(B) [Item 1302(d)(1)(i)(B) of Regulation S–K].

of reporting that there are reasonable prospects for economic extraction.[679]

This change is intended to address the concern of some commenters [680] that the proposed initial assessment requirement would exceed what is required under the CRIRSCO standards because full consideration of the modifying factors is only required at the mineral reserve determination stage. The adopted initial assessment requirement will more closely align the Commission's mining property disclosure requirements with the CRIRSCO standards.[681]

At the same time, the adopted requirement will underscore that, at the resource determination stage, the qualified person must assess both the geologic characteristics of the deposit as well as the relevant technical and economic factors likely to influence the prospect of economic extraction in order to conclude that the parts of the mineral deposit he or she is determining to be mineral resources have reasonable prospects of economic extraction. While the relevant technical and economic factors to be considered at the resource determination stage are likely to be similar to the modifying factors applied at the reserve determination stage, because the final rules only require a qualitative assessment of the technical and economic factors at the resource determination stage, that assessment will be less thorough and less certain than the assessment of modifying factors required at the reserve determination stage. Accordingly, the final rules provide, as proposed, that an initial assessment cannot be used as the basis for disclosure of mineral reserves.[682]

Although a commenter recommended that the format of the initial assessment conform to JORC Table 1's Checklist of Assessment and Reporting Criteria on an ''if not why not basis,'' [683] we are adopting, substantially as proposed, a format for the initial assessment that more closely resembles the technical report format of Canada's NI 43–101F1. While there is substantial overlap in the items required to be considered and discussed under JORC Table 1 and Canada's NI 43–101F1, we believe that the presentation of disclosure requirements in the Canadian technical report format is clearer and more comprehensive and, as such, will help elicit better disclosure.[684]

a. Cut-Off Grade and Price Estimation

Similar to the proposed rules, the final rules require that a qualified person include in the initial assessment a cut-off grade [685] estimation based on assumed unit costs for surface or underground operations and estimated mineral prices.[686] We continue to believe that a discussion of cut-off grade is an appropriate requirement for a technical study that supports mineral resource estimation because, by definition, a mineral resource estimate is not just an inventory of all mineralization. It is an estimate of that part of the deposit that has reasonable prospects of economic extraction.[687] We believe the cut-off grade is the best indicator, at this stage, of such prospects because it requires the qualified person to estimate and exclude that portion of the deposit that has no reasonable prospects of economic extraction at the time of the analysis.

In connection with the cut-off grade estimation requirement, the qualified person must make and disclose an assumption about whether the deposit will be mined with underground or surface mining methods.[688] Given the wide disparity between surface and underground mining costs, we are concerned that any unit costs estimate that is not specific to one of these two broad categories of mining methods may not adequately establish the reasonable prospects of economic extraction.

In a change from the proposed rules, in response to comments received, we are not requiring that the qualified person use a commodity price that is no higher than the average spot price during the 24-month period prior to the end of the last fiscal year, unless prices are defined by contractual arrangements. Consistent with the suggestion of numerous commenters, the final rules instead provide that, when estimating mineral prices, the qualified person must use a price for each commodity that provides a reasonable basis for establishing the prospects of economic extraction for mineral resources.[689] In addition, the qualified person must disclose the price used and explain, with particularity, his or her reasons for using the selected price, including the material assumptions underlying the selection. This explanation must include disclosure of the time frame used to estimate the commodity price and unit costs for cut-off grade estimation and the reasons justifying the selection of that time frame.[690] The selected price and all material assumptions underlying it must be current as of the end of the registrant's most recently completed fiscal year.[691] Similar to the proposed rule, the qualified person may use a price set by contractual arrangement, provided that such price is reasonable, and the qualified person discloses that he or she is using a contractual price when disclosing the price used.[692]

We believe that the adopted estimated pricing requirement will more closely align the Commission's disclosure rules to the ''any reasonable and justifiable price'' standard under the CRIRSCO-based codes and thereby address several concerns raised by commenters.[693] First, under the final rules, a qualified person is able to use a price that is either a historical price or one based on forward-looking pricing forecasts. Because, according to commenters, most mining companies currently rely on consensus prices based on forward-looking pricing forecasts,[694] the adopted estimated

[679] *See* 17 CFR 229.1300.

[680] *See, e.g.,* letters from Amec, Eggleston, and Northern Dynasty.

[681] *See, e.g.,* letter from Amec; *see also* CRIRSCO International Reporting Template, *supra* note 175, at cl. 21 (''The term 'reasonable prospects for eventual economic extraction' implies a judgement (albeit preliminary) by the Competent Person in respect of the technical and economic factors likely to influence the prospect of economic extraction, including the approximate mining parameters.'').

[682] *See* the definition of ''initial assessment'' in 17 CFR 229.1300.

[683] *See* letters from BHP, JORC, and Rio Tinto.

[684] *See infra* Section II.G.3. for a detailed discussion of the disclosure requirements for the technical report summary regarding mineral resources (in addition to those regarding mineral reserves and exploration results).

[685] The final rules define cut-off grade, as proposed, to mean the grade (*i.e.,* the concentration of metal or mineral in rock) which determines the destination of the material during mining. For purposes of establishing ''prospects of economic extraction,'' the cut-off grade is the grade that distinguishes material deemed to have no economic value (it will not be mined in underground mining or if mined in surface mining, its destination will be the waste dump) from material deemed to have economic value (its ultimate destination during mining will be a processing facility). Other terms used in similar fashion as cut-off grade include net smelter return, pay limit, and break-even stripping ratio. 17 CFR 229.1300.

[686] *See* 17 CFR 229.1302(d)(2) [Item 1302(d)(2) of Regulation S–K].

[687] *See, e.g.,* CIM Definition Standards at 4 (''A Mineral Resource is an inventory of mineralization that under realistically assumed and justifiable technical and economic conditions might become economically extractable.''). *See also* JORC Code, *supra* note 175, at pt. 20 (''Portions of a deposit that do not have reasonable prospects for eventual economic extraction must not be included in a Mineral Resource''); and SME Guide, *supra* note 177, at pt. 35 (''. . .a Mineral Resource is not an inventory of all mineralization drilled or sampled, regardless of cut-off grade, likely mining dimensions, location, or continuity; rather it is a realistic estimate of mineralization which, under assumed and justifiable technical and economic conditions, might become economically extractable.'').

[688] *See* Item 1302(d)(2) of Regulation S–K.

[689] *See id.*

[690] *See id.*

[691] *See id.*

[692] *See id.*

[693] We are also adopting this estimated pricing standard for the determination and disclosure of mineral reserves. *See infra* Section II.F.2.

[694] *See, e.g.,* letter from CIM.

pricing requirement will allow registrants to use the same prices for disclosing mineral resources in Commission filings as they do for their own internal management purposes and when reporting in CRIRSCO-based jurisdictions. This should help limit the compliance costs of the final rules.

Second, the revised estimated pricing requirement permits a registrant to use a different price for mineral resource determination than it uses for reserve determination, and to vary the estimated price for different commodities, as long as those prices are reasonable and justifiable. Consequently, the determination and disclosure of a registrant's mineral resources should more accurately reflect the information guiding a registrant's business decisions because the qualified person has more flexibility in selecting the different prices for mineral resource and reserve estimation (as opposed to being limited to prices less than the 24-month trailing average).[695]

Third, because the adopted estimated pricing requirement conforms to the CRIRSCO standards and global industry practice, it will help to promote uniformity and comparability regarding the disclosure of mineral resource and reserve estimates among mining registrants, which should benefit investors by enhancing their analysis and understanding of registrants' mining operations.[696]

We are not adopting a provision, as suggested by a few commenters,[697] that would exempt the disclosure of the price, and related material assumptions, underlying mineral resource (or mineral reserve) estimates. Because of the important role that pricing considerations play in determining estimates of mineral resources (and mineral reserves), we believe that such an exemption could lead to the omission of information that is material to an investor's understanding of those estimates.

b. Qualitative Assessment of Factors and Permitted Assumptions

We are adopting a provision that specifies the relevant technical and economic factors likely to influence the reasonable prospect of economic extraction that, at a minimum, the qualified person must qualitatively assess.[698] While the factors are identical to those in the proposed instruction, we have conformed that instruction to reflect the change in the definition of, and required disclosure concerning, the initial assessment. We believe a qualitative evaluation of these listed factors, at a minimum, is necessary to determine the economic potential of a mining property. An assessment of the geological characteristics of the mined material would not be complete if it did not include an evaluation and discussion of infrastructure, mine design, processing, and environmental issues that could pose obstacles to the material's extraction.

We are adopting another provision that refers the qualified person to Table 1 to paragraph (d) of Item 1302 for the assumptions permitted to be made when preparing the initial assessment as well as other technical studies.[699] This table sets forth the minimum requirements for various factors that the qualified person must evaluate when preparing an initial assessment, pre-feasibility study, or feasibility study. It is substantially similar to the proposed Table 1 but has been conformed to reflect the change in the definition of, and required disclosure concerning, the initial assessment. We are presenting the minimum factors to be considered for each study in one table to facilitate a comparison of the evaluative factor requirement across the three key technical studies proposed to be used for mineral resource and reserve disclosure. As this presentation demonstrates, the evaluative process becomes more exacting as mining property assessment progresses from mineral resource estimation to mineral reserve estimation.

The assumptions permitted to be made in the initial assessment include those pertaining to infrastructure location and the required plant area, type of power supply, site access roads and camp or town site, production rates, processing method and plant throughput, post-mining land uses, and plans for tailings disposal, reclamation, and mitigation. Allowing assumptions for a variety of factors at the resource determination stage is generally consistent with guidelines under the CRIRSCO-based codes.[700] Moreover, the assumption phase is temporary as the qualified person must substitute most assumptions with empirical evidence and facts as part of the pre-feasibility or feasibility study that is required for determining mineral reserves.

We are not expanding the disclosure of environmental factors in connection with the initial assessment, as suggested by some commenters.[701] As explained in greater detail below, we believe that the specified environmental factors required to be included in the technical report summary will likely cover the concerns raised by those commenters to the extent that they are material to investors.[702]

c. Optional Economic (Cash Flow) Analysis

Similar to a proposed instruction, we are adopting a provision stating that a qualified person may include cash flow analysis in an initial assessment to demonstrate economic potential. If the qualified person includes cash flow analysis in the initial assessment, then the adopted provision imposes the same accuracy and contingency levels required for operating and capital cost estimates as under the proposed instruction.[703] The qualified person must state the accuracy and contingency levels in the initial assessment. We believe that these accuracy and contingency requirements [704] for operating and capital costs are appropriate because they are generally consistent with those accepted for scoping studies.[705]

In a change from the proposed rules, the final rules will permit a qualified person to include inferred mineral resources in a cash flow analysis prepared as part of the initial assessment as long as the qualified person:

- States with equal prominence to the disclosure of mineral resource estimates that the assessment is preliminary in nature, it includes inferred mineral resources that are considered too speculative geologically to have modifying factors applied to them that would enable them to be categorized as mineral reserves, and there is no certainty

[695] *See supra* note 659 and accompanying text.

[696] *See, e.g.,* letter from CIM.

[697] *See supra* notes 662–664 and accompanying text.

[698] *See* 17 CFR 229.1302(d)(3) [Item 1302(d)(3) of Regulation S–K]. These factors include: site infrastructure; mine design and planning; processing plant; environmental compliance and permitting; and any other reasonably assumed technical and economic factors, including factors related to local individuals and groups, which are necessary to demonstrate reasonable prospects for economic extraction. *See also* Table 1 to paragraph (d) of Item 1302 of Regulation S–K.

[699] *See* 17 CFR 229.1302(d)(1)(iv) [Item 1302(d)(1)(iv) of Regulation S–K].

[700] *See, e.g.,* SME Guide, *supra* note177, Table 1, at 44–67.

[701] *See supra* notes 669–671 and accompanying text.

[702] *See infra* Section II.G.3.

[703] 17 CFR 229.1302(d)(4)(i) [Item 1302(d)(4)(i) of Regulation S–K], which requires operating and capital cost estimates to have an accuracy level of at least approximately ±50 percent and a contingency level of no greater than 25 percent.

[704] We have included both accuracy and contingency requirements for operating and capital cost estimates in Table 1 to paragraph (d) of Item 1302 of Regulation S–K.

[705] *See, e.g.,* SME Guide, *supra* note177, Table 2, at 68–69 (providing accuracy and contingency ranges for capital and operating cost estimates in scoping, pre-feasibility, and feasibility studies).

that this economic assessment will be realized;

- Discloses the percentage of the mineral resources used in the cash flow analysis that are classified as inferred resources; and
- Discloses, with equal prominence, the results of the economic analysis excluding inferred resources in addition to the results that include inferred resources.[706]

These conditions are generally in line with the approach of Canada's NI 43–101, which permits the use of inferred resources in a preliminary economic assessment as long as cautionary language about such use is provided. We are adopting this change to address commenters' concern that, because inferred resources may be included in economic analyses in preliminary economic assessments under Canada's NI 43–101 and in scoping studies under other CRIRSCO-based codes, U.S. registrants would be at a competitive disadvantage were we to adopt subpart 1300, as proposed.[707] We believe that the above conditions will appropriately caution investors concerning the level of risk underlying such mineral resource estimates and provide them with additional information to help evaluate whether to invest on the basis of estimates that include inferred resources.

As previously noted, an initial assessment is not required to have an economic analysis, and when it does not include such an analysis, its scope is narrower than that of a preliminary economic assessment under Canada's NI 43–101 or a scoping study under other CRIRSCO-based codes.[708] But if a qualified person opts to provide an economic analysis, which includes inferred resources, in an initial assessment under the final rules, a U.S. registrant may use such an initial assessment for substantially similar purposes as a Canadian registrant uses a preliminary economic assessment or another non-U.S. registrant uses a scoping study in Australia, South Africa, or other foreign jurisdiction that has adopted a CRIRSCO-based code.

As previously discussed, we do not believe that other quantitative measures of economic potential that omit cash flows are appropriate, and we are concerned that they potentially could be misleading.[709] Capital expenditures, operating costs, and revenues vary over the life of a mine due to variations in mining conditions. Hence, economic analyses that do not account for these variations may not tell a complete story. For example, a gross profit evaluation that does not account for the timing of capital outlays and revenues could indicate that a project is viable, yet in actuality timely loan repayments may not be possible. Consequently, to the extent a qualified person wants to include an economic analysis in an initial assessment, he or she must use a cash flow analysis.

5. USGS Circular 831 and 891

i. Proposed Interpretation

In the Proposing Release, we explained why we do not believe that it would be appropriate to permit the continued classification of mineral resources based on United States Geological Survey (''USGS'') Circulars 831 and 891 following adoption of subpart 1300 of Regulation S–K.[710] Consistent with the mission of the USGS, these circulars were mostly suitable for national and regional level reporting of mineral resources and reserves for government planning purposes,[711] and were not intended to be the basis for public company disclosure to investors. While Circular 831 initially established a classification system for all mineral commodities, its classification scheme has been largely phased out for metal mining. It is still used in coal and some industrial minerals mining, while Circular 891 was specifically designed, and is still used, for resource or reserve classification of coal.[712]

In the past, the staff has not objected to mineral reserve disclosure that used these circulars to classify mineral resources as inferred, indicated, or measured resources.[713] However, we indicated in the Proposing Release that we do not believe the use of USGS Circulars 831 and 891 for resource classification in Commission filings would be consistent with the proposed rules. As we explained, the primary criterion for the required mineral resource classification under the CRIRSCO standards, upon which the Commission's proposed rules are based, is the geologic confidence in the estimates based on the geologic evidence (limited, adequate, or conclusive).[714] In addition, under the CRIRSCO standards and the Commission's proposed rules, all disclosed mineral resources must have reasonable prospects of economic extraction, which requires the qualified person to consider a variety of technical and economic factors, in addition to geologic evidence, when evaluating the economic potential of a deposit.[715]

In contrast, the primary criterion in the Circulars' classification system is the extent to which tonnages fall within particular distances from a drill hole or outcrop.[716] Although drill hole spacing may be a factor that informs the qualified person's assessment of geologic confidence, for the purposes of public company disclosure to investors, we indicated that we do not believe it should be the sole factor.[717] We therefore solicited comment on the appropriateness of using Circulars 831 and 891 to classify mineral resources.[718]

[706] 17 CFR 229.1302(d)(4)(ii) [Item 1302(d)(4)(ii) of Regulation S–K].

[707] *See supra* note 674 and accompanying text.

[708] *See supra* notes 619–621 and accompanying text.

[709] *See* Proposing Release, *supra* note 5, at Section II.E.3.

[710] *See* Proposing Release, *supra* note 5, at Section II.E.4, which refers to USGS Circular 891 (stating that ''[i]n 1980, the [USGS and Bureau of Mines] published Circular 831, 'Principles of the Mineral Resource Classification System of the U.S. Bureau of Mines and U.S. Geological Survey' (U.S. Geological Survey, 1980). The circular, which outlines a classification system for all mineral commodities, filled the classification needs of the Bureau of Mines, which was no longer responsible for coal resource classification, and was the basis for this revision of the coal resource classification system by the Geological Survey. The revision, embodied in this report, has two main objectives: (1) to provide detailed information lacking in Bulletin 1450–B; and (2) to provide standard definitions, criteria, guidelines, and methods required for uniform application of the principles outlined in Circular 831''). Gordon H. Wood, Jr et al., U.S. Geological Survey, U.S. Dep't of the Interior, *Coal Resource Reclassification System of the U.S. Geological Survey, USGS Circular 891* (1983), *http://pubs.usgs.gov/circ/1983/0891/report.pdf.*

[711] *See* Proposing Release, Section II.E.4, which refers to USGS Circular 831 (stating that ''[t]he system can be used to report the status of mineral and energy-fuel resources for the Nation or for specific areas''). U.S. Geological Survey & U.S. Bureau of Mines, U.S. Dep't of the Interior, *Principles of a Resource/Reserve Classification for Minerals: A Revision of the Classification System Published as USGS Survey Bulletin 1450–A, USGS Circular 831* (1980), *http://pubs.usgs.gov/circ/1980/0831/report.pdf.*

[712] *See id.*

[713] Guide 7 prohibits mineral resource disclosure and as such does not provide any guidance, or place any restrictions, on how to classify mineral resources.

[714] *See supra* Section II.E.3.

[715] *See supra* Sections II.E.2 and II.E.4.

[716] The Circulars prescribe strict guidelines to classify mineral resources based on the distance from a drill hole (''drill hole spacing'') that do not vary depending on the complexity and specific facts of the deposit. For example, these Circulars define measured (0- to ¼-mile), indicated (¼ to ¾-mile) and inferred (¾- to 3-miles) mineral resources based on drill hole (or outcrop) radii.

[717] *See, e.g.,* Ricardo A. Olea and James A. Luppens, *Modeling Uncertainty in Coal Resource Assessments, With an Application to a Central Area of the Gillette Coal Field, USGS Scientific Investigations Report 2014–5196* 1 (2014) (concluding that an approach that involved establishing confidence limits ''should be considered realistic improvement[ ] over distance methods used for quantitative classification of uncertainty in coal resource, such as U.S. Geological Survey Circular 891'').

[718] *See* Proposing Release, *supra* note 5, at Section II.E.4.

ii. Comments on the Proposed Interpretation

Numerous parties supported the Commission's position that use of USGS Circulars 831 and 891 to classify mineral resources would not be appropriate under the proposed rules.[719] Some commenters stated that the Circulars are inconsistent with the CRIRSCO standards and were designed for a different purpose (*i.e.,* government identification of mineral occurrences that may be of economic interest 25–50 years in the future.)[720] For that reason, according to those commenters, allowing continued use of the Circulars to classify resources would lead to investor confusion and should never be permitted,[721] even for coal.[722]

One commenter opposed the use of Circulars 831 and 891 to classify mineral resources because they are not based on modern geostatistical methods that are now routinely applied and, thus, are outdated.[723] Another commenter agreed that Circulars 831 and 891 are ''completely out of date and do not address many modern aspects of exploration, sampling, chain of custody, quality assessment/quality controls ('QA/QC'), resource estimation methods, validation and reconciliation.''[724] One other commenter stated that the use of Circulars 831 and 891 to classify mineral resources would not be appropriate because of the poor alignment with CRIRSCO, the lack of economic criteria, and the potential to cause inconsistent disclosure.[725]

In contrast, a few commenters stated that the Commission should allow the use of the Circulars for coal deposits because they are still a valid tool in classifying coal deposits.[726] As one of those commenters explained, because coal is a tabular deposit that is often relatively consistent over large areas, it lends itself to the type of evaluation provided by the Circulars.[727]

iii. Final Interpretation

Having considered the comments received, we are affirming our position that the use of USGS Circulars 831 and 891 for resource classification in Commission filings should not be permitted under the final rules. As we explained in the Proposing Release, those Circulars provide a method of classification that primarily relies on a single criterion—the extent to which tonnages fall within particular distances from a drill hole or outcrop.[728] In contrast, the final rules, which provide a mineral resource classification scheme that is substantially similar to the CRIRSCO classification system, require a qualified person to assess the geologic confidence in the resource estimates based on the geologic evidence and, in addition, to consider a variety of relevant technical and economic factors likely to influence the prospect of economic extraction.[729]

Consequently, we agree with commenters that the method used to classify mineral resources in Circulars 831 and 891 is inconsistent with the CRIRSCO standards and should not be permitted under new subpart 1300, even when classifying coal resources.[730] Because, as commenters indicated, the USGS Circulars do not address many modern aspects of exploration, sampling, resource estimation methods, validation, and reconciliation,[731] which are included under the CRIRSCO standards, we do not believe that the Circulars are the most appropriate method for purposes of public company disclosure to investors. Rather, we believe that the continued reliance on those Circulars to classify mineral resources would lead to inconsistencies with mineral resource estimates determined under the CRIRSCO standards and investor confusion. Accordingly, neither a registrant nor its qualified person may use Circulars 831 and 891 to classify mineral resources when providing the disclosure required under subpart 1300.

*F. Treatment of Mineral Reserves*

1. The Framework for Determining Mineral Reserves

i. Rule Proposal

Guide 7 defines a mineral reserve as ''that part of a mineral deposit which could be economically and legally extracted or produced at the time of the reserve determination.''[732] Guide 7 does not, however, delineate the factors that must be considered when making a reserve determination. In contrast, other jurisdictions have adopted the CRIRSCO framework whereby the determination of mineral reserves occurs by applying and evaluating specifically defined ''modifying factors'' to indicated and measured mineral resources.[733]

We proposed to revise the definition of mineral reserves to align it generally with the definition under the CRIRSCO-based codes by adopting the framework of applying modifying factors to indicated or measured mineral resources in order to convert them to mineral reserves.[734] As part of this framework, we proposed definitions of ''mineral reserves,'' ''probable mineral reserves,'' ''proven mineral reserves,'' and ''modifying factors.''

We proposed to define ''mineral reserve'' as an estimate of tonnage and grade or quality of indicated or measured mineral resources that, in the opinion of the qualified person, can be the basis of an economically viable project. More specifically, as proposed, a mineral reserve is the economically mineable part of a measured or indicated mineral resource, net of allowances for diluting materials and for losses that may occur when the material is mined or extracted.[735]

Under the proposed rules, the determination that part of a measured or indicated mineral resource is economically mineable would have to be based on a preliminary feasibility (pre-feasibility) or feasibility study conducted by a qualified person applying the modifying factors to indicated or measured mineral resources. Such study would have to demonstrate that, at the time of reporting, extraction of the mineral reserve is economically viable under reasonable investment and market assumptions. Moreover, the study would have to establish a life of mine plan that is technically achievable and economically viable, which would be the basis of determining the mineral reserve.[736]

As used in the proposed definition of mineral reserve, ''economically viable'' means that the qualified person has determined, using a discounted cash flow analysis, or has otherwise analytically determined, that extraction of the mineral reserve is economically viable under reasonable investment and market assumptions.[737] As used in this proposed definition, ''investment and market assumptions'' includes all

[719] *See, e.g.,* letters from AIPG, Amec, AngloGold, BHP, CBRR, Eggleston, Gold Resource, Midas, Northern Dynasty, Rio Tinto, SME 1, and SRK 1.

[720] *See, e.g.,* letters from AIPG and SME 1.

[721] *See, e.g.* letters from AIPG, Eggleston, and SME 1.

[722] *See* letters from AIPG and SME 1.

[723] *See* letter from BHP.

[724] Letter from SRK 1.

[725] *See* letter from Rio Tinto.

[726] *See* letters from Alliance, Cloud Peak, and NMA 1.

[727] *See* letter from Alliance.

[728] *See* Proposing Release, *supra* note 5, at Section II.E.4.

[729] *See supra* Sections II.E.2 through II.E.4.

[730] *See, e.g.,* letters from AIPG and SME 1.

[731] *See, e.g.,* letters from BHP and SRK 1.

[732] Paragraph (a)(1) of Guide 7.

[733] *See, e.g.,* CIM Definition Standards, *supra* note 351, at 5–6; JORC Code, *supra* note 175, at pt. 29; SME Guide, *supra* note 177, at pt. 41; SAMREC Code, *supra* note 267, at pt. 35; and PERC Reporting Standard, *supra* note 302, at pt. 8.1.

[734] *See* Proposing Release, *supra* note 5, at Section II.F.1.

[735] *See id.*

[736] *See id.*

[737] *See id.*

assumptions made about the prices, exchange rates, sales volumes and costs that are necessary and are used to determine the economic viability of the reserves.[738]

As proposed, the price used to determine the economic viability of the mineral reserves could not be higher than the average spot price during the 24-month period prior to the end of the fiscal year covered by the study, determined as an unweighted arithmetic average of the daily closing price for each trading day within such period, except in cases where sales prices are determined by contractual agreements. In such a case, the qualified person would be able to use the price set by the contractual arrangement, provided that such price is reasonable and the qualified person discloses that he or she is using a contractual price and discloses the contractual price used.[739]

The proposed rules used the CRIRSCO classification scheme and framework for mineral reserve determination, which subdivides mineral reserves, in order of increasing confidence in the results obtained from the application of the modifying factors to the indicated and measured mineral resources, into probable mineral reserves and proven mineral reserves.[740] Similar to the CRIRSCO classification scheme,[741] we proposed to define ''probable mineral reserves'' as the economically mineable part of an indicated and, in some cases, a measured mineral resource.[742]

As we explained in the Proposing Release, for a probable mineral reserve, the qualified person's confidence in the results obtained from the application of the modifying factors and in the estimates of tonnage and grade or quality is lower than what is sufficient for a classification as a proven mineral reserve, but is still sufficient to demonstrate that, at the time of reporting, extraction of the mineral reserve is economically viable under reasonable investment and market assumptions.[743] This lower level of confidence can be due either to higher geologic uncertainty when the qualified person converts an indicated mineral resource to a probable mineral reserve or higher risk in the results of the application of modifying factors at the time when the qualified person converts a measured mineral resource to a probable mineral reserve. As further required by the proposed rules, a qualified person must classify a measured mineral resource as a probable mineral reserve when his or her confidence in the results obtained from the application of the modifying factors to the measured mineral resource is lower than what is sufficient for a proven mineral reserve.[744]

Similar to the CRIRSCO classification scheme,[745] we proposed to define ''proven mineral reserves'' as the economically mineable part of a measured mineral resource.[746] As the proposed rules explained, for a proven mineral reserve, the qualified person must have a high degree of confidence in the results obtained from the application of the modifying factors and in the estimates of tonnage and grade or quality.[747] In addition, as proposed, a proven mineral reserve can only result from conversion of a measured mineral resource.[748]

We proposed to define ''modifying factors'' as the factors that a qualified person must apply to mineralization or geothermal energy and then evaluate in order to establish the economic prospects of mineral resources, or the economic viability of mineral reserves.[749] Similar to the CRIRSCO framework, a qualified person would have to apply and evaluate modifying factors to convert measured and indicated mineral resources to proven and probable mineral reserves.[750] As proposed, these factors included, but were not restricted to, mining, energy recovery and conversion, processing, metallurgical, economic, marketing, legal, environmental, infrastructure, social, and governmental factors. We also proposed that the number, type, and specific characteristics of the applied modifying factors are a function of and depend upon the mineral, mine, property, or project.[751]

We proposed several instructions about the conversion of mineral resources into mineral reserves. For example, one instruction explained that, similar to the CRIRSCO framework,[752] if the uncertainties in the results obtained from the application of the modifying factors, which prevented a measured mineral resource from being converted to a proven mineral reserve, no longer exist, then the qualified person may convert the measured mineral resource to a proven mineral reserve.[753]

Another instruction stated that a qualified person cannot convert an indicated mineral resource to a proven mineral reserve unless there is new evidence that justifies conversion of the indicated mineral resource to a measured mineral resource.[754] A third instruction explained that a qualified person cannot convert an inferred mineral resource to a mineral reserve without first obtaining new evidence that justifies converting it to an indicated or measured mineral resource.[755] These proposed instructions are consistent with the CRIRSCO framework for conversion of mineral resources into mineral reserves.[756]

We proposed a definition of mineral reserve as an estimate of tonnage and grade or quality that is net of allowances for diluting materials and mining losses. This is in contrast to the definition of mineral reserve under the CRIRSCO standards, which includes diluting materials in reserve estimates.[757] We proposed a net estimate for reserves because the proposed rules would require disclosure of mineral reserves at three points of reference: In-situ,[758] plant or mill feed, and saleable product.[759] As we explained, estimates that are exclusive of diluting materials and mining losses would provide a

[738] *See id.*

[739] *See id.*

[740] *See id.*

[741] *See, e.g.,* JORC Code, *supra* note 175, at pt. 30; CIM Definition Standards, *supra* note 351, at 6; SAMREC Code, *supra* note 267, at pt. 36; and PERC Reporting Standard, *supra* note 302, at pt. 8.11.

[742] *See* Proposing Release, *supra* note 5, at Section II.F.1.

[743] *See id.*

[744] *See id.*

[745] *See, e.g.,* JORC Code, *supra* note 175, at pt. 31; CIM Definition Standards, *supra* note 351, at 6; SAMREC Code, *supra* note 267, at pt. 37; and PERC Reporting Standard, *supra* note 302, at pt. 8.13.

[746] *See* Proposing Release, Section II.F.1.

[747] *See id.*

[748] *See id.*

[749] *See id.*

[750] *See, e.g.,* JORC Code, *supra* note 175, at pt. 12; CRIRSCO International Reporting Template, *supra* note 20, at cl. 12; SAMREC Code, *supra* note 267, at pt. 12; and PERC Reporting Standard, *supra* note 302, at pt. 4.3.

[751] *See* Proposing Release, *supra* note 5, at Section II.F.1.

[752] *See, e.g.,* JORC Code, *supra* note 175, at pt. 32; CRIRSCO International Reporting Template, *supra* note 20, at cl. 33; SAMREC Code, *supra* note 267, at pt. 38, and PERC Reporting Standard, *supra* note 302, at pt. 8.15.

[753] *See* Proposing Release, *supra* note 5, at Section II.F.1.

[754] *See id.*

[755] *See id.*

[756] *See, e.g.,* JORC Code, supra note 175, at pt. 32; CRIRSCO International Reporting Template, *supra* note 20, at cl. 33; SAMREC Code, *supra* note 267, at pt. 38; and PERC Reporting Standard, *supra* note 302, at pt. 8.15.

[757] In this regard, we stated our belief that, because excluding diluting materials is a minor computational step in reserve estimation, the proposed net estimate for reserves measure would not impose a significant additional compliance burden for registrants. *See* Proposing Release, *supra* note 5, at Sections II.F.1.

[758] In-situ means ''in its original place.'' It is used in this context to refer to mineral reserves estimated as in-place tons.

[759] *See* Proposing Release, *supra* note 5, at Sections II.F.1–2.

clearer picture of the efficiency of the processing method.[760]

Under the proposal, when discussing the analysis in the technical report summary, the qualified person would be required to disclose the assumptions made about prices, exchange rates, discount rate, sales volumes and costs necessary to determine the economic viability of the reserves.[761]

ii. Comments on the Rule Proposal

Many commenters generally supported the Commission's proposal to adopt the CRIRSCO framework of applying modifying factors to indicated or measured mineral resources in order to convert them to mineral reserves.[762] One commenter supported the Commission's proposed definition of ''mineral reserve'' as the economically mineable part of a measured or indicated mineral resource, net of allowances for diluting materials and for losses that may occur when the material is mined or extracted.[763] Another commenter stated that the proposed definition of mineral reserve was acceptable, but the definition in the CIM Definition Standards, which does not use a net reserve concept, is substantially better and consistent with international usage.[764] One other commenter preferred the CRIRSCO definition of mineral reserve, which includes dilution and allowances for losses, but stated that, alternatively, the Commission should permit a registrant to disclose its reserves both as inclusive of dilution and losses and as a net estimate.[765]

Many other commenters, however, strongly opposed the net reserve concept and urged the Commission to adopt the CRIRSCO definition of mineral reserve.[766] Those commenters disagreed with the Commission's statement that the calculation of a net estimate would be ''relatively minor.'' [767] Moreover, some commenters stated that, in addition to conflicting with the comparable definition under the CRIRSCO standards, the proposed definition of mineral reserve also is inconsistent with that part of the proposed definition that requires the application of the modifying factors to mineral resources in order to determine mineral reserves, and is therefore unrealistic.[768] Because application of the modifying factors, which include operational and processing factors, necessarily involves dilution and allowances for losses, it is not possible to exclude them and satisfy the modifying factors prong of the mineral reserve definition.[769]

Several commenters were generally supportive of the proposed definitions of probable and proven mineral reserve because they are consistent with the CRIRSCO definitions.[770] Several commenters also generally supported the proposed definition of modifying factors.[771] One commenter stated that the proposed definition is consistent with the CRIRSCO standards.[772] Other commenters recommended adding other specified factors to the definition, such as decommissioning costs, reclamation costs, and assumptions for mining losses, among other things.[773]

Several commenters supported the Commission's proposal to include a life of mine plan disclosure requirement in the technical studies required to support a determination of mineral reserves.[774] One commenter described the life of mine requirement as ''fundamental'' to determining whether a mine will be economically viable at the time of reporting.[775] A second commenter stated that the proposed life of mine plan requirement is consistent with requirements in global jurisdictions.[776]

One commenter, however, opposed a life of mine plan disclosure requirement because such a requirement would reveal commercially sensitive information and would be onerous on registrants with a large number of reserves.[777] Another commenter objected to the proposed life of mine plan disclosure requirement on the grounds that, because coal mine plans often include areas not yet controlled by a company, disclosing mine life plans would allow competitors to interfere with the company's operations by acquiring strategic mineral rights already targeted by the company.[778] That commenter also stated that, because life of mine plans are always subject to change, their disclosure could lead potential investors to assume incorrectly that mining is possible under all conditions.[779]

Several commenters generally supported the proposed requirement that a qualified person conduct a discounted cash flow analysis to demonstrate economic viability.[780] One commenter stated that discounted cash flows are the most widespread and industry accepted approach of evaluation and should be required.[781] Another commenter stated that we should require a non-discounted cash flow analysis in addition to the industry standard discounted cash flow analysis.[782]

In contrast, one commenter opposed the proposed discounted cash flow requirement because it ''is overly prescriptive compared to the CRIRSCO requirement to base reserves on studies that have determined a mine plan that is technically and economically achievable.'' [783] Another commenter stated that annual cash flow forecasts should be omitted for operating mines ''as publication may affect a competitive advantage in labor or customer negotiations.'' [784]

Similar to comments received on the proposed pricing requirement for mineral resource estimates, many commenters objected to the proposed requirement that a qualified person use a 24-month trailing average price for the discounted cash flow analysis required for the determination of mineral reserves. Commenters maintained that the proposed historical pricing requirement would conflict with the industry practice of relying on forward-looking pricing forecasts and the

[760] The efficiency of the processing method demonstrates how well the registrant converts the resource into saleable product. *See* Proposing Release, *supra* note 5, at Section II.F.1.

[761] *See id.*

[762] *See, e.g.,* letters from AngloGold, BHP, CBRR, Eggleston, Gold Resource, JORC, Midas, Northern Dynasty, Rio Tinto, SAMCODES 1 and 2, and Vale.

[763] *See* letter from Midas.

[764] *See* letter from Eggleston.

[765] *See* letter from Energy Fuels.

[766] *See* letters from Amec, AngloGold, BHP, CBRR, Coeur, FCX, Gold Resource, Golder, MMSA, NMA 1, Northern Dynasty, Randgold, Rio Tinto, Royal Gold, SAMCODES 1, SME 1, SRK 1, Vale, and Willis.

[767] *See, e.g.,* letters from BHP, FCX, Golder, and MMSA.

[768] *See, e.g.,* letters from BHP, CBRR, Randgold, and Rio Tinto.

[769] Some of the commenters made similar arguments when objecting to the proposed requirement to disclose mineral reserves as in-situ in addition to plant/mill feed and saleable product. *See, e.g.,* letters from Amec, Rio Tinto, SME 1, and Vale. *See infra* Section II.G. for further discussion.

[770] *See* letters from AngloGold, CBRR, Eggleston, Midas, Northern Dynasty, and SRK 1.

[771] *See, e.g.,* letters from AngloGold, CBRR, Golder, Midas, and SRK 1.

[772] *See* letter from CBRR.

[773] See letters from SRK 1 and Golder. As previously discussed, some commenters objected to the application of the modifying factors at the mineral resource determination stage. *See, e.g.,* letters from Amec and Eggleston. Those commenters requested that we remove from the definition of modifying factors their use to establish the economic prospects of mineral resources.

[774] *See* letters from Amec, CBRR, Eggleston, Gold Resource, Golder, Midas, Northern Dynasty, Rio Tinto, SAMCODES 2, and SRK 1.

[775] *See* letter from Eggleston.

[776] *See* letter from CBRR.

[777] *See* letter from BHP.

[778] *See* letter from Alliance.

[779] *See id.*

[780] *See, e.g.,* letters from Amec, AngloGold, Eggleston, Midas, Northern Dynasty, Rio Tinto, and SRK 1.

[781] *See* letter from Midas; *see also* letter from Eggleston.

[782] *See* letter from SRK 1.

[783] Letter from BHP.

[784] Letter from SME 1.

CRIRSCO guidance allowing the use of any reasonable and justifiable price.[785]

iii. Final Rules

We are revising the definition of mineral reserves (currently in Guide 7) by adopting the CRIRSCO framework of applying modifying factors to indicated or measured mineral resources in order to convert them to mineral reserves, as proposed. The adopted framework requires a registrant's disclosure of mineral reserves to be based on a qualified person's detailed evaluation of the modifying factors as applied to indicated or measured mineral resources, which would demonstrate the economic viability of the mining property or project.[786] The adopted framework includes a series of definitions that describe the relationship between the different classes of mineral resources and reserves and underscores the incremental nature of mineral resource and reserve determination.

We are adopting the definition of mineral reserve largely as proposed.[787] In a change from the proposed rules, the adopted definition of mineral reserve provides that a mineral reserve includes diluting materials and allowances for losses that may occur when the material is mined or extracted.[788] We have been persuaded to remove the proposed net reserve concept from the definition of mineral reserve by commenters that maintained that such removal was necessary to make the definition consistent with the comparable CRIRSCO definition [789] and to avoid internal inconsistencies.[790] As commenters noted, the CRIRSCO standards and the final rules [791] require the determination of mineral reserves to be based upon a qualified person's application of the modifying factors to indicated or measured mineral resources. The modifying factors include mining method, which is the source of dilution and mining losses, and mineral processing methods, which determine recovery factors. Because dilution and losses are realistic consequences of applying the modifying factors, we believe it is reasonable to include both diluting materials and allowances for losses in the definition of mineral reserve.[792]

The final rules no longer define modifying factors to include factors used to establish the economic prospects of mineral resources. Instead, the adopted definition provides that modifying factors are the factors that a qualified person must apply to indicated and measured resources and then evaluate in order to establish the economic viability of mineral reserves.[793] This change from the proposal is consistent with the change made to the initial assessment requirement, which no longer requires application of the modifying factors at the resource determination stage.[794] Referencing the modifying factors solely in the context of mineral reserve determination will align the final rules with the CRIRSCO standards and avoid confusing registrants and investors about the level of analysis required at the resource determination stage.

Consistent with the proposed rules, the adopted definition of modifying factors provides that a qualified person must apply and evaluate modifying factors to convert measured and indicated mineral resources to proven and probable mineral reserves. Also largely as proposed, the adopted definition provides examples of the modifying factors, which include, but are not restricted to: Mining; processing; metallurgical; infrastructure; economic; marketing; legal; environmental compliance; plans, negotiations, or agreements with local individuals or groups; and governmental factors.[795] Although some commenters suggested adding other specific factors to the list,[796] we decline to do so because the adopted definition makes clear that the list of factors is not exclusive, and is consistent with the factors specified in the CRIRSCO definition of modifying factors.[797]

The adopted definition of modifying factors further states, as proposed, that the number, type and specific characteristics of the modifying factors applied will necessarily be a function of and depend upon the mineral, mine, property, or project.[798] For example, applying and evaluating processing factors means the qualified person must examine the characteristics of the mineral resource and determine that the material can be processed economically into saleable product using existing technology. Similarly, applying and evaluating legal factors means the qualified person must examine the regulatory regime of the host jurisdiction to establish that the registrant can comply (fully and economically) with all laws and regulations (*e.g.,* mining, safety, environmental, reclamation, and permitting regulations) that are relevant to operating a mineral project using existing technology.

As proposed, the final rules provide that a qualified person must subdivide mineral reserves, in order of increasing confidence in the results obtained from the application of the modifying factors to the indicated and measured mineral resources, into probable mineral reserves and proven mineral reserves.[799] The final rules define ''probable mineral reserve'' to mean the economically mineable part of an indicated and, in some cases, a measured mineral resource.[800] As the final rules explain, for a probable mineral reserve, the qualified person's confidence in the results obtained from the application of the modifying factors and in the estimates of tonnage and grade or quality is lower than what is sufficient for a classification as a proven mineral reserve, but is still sufficient to

[785] *See, e.g.,* letters from Amec, AngloGold, CBRR, CIM, Eggleston, JORC, NMA 1, Northern Dynasty, Randgold, Rio Tinto, SME 1, and Vale.

[786] *See* Item 1302(e) of Regulation S–K [17 CFR 229.1302(e)].

[787] *See* 17 CFR 229.1300, which defines a mineral reserve as an estimate of tonnage and grade or quality of indicated and measured mineral resources that, in the opinion of the qualified person, can be the basis of an economically viable project. The adopted definition further provides that a mineral reserve is the economically mineable part of a measured or indicated mineral resource.

[788] *See id.*

[789] *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 30; JORC Code, supra note 175, at pt. 29; SAMREC Code, *supra* note 267, at pt. 35; and PERC Reporting Standard, *supra* note 302, at pt. 8.1.

[790] *See supra* note 768 and accompanying text.

[791] 17 CFR 229.1302(e)(2) [Item 1302(e)(2) of Regulation S–K] (providing in relevant part that the ''determination of probable or proven mineral reserves must be based on a qualified person's application of the modifying factors to indicated or measured mineral resources, which results in the qualified person's determination that part of the indicated or measured mineral resource is economically mineable'').

[792] In addition, removal of the net reserve concept from the definition of mineral reserve is consistent with our elimination of the requirement to disclose mineral reserves in-situ. *See infra* Section II.G.

[793] *See* the definition of ''modifying factors'' in 17 CFR 229.1300.

[794] *See supra* Section II.E.4.

[795] *See* 17 CFR 229.1300. These factors are similar to the modifying factors under the CRIRSCO standards, which include ''mining, processing, metallurgical, infrastructure, economic, marketing, legal, environmental, social, and governmental factors.'' CRIRSCO International Reporting Template, *supra* note 20, at cl. 12. Rather than refer to ''social'' or ''social-economic'' factors, as in the Proposing Release, the final rules refer more specifically to factors pertaining to local individuals or groups. Examples of such matters include consideration of: Limitations on a mining project that abuts a tribal burial ground; the potential need to relocate local individuals because of the scope of the mining project; and commitments to build a community center or local clinic. We believe this change will clarify the type of factors the qualified person may wish to consider in this area.

[796] *See* letters from Golder and SRK 1.

[797] *See* CRIRSCO International Reporting Template, *supra* note 20, at cl. 12.

[798] *See* 17 CFR 229.1300.

[799] *See* 17 CFR 229.1302(e)(2).

[800] *See* the definition of ''probable mineral reserve'' in 17 CFR 229.1300.

demonstrate that, at the time of reporting, extraction of the mineral reserve is economically viable under reasonable investment and market assumptions. The lower level of confidence is due to higher geologic uncertainty when the qualified person converts an indicated mineral resource to a probable mineral reserve or higher risk in the results of the application of modifying factors at the time when the qualified person converts a measured mineral resource to a probable mineral reserve.[801] The final rules further provide that a qualified person must classify a measured mineral resource as a probable mineral reserve when his or her confidence in the results obtained from the application of the modifying factors to the measured mineral resource is lower than what is sufficient for a proven mineral reserve.[802]

The final rules define ''proven mineral reserve,'' as proposed, to mean the economically mineable part of a measured mineral resource.[803] For a proven mineral reserve, the qualified person must have a high degree of confidence in the results obtained from the application of the modifying factors and in the estimates of tonnage and grade or quality.[804] Moreover, a proven mineral reserve can only result from conversion of a measured mineral resource.[805] The adopted definitions of probable and proven mineral reserves are generally consistent with the comparable definitions under the CRIRSCO-based codes and, as such, were supported by several commenters.[806]

As discussed below,[807] the determination that part of a measured or indicated mineral resource is economically mineable must be based on a preliminary feasibility (pre-feasibility) or feasibility study that discusses the qualified person's application of the modifying factors to indicated or measured mineral resources, and demonstrates that, at the time of reporting, extraction of the mineral reserve is economically viable under reasonable investment and market assumptions.[808] As proposed, the final rules provide that the study must establish a life of mine plan that is technically achievable and economically viable, and which will be the basis of determining the mineral reserve.[809] As commenters noted, establishing a life of mine plan is fundamental to determining the economic viability of a deposit and is consistent with global industry practice.[810] Although some commenters expressed concern that requiring the disclosure of a life of mine plan could result in the disclosure of proprietary, commercially sensitive information,[811] given the importance of the life of mine plan to determining the economic viability of a mining project, we believe that requiring disclosure of the life of mine plan is necessary to help an investor understand the basis of a registrant's mineral reserves estimate.

Consistent with numerous comments received,[812] the final rules provide, as proposed, that when used in reference to a mineral reserve, the term ''economically viable'' means that the qualified person has determined, using a discounted cash flow analysis, or has otherwise analytically determined, that extraction of the mineral reserve is economically viable under reasonable investment and market assumptions.[813] Although one commenter disagreed,[814] we believe the requirement to conduct a discounted cash flow or other similar analysis is consistent with industry practice[815] and the requirement under the CRIRSCO-based codes that mineral reserve determination must be based on a financial analysis under reasonable assumptions demonstrating that extraction of the reserve is economically viable.[816]

The final rules further provide, as proposed, that the term ''investment and market assumptions'' includes all assumptions made about the prices, exchange rates, interest and discount rates, sales volumes, and costs that are necessary and are used to determine the economic viability of the reserves.[817] In a change from the proposed rules, however, and in response to comments received, the final rules do not require the qualified person to use a price that is no higher than the 24-month trailing average price. Instead, the qualified person must use a price for each commodity that provides a reasonable basis for establishing that the project is economically viable.[818] The qualified person will be required to explain, with particularity, his or her reasons for selecting the price and the underlying material assumptions regarding the selection.[819] We are adopting this change for the same reasons that we changed the pricing requirement for the cut-off estimation required for the determination of mineral resources.[820]

We believe that the adopted framework for mineral reserve determination and disclosure is preferable to Guide 7's approach. Although Guide 7 similarly defines a mineral reserve as that part of a mineral deposit that can be economically and legally extracted or produced, it does not specify the level of geologic evidence that must exist or the factors that must be considered to convert the deposit to a mineral reserve. In contrast, under the adopted framework, the only estimates of grade or quality and tonnages that a registrant can disclose as mineral reserves are those parts of the indicated and measured mineral resources that, after all relevant modifying factors have been evaluated, can be shown to be part of a viable mineral project.[821] The adopted

[801] 17 CFR 229.1302(e)(2)(i) [Item 1302(e)(2)(i) of Regulation S–K].

[802] *Id.*

[803] *See* the definition of ''proven mineral reserve'' in 17 CFR 229.1300.

[804] 17 CFR 229.1302(e)(2)(ii) [Item 1302(e)(2)(ii) of Regulation S–K].

[805] *See* the definition of ''proven mineral reserve'' in 17 CFR 229.1300.

[806] *See supra* note 770 and accompanying text.

[807] *See infra* Section II.F.2.

[808] 17 CFR 229.1302(e)(1) and (3) [Item 1302(e)(1) and (3) of Regulation S–K].

[809] *See* Item 1302(e)(3) of Regulation S–K.

[810] *See, e.g.,* letters from CBRR and Eggleston; *see also supra* note 774. In this regard, we note that the SME Guide expressly requires a life of mine plan in its technical study. *See* SME Guide, *supra* note 177, Table 1, at 54 (''Mining method(s), mine plans and production schedules defined for the life of the project'' are required to support mineral reserve disclosure). Under the CRIRSCO-based codes, the qualified person has to develop mine plans in order to estimate cash flows, which are required by the codes for the financial analysis necessary to support mineral reserve disclosure. The cash flows must be based on costs and revenues associated with planned production over the life of the project. *See, e.g.,* JORC Code, *supra* note 175, at pt. 29 (stating that ''[d]eriving an Ore Reserve without a mine design or mine plan through a process of factoring of the Mineral Resource is unacceptable . . . The studies will have determined a mine plan and production schedule that is technically achievable and economically viable and from which the Ore Reserves can be derived'').

[811] *See supra* notes 777–778 and accompanying text.

[812] *See supra* note 780 and accompanying text.

[813] *See* the definition of ''economically viable'' in 17 CFR 229.1300. Whether the investment and market assumptions are ''reasonable'' will necessarily be a facts and circumstances determination based upon the relevant economic and market factors.

[814] *See* letter from BHP.

[815] *See* letters from Eggleston and Midas.

[816] *See, e.g.,* SME Guide, *supra* note 177, at pt. 41 (''The term 'economically viable' implies that extraction of the Mineral Reserve has been determined or analytically demonstrated (*e.g.,* such as by a cash flow in the report) to be viable and justifiable under reasonable investment and market assumptions''). *See also* JORC Code, *supra* note 175, at pt. 29 (''The term 'economically mineable' implies that extraction of the Ore Reserves has been demonstrated to be viable under reasonable financial assumptions'').

[817] *See* the definition of ''investment and market assumptions'' in 17 CFR 229.1300.

[818] 17 CFR 229.1302(e)(4) [Item 1302(e)(4) of Regulation S–K].

[819] *See id.*

[820] *See supra* Section II.E.4.iii.a.

[821] In this regard, a qualified person will not be able to use inferred mineral resources to support a determination of mineral reserves unless new

framework requires the qualified person to disclose the specific mining, processing, metallurgical, environmental, economic, legal, and other applicable factors that he or she has evaluated in detail, and which has led the qualified person to conclude that extraction of the deposit is economically viable. We therefore believe that the adopted framework will promote clearer, more detailed, and more accurate disclosure about the economic viability of a registrant's mineral deposits, which should enhance an investor's understanding of the registrant's mining operations.

When considered as a whole, and in light of the significant changes made to the proposed rules discussed above, we believe that the adopted mineral reserve disclosure framework is substantially similar to the CRIRSCO framework. As such, its adoption should enhance consistency in mining disclosure across jurisdictions and thereby facilitate comparability of information for investors. It also should limit reporting costs for the numerous mining registrants that are dual-listed and currently subject to different Commission and CRIRSCO-based disclosure requirements.

2. The Type of Study Required To Support a Reserve Determination

i. Rule Proposal

Historically, the staff has requested a final feasibility study to support the disclosure of mineral reserves in a Commission filing. In contrast, the CRIRSCO-based codes have permitted either a pre-feasibility study or a feasibility study in support of a determination of mineral reserves. To help align the Commission's mining property disclosure rules with the CRIRSCO standards, we proposed to permit either a preliminary feasibility study or a feasibility study to support the determination and disclosure of mineral reserves.[822] We proposed to define a ''preliminary feasibility study'' (or ''pre-feasibility study'') as a comprehensive study of a range of options for the technical and economic viability of a mineral project that has advanced to a stage where a qualified person has determined (in the case of underground mining) a preferred mining method, or (in the case of surface mining) a pit configuration, and in all cases has determined an effective method of mineral processing and an effective plan to sell the product.[823]

As proposed, a pre-feasibility study must include a financial analysis based on reasonable assumptions, based on appropriate testing, about the modifying factors and the evaluation of any other relevant factors that are sufficient for a qualified person to determine if all or part of the indicated and measured mineral resources may be converted to mineral reserves at the time of reporting.[824] The study's financial analysis must have the level of detail necessary to demonstrate, at the time of reporting, that extraction is economically viable. In addition, as noted in the proposed definition of a pre-feasibility study, while a pre-feasibility study is less comprehensive and results in a lower confidence level than a feasibility study, a pre-feasibility study is more comprehensive and results in a higher confidence level than an initial assessment.[825]

We proposed to define a ''feasibility study'' [826] as a comprehensive technical and economic study of the selected development option for a mineral project, which includes detailed assessments of all applicable modifying factors together with any other relevant operational factors, and detailed financial analysis that are necessary to demonstrate, at the time of reporting, that extraction is economically viable.[827] According to the proposed definition, the results of the study may serve as the basis for a final decision by a proponent or financial institution to proceed with, or finance, the development of the project. Thus, a feasibility study is more comprehensive, with a higher degree of accuracy, and yielding results with a higher level of confidence, than a pre-feasibility study. Under the proposed rules, it must contain mining, infrastructure, and process designs completed with sufficient rigor to serve as the basis for an investment decision or to support project financing.[828]

Although the use of a pre-feasibility study could increase the uncertainty regarding a registrant's disclosure about mineral reserves, compared to a feasibility study, we proposed to allow either study to support the determination and disclosure of mineral reserves based on our belief that any such uncertainty would be reduced by the requirements included in the proposed definitions and corresponding proposed instructions. One such proposed requirement was that all reserve disclosures based on a pre-feasibility study must include the qualified person's justification for using a pre-feasibility study instead of a final feasibility study.[829]

Another proposed requirement was that the pre-feasibility study must include a financial analysis at a level of detail sufficient to demonstrate the economic viability of extraction. A proposed instruction stated that the pre-feasibility study must include an economic analysis that supports the property's economic viability as assessed by a detailed discounted cash flow analysis.[830] This economic analysis must describe in detail applicable taxes and provide an estimate of revenues, which in certain situations (*e.g.,* where the products are not traded on an exchange or no established market or sales contract exists) must be based on at least a preliminary market study.[831] We also proposed to prohibit a qualified person from using inferred mineral resources in the pre-feasibility study's financial analysis.[832]

In another instruction, we proposed to require the use of a final feasibility study in high risk situations.[833] For example, as proposed, a final feasibility study would be required in situations where the project is the first in a particular mining district with substantially different conditions than existing company projects, such as environmental and permitting restrictions, labor availability and skills,

evidence (*e.g.,* data and analysis) has first caused an increased confidence in the geologic evidence sufficient to reclassify those resources as indicated or measured mineral resources. Similarly, a qualified person will not be able to convert an indicated mineral resource to a proven mineral reserve without first determining that conclusive, rather than just adequate, geological evidence exists to support reclassification to a measured mineral resource.

[822] *See* Proposing Release, *supra* note 5, at Section II.F.2.

[823] *See id.*

[824] *See id.*

[825] *See id.*

[826] As proposed, terms such as ''full, final, comprehensive, bankable, or definitive'' feasibility study are equivalent to a feasibility study. *See id.*

[827] *See id.*

[828] *See id.*

[829] *See id.*

[830] *See id.*

[831] We proposed to define a ''preliminary market study'' to mean a study that is sufficiently rigorous and comprehensive to determine and support the existence of a readily accessible market for the mineral. It must, at a minimum, include product specifications based on preliminary geologic and metallurgical testing, supply and demand forecasts, historical prices for the preceding five or more years, estimated long term prices, evaluation of competitors (including products and estimates of production volumes, sales, and prices), customer evaluation of product specifications, and market entry strategies. The study must provide justification for all assumptions. It can, however, be less rigorous and comprehensive than a final market study, which is required for a full feasibility study. *See* Proposing Release, *supra* note 5, at note 264 and accompanying text.

[832] *See* Proposing Release, *supra* note 5, at Section II.F.2.

[833] *See id.*

remoteness, and unique mineralization and recovery methods.[834]

We proposed other instructions to help ensure that the pre-feasibility study is sufficiently rigorous to support a conclusion that extraction of the reserve is economically viable. For example, one proposed instruction explained that the factors to be considered in a pre-feasibility study are typically the same as those required for an initial assessment, but considered at a greater level of detail or at a later stage of development.[835] According to another proposed instruction, the operating and capital cost estimates in a pre-feasibility study must have an accuracy level and a contingency range that are significantly narrower than those permitted to support a determination of mineral resources.[836]

An additional proposed instruction addressed whether and when a registrant would be required to take additional steps to support its determination of mineral reserves. As that instruction explained, a determination of mineral reserves does not necessarily require that extraction facilities are in place or operational, that the company has obtained all necessary permits, or that the company has entered into sales contracts for the sale of mined products. However, such determination does require that the qualified person has, after reasonable investigation, not identified any obstacles to obtaining permits and entering into the necessary sales contracts, and reasonably believes that the chances of obtaining such approvals and contracts in a timely manner are highly likely.[837] The qualified person must take into account the potential adverse impacts, if any, from any unresolved material matter on which extraction is contingent and which is dependent on a third party.

Another proposed instruction addressed when the completion of a preliminary or final market study, as part of a pre-feasibility or feasibility study, may be required to support a determination of mineral reserves. As proposed, a preliminary market study (for a pre-feasibility study) or final market study (for a feasibility study) would be required where the mine's product cannot be traded on an exchange, there is no other established market for the product, and no sales contract exists.

Finally, pursuant to another proposed instruction, a pre-feasibility study must identify sources of uncertainty that require further refinement in a final feasibility study.[838] We proposed this requirement to elicit appropriate disclosure about the areas of risk present in the pre-feasibility study, which we believed would help investors in assessing the reliability of the study.

We proposed several instructions regarding the use of a feasibility study to support the determination and disclosure of mineral reserves. Pursuant to one instruction, a feasibility study must apply and describe all relevant modifying factors in a more detailed form and with more certainty than a pre-feasibility study.[839]

According to another instruction, a feasibility study must include an economic analysis that describes taxes, estimates revenues, and assesses economic viability by a detailed discounted cash flow analysis.[840] In addition, in certain circumstances, the feasibility study must include an estimate of revenues based on at least a final market study [841] or possible letters of intent to purchase.

Pursuant to a third proposed instruction, operating and capital cost estimates in a feasibility study, at a minimum, must have an accuracy level of approximately ±15% and a contingency range not exceeding 10%.[842] As proposed, the qualified person must state the accuracy level and contingency range in the feasibility study.

ii. Comments on the Rule Proposal

Most commenters that addressed the issue supported the Commission's proposal to permit either a pre-feasibility or feasibility study to provide the basis for determining and reporting mineral reserves.[843] While commenters generally agreed with the proposed definitions of ''pre-feasibility study'' and ''feasibility study,'' many commenters opposed the Commission's proposal to require the use of a feasibility study in high risk situations.[844] Most of those commenters believed that the decision regarding whether to use a pre-feasibility or feasibility study should be left to the discretion and professional judgment of the qualified person.[845] One commenter explained that, for a pre-feasibility study, under CRIRSCO guidance, the qualified person is required to assess and disclose relevant risks, including high risks. If the qualified person has therefore met all of the requirements for a pre-feasibility study, he or she should not need to justify the use of a pre-feasibility study to support mineral reserve estimates.[846] A second commenter stated that ''with a high risk project, it is even more important to complete a pre-feasibility study prior to a feasibility study to help identify and mitigate the risks before proceeding to a feasibility study.'' [847] After stating that qualified persons should be allowed to use their discretion as to whether the risk associated with a pre-feasibility study is too high to support a reserve, a third commenter noted that if the first pre-feasibility study is inconclusive, it is common practice to not disclose mineral reserves until additional studies are completed and the development case is clear.[848]

In contrast, another commenter expressed its support for requiring a feasibility study for high risk situations where a proposed mining project has unique or particularly challenging conditions, such as when it is in close proximity to environmentally protected resources.[849] One other commenter stated that, for ''greenfield projects (including new process routes for production expansion of existing operations)'' and other high risk situations, a feasibility study should

[834] *See id.*

[835] *See id.*

[836] *See id.* According to this proposed instruction, operating and capital cost estimates in a pre-feasibility study must, at a minimum, have an accuracy level of approximately ±25% and a contingency range not exceeding 15%.

[837] *See id.*

[838] *See id.*

[839] *See id.*

[840] *See id.*

[841] We proposed to define a ''final market study'' to mean a comprehensive study to determine and support the existence of a readily accessible market for the mineral. Under the proposed rules, the study must, at a minimum, include product specifications based on final geologic and metallurgical testing, supply and demand forecasts, historical prices for the preceding five or more years, estimated long term prices, evaluation of competitors (including products and estimates of production volumes, sales, and prices), customer evaluation of product specifications, and market entry strategies or sales contracts. The study also must provide justification for all assumptions, which must include all material contracts required to develop and sell the reserves. *See* Proposing Release, *supra* note 5, at note 286 and accompanying text.

[842] *See id.*

[843] *See* letters from Amec, AngloGold, BHP, CBRR, CIM, Eggleston, Gold Resource, Golder, Midas, Northern Dynasty, Randgold, Rio Tinto, SAMCODES 2, SME 1, SRK 1, and Vale.

[844] *See* letters from Amec, AngloGold, Eggleston, Energy Fuels, Golder, Midas, Northern Dynasty, Rio Tinto, and SRK 1.

[845] *See, e.g.,* letters from Amec, AngloGold, Eggleston, Energy Fuels, Rio Tinto, and SRK 1.

[846] *See* letter from Amec.

[847] Letter from SRK 1.

[848] *See* letter from Rio Tinto.

[849] *See* letter from Columbia. The commenter also recommended requiring a feasibility study to address: Design criteria for tailing dams, specifically the risk of failure; contingency and emergency plans for tailings dam failures; drought management plans; and remediation plans.

support the definition of mineral reserves.[850]

One commenter opposed requiring either a pre-feasibility study or feasibility study to support the determination and disclosure of reserves. According to that commenter, ''[f]or coal companies operating in well-defined coal fields, these types of formal studies are not typically conducted, as on-going operations provide all the feasibility information that is required.'' [851] That commenter estimated that requiring either type of study would cost it several million dollars without providing a benefit. Moreover, according to that commenter, due to the competitive bidding nature of the coal industry, public disclosure of information contained in those studies would likely cause it competitive harm.[852]

One commenter stated that the proposed accuracy and contingency levels for a pre-feasibility study are too rigid and do not reflect the diversity of mining project locations and mine project types.[853] That commenter also was concerned with the level of detail required for certain items of the pre-feasibility study, such as environmental compliance and permitting requirements.

Some commenters expressly supported the Commission's proposal to include definitions of preliminary and final market studies as part of the instructions for pre-feasibility and feasibility studies.[854] One commenter stated that market studies should be required for non-freely traded commodities where there are barriers to market entry, but the Commission should not require disclosure of certain portions of the market studies if such disclosure would break confidentiality agreements or divulge planned market entry strategies that are proprietary to the company.[855] Other commenters, however, opposed the proposed definitions on the grounds that they are vague,[856] are not standard practice,[857] or include strategic market decisions that can affect the market competition.[858]

Some commenters objected to our inclusion of environmental compliance and permitting requirements or interests of agencies, non-governmental organizations, communities and other stakeholders as required items to be covered under a pre-feasibility or feasibility study.[859] These commenters stated that such inclusion would introduce an ''unworkable and inappropriate disclosure mandate'' and impose high direct and indirect costs. Other commenters advocated expanding the required disclosure of environmental and sustainability factors.[860]

iii. Final Rules

We are adopting the proposed requirement that a registrant's disclosure of mineral reserves must be based upon a qualified person's pre-feasibility study or feasibility study, which supports a determination of mineral reserves.[861] The pre-feasibility or feasibility study must include the qualified person's detailed evaluation of all applicable modifying factors to demonstrate the economic viability of the mining property or project.[862] Moreover, the technical report summary submitted by the qualified person to support a determination of mineral reserves must describe the procedures, findings, and conclusions reached for the pre-feasibility or feasibility study.[863]

Most commenters addressing the issue supported requiring either a pre-feasibility study or feasibility study to support a determination of mineral reserves.[864] Although one commenter opposed requiring either type of study on the grounds that, because neither study is commonly undertaken in the coal industry, the proposed requirement would be costly and could result in competitive harm,[865] we believe that, as evidenced by the widespread support from other commenters, the pre-feasibility or feasibility study requirement is consistent with current industry practice under the CRIRSCO standards. We also note that, as previously explained, the final rules do not require a mining company, such as a coal company, to hire a qualified person before it can develop and extract the mined commodity. However, once the company engages in public capital-raising, and seeks to classify and report its deposits as mineral reserves, then, consistent with the CRIRSCO standards, for the protection of investors, there must be a pre-feasibility or feasibility study to support its disclosure of reserves in Commission filings.

We also are adopting the proposed definitions of preliminary feasibility study[866] and feasibility study.[867] Because these definitions are substantially similar to the comparable definitions under the CRIRSCO-based codes,[868] many commenters supported their adoption.[869] These definitions establish that, while both a pre-feasibility and feasibility study are comprehensive technical and economic studies, which must include a financial analysis at a level of detail necessary to demonstrate, at the time of reporting, that extraction is economically viable, a pre-feasibility study is less comprehensive and results in a lower confidence level than a feasibility study. This is because of the key differences between a pre-feasibility study and a (final) feasibility study, which include that:

- A pre-feasibility study discusses a ''range of options'' for the technical and economic viability of a mineral project whereas a feasibility study focuses on a particular option selected for the development of the project;
- A pre-feasibility study generally has a less detailed assessment of the modifying factors necessary to demonstrate that extraction is economically viable than the corresponding assessment in a feasibility study; and
- A pre-feasibility study generally has a less detailed financial analysis that is based on less firm budgetary considerations (*e.g.,* historical costs rather than actual, firm quotations for major capital items) and more assumptions than the financial analysis in a feasibility study.

Despite these differences, we believe that revising our rules to allow a pre-feasibility study to support the determination and disclosure of mineral reserves benefits both registrants and investors. Permitting the use of a pre-feasibility study to determine mineral reserves under our rules would align the Commission's disclosure regime with those under the CRIRSCO-based codes and, as such, provide greater uniformity in global mining disclosure requirements to the benefit of both mining registrants and their investors. Permitting the use of a pre-feasibility study also could significantly reduce a mining registrant's costs in connection

[850] *See* letter from CBRR.

[851] Letter from Alliance.

[852] *See id.*

[853] *See* letter from Amec.

[854] *See* letters from Amec, AngloGold, Eggleston, Golder, Rio Tinto, and SRK 1.

[855] *See* letter from Amec.

[856] *See* letter from Northern Dynasty.

[857] *See* letter from SAMCODES 2.

[858] *See* letter from CBRR.

[859] *See, e.g.,* letters from NMA 2 and SME 1.

[860] *See, e.g.,* letters from Columbia and SASB.

[861] Item 1302(e)(1) of Regulation S–K.

[862] *See id.*

[863] *See id.,* referencing 17 CFR 229.601(b)(96).

[864] *See supra* note 843 and accompanying text.

[865] *See* letter from Alliance.

[866] *See* the definition of ''preliminary feasibility study'' in 17 CFR 229.1300.

[867] *See* the definition of ''feasibility study'' in 17 CFR 229.1300.

[868] *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 38–39; JORC Code, *supra* note 175, at pts. 39–40; SAMREC Code, *supra* note 267, at pts. 46–47; and PERC Reporting Standard, *supra* note 302, at pts. 5.5–5.9.

[869] *See, e.g.,* letters from AngloGold, BHP, CBRR, Rio Tinto, and SRK 1.

with the determination of mineral reserves.

We also continue to believe that the adopted requirements in the definition of, and provisions regarding, a pre-feasibility study will limit any additional uncertainty caused by its use. For example, like a feasibility study, a pre-feasibility study must include an economic analysis that supports the property's economic viability as assessed by a detailed discounted cash flow analysis or other similar financial analysis.[870] Consistent with other adopted provisions that contain a pricing requirement, an adopted provision states that, for either type of study, a qualified person must use a price for each commodity that provides a reasonable basis for establishing that the project is economically viable.[871] The qualified person must disclose the price used and explain, with particularity, his or her reasons for using the selected price, including the material assumptions underlying the selection. This explanation must include disclosure of the time frame used to estimate the price and costs and the reasons justifying the selection of that time frame.[872] As with other adopted pricing provisions, for the pre-feasibility or feasibility study, the qualified person may use a price set by contractual arrangement, provided that such price is reasonable, and the qualified person discloses that he or she is using a contractual price when disclosing the price used.[873]

In addition, the economic analysis for a pre-feasibility study must describe in detail applicable taxes and provide an estimate of revenues.[874] We believe that this level of detail for the economic analysis in a pre-feasibility study is consistent with current practice in the industry and comparable to the requirements for mineral reserve disclosure based on a pre-feasibility study in the CRIRSCO-based jurisdictions.[875]

Similar to a proposed instruction, the final rules require a qualified person to exclude inferred mineral resources from the pre-feasibility study's demonstration of economic viability in support of a disclosure of a mineral reserve.[876] Under the adopted framework, a qualified person cannot convert an inferred mineral resource to a mineral reserve without first obtaining new evidence that justifies converting it to an indicated or measured mineral resource.[877] This treatment of inferred resources is consistent with guidance under the CRIRSCO standards, which explains that, because confidence in the inferred resource estimate is usually not sufficient to allow the results of the application of technical and economic parameters to be used for detailed mine planning, there is no direct link from an inferred resource to any category of mineral reserves.[878]

Similar to proposed instructions, we are adopting other requirements that relate to the conversion of indicated or measured mineral resources into mineral reserves.[879] These requirements are consistent with the mineral resource classification scheme and mineral reserve disclosure framework under the CRIRSCO standards.[880]

Also similar to proposed instructions, we are adopting other provisions pertaining to the use of a pre-feasibility study. One such provision explains that factors to be considered in a pre-feasibility study are typically the same as those required for a feasibility study, but considered at a lower level of detail or at an earlier stage of development.[881] The list of factors is not exclusive. For example, a pre-feasibility study must define, analyze, or otherwise address in detail, to the extent material:

- The required access roads, infrastructure location and plant area, and the source of all utilities (*e.g.,* power and water) required for development and production;
- The preferred underground mining method or surface mine pit configuration, with detailed mine layouts drawn for each alternative;
- The bench lab tests[882] that have been conducted, the process flow sheet, equipment sizes, and general arrangement that have been completed, and the plant throughput;

The environmental compliance and permitting requirements, the baseline studies, and the plans for tailings disposal, reclamation and mitigation, together with an analysis establishing that permitting is possible; and

- Any other reasonable assumptions, based on appropriate testing, regarding the modifying factors sufficient to demonstrate that extraction is economically viable.[883]

Some commenters objected to the inclusion of environmental compliance and permitting requirements or the interests of agencies, non-governmental organizations, communities, and other stakeholders as required items to be disclosed in a pre-feasibility (or feasibility) study.[884] We believe that the inclusion of compliance, regulatory, and legal risks that are material to the

[870] 17 CFR 229.1302(e)(5) [Item 1302(e)(5) of Regulation S–K].

[871] 17 CFR 229.1302(e)(4) [Item 1302(e)(4) of Regulation S–K].

[872] *See id.*

[873] *See id.* Like the other adopted pricing provisions, this provision further states that the selected price and all material assumptions underlying it must be current as of the end of the registrant's most recently completed fiscal year. When discussing the analysis in the technical report summary, the qualified person will be required to disclose the assumptions made about prices, exchange rates, discount rate, sales volumes and costs necessary to determine the economic viability of the reserves.

[874] *See* Item 1302(e)(5) of Regulation S–K.

[875] *See, e.g.,* CIM Definition Standards, *supra* note 351, at 3 (stating that the standard ''requires the completion of a Preliminary Feasibility Study as the minimum prerequisite for the conversion of Mineral Resources to Mineral Reserves''); *see also* CIM Estimation of Mineral Resources and Mineral Reserves Best Practice Guidelines 45 (2003) (in discussing work to determine the economic merits of a deposit, stating that ''[t]his work specifically includes mining engineering evaluations and, most importantly, the preparation of an appropriate cash flow analysis. These aspects are normal components of both feasibility studies and preliminary feasibility studies'').

[876] 17 CFR 229.1302(e)(6) [Item 1302(e)(6) of Regulation S–K].

[877] 17 CFR 229.1302(e)(15) [Item 1302(e)(15) of Regulation S–K].

[878] *See* CRIRSCO International Reporting Template, *supra* note 20, at cl. 22; *see also* JORC Code, *supra* note 175, at pt. 21 (''Confidence in the estimate of Inferred Mineral Resources is not sufficient to allow the results of the application of technical and economic parameters to be used for detailed planning in Pre-Feasibility (Clause 39) or Feasibility (Clause 40) Studies'').

[879] One provision states that the qualified person cannot convert an indicated mineral resource to a proven mineral reserve unless new evidence first justifies conversion to a measured mineral resource. *See* 17 CFR 229.1302(e)(14) [Item 1302(e)(14) of Regulation S–K]. Another provision states that if the uncertainties in the results obtained from the application of the modifying factors that prevented a measured mineral resource from being converted to a proven mineral reserve no longer exist, then the qualified person may convert the measured mineral resource to a proven mineral reserve. *See* 17 CFR 229.1302(e)(13) [Item 1302(e)(13) of Regulation S–K].

[880] *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 33; JORC Code, *supra* note 175, at pt. 32; SAMREC Code, *supra* note 267, at pt. 38; and PERC Reporting Standard, *supra* note 302, at pt. 8.15.

[881] 17 CFR 229.1302(e)(7) [Item 1302(e)(7) of Regulation S–K].

[882] In the design of industrial process plants, engineers test the design concepts at increasingly larger scales. An initial step in this process is to conduct laboratory tests using a laboratory simulation of the conceptual process plant (referred to as bench lab tests). If successful, engineers then conduct tests using a small scale field plant that can process bulk samples (referred to as pilot or demonstration plant tests). It is only when these tests are successful that designs for full scale industrial plants are approved and the plants are constructed. Feasibility studies, depending on the stage, involve bench lab scale or pilot scale tests. *See, e.g.,* Christopher G. Morris, *Academic Press Dictionary of Science and Technology* 244 (1992) (defining bench-scale testing as ''[t]he practice of examining materials, methods, or chemical processes on a scale that can be performed on a work bench''). *See also* American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 406 (2d ed. 1997) (defining a pilot plant as ''a small-scale processing plant in which representative tonnages of ore can be tested under conditions which foreshadow (or imitate) those of the full-scale operation proposed for a given ore'').

[883] *See* Item 1302(e)(7) of Regulation S–K; *see also* Table 1 to paragraph (d) of Item 1302 of Regulation S–K.

[884] *See supra* note 859 and accompanying text.

conclusions of the study is necessary because factors such as environmental regulatory compliance, the ability to obtain necessary permits, and other legal challenges can directly impact the economic viability of a mining project. We are adopting requirements for pre-feasibility studies largely as proposed, but with modifications in order to simplify the description of the factors to be considered and to clarify that the pre-feasibility (or feasibility) factors must only be analyzed and discussed if they are material to the findings of the study.

Another provision requires that operating and capital cost estimates in a pre-feasibility study, at a minimum, have an accuracy level of approximately ±25% and a contingency range not exceeding 15%. The qualified person must state the accuracy level and contingency range in the pre-feasibility study.[885]

A further provision requires the pre-feasibility study to identify sources of uncertainty that require further refinement in a final feasibility study, as proposed.[886] This provision is consistent with the qualified person's duty to assess risk in a pre-feasibility study. As noted by one commenter, assessment of risk is intrinsic to completion of a pre-feasibility study, and material risks must be appropriately evaluated by the qualified person and disclosed by the registrant to protect investors.[887]

As noted by commenters,[888] these latter provisions (addressing the level at which the modifying factors are assessed, the appropriate accuracy level and contingency range for operating and capital costs, and sources of uncertainty) are generally consistent with current industry practice and comparable to requirements for the use of a pre-feasibility study in the CRIRSCO-based jurisdictions.[889] As such, the adopted provisions will cause a registrant's use of a pre-feasibility study in Commission filings to meet the industry established minimum level of detail and rigor sufficient to determine mineral reserves.

Similar to a proposed instruction, we are adopting a provision explaining that the term ''mineral reserves'' does not necessarily require that extraction facilities are in place or operational, that the company has obtained all necessary permits or that the company has entered into sales contracts for the sale of mined products. It does require, however, that the qualified person has, after reasonable investigation, not identified any obstacles to obtaining permits and entering into the necessary sales contracts, and reasonably believes that the chances of obtaining such approvals and contracts in a timely manner are highly likely.[890] This provision is similar to guidance provided under the CRIRSCO standards.[891]

The provision further states that, in certain circumstances, the determination of mineral reserves may require the completion of at least a preliminary market study, in the context of a pre-feasibility study, or a final market study, in the context of a feasibility study, to support the qualified person's conclusions about the chances of obtaining revenues from sales. For example, a preliminary or final market study would be required where the mine's product cannot be traded on an exchange, there is no other established market for the product, and no sales contract exists.[892] Although one commenter opposed the proposed requirement to obtain a preliminary or final market study on the grounds that it could compel the disclosure in the technical report summary of commercially sensitive information,[893] the final rules do not require the disclosure of all of the details of a market study. As with exploration results, a registrant only has a duty to disclose the details that are material to investors.

When assessing mineral reserves, the qualified person must take into account the potential adverse impacts, if any, from any unresolved material matter on which extraction is contingent and which is dependent on a third party.[894] Several commenters generally supported this requirement.[895] We believe that this provision will result in more detailed disclosure, when required under the circumstances, concerning the basis for the qualified person's conclusions as to whether the deposit is a mineral reserve.

In a change from the proposed rules, we are not requiring the qualified person to justify the use of a pre-feasibility study in lieu of a feasibility study. We also are not requiring the use of a feasibility study in high risk situations. We are persuaded by commenters' view that, consistent with the CRIRSCO standards, it should be left to the discretion and professional judgment of the qualified person to determine the appropriate level of study required to support the determination of mineral reserves under the circumstances.[896] We believe that the adopted disclosure requirements for a pre-feasibility study, taken as a whole, will help to mitigate any increased risk resulting from permitting the use of a pre-feasibility study to support the determination and disclosure of mineral reserves. If the qualified person satisfies those requirements, including conducting an assessment of material risks affecting the economic viability of the deposit, we do not believe additional disclosure concerning why he or she chose to conduct a pre-feasibility study is necessary. Moreover, in high risk situations, the qualified person will have to perform additional evaluative work to meet the level of certainty required for a pre-feasibility study. If, in the judgment of the qualified person, that level of certainty has been met, we believe the pre-feasibility study should be permitted to support the determination of mineral reserves.

Similar to a proposed instruction, we are adopting a provision requiring a feasibility study to contain the application and description of all relevant modifying factors in a more detailed form and with more certainty than a pre-feasibility study.[897] The list of factors is not exclusive. Pursuant to that provision, a feasibility study must define, analyze, or otherwise address in detail, to the extent material:

- Final requirements for site infrastructure, including well-defined access roads, finalized plans for infrastructure location, plant area, and camp or town site, and the established source of all required utilities (*e.g.,* power and water) for development and production;
- A finalized mining method, including detailed mine layouts and final development and production plan for the preferred alternative with the required equipment fleet specified, together with detailed mining schedules, construction and production ramp up, and project execution plans;

[885] 17 CFR 229.1302(e)(9) [Item 1302(e)(9) of Regulation S–K]; *see also* Table 1 to paragraph (d) of Item 1302 of Regulation S–K.

[886] 17 CFR 229.1302(e)(8) [Item 1302(e)(8) of Regulation S–K].

[887] *See* letter from Rio Tinto.

[888] *See, e.g.,* letters from AngloGold, Eggleston, SAMCODES 2, and SRK 1.

[889] *See, e.g.,* SME Guide, *supra* note 177, Tables 1–2.

[890] 17 CFR 229.1302(e)(3)(i) [Item 1302(e)(3)(i) of Regulation S–K].

[891] *See, e.g.,* CRIRSCO International Reporting Template, *supra* note 20, at cl. 30; SME Guide, *supra* note 267, at pt. 41; JORC Code, *supra* note 175, at pt. 29; and PERC Reporting Standard, *supra* note 302, at pt. 8.3.

[892] 17 CFR 229.1302(e)(3)(ii) [Item 1302(e)(3)(ii) of Regulation S–K].

[893] *See* letter from CBRR.

[894] *See* Item 1302(e)(3)(ii) of Regulation S–K.

[895] *See* letters from Amec, AngloGold, Eggleston, Golder, Rio Tinto, and SRK 1.

[896] *See supra* note 845 and accompanying text.

[897] 17 CFR 229.1302(e)(10) [Item 1302(e)(10) of Regulation S–K]; *see also* Table 1 to paragraph (d) of Item 1302 of Regulation S–K.

• Completed detailed bench lab tests and a pilot plant test,[898] if required, based on risk, in addition to final requirements for process flow sheet, equipment sizes, general arrangement, and the final plant throughput;
• The final identification and detailed analysis of environmental compliance and permitting requirements, together with the completion of baseline studies and finalized plans for tailings disposal, reclamation, and mitigation; and
• Detailed assessments of other modifying factors necessary to demonstrate that extraction is economically viable.[899]

Similar to another proposed instruction, we are adopting a provision requiring a feasibility study to include an economic analysis that describes taxes in detail, estimates revenues, and assesses economic viability by a detailed discounted cash flow analysis.[900] The qualified person must use a price for each commodity in the economic analysis that meets the requirements of the earlier described pricing provision.[901] Thus, as long as the price provides a reasonable basis for establishing that the project is economically viable, and the qualified person explains, with particularity, his or her reasons for using the selected price, including the material assumptions regarding the selection, the price used may be either a historical price or one based on forward-looking pricing forecasts.

Finally, similar to a proposed instruction, we are adopting a provision requiring that operating and capital cost estimates in a feasibility study, at a minimum, have an accuracy level of approximately ±15 percent and a contingency range not exceeding 10 percent. The qualified person must state the accuracy level and contingency range in the feasibility study.[902]

These requirements for the use of a feasibility study to support mineral reserve estimates are intended to promote accurate and uniform disclosure of mineral reserves in Commission filings, which should benefit investors as well as registrants. As commenters noted,[903] the requirements concerning the level of detail or stage of development for the evaluation of modifying factors, and those regarding the accuracy level and contingency range for operating and capital cost estimates, are generally comparable to those required for the use of a feasibility study to support mineral reserve estimates under the CRIRSCO-based codes.[904] We believe aligning the Commission's disclosure requirements with international standards will benefit investors and registrants by promoting uniformity in mining disclosure standards. In addition, these requirements are generally consistent with current practices regarding the use of a feasibility study to support a determination and disclosure of mineral reserves.

*G. Specific Disclosure Requirements*

1. Requirements for Summary Disclosure

i. Rule Proposal

We proposed that registrants with material mining operations that own two or more mining properties must provide summary disclosure of their mining operations.[905] We proposed the summary disclosure requirement based on our belief that investors would benefit from an overview of a registrant's mining operations in addition to a property by property description. We also believed that this proposed requirement would help foster more efficient and more effective disclosure, as a registrant would be able to provide summary disclosure about all of its properties where some or all are not individually material.[906]

As part of its summary disclosure, we proposed to require a registrant to include a map or maps showing the locations of all mining properties.[907] The proposed map requirement would provide investors a point of reference to assess the geographic and socio-political risks associated with the registrant's mining operations.[908]

We also proposed that the summary disclosure must include a presentation, in tabular form (Table 2 of the proposed rules), of certain specified information about the 20 properties with the largest asset values (or fewer, if the registrant has an economic interest in fewer than 20 mining properties).[909] For the purpose of determining the top 20 properties by asset value, we proposed to permit a registrant with interrelated mining operations to treat those operations as one mining property.[910] As proposed, for each of the properties required to be included in the summary disclosure, a registrant would be required to identify the property, report the total production from the property for the three most recently completed fiscal years, and disclose the following information:

• The location of the property;
• The type and amount of ownership interest;
• The identity of the operator;
• Title, mineral rights, leases or options and acreage involved;
• The stage of the property (exploration, development or production);
• Key permit conditions;
• Mine type and mineralization style; and
• Processing plant and other available facilities.[911]

We proposed this requirement to provide investors with an appropriately comprehensive and thorough understanding of a registrant's mining operations.

We further proposed to require a registrant to provide a summary, in tabular form (Table 3 of the proposed rules), of its mineral resources and mineral reserves at the end of its most recently completed fiscal year, by commodity and geographic area, and for each property containing 10 percent or more of the registrant's mineral reserves or 10 percent or more of the registrant's combined measured and indicated mineral resources.[912] The registrant would be required to provide this summary for each class of mineral reserves (probable and proven) and resources (inferred, indicated, and measured), together with total mineral reserves and total measured and indicated mineral resources.[913] As proposed, all mineral reserves and resources reported in the summary table must be based on, and accurately reflect, information and supporting documentation prepared by a qualified person.

The Commission also proposed several instructions to the proposed summary disclosure requirement that:

• Defined the term ''by geographic area'' to mean by individual country, regions of a country, state, groups of states, mining

[898] *See supra* note 882 and accompanying text.

[899] *See* Item 1302(e)(10) of Regulation S–K; *see also* Table 1 to paragraph (d) of Item 1302(d) of Regulation S–K.

[900] 17 CFR 229.1302(e)(11) [Item 1302(e)(11) of Regulation S–K].

[901] *See* Item 1302(e)(4) of Regulation S–K.

[902] 17 CFR 229.1302(e)(12) [Item 1302(e)(12) of Regulation S–K].

[903] *See, e.g.,* letters from Eggleston, SAMCODES 2, and SRK 1.

[904] *See, e.g.,* SME Guide, *supra* note 177, Tables 1–2.

[905] *See* Proposing Release, *supra* note 5, at Section II.G.1. The proposed provision specified that the registrant would be required to provide summary disclosure for all properties that: The registrant owns or in which it has, or it is probable that it will have, a direct or indirect economic interest; it operates, or it is probable that it will operate, under a lease or other legal agreement that grants the registrant ownership or similar rights that authorize it, as principal, to sell or otherwise dispose of the mineral; and for which it has, or it is probable that it will have, an associated royalty or similar right.

[906] *See id.*

[907] *See id.*

[908] *See id.*

[909] *See id.*

[910] *See id.*

[911] *See id.*

[912] *See id.*

[913] *See id.*

district, or other political units, to the extent material to and necessary for an investor's understanding of a registrant's mining operations;

- Explained that all disclosure of mineral resources must be exclusive of mineral reserves;
- Required that all disclosure of mineral resources and reserves must be only for the portion of the resources or reserves attributable to the registrant's interest in the property;
- Required all mineral resource and reserve estimates to be based on prices that are no higher than the average spot price during the 24-month period prior to the end of the fiscal year covered by the report, determined as an unweighted arithmetic average of the daily closing price for each trading day within such period, unless prices are defined by contractual arrangements; and
- Required that the mineral resource and reserve estimates called for in Table 3 of the proposed rules must be in terms of saleable product.[914]

As proposed, for a registrant with mining operations that are, in the aggregate, material but for which no individual property is material, this summary disclosure would be the only mining disclosure required in the registrant's filings. For a registrant with individual properties that are material, we proposed additional, more detailed, disclosure about such properties.[915] We proposed to exclude a registrant with only one mining property from the summary disclosure requirement because we did not see any benefit to requiring summary disclosure, in addition to individual disclosure, for a single material property.[916]

ii. Comments on the Rule Proposal

Several commenters offered conditional support for the Commission's summary disclosure proposal.[917] One commenter supported the proposed summary disclosure requirement but recommended that the requirement apply to 80% of the registrant's mining properties based on asset value rather than the top 20 properties out of concern that the proposed requirement would be costly for registrants with numerous immaterial properties and only a few material properties.[918]

A number of commenters supported the proposed summary disclosure requirements but stated that the requirement to disclose information about the top 20 properties by asset value should include only material properties.[919] One of those commenters also suggested allowing certain information, such as the description of mineral rights and key permit conditions, to be disclosed in abbreviated form.[920] That commenter also supported a version of the summary disclosure of mineral resources and reserves in tabular form because summary disclosure of mineral resource and mineral reserves in table form is industry practice and widely used.[921] Another commenter recommended merging the two tables for summary disclosure into one, excluding geographic disclosure, and eliminating the map requirement for summary disclosure.[922]

Many other commenters opposed the proposed summary disclosure requirements on the grounds that they were overly prescriptive, were inconsistent with CRIRSCO requirements, and/or would be burdensome in particular for U.S. registrants that are dual-listed in one of the CRIRSCO-based jurisdictions.[923] Commenters that indicated the proposed tables were too prescriptive stated that their ''one-size-fits-all'' approach reflected a lack of appreciation for the diversity of operations within the mining industry and the fact that many of the details required to be disclosed would not be comparable.[924] Some commenters urged the Commission to delete all of the tables and allow the registrant and its qualified persons to determine the most appropriate format for presentation of the required disclosure items (whether in text summaries or in tables designed by the registrant or its qualified persons).[925] Another commenter stated that summary disclosure and accompanying tables should be left to the discretion of the registrant as long as the disclosure follows an existing global standard, such as JORC, NI 43–101, or CRIRSCO.[926] Some commenters further stated that the Commission should limit the tables to a list of material properties and statements of mineral resources and mineral reserves.[927]

One commenter indicated that disclosure of information on the top 20 properties, by asset value, would not be useful for investors.[928] That commenter stated that a technical report summary would provide more meaningful information in a context that would allow an investor to understand better the value of a project.

Another commenter opposed the proposed summary disclosure requirement because it ''all but eliminates'' the discretion of the registrant and qualified person to determine the most suitable presentation of material information relating to each property. That commenter noted that other alternative bases for grouping operations other than by asset value, such as geographic region, commodity or reporting segment, may be more informative for investors.[929] Other commenters stated that the disclosure required regarding the top 20 properties by asset value was too complex to be put in a table.[930]

Several commenters opposed the proposed tabular presentation of summary disclosure of mineral resources and reserves because they believed it conflicted with CRIRSCO requirements that resources and reserves should not be reported in the same table, and inferred resources should not be presented alongside indicated and measured resources, in order to avoid misleading investors that resource estimates are as economically feasible as reserve estimates.[931] Some of the commenters, however, maintained that mineral resources should include reserves, as permitted under the CRIRSCO-based codes.[932]

Many commenters opposed the proposed instruction requiring the mineral resource and reserve estimates in proposed Table 3 to be in terms of saleable product.[933] Most of those commenters maintained that it is customary under the CRIRSCO-based

[914] *See id.*

[915] *See infra* Section II.G.2.

[916] *See* Proposing Release, *supra* note 5, at Section II.G.1.

[917] *See, e.g.,* letters from AngloGold, CBRR, Columbia, Davis Polk, Midas, Rio Tinto, and SRK 1.

[918] *See id.*

[919] *See* letters from Alliance, CBRR, FCX, Midas, and SRK 1.

[920] *See* letter from Midas.

[921] *See id.*

[922] *See* letter from SRK 1.

[923] *See* letters from AIPG, Amec, BHP, Chamber, CIM, Cleary & Gottlieb, Cloud Peak, Coeur, Eggleston, Graves, Newmont, NMA 1, NSSGA, Royal Gold, SAMCODES 1, SME 1, Vale, and Willis.

[924] *See* letters from AIPG, Chamber, Cleary & Gottlieb, NMA 1, NSSGA, SAMCODES 1, and SME 1.

[925] *See* letters from AIPG, Graves, NMA 1, SME 1, and Vale. Similarly, most commenters that responded to our request for comment opposed requiring the summary disclosure to be formatted in XBRL on the grounds that the data required to be disclosed in those tables was largely specific to each registrant and would not benefit from presentation in a structured format. *See* letters from AIPG, Alliance, Amec, AngloGold, CBRR, Chamber, Eggleston, MMSA, Rio Tinto, and SME 1.

[926] *See* letter from Cloud Peak.

[927] *See, e.g.,* letters from Coeur, SME 1, and Willis.

[928] *See* letter from Amec.

[929] *See* letter from Cleary & Gottlieb.

[930] *See* letters from AIPG, FCX, Newmont, and SME 1.

[931] *See* letters from AIPG, BHP, CIM, Cleary & Gottlieb, SME 1, and Vale.

[932] *See, e.g.,* letters from BHP 1 and SAMCODES 1.

[933] *See* letters from Amec, AngloGold, BHP, CIM, Eggleston, FCX, Newmont, Rio Tinto, SAMCODES 1, SME 1, and Vale.

codes to disclose mineral resources on an in situ basis and that the proposed instruction would effectively define a mineral resource as a mineral reserve.[934] Commenters further recommended requiring the disclosure of reserves on either a run of mine or plant/mill feed basis [935] (for metals and some coal and industrial mines) [936] or in terms of saleable product (if customary for some coal and industrial mines) and not on an in situ basis.[937]

One commenter stated that, due to the nature of the aggregates industry, where products are relatively low-priced, mines are shallow, the costs of developing an aggregates quarry or underground mine are far less, and the risks are low compared to other types of mines, many of the proposed tabular disclosure items about reserves, resources and related data points appeared to be either immaterial to investors or to consist of proprietary information the disclosure of which would harm an aggregates company's competitive position.[938]

iii. Final Rules

With some modification, we are adopting the proposed requirement that registrants with material mining operations, which own or otherwise have economic interests in two or more mining properties, provide summary disclosure of their mining operations.[939] Many commenters agreed with our proposal to require summary disclosure even if they disagreed with one or more of the specific disclosure items.[940] We continue to believe that, for registrants with material mining operations, requiring an overview of their mining operations, regardless of whether they have material individual properties, will be useful to investors and help foster more efficient and effective disclosure.

We recognize that many commenters opposed our proposal to require a presentation of summary disclosure, in tabular form, of certain specified information about the 20 properties with the largest asset values because they believed it to be overly prescriptive, inconsistent with CRIRSCO requirements, or burdensome in particular for U.S. registrants that are dual-listed in one of the CRIRSCO-based jurisdictions.[941] To reduce the prescriptive nature of the summary disclosure requirement, consistent with commenters' suggestions, the final rules will permit a registrant to present an overview of its mining properties and operations in either narrative or tabular format.[942]

In addition, in a change from the proposed rules, which required the disclosure of the total production from each of the registrant's top 20 properties by asset value for the three most recently completed fiscal years, the final rules require that the overview must include annual production on an aggregated basis [943] for the registrant's mining properties during each of the three most recently completed fiscal years.[944] Moreover, rather than require the disclosure of other specified information for each of a registrant's top 20 properties by asset value, the final rules provide that the overview should include the following information for the registrant's mining properties considered in the aggregate, and only as relevant:

- The location of the properties; [945]
- The type and amount of ownership interests;
- The identity of the operator or operators;
- Titles, mineral rights, leases or options and acreage involved;
- The stages of the properties (exploration, development, or production);
- Key permit conditions;
- Mine types and mineralization styles; and
- Processing plants and other available facilities.[946]

The final rules also include a provision explaining that, when presenting the overview, the registrant should include the amount and type of disclosure concerning its mining properties that is material to an investor's understanding of the registrant's properties and mining operations in the aggregate.[947] The provision further states that this disclosure will depend upon a registrant's specific facts and circumstances and may vary from registrant to registrant. Finally, this provision asks registrants to refer to, rather than duplicate, any disclosure concerning individually material properties provided in response to the individual disclosure requirements,[948] discussed below.[949]

We believe this more principles-based approach to eliciting summary disclosure on a registrant's mining operations addresses commenters' concerns while still providing a meaningful overview of registrants' mining operations, particularly for those registrants with no or only a few individually material properties. As previously explained, Guide 7 currently calls for the disclosure of all of the above listed items of information.[950] We note, for instance, that most registrants engaged in industrial minerals and aggregates mining have no or only a few individually material properties and currently provide disclosure similar to

[934] *See* letters from BHP, CIM, Eggleston, Newmont, Rio Tinto, and SME 1.

[935] ''Run of mine'' ore refers to ore in its unprocessed form (*i.e.,* in the form mined), while plant/mill feed refers to the material that is fed to a processing plant. Both terms are used in the mining industry, in this context, to refer to material that is affected by mining dilution and losses but is yet to be processed.

[936] *See* letters from AngloGold, CIM, Golder, Newmont, SME 1, and Vale. *See also* letter from FCX (mineral reserves should either be disclosed as ''run-of-mine (plant/mill feed) ore tons, contained product before plant recovery and saleable product after plant recovery'').

[937] *See* letters from CRIRSCO, Golder, Rio Tinto, SME 1, and Vale.

[938] *See* letter from NSSGA.

[939] 17 CFR 229.1303(a)(1) [Item 1303(a)(1) of Regulation S–K]. The registrant must provide the summary disclosure for all properties that the registrant owns or in which it has, or it is probable that it will have, a direct or indirect economic interest. It also must provide summary disclosure for properties that it operates, or it is probable that it will operate, under a lease or other legal agreement that grants the registrant ownership or similar rights that authorize it, as principal, to sell or otherwise dispose of the mineral. Further, a registrant must provide summary disclosure for properties for which it has, or it is probable that it will have, an associated royalty or similar right, unless the registrant lacks access to the information about the underlying properties, as specified in Item 1303(b) of Regulation S–K, and the registrant meets the conditions for omitting the summary disclosure pursuant to Item 1303(a)(3) of Regulation S–K. *See supra* Section II.B.4.

[940] *See, e.g.,* letters from AngloGold, CBRR, Columbia, Davis Polk, Midas, Rio Tinto and SRK 1.

[941] *See supra* note 923 and accompanying text.

[942] *See* 17 CFR 229.1303(b)(2).

[943] In a change from the proposed rules, the final rules eliminate the proposed instruction that would permit a registrant with interrelated mining operations to treat those operations as one mining property for the purpose of providing summary disclosure. Since we are no longer requiring the disclosure of specified information for each of a registrant's top 20 properties, and are only requiring such disclosure in the aggregate, we no longer believe that instruction to be necessary.

[944] 17 CFR 229.1303(b)(2)(i) [Item 1303(b)(2)(i) of Regulation S–K].

[945] As proposed, the summary disclosure must include a map or maps showing the locations of all mining properties. *See* Item 1303(b)(1) of Regulation S–K [17 CFR 229.1303(b)(1)]. We continue to believe the map requirement is an effective means of providing investors with a point of reference to assess the geographic and socio-political risks associated with the registrant's mining operations. Item 102 requires registrants to provide ''appropriate maps'' disclosing ''the location'' of significant properties, but does not address whether or when registrants with multiple properties, none of which are material, should provide a map (or maps) showing the location of all its mining properties. We believe that the adopted map requirement, which is consistent with current practices, will help ensure that investors are provided with beneficial information without significantly impacting current disclosure practices.

[946] 17 CFR 229.1303(b)(2)(ii) [Item 1303(b)(2)(ii) of Regulation S–K].

[947] 17 CFR 229.1303(b)(2)(iii) [Item 1303(b)(2)(iii) of Regulation S–K].

[948] *See id.*

[949] *See infra* Section II.G.2.

[950] *See* Proposing Release, *supra* note 5, Section II.G.1.

summary disclosure called for by Guide 7.

This more principles-based approach is also intended to address the concern of some commenters that the proposed rules established a ''one size fits all'' approach that did not account for the diversity of operations within the mining industry.[951] By requiring a registrant to provide an overview of its mining operations that includes the suggested items of information, as relevant, tailored to its particular facts and circumstances,[952] and presented in a manner of the registrant's choosing, we believe the final rules will elicit material information for investors without unduly burdening the registrant.

As proposed, the final rules require a registrant to provide a summary of its mineral resources and mineral reserves at the end of its most recently completed fiscal year, by commodity and geographic area,[953] and for each property containing 10 percent or more of the registrant's mineral reserves or 10 percent or more of the registrant's combined measured and indicated mineral resources. The registrant will be required to provide this summary, including the amount and grade or quality, for each class of mineral reserves (probable and proven) and resources (inferred, indicated, and measured), together with total mineral reserves and total measured and indicated mineral resources.[954]

We continue to believe that the summary disclosure of mineral resources and reserves is necessary to understand a registrant's material mining operations at fiscal year's end. For example, an understanding of the registrant's total mineral resources and reserves and where those mineral resources and reserves are located can enable investors to understand and evaluate the registrant's projected future earnings from its mining operations and its ability to replenish depleting mineral reserves, a well-established measure of financial performance in mining.[955] The breakdown of the mineral resources and reserves by category and source (geographic area and property) also will provide investors with a measure of the associated risk.

Contrary to the concerns of some commenters,[956] the final rules' requirement that a registrant provide a summary of its mineral resources and reserves does not impose an affirmative obligation to estimate mineral resources and reserves, as defined in these rules, on a mining property where the registrant has not estimated mineral resources and reserves. Registrants will have an obligation to disclose mineral resources and reserves in their summary disclosure only to the extent that they have already engaged a qualified person or persons to estimate such mineral resources and reserves.

In order to standardize the disclosure, facilitate a registrant's compliance with the disclosure requirements, and enhance investor understanding of this information, similar to our proposal, the final rules require that a registrant provide the summary of all mineral resources and reserves at the end of the most recently completed fiscal year in tabular format. However, we agree with those commenters that maintained that we should separate disclosure of mineral resources and reserves in order to reduce the potential for investor confusion.[957] Accordingly, the final rules require registrants to use separate tables when reporting mineral resources and reserves, as required by Item 1303(b)(3) of Regulation S–K. The disclosure should follow the format of the tables designated as Tables 1 and 2 to paragraph (b) of Item 1303.

Similar to a proposed instruction, we are adopting a provision requiring mineral resources, reported in the summary disclosure provided in Table 1 to paragraph (b) of Item 1303, to be exclusive of mineral reserves.[958] We continue to believe that requiring the disclosure of mineral resources exclusive of reserves in the main disclosure document (as opposed to such disclosure in the technical report summary, which is attached as an exhibit to the Commission filing) will reduce the risk of investor confusion. In contrast, we believe that, because the technical report summary is more likely to be read by analysts or investors possessing a more sophisticated understanding of the mining industry and its current practices than the average retail investor, permitting mineral resources to include mineral reserves when disclosed in the technical report summary is less likely to cause confusion.[959]

Similar to another proposed instruction, we are adopting a provision requiring that all disclosure of mineral resources and reserves be only for the portion of the resources or reserves attributable to the registrant's interest in the property.[960] Commenters did not oppose this proposed instruction.[961] For the reasons stated in the Proposing Release, we continue to believe that this provision is reasonable and would help reduce investor confusion.[962]

As previously discussed, we are revising our approach to what is permitted regarding selecting an appropriate price to determine ''prospects of economic extraction'' for mineral resources and ''economic viability'' for mineral reserves.[963] Consequently, the final rules provide that each mineral resource and reserve estimate must be based on a reasonable and justifiable price, selected by a qualified person, which provides a

[951] *See, e.g.,* letter from NMA 2.

[952] Another provision states that, as proposed, a registrant with a royalty or similar economic interest should provide only the portion of the production that led to royalty or other incomes for each of the three most recently completed fiscal years. *See* Item 1303(b)(2)(iv) of Regulation S–K. We continue to believe that registrants with a royalty or similar economic interest in mining properties, if they have access to such information, should only report the portion of production leading to their incomes to reduce the risk of confusing investors.

[953] Similar to a proposed instruction, the final rules define ''by geographic area'' to mean by individual country, regions of a country, state, groups of states, mining district, or other political units, to the extent material to and necessary for an investor's understanding of a registrant's mining operations. *See* 17 CFR 229.1303(b)(3)(i) [Item 1303(b)(3)(i) of Regulation S–K]. We continue to believe this breakdown is necessary for investors to understand the source and associated socio-political risks of the registrant's mineral reserves and resources.

[954] *See* 17 CFR 229.1303(b)(3). As previously discussed, all mineral reserves and resources reported in the summary disclosure must be based on, and accurately reflect, information and supporting documentation prepared by a qualified person. *See* Item 1302(a) of Regulation S–K; *see also* Section II.C.1. for a discussion of the final rules' stipulations on the responsibilities of the qualified person and the registrant.

[955] *See, e.g.,* R. L. Robinson and B. W. Mackenzie, *Economic Comparison of Mineral Exploration and Acquisition Strategies to Obtain Ore Reserves* 281–282 (1987). (''Mining company objectives are . . . profit, growth, and survival . . . To survive, the company must successfully invest . . . in replacing the depleted ore reserves. An underlying thread among the profit, growth, and survival objectives is ore reserve replacement and growth''). *See also* H. R. Bullis, *Gold Deposits, Exploration Realities, and the Unsustainability of Very Large Gold Producers* 313–320 (2003).

[956] *See, e.g.,* letter from NSSGA.

[957] *See supra* note 931 and accompanying text.

[958] 17 CFR 229.1303(b)(3)(ii) [Item 1303(b)(3)(ii) of Regulation S–K].

[959] *See infra* Section II.G.3. for a discussion of the adopted provision that permits a qualified person to disclose resources inclusive of reserves in the technical report summary as long as he or she also discloses resources as excluding reserves.

[960] 17 CFR 229.1303(b)(3)(iii) [Item 1303(b)(3)(iii) of Regulation S–K].

[961] Only one commenter addressed this proposed instruction. That commenter stated that, although it believed the decision to report mineral resources or mineral reserves on a 100% or other ownership basis should be at the discretion of the registrant, it considered ''that the information on the registrant's interest in the property is important information and should be included with the reporting of Mineral Resource and Mineral Reserve estimates.'' Letter from Amec.

[962] *See* Proposing Release, *supra* note 5, at Section II.G.1.

[963] *See supra* Sections II.E.4., II.F.2.

reasonable basis for establishing the prospects of economic extraction for mineral resources, and is the basis for determining the economic viability of the deposit for mineral reserves.[964] We believe this approach will further align the Commission's rules with the CRIRSCO requirements and help limit the compliance burden on registrants.

Many commenters stated that requiring registrants to disclose mineral resources and reserves at a specific point of reference (in this case, as saleable product) is counter to the CRIRSCO-based codes and current industry practice, which permit the estimation of resources and reserves at a disclosed single point of reference selected by the qualified person.[965] To help limit the compliance burden for registrants, especially those that are cross-listed in CRIRSCO-based jurisdictions, the final rules will permit a registrant and its qualified person(s) to disclose mineral resources and reserves at any point of reference as long as they disclose the selected point of reference. For summary disclosure, the final rules require that each mineral resource and reserve estimate in Tables 1 and 2 to paragraph (b) of Item 1303 be based on a specific point of reference selected by a qualified person. The registrant also must disclose the selected point of reference for each of these Tables 1 and 2.[966]

Another provision stipulates, as proposed, that the registrant may modify the tabular formats in Tables 1 and 2 to paragraph (b) of Item 1303 for ease of presentation or to add information.[967] While we continue to believe that the tabular presentation of summary resources and reserves disclosure will standardize the disclosure and make it easier for investors to understand and assess investments in registrants engaged in material mining operations, we emphasize that the tables can be modified to fit a registrant's particular situation. Contrary to the views of several commenters,[968] like the proposed rules, the final rules expressly provide, in recognition of the diversity in the mining sector, that registrants can modify the tables to fit their own particular facts and circumstances.

A final provision states that all material assumptions and information pertaining to the summary disclosure of a registrant's mineral resources and mineral reserves required by this section, including material assumptions related to price estimates, must be current as of the end of the registrant's most recently completed fiscal year.[969] We believe this provision is a useful reminder that, although the qualified person is responsible for determining the mineral resource or reserve estimates included in the summary disclosure, the registrant bears the ultimate responsibility for ensuring that those estimates, and the material assumptions underlying them, remain current as of the date for which the mineral resource or reserve estimates have been disclosed.

2. Requirements for Individual Property Disclosure

i. Rule Proposal

We proposed that a registrant with material mining operations provide, in addition to summary disclosure, more detailed information for each of its individual properties that is material to its business or financial condition.[970] We made this proposal because of our belief that summary property disclosure alone would not provide all relevant information about the properties and assets that generate a mining registrant's revenues. We therefore proposed that, for each material individual property, a registrant would have to provide a brief description of the property, including:

- The property's location, accurate to within one mile, using an easily recognizable coordinate system (*e.g.,* latitude and longitude), including appropriate maps, with proper engineering detail (such as scale, orientation, and titles), which must be legible on the page when printed;
- Existing infrastructure, including roads, railroads, airports, towns, ports, sources of water, electricity, and personnel; and
- A brief description, including the name or number and size (acreage), of the titles, claims, concessions, mineral rights, leases or options under which the registrant and its subsidiaries have or will have the right to hold or operate the property, and how such rights are obtained at this location, indicating any conditions that the registrant must meet in order to obtain or retain the property. If held by leases or options or if the mineral rights otherwise have termination provisions, the registrant would have to provide the expiration dates of such leases, options or mineral rights and associated payments.[971]

For each material property, the proposed rules also required a registrant to disclose a history of previous operations, a description of the condition and status of the property, and a description of any significant encumbrances to the property, including current and future permitting requirements and associated deadlines, permit conditions, regulatory violations and associated fines.[972]

We also proposed to require several items of disclosure in tabular form, including a summary of the exploration activity for the most recently completed fiscal year (Table 4 of the proposed rules), a summary of material exploration results for the most recently completed fiscal year (Table 5 of the proposed rules), a summary of all mineral resources and reserves (if mineral resources or reserves have been determined) (Table 6 of the proposed rules), and a comparison of the property's mineral resources and reserves as of the end of the last fiscal year against the mineral resources and reserves as of the end of the preceding fiscal year, with an explanation of any material change between the two (Tables 7 and 8 of the proposed rules).[973] A proposed instruction provided that registrants would be permitted to modify the tables for ease of presentation, to add information, or to combine two or more required tables throughout their disclosure.[974]

We further proposed that, if the registrant has not previously disclosed mineral reserve or resource estimates in a filing with the Commission or is disclosing material changes to its previously disclosed mineral reserve or resource estimates, it must provide a brief discussion of the material assumptions and criteria underlying the estimates and cite to the corresponding sections of the technical report summary, which would be filed as an exhibit.[975] We similarly proposed that, if the registrant has not previously disclosed material exploration results in a filing with the Commission, or is disclosing material changes to its previously disclosed exploration results, it must provide sufficient information to allow for an accurate understanding of the significance of the exploration results and cite to corresponding sections of the summary technical

[964] 17 CFR 229.1303(b)(3)(iv) [Item 1303(b)(3)(iv) of Regulation S–K].

[965] *See supra* note 933 and accompanying text.

[966] 17 CFR 229.1303(b)(3)(v) [Item 1303(b)(3)(v) of Regulation S–K].

[967] 17 CFR 229.1303(b)(3)(vi) [Item 1303(b)(3)(vi) of Regulation S–K]. However, a registrant may not modify the tabular format to remove any of the required disclosure from the tables.

[968] *See* letters from AIPG, Chamber, Cleary & Gottlieb, NMA, NSSGA, SAMCODES 1, and SME 1.

[969] 17 CFR 229.1303(b)(3)(vii) [Item 1303(b)(3)(vii) of Regulation S–K].

[970] *See* Proposing Release, *supra* note 5, at Section II.G.2.

[971] *See id.*

[972] *See id.*

[973] *See id.*

[974] *See id.*

[975] *See id.*

report, which would be filed as an exhibit.[976]

We proposed additional individual property disclosure instructions applicable to registrants that have not previously disclosed mineral resource or reserve estimates or material exploration results or that are disclosing a material change in previously disclosed mineral resource or reserve estimates or material exploration results. Most of those proposed instructions were designed to assist registrants in determining whether there has been a material change in estimates of mineral resources, mineral reserves, or material exploration results. For example, according to one proposed instruction, whether a change in exploration results, mineral resources, or mineral reserves, is material must be based on all facts and circumstances, both quantitative and qualitative. Pursuant to another proposed instruction, a change in exploration results that significantly alters the potential of the exploration target is considered material.

Other proposed instructions would establish quantitative thresholds for presumed materiality of a change in estimates of mineral resources or reserves. For example, according to one proposed instruction, an annual change in total resources or reserves of 10 percent or more, excluding production as reported in Tables 7 and 8 of the proposed rules, is presumed to be material, and thus would need to be disclosed.[977] According to another proposed instruction, a cumulative change in total resources or reserves of 30 percent or more in absolute terms, excluding production as reported in Tables 7 and 8 of the proposed rules, from the current filed technical report summary is presumed to be material. A third proposed instruction would require that, when applying these quantitative thresholds for presumed materiality, the registrant should consider the change in total resources or reserves on the basis of total tonnage or volume of saleable product.[978]

We also proposed an instruction that would require a registrant to consider whether the filed technical report summary is current with respect to all material assumptions and information, including assumptions relating to or underlying all modifying factors and scientific and technical information (*e.g.,* sampling data, estimation assumptions, and methods). To the extent that the registrant is not filing a technical report summary, but instead is basing the required disclosure upon a previously filed report, that report would also have to be current in these respects. If the previously filed report is not current in these respects, the registrant would have to file a revised or new summary technical report from a qualified person, which supports the registrant's mining property disclosures.[979]

Finally, we proposed an instruction explaining that a report containing estimates of the quantity, grade, or metal or mineral content of a deposit or exploration results that a registrant has not verified as a current mineral resource, mineral reserve, or exploration results, and which was prepared before the registrant acquired, or entered into an agreement to acquire, an interest in the property that contains the deposit, would not be considered current and could not be filed in support of disclosure.[980]

ii. Comments on the Rule Proposal

Many of the comments on the proposed individual property disclosure requirements were substantially similar to the comments in response to the proposed summary disclosure provisions. While commenters acknowledged the importance of disclosure on individually material properties,[981] many believed the proposed disclosure requirements were overly prescriptive and many were critical of one or more of the proposed tables.[982] One commenter opposed Tables 4–8 altogether because of the level of detail required, which in the commenter's view would likely result in any useful information being obscured, and which would be overly burdensome for registrants to produce.[983]

Another commenter stated that certain proposed provisions, which would require detailed information about leases, mining rights and encumbrances, would likely result in over-disclosure of information that is not material to investors.[984] In addition, one commenter stated that the Commission should revise the individual property disclosure requirements in proposed Item 1304 to align it with the checklist content and format in CRIRSCO Template Table 1.[985]

Several commenters opposed requiring the proposed tables for exploration activity and exploration results (Tables 4 and 5 of the proposed rules) on the grounds that they are inconsistent with CRIRSCO standards, are onerous to produce, and would result in disclosure that is potentially competitively harmful, or would not be meaningful to most investors.[986] Some of the commenters opposed Tables 4 and 5 of the proposed rules because, in their view, the tables implied that drilling is the only form of exploration and ignored various other forms of data collection and analysis, such as geochemical and geophysical surveys, which are routinely used in exploration.[987] Maintaining that it would be too difficult to include thousands of datum points regarding exploration into a single table, those commenters recommended that Tables 4 and 5 of the proposed rules either should be eliminated from the final rules[988] or allowed either in narrative form or in company-designed tables.[989]

While commenters generally supported the disclosure of mineral resources and reserves in tabular format,[990] most commenters that addressed the issue were critical of Table 6 of the proposed rules in various respects. Several commenters opposed proposed Table 6 on the grounds that it would require the disclosure of mineral resources and reserves in the same table, as well as inferred resources alongside

[976] *See id.*

[977] *See id.*

[978] *See id.*

[979] *See id.*

[980] *See id.*

[981] *See, e.g.,* letters from Eggleston, Midas, and Rio Tinto.

[982] *See* letters from AIPG, Amec, AngloGold, BHP, CBRR, CIM, Cleary & Gottlieb, Coeur, Davis Polk, Eggleston, FCX, Gold Resource, Midas, MMSA, Newmont, NSSGA, Rio Tinto, SAMCODES 1, SME 1, SRK 1, Vale, and Willis.

[983] *See* letter from Amec.

[984] *See* letter from Newmont; *see also* letter from Amec (objecting to some of the proposed requirements as requesting unnecessary detail for an annual disclosure filing, including the requirement to provide: A summary of the exploration activity and material exploration results for the most recently completed year; a description of any significant encumbrances to the property; a description of the titles, claims, concessions, mineral rights, leases or options regarding the property; and a history of previous operations) and letter from Cleary & Gottlieb (objecting to the proposed requirement to disclose the age and physical condition of the property on the grounds that it would not be useful to investors and would be very burdensome to a company with significant mining operations).

[985] *See* letter from BHP.

[986] *See* letters from Amec, AngloGold, Cleary & Gottlieb, FCX, Midas, MMSA, SME 1, SRK 1, and Vale.

[987] *See, e.g.,* letters from NSSGA, SME 1, SRK 1, and Vale.

[988] *See, e.g.,* letters from SRK 1 (recommending removal of proposed Table 5) and Vale (recommending removal of both proposed Tables 4 and 5).

[989] *See, e.g.,* letter from and SME 1; *see also* letter from Cleary (recommending a principles-based approach generally to the information required to be disclosed in tabular format, which would allow a registrant and its qualified persons to exercise greater judgment in determining the most suitable format and content of material mining disclosure).

[990] *See, e.g.,* letters from AngloGold, Eggleston, and Rio Tinto.

indicated and measured mineral resources, which would be inconsistent with CRIRSCO standards.[991] Commenters also opposed proposed Table 6 because it would require the disclosure of mineral reserves net of allowances for dilution and losses, which would be contrary to industry practice under the CRIRSCO-based codes.[992] For similar reasons, some commenters also opposed proposed Table 6 because it would require the disclosure of mineral resources as exclusive of mineral reserves.[993] One of those commenters stated that a registrant should be permitted to disclose mineral resources as inclusive or exclusive of mineral reserves as long as it clearly explains the basis of its disclosed estimate.[994]

Numerous commenters also opposed proposed Table 6 because it would require the disclosure of mineral reserves on the basis of three points of reference.[995] Commenters maintained that, to be consistent with the CRIRSCO-based codes, the Commission should only require the disclosure of mineral resources on an in situ basis [996] and reserves on a run of mine [997] or saleable product basis.[998]

One commenter stated that proposed Table 6 incorrectly suggests that different types of mining projects are comparable, which is inconsistent with the diversity found in the mining industry.[999] Another commenter opposed the overly prescriptive nature of Table 6 and recommended leaving its inclusion and format to the discretion of the qualified person.[1000]

In addition, many commenters opposed Table 6 because it would require the determination and disclosure of mineral resources and reserves based on a 24-month trailing average price.[1001] Some commenters further objected to the inclusion of the total cost or book value of a mining property and the commodity price in the case of commodities traded under contract, the terms of which are confidential.[1002]

One commenter supported the proposed reconciliation requirement in Tables 7 and 8 of the proposed rules because ''[r]econciliation between numbers on consecutive fiscal years is important to validate uncertainty assumptions and resource/reserve classification.'' [1003] Other commenters either supported proposed Tables 7 and 8 with little to no discussion [1004] or supported having a reconciliation requirement while disagreeing with various aspects of the proposed tabular format.[1005] Some commenters objected to the high granularity of disclosure required in proposed Tables 7 and 8, which they stated would impose a significant reporting burden for a registrant with a large number of properties reported.[1006] Noting that the mining industry has only formalized reconciliation reporting in the past 10 years, and stating that obtaining accurate reconciliation has been difficult for a variety of reasons, other commenters recommended that the Commission make resource and reserve reconciliation voluntary.[1007]

Some commenters provided conditional support for the Commission's proposed requirement to provide a discussion of the material assumptions underlying a registrant's disclosure of mineral resources, mineral reserves, or material exploration results when first disclosing them or when disclosing material changes to the previously disclosed estimates and results.[1008] One commenter stated that it supported the Commission's proposed requirement to provide a discussion of material assumptions as long as the Commission deemed the summaries prepared for CRIRSCO reporting (*e.g.,* based on JORC Table 1) to be acceptable for Commission reporting purposes.[1009]

Another commenter supported the proposed disclosure requirement for material assumptions but opposed any prescriptive requirement, such as the proposed percentage thresholds that would trigger when a material change has occurred, relating to such disclosure.[1010] A third commenter stated that, consistent with international practice, a detailed discussion of the material assumptions should be included in the technical report while a summary of material assumptions should occur in annual filings.[1011] This commenter, however, stated that while the proposed instruction, providing that an annual change in total resources or reserves of 10% or more is presumed to be material, was reasonable, a change of 25% might be better.[1012] A fourth commenter approved of the 30% cumulative change threshold while recommending a 15% threshold for an annual change.[1013] A fifth commenter believed that the 10% threshold for defining a material change for both mineral resources and reserves was too narrow. That commenter recommended allowing the qualified person to determine when a material change has occurred.[1014]

In response to our request for comment, most commenters that addressed the issue opposed requiring presentation of Tables 4 through 8 of the proposed rules in XBRL format.[1015] Commenters primarily objected to such a requirement because it would be expensive [1016] and, ''given the uniqueness of the information to the registrant,'' they did not feel there was any useful information that would benefit from being presented in a

[991] *See* letters from AIPG, BHP, CBRR, CIM, and SME 1.

[992] *See* letters from BHP, CIM, Newmont, and SRK 1.

[993] *See* letters from AngloGold, BHP, and JORC.

[994] *See* letter from JORC.

[995] *See* letters from Amec, BHP, CIM, Eggleston, JORC, MMSA, Newmont, Randgold, Royal Gold, SME 1, and SRK 1.

[996] *See, e.g.,* letters from Amec, CIM, Newmont, Randgold, and Rio Tinto.

[997] *See, e.g.,* letters from CIM, Randgold, and SME 1.

[998] *See, e.g.,* letters from MMSA, Randgold, and SME 1; *see also* letters from CBRR and FCX (recommending the reporting of reserves as run-of-mine (plant/mill feed) ore tons, contained product before plant recovery and saleable product after plant recovery).

[999] *See* letter from SME 1; *see also* letter from JORC (generally opposing all of the tables as being inconsistent with the diversity in the mining industry).

[1000] *See* letter from Vale.

[1001] *See* letters from AIPG, Alliance, AngloGold, BHP, CBRR, Chamber, CIM, Cleary & Gottlieb, Coeur, Davis Polk, Dorsey & Whitney, Eggleston, Gold Resource, Newmont, NMA 1, Northern Dynasty, Randgold, Rio Tinto, SAMCODES 1 and 2, Shearman & Sterling, SME 1, Vale, and Willis.

[1002] *See, e.g.,* letter from BHP; *see also* letter from NSSGA (opposing the disclosure of a weighted contract price in Table 3 on similar grounds).

[1003] Letter from CBRR.

[1004] *See* letter from Gold Resource.

[1005] *See* letter from AngloGold (supporting the proposed requirement for reconciliation, but also recommending leaving the ''level of granularity in the reconciliation'' to the discretion of the qualified person); letter from Eggleston (stating that requiring a comparison of mineral resources and reserves would be useful, but also maintaining that a meaningful comparison of mineral reserves could not be obtained using the proposed table); and letter from SRK 1 (stating that the proposed tables may provide useful information to a technically knowledgeable reader but may also create confusion for investors).

[1006] *See* letters from Amec, MMSA, and Rio Tinto.

[1007] Letters from AIPG and SME 1; *see also* letter from Vale (recommending that inclusion and format of Tables 7 and 8 be left to the discretion of the qualified person).

[1008] *See, e.g.,* letters from AngloGold, CBRR, Eggleston, Midas, Rio Tinto, and SRK 1.

[1009] *See* letter from Rio Tinto.

[1010] *See* letter from AngloGold.

[1011] *See* letter from Eggleston.

[1012] *See id.*

[1013] *See* letter from CBRR.

[1014] *See* letter from Newmont. Another commenter suggested a 25% materiality threshold for contained metal in reserves and a 50% threshold for contained metal in resources together with an ''additional overriding qualitative obligation that any change the registrant deems a material change should be disclosed.'' Letter from Midas.

[1015] *See, e.g.,* letters from AIPG, Alliance, Amec, AngloGold, CBRR, Chamber, Eggleston, MMSA, Rio Tinto, and SME 1.

[1016] *See* letter from SME 1.

structured format.[1017] One commenter, however, supported requiring the presentation of proposed Tables 4 through 8 in XBRL because it would ''likely benefit investors and potential investors as well as align SEC reporting requirements with potential industry standards in the near future.'' [1018]

Some commenters recommended that, consistent with CRIRSCO standards, such as NI 43–101 [1019] and JORC, but contrary to the Commission's proposal, the Commission allow a registrant and its qualified person(s) to use historical estimates of the quantity, grade or mineral content of a deposit that the registrant has not verified and that was prepared before the registrant acquired or entered into an agreement to acquire an interest in the property containing the deposit.[1020] As two of those commenters explained, the inability to use historical estimates in a Commission filing could render a proposed acquisition a practical impossibility because there could be insufficient time to complete an independent estimate of the resources or reserves for the target property.[1021]

**iii. Final Rules**

With modifications, we are adopting the proposed requirement that a registrant with material mining operations must disclose certain information about each property that is material to its business or financial condition.[1022] When determining the materiality of a property relative to its business or financial condition, a registrant must apply the same standards and other considerations to each individual property as required when determining whether its mining operations as a whole are material.[1023] We continue to believe that, because summary property disclosure alone will not provide all relevant information about the properties and assets that generate a mining registrant's revenues, detailed disclosure regarding a registrant's individually material properties is necessary to provide investors with a comprehensive understanding of a registrant's mining operations.

As proposed, the final rules require a registrant to provide a brief description of each material property, including: the property's location; [1024] existing infrastructure, including roads, railroads, airports, towns, ports, sources of water, electricity, and personnel; [1025] and a brief description, including the name or number and size (acreage), of the titles, claims, concessions, mineral rights, leases or options under which the registrant and its subsidiaries have or will have the right to hold or operate the property.[1026]

Further, as proposed, the final rules will require registrants with individually material mining properties to provide, as relevant to each material property: A brief description of the present condition of the property, the work completed by the registrant on the property, the registrant's proposed program of exploration or development, the current stage of the property as exploration, development or production, the current state of exploration or development of the property, and the current production activities; [1027] the age, details as to modernization and physical condition of the equipment, facilities, infrastructure, and underground development; [1028] the total cost for or book value of the property and its associated plant and equipment; [1029] a brief history of previous operations, including the names of previous operators, insofar as known; [1030] and a brief description of any significant encumbrances to the property, including current and future permitting requirements and associated timelines, permit conditions, and violations and fines.[1031]

Although several commenters opposed some of these individual disclosure requirements on the basis that they are too prescriptive and would be burdensome on registrants,[1032] the above items of disclosure are substantially similar to items called for by Item 102 of Regulation S–K and Guide 7.[1033] Also, these disclosures are

[1017] Letter from AngloGold; *see also* letters from AIPG and SME 1.

[1018] Letter from SRK 1.

[1019] As one of the commenters explained, under Canada's NI 43–101, the use of a historical estimate is contingent upon the registrant disclosing: The date and source of the historical estimate; the relevance and reliability of the historical estimate; the key assumptions, parameters and methods used to prepare the historical estimate if known; the work that needs to be done to upgrade or verify the historical estimate; and that the qualified person has not done sufficient work to classify the historical estimate as a current estimate and, therefore, the registrant is not treating the historical estimate as a current estimate of mineral resources or reserves. *See* letter from Coeur.

[1020] *See* letters from Amec, Coeur, Gold Resource, Newmont, and NMA 1.

[1021] *See* letters from Newmont and NMA 1.

[1022] 17 CFR 229.1304(a)(1) [Item 1304(a)(1) of Regulation S–K].

[1023] *See id.* The registrant would have to apply those standards and other considerations to each individual property that it owns or in which it has, or it is probable that it will have, a direct or indirect economic interest. It also would have to provide individual disclosure for each material property that it operates, or it is probable that it will operate, under a lease or other legal agreement that grants the registrant ownership or similar rights that authorize it, as principal, to sell or otherwise dispose of the mineral. Further, a registrant would have to provide individual disclosure for each material property for which it has, or it is probable that it will have, an associated royalty or similar right, unless the registrant lacks access to the information about the underlying properties, as specified in Item 1304(b) of Regulation S–K, and the registrant meets the conditions for omitting the individual property disclosure pursuant to Item 1304(a)(2) of Regulation S–K. *See supra* Section II.B.4.

[1024] *See* Item 1304(b)(1)(i) of Regulation S–K [17 CFR 229.1304(b)(1)(i)], which requires the description of the property's location to be accurate to within one mile, using an easily recognizable coordinate system, including appropriate maps, with proper engineering detail (such as scale, orientation, and titles) that must be legible on the page when printed. We continue to believe that this level of detail is similar to the level of detail required by the CRIRSCO-based codes. *See, e.g.,* PERC Reporting Standard, *supra* note 302, Table 1 (requirement on key plan, maps and diagrams, which calls for ''a location or index map and more detailed maps showing all important features described in the text, including all relevant cadastral and other infrastructure features . . . All maps, plans and sections noted in this checklist, should be legible, and include a legend, coordinates, coordinate system, scale bar and north arrow''). *See also* SAMREC Code, *supra* note 267, Table 1 (calling for a ''detailed topo-cadastral map'').

[1025] 17 CFR 229.1304(b)(1)(ii) [Item 1304(b)(1)(ii) of Regulation S–K].

[1026] Item 1304(b)(1)(iii) of Regulation S–K [17 CFR 229.1304(b)(1)(iii)], which also requires a description of how such property rights were obtained at this location, indicating any conditions that the registrant must meet in order to obtain or retain the property. If held by leases or options or if the mineral rights otherwise have termination provisions, the registrant must provide the expiration dates of such leases, options, or mineral rights and associated payments.

[1027] Item 1304(b)(2)(i) of Regulation S–K [17 CFR 229.1304(b)(2)(i)], which also requires the registrant to identify mines as either surface or underground, with a brief description of the mining method and processing operations. If the property is without known reserves and the proposed program is exploratory in nature or the registrant has started extraction without determining mineral reserves, the registrant must provide a statement to that effect.

[1028] 17 CFR 229.1304(b)(2)(ii) [Item 1304(b)(2)(ii) of Regulation S–K].

[1029] 17 CFR 229.1304(b)(2)(iii) [Item 1304(b)(2)(iii) of Regulation S–K].

[1030] 17 CFR 229.1304(b)(2)(iv) [Item 1304(b)(2)(iv) of Regulation S–K].

[1031] 17 CFR 229.1304(b)(2)(v) [Item 1304(b)(2)(v) of Regulation S–K].

[1032] *See* letters from Alliance, Amec, BHP, CBRR, FCX, Newmont, and SRK 1.

[1033] For example, paragraph (b) of Guide 7 calls for registrants to disclose the location and means of access to the property, a description of the title, claim, lease or option under which the registrant operates the property with appropriate maps to portray the location, a history of previous operations, a description of the present condition of the property, the work completed by the registrant on the property, the registrant's proposed program of exploration and development, the current state of exploration or development of the property, and a description of the rock formations and mineralization of existing or potential economic significance on the property, including the identity of the principal metallic or other constituents insofar as known.

substantially similar to what is called for under CRIRSCO-based rules.[1034] We continue to believe that these items elicit material information for investors.

Similar to a proposed instruction, the final rules include a provision that establishes guidelines for classifying the current stage of a property as exploration, development, or production.[1035] Also as proposed, a second provision advises registrants to include only geological information that is brief and relevant to property disclosure rather than an extensive description of regional geology.[1036] We believe that this latter provision is consistent with the transparency principle under the CRIRSCO standards and will help investors better understand a registrant's mining operations.

As proposed, we are adopting final rules that would require a registrant to disclose, if mineral resources or reserves have been determined, a summary of all mineral resources or reserves as of the end of the most recently completed fiscal year.[1037] While we are still requiring the same disclosure, in response to those commenters who noted that reporting mineral resources and reserves together is counter to the principles of the CRIRSCO-based codes and could cause investor confusion, we are modifying the presentation of the disclosure.[1038] Consequently, instead of one table (proposed Table 6), the final rules require that, for each property, the registrant disclose in tabular format, as provided in Table 1 to paragraph (d) of Item 1304, for each class of mineral resources (measured, indicated, and inferred), together with total measured and indicated mineral resources, the estimated tonnages and grades (or quality, where appropriate), and in Table 2 to paragraph (d) of Item 1304, for each class of mineral reserves (proven and probable), together with total mineral reserves, the estimated tonnages, grades (or quality, where appropriate), cut-off grades and metallurgical recovery. Furthermore, consistent with our approach to summary disclosure and in light of commenters' concerns about requiring three points of reference, the disclosures in these Tables 1 and 2 will be based on a specific point of reference selected by a qualified person.[1039] The registrant must disclose the selected point of reference for each of Tables 1 and 2 to paragraph (d) of Item 1304.[1040]

Similar to a proposed instruction, we are adopting an instruction that would permit a registrant to modify the tabular formats in these Tables 1 and 2 for ease of presentation, to add information, or to combine two or more required tables.[1041] This instruction is intended to provide registrants with the flexibility to organize the required data to fit their own particular circumstances. For example, depending on the number of individually material properties owned or operated, a registrant may decide to disclose mineral resources on separate properties all in one table or in multiple tables, and mineral reserves on separate properties all in one table or in multiple tables. The adopted instruction makes clear, however, that when combining tables, the registrant should not report mineral resources and reserves in the same table.[1042]

Another provision states that all disclosure of mineral resources by the registrant must be exclusive of mineral reserves.[1043] We are adopting this provision for the same reasons as our adoption of a substantially similar provision for summary disclosure.[1044]

We are adopting rules that, as proposed, will require a registrant to compare each material property's mineral resources and reserves as of the end of the last fiscal year with the mineral resources and reserves as of the end of the preceding fiscal year, and explain any material change between the two.[1045] However, unlike our rule proposal, and in response to comments received about various challenges associated with providing this disclosure,[1046] the final rules provide that the comparison may be in either narrative or tabular format. This will provide registrants greater flexibility in presenting their disclosure and should help limit the compliance burden for registrants, especially those with large numbers of reported properties. Like the proposed rules, the final rules specify that the comparison must disclose information concerning:

- The mineral resources or reserves at the end of the last two fiscal years;
- The net difference between the mineral resources or reserves at the end of the last completed fiscal year and the preceding fiscal year, as a percentage of the resources or reserves at the end of the fiscal year preceding the last completed one;
- An explanation of the causes of any discrepancy in mineral resources including depletion or production, changes in commodity prices, additional resources discovered through exploration, and changes due to the methods employed; and
- An explanation of the causes of any discrepancy in mineral reserves including depletion or production, changes in the resource model, changes in commodity prices and operating costs, changes due to the methods employed, and changes due to acquisition or disposal of properties.[1047]

This comparative disclosure requirement will help investors understand the reasons for the year to year changes in a registrant's mineral resources and reserves, which should help them analyze and evaluate a registrant's future prospects. While Guide 7 calls for annual disclosure of mineral reserves, it does not call for registrants to compare their current mineral reserve disclosure with previously provided disclosure. Registrants, however, provide much of the disclosure required under the comparative disclosure provision pursuant to current disclosure practices.[1048]

If the registrant has not previously disclosed mineral reserve or resource estimates in a Commission filing or is disclosing material changes to its previously disclosed mineral reserve or resource estimates, we are adopting rules, as proposed, requiring it to provide a brief discussion of the material assumptions and criteria underlying the estimates.[1049] The material assumptions and criteria will depend on the specific facts and circumstances surrounding the particular property and the mineral resource and reserve estimates.[1050] However, the disclosure of these assumptions and criteria must include all of the material information necessary

[1034] *See, e.g.,* ASX Listing Rules 5.1 and 5.3, which call for similar disclosures including, as relevant to mining exploration or production entities, details of exploration activities, mining production and development activities, exploration, mining and development expenditures, and information on mining tenements.

[1035] *See supra* Section II.B.5.iii (discussing Item 1304(c)(1) of Regulation S–K).

[1036] 17 CFR 229.1304(c)(2) [Item 1304(c)(2) of Regulation S–K].

[1037] 17 CFR 229.1304(d)(1).

[1038] *See supra* note 991 and accompanying text.

[1039] *See* 17 CFR 229.1304(d)(1).

[1040] *See id.*.

[1041] Instruction 1 to 17 CFR 229.1304(d)(1). As previously noted, a registrant may not modify the required tables to remove any of the required disclosure from the tables.

[1042] *See id.*

[1043] 17 CFR 229.1304(d)(2) [Item 1304(d)(2) of Regulation S–K].

[1044] *See supra* note 959 and accompanying text. As previously discussed, *see supra* Section II.B.4., a third instruction states that a registrant with only a royalty interest should provide only the portion of the resources or reserves that are subject to the royalty or similar agreement. *See* 17 CFR 229.1304(d)(3).

[1045] 17 CFR 229.1304(e) [Item 1304(e) of Regulation S–K].

[1046] *See supra* note 1005.

[1047] 17 CFR 229.1304(e)(1)–(4) [Items 1304(e)(1)–(4) of Regulation S–K].

[1048] *See, e.g.,* letters from AngloGold, CBRR, and Eggleston.

[1049] 17 CFR 229.1304(f)(1) [Item 1304(f)(1) of Regulation S–K].

[1050] 17 CFR 229.1304(f)(3) [Item 1304(f)(3) of Regulation S–K].

for investors reasonably to understand the disclosed mineral resources or reserves. In addition, the registrant must cite to corresponding sections of the technical report summary if one is filed as an exhibit pursuant to Item 1302(b).[1051]

As previously discussed, we have revised the proposed rules to state that, if a registrant is disclosing exploration activity and exploration results for any material property for its most recently completed fiscal year, it must provide summaries that include certain specified information.[1052] For exploration activity, the summary must describe, for each material property as relevant, the sampling methods used, and, for each sampling method used, the number of samples, the total size or length of the samples, and the total number of assays.[1053] For exploration results, the summary must identify, for each relevant material property, the hole, trench or other sample that generated the exploration results, describe the length, lithology, and key geologic properties of the exploration results, and include a brief discussion of the exploration results' context and relevance.[1054] If the summary of exploration results only includes results from selected samples and intersections, it should be accompanied with a discussion of the context and justification for excluding other results.[1055]

In a change from the proposed rules, in response to comments received, the final rules will permit registrants to provide the summaries of exploration activity and exploration results in narrative or tabular format.[1056] We believe this change will address the concerns of commenters that opposed Tables 4 and 5 of the proposed rules because those tables suggested that drilling is the only form of exploration and because it would be too difficult to include thousands of datum points regarding exploration into a single table.[1057] We agree that, as some commenters suggested, permitting registrants to provide disclosure on exploration activity and exploration results in narrative or tabular format will help limit the final rules' compliance burden while still providing important benefits to investors.[1058]

As previously noted, the final rules permit a registrant to disclose an exploration target when discussing exploration results or exploration activity related to a material property as long as the disclosure is accompanied by the cautionary and explanatory statements specified in Item 1302(c) of Regulation S–K.[1059] Consistent with similar requirements under the CRIRSCO-based codes, the disclosure about an exploration target will help investors understand the significance of a registrant's disclosed exploration results and exploration activities, while the required accompanying statements will help investors understand the conceptual basis and limitations of the exploration target.[1060]

Similar to the disclosure requirement for mineral resources or mineral reserves, if the registrant has not previously disclosed exploration results in a filing with the Commission, or is disclosing material changes to its previously disclosed exploration results, the final rules require it to provide sufficient information to allow for an accurate understanding of the significance of the exploration results.[1061] This must include information such as exploration context, type and method of sampling, sampling intervals and methods, relevant sample locations, distribution, dimensions, and relative location of all relevant assay and physical data, data aggregation methods, land tenure status, and any additional material information that may be necessary to make the disclosure concerning the registrant's exploration results not misleading. The registrant must cite to corresponding sections of the summary technical report if one is filed.[1062]

Similar to proposed instructions, we also are adopting individual property disclosure provisions applicable to registrants that have not previously disclosed mineral resource or reserve estimates or exploration results or that are disclosing a material change in previously disclosed mineral resource or reserve estimates or exploration results. Most of these provisions are designed to assist registrants in determining whether there has been a material change in estimates of mineral resources, mineral reserves, or exploration results. For example, a pair of provisions explains that whether a change in exploration results, mineral resources, or mineral reserves, is material must be based on all facts and circumstances, both quantitative and qualitative.[1063] Another provision states that a change in exploration results that significantly alters the potential of the subject deposit is considered material.[1064]

In a change from the proposed rules, we are not providing quantitative guidance for what is presumed to be a material change in estimates of mineral resources or reserves. We have been persuaded by commenters that objected to the proposed quantitative guidance as being overly prescriptive.[1065]

If material assumptions in the filed technical report summary are no longer valid, under current facts and circumstances, then using such a technical report summary to support disclosure of mineral resources or reserves can be misleading to investors. Consequently, we are adopting a provision, similar to a proposed instruction, that requires a filed technical report summary to be current with respect to all material assumptions and information, including assumptions relating to all modifying factors and scientific and technical information (*e.g.,* sampling data, estimation assumptions and methods), as of the end of the registrant's most recently completed fiscal year.[1066] To the extent that the registrant is not filing a technical report summary but instead is basing the required disclosure upon a previously filed report, that report must also be current in these material respects. If the previously filed report is not current in these material respects, the registrant must file a revised or new summary technical report from a qualified person that supports the registrant's mining property disclosures.[1067]

Finally, we are adopting a provision stating that a report containing one or more estimates of the quantity, grade, or metal or mineral content of a deposit or exploration results that a registrant has not verified as a current mineral

[1051] *See* 17 CFR 229.1304(f)(1).

[1052] *See supra* Section II.D.3.

[1053] 17 CFR 229.1304(g)(1) [Item 1304(g)(1) of Regulation S–K].

[1054] 17 CFR 229.1304(g)(2) [Item 1304(g)(2) of Regulation S–K].

[1055] *See id.*

[1056] 17 CFR 229.1304(g)(3) [Item 1304(g)(3) of Regulation S–K].

[1057] *See, e.g.,* letters from Cleary & Gottlieb, NSSGA, SME 1, SRK 1, and Vale.

[1058] *See* letters from Cleary & Gottlieb and SME 1. Whether in narrative or tabular format (and, if in tabular format, whether the tables are similar to proposed Tables 4 and 5 or are tables designed by the registrant), the disclosure of exploration activity and material exploration results must be reasonably comprehensive and not omit material facts that may make the disclosure misleading.

[1059] *See* 17 CFR 229.1304(g)(5).

[1060] *See supra* Section II.D.3.

[1061] 17 CFR 229.1304(g)(6)(i) [Item 1304(g)(6)(i) of Regulation S–K].

[1062] *See id.*

[1063] 17 CFR 229.1304(f)(3) [Item 1304(f)(3) of Regulation S–K]; and 17 CFR 229.1304(g)(6)(ii) [Item 1304(g)(6)(ii) of Regulation S–K].

[1064] 17 CFR 229.1304(g)(6)(iii) [Item 1304(g)(6)(iii) of Regulation S–K].

[1065] *See, e.g.,* letter from AngloGold.

[1066] 17 CFR 229.1304(f)(2) [Item 1304(f)(2) of Regulation S–K].

[1067] *See id.*

resource, mineral reserve, or exploration results, and which was prepared before the registrant acquired, or entered into an agreement to acquire, an interest in the property that contains the deposit (*i.e.,* a ''historical estimate''), is not considered current and cannot be filed in support of disclosure.[1068]

However, in a change from the proposed rules, and as a result of comments received, we are adopting a targeted accommodation that permits a registrant to include a historical estimate in a Commission filing that pertains to a merger, acquisition, or business combination if the registrant is unable to update the estimate prior to the completion of the relevant transaction. In that event, when referring to the estimate, the registrant must disclose the source and date of the estimate, and state that a qualified person has not done sufficient work to classify the estimate as a current estimate of mineral resources, mineral reserves, or exploration results, and that the registrant is not treating the estimate as a current estimate of mineral resources, mineral reserves, or exploration results.[1069] These conditions are generally consistent with those required for the use of historical estimates under Canada's NI 43–101.[1070] This change should address the concern of commenters that the proposed prohibition regarding the use of historical estimates could render some acquisitions or other similar business transactions a practical impossibility. At the same time, to mitigate any potential risk from the use of older information, the adopted provision requires that investors be provided with additional information to help them evaluate an investment in a registrant that has engaged in a merger or similar business transaction involving the use of a historical estimate.

We believe these provisions will help a registrant determine when it must file a technical report summary as an exhibit to the filing and provide the appropriate accompanying disclosure in the filing about the resource or reserve estimates and exploration results. At the same time, the adopted provisions will help to ensure that investors are provided with current information about the registrant's mineral resources and reserves and exploration results.

Like the proposed rules, the final rules do not require a registrant to format any of its disclosure about its individually material properties in XBRL. In light of the flexibility provided in the final rules for these disclosures, which will permit registrants to tailor the disclosures to their unique facts and circumstances, we believe that presentation in a structured format, such as XBRL, would impose additional burdens on registrants without providing substantial additional benefits for users of the information.[1071] For similar reasons, we are not requiring registrants' summary disclosure to be formatted in XBRL.

3. Requirements for Technical Report Summaries

i. Rule Proposal

We proposed rules that would require a registrant to file, as an exhibit, a technical report summary to support the disclosure of mineral resources, mineral reserves, or material exploration results for each material property.[1072] The proposed rules would require a qualified person to identify and summarize the scientific and technical information and conclusions reached concerning material mineral exploration results, initial assessments used to support disclosure of mineral resources, and preliminary or final feasibility studies used to support disclosure of mineral reserves, for each material property, in the technical report summary.[1073] The qualified person also would be required to sign and date the technical report summary.[1074] We proposed this latter requirement to help ensure the reliability of the technical report summary.

We proposed specific requirements for the contents of the technical report summary to elicit scientific and technical information to support the determination and disclosure of mineral resources, mineral reserves, and material exploration results. The proposed requirements are similar in most respects to the items of information required for the summary report under Canada's NI 43–101.[1075] They are also similar to the contents suggested in the mining engineering literature.[1076] In the Proposing Release, we stated that these similarities support our view that the proposed sections of the technical report summary would provide relevant and useful information to facilitate an investor's understanding of a registrant's mineral resources, mineral reserves, and material exploration results.[1077]

We proposed that the technical report summary must not include large amounts of technical or other project data, either in the report or as appendices to the report.[1078] In addition, the proposed rules required the qualified person to draft the summary to conform, to the extent practicable, with plain English principles under the Securities Act and Exchange Act.[1079] While the proposed requirements were designed primarily to help improve the readability of the technical report summary for the benefit of those investors who do not have a technical scientific or engineering background, they would also benefit more sophisticated investors to the extent that they result in a more readable and understandable document. They also are consistent with similar Canadian mining disclosure standards.[1080]

We proposed that the technical report summary consist of some or all of 26 sections, depending upon the specific scope of the summary.[1081] As proposed, a technical report summary that reports the results of a preliminary or final feasibility study would have to include all 26 sections. A technical report summary that reports the results of an initial assessment or that reports material exploration results could omit information required by certain of the proposed technical report summary sections.[1082]

Although the proposed sections were similar in most respects to the items of information required for the summary

[1068] 17 CFR 229.1304(h) [Item 1304(h) of Regulation S–K].

[1069] *See id.*

[1070] *See* Canada's NI 43–101, *supra* note 123, at pt. 2.4.

[1071] *See supra* notes 1015–1017 and accompanying text.

[1072] *See* Proposing Release, Section II.G.3.

[1073] *See id.*

[1074] *See id.*

[1075] *See* Canada's Form 43–101F1 (prescribing 27 sections for the technical report summary required for each material property pursuant to Canada's NI 43–101), *http://web.cim.org/standards/documents/Block484_Doc111.pdf.*

[1076] *See, e.g.,* W. Hustrulid, M. Kuchta, and R. Martin, 1 *Open Pit Mine Planning & Design* 14–16 (3rd ed. 2013); Richard West, *Preliminary, Prefeasibility and Feasibility Studies, Australian Mineral Economics—A Survey of Important Issues* (Philip Maxwell and Pietro Guj, eds, 2006).

[1077] *See* Proposing Release, *supra* note 5, at Section II.G.

[1078] *See id.*

[1079] *See* 17 CFR 230.421 [Securities Act Rule 421] and 17 CFR 240.13a–20 [Securities Exchange Act Rule 13a–20].

[1080] *See* Instruction 3 to Form 43–101F1 (''The qualified person preparing the technical report should keep in mind that the intended audience is the investing public and their advisors who, in most cases, will not be mining experts. Therefore, to the extent possible, technical reports should be simplified and understandable to a reasonable investor. However, the technical report should include sufficient context and cautionary language to allow a reasonable investor to understand the nature, importance, and limitations of the data, interpretations, and conclusions summarized in the technical report'').

[1081] *See* Proposing Release, *supra* note 5, at Section II.G.3.

[1082] *See id.*

report under Canada's NI 43–101,[1083] there were a couple of notable differences. First, the proposed rules did not permit a qualified person to include a disclaimer of responsibility if he or she relies on a report, opinion, or statement of another expert in preparing the technical report summary.[1084] Second, we proposed to include sections about hydrogeology and geotechnical data, including testing and analysis, which are not included in Canada's NI 43–101.

ii. Comments on the Rule Proposal

While acknowledging that the Commission's proposal to require 26 specified sections in the technical report summary is similar to the content required under Canada's NI 43–101, numerous commenters urged the Commission to follow explicitly the content and format of Canada's Form 43–101F1 so that technical report summaries filed with the Commission would be interchangeable with technical reports prepared under Canada's NI 43–101.[1085] One of those commenters also recommended that the Commission explicitly incorporate the Canadian form by reference, ''which would allow for regular updates without going through additional rulemaking.'' [1086] Several other commenters, however, recommended that the technical report summary follow the format of CRIRSCO's Table 1 and the corresponding guidance in JORC or SAMREC rather than the format and guidance under Canada's NI43–101 because they viewed the latter as being too prescriptive.[1087] One of those commenters further recommended that the Commission adopt ''carve-outs'' for commercially sensitive information.[1088] Another commenter opposed the proposed technical report summary requirement as being too prescriptive and recommended that the Commission refer U.S. registrants to the 2014 SME Guide, which would be included as an appendix to the final rules.[1089]

Two commenters opposed the technical report summary filing requirement on the grounds that it ''is a significant change to the current SEC rules and goes beyond most CRIRSCO-based disclosure regimes, other than Canada and Australia, which do not require filing of expert reports.'' [1090] One of those commenters also believed that many of the required sections in the proposed technical report summary seemed designed to satisfy some unstated social or political goal rather than to provide material information to investors.[1091] The other commenter stated that the proposed rules would require a registrant in the aggregates business to collect and report on data that management typically does not use in its own analysis of its business.[1092] Because that commenter believed that many sections of the technical report summary would result in immaterial information to investors due to the nature of the aggregates industry, and because of its concern that some of the requested information, such as pricing, would place confidential business plan information into the public domain to the detriment of its competitive position, the commenter requested that the Commission exclude registrants in the aggregates business from having to comply with the technical report summary requirement.[1093]

One commenter who opposed the proposed technical report summary because of its differences with CRIRSCO-based disclosure requirements stated that ideally the Commission should adopt mining disclosure rules that are substantially the same as the CRIRSCO-based codes. As an alternative, however, that commenter recommended that the Commission adopt a ''reciprocal recognition'' approach that would allow foreign issuers to file their home country (CRIRSCO-based) reports in satisfaction of the U.S. rules and U.S. issuers to file U.S. compliant reports in satisfaction of foreign requirements.[1094]

Several commenters recommended changing the name of the technical report summary to either ''summary technical report'' or just ''technical report.'' [1095] Commenters urged such a change in order to align the name of the required report with that required under the CRIRSCO-based codes and because the Commission's proposed name suggests that there is a full technical report when in many instances there is not.

Some commenters generally approved of the proposed 26 sections of the technical report summary while suggesting modifications for certain sections. For example, one commenter stated that adding sections on hydrogeology and geotechnical would be appropriate for reserve determination but not for resource estimation because such information is typically not available.[1096] Another commenter recommended excluding those sections when disclosing exploration results for the same reason.[1097] A third commenter recommended excluding from the technical report summary detailed hydrogeology and geotechnical data as well as any other detailed technical data that most investors would not find meaningful.[1098]

Another commenter, however, supported the inclusion of sections on hydrology and rock mechanics.[1099] This commenter agreed with most of the topics included in the proposed technical report summary requirement, but opposed requiring annual cash flow forecasts and measures of economic viability, such as net present value, internal rate of return and payback period of capital, under ''results of the economic analysis'' on the grounds that such information is sensitive and should only be requested under specific situations and afforded confidential treatment.[1100]

One commenter urged the Commission to adopt a technical report summary provision requiring ''detailed descriptions of infrastructure needs for mining projects, especially dams, tailings disposal, water and energy access.'' [1101] That commenter also supported adoption of the technical report summary provision requiring descriptions of the environmental, permitting, and social or community factors related to the project, which the commenter indicated would include a description of ''social license to operate'' risks.[1102]

Another commenter disagreed with the proposed requirement that a

[1083] *See supra* note 1075 and accompanying text.

[1084] In contrast, Canada's NI 43–101 would permit the qualified person to include a disclaimer of responsibility if he or she relies on a report, opinion, or statement of another expert who is not a qualified person in preparing the technical report summary. *See* Item 3 of Canada's Form NI 43–101F1.

[1085] *See* letters from AIPG, Amec, Coeur, Eggleston, Gold Resource, Northern Dynasty, SME 1, and Willis.

[1086] Letter from AIPG.

[1087] *See* letters from AngloGold, BHP, JORC, MMSA, Randgold, Rio Tinto, and SAMCODES 1.

[1088] *See* letter from BHP.

[1089] *See* letter from CRIRSCO.

[1090] *See* letters from Chamber and NSSGA.

[1091] *See* letter from Chamber.

[1092] *See* letter from NSSGA.

[1093] *See id.*

[1094] *See* letter from PDAC.

[1095] *See* letters from AIPG, Coeur, Eggleston, Gold Resource, Midas, and SME 1.

[1096] *See* letter from Midas; *see also* letter from MMSA.

[1097] *See* letter from Eggleston; *see also* letter from SRK 1 (recommending excluding those sections for both exploration results and resource estimation).

[1098] *See* letter from Andrews & Kurth; *see also* letter from Amec (recommending exclusion of hydrogeology and geotechnical sections in conjunction with recommendation to exclude mineral brines and geothermal energy from scope of rules).

[1099] *See* letter from CBRR.

[1100] *Id.*

[1101] Letter from Earthworks.

[1102] *See Id.*

qualified person opine on whether all issues relating to all relevant modifying factors can be resolved with further work. The commenter further opposed the proposed provision requiring a qualified person to justify the use of a pre-feasibility study instead of a feasibility study. According to that commenter, because the CRIRSCO standards require a pre-feasibility study to be sufficient for a competent person, acting reasonably, to determine if all or part of a mineral resource may be converted to a mineral reserve at the time of reporting, no additional justification for use of a pre-feasibility should be required.[1103]

In response to our solicitation of comment regarding whether we should expand the disclosure required by the technical report summary, most commenters [1104] that addressed the issue did not favor expanding the technical report summary provision that would require the qualified person to describe the environmental, permitting, and social or community factors related to the project.[1105] One of those commenters objected to expanding the mining property disclosure requirements to include a more detailed discussion regarding sustainability and related issues on the grounds that it already discloses material environmental, social, and governance information for investors in its corporate social responsibility reports that it publishes annually on its web site.[1106] The commenter further noted that, to the extent that sustainability issues present a material risk, a registrant would already have to disclose that risk in the Risk Factors section of its Exchange Act annual report.[1107]

Some commenters, however, recommended that the Commission require a registrant and its qualified person(s) to consider sustainability factors when determining mineral resources and reserves.[1108] For example, one commenter suggested that the Commission explicitly require a carbon budget analysis in the economic viability determination for proven reserves.[1109] This commenter also recommended that the Commission: (i) Require the use of a spectrum of price forecasts and sensitivity analysis in assessing the economic recoverability of a coal deposit; and (ii) expand the definition of a qualified person to require an expertise in conducting a carbon budget analysis.[1110]

Another commenter urged the Commission to require the consideration of numerous sustainability topics when applying the modifying factors in mineral resource and reserve determinations.[1111] Under this approach, for metals mining, a qualified person would have to consider greenhouse gas emissions, air quality, biodiversity impacts, community relations and rights of indigenous peoples, and workforce health, safety, and well-being together with energy management, water management, and waste and hazardous materials management. The commenter further recommended that the Commission explicitly require a qualified person to have relevant experience to assess and render judgment on any potential modifying factor.[1112]

One commenter supported the consideration of climate, environmental, social, safety, and health modifying factors both in technical studies and company reports.[1113] Noting that most companies address sustainability issues in detail in separate reports, the commenter recommended that sustainability information should only be provided in a technical report in summary form.[1114] Another commenter noted that, although environmental and social matters have become ''extremely important'' in the estimation of mineral resources and reserves, those matters are already part of the modifying factors required to be considered under the CRIRSCO framework.[1115]

One commenter requested clarification of two instructions to the proposed technical report summary provision that requires a qualified person to describe the current or proposed mineral processing methods and the reasons for selecting these methods as the most suitable for extracting the valuable products from the mineralization under consideration. That commenter objected to the use of the term ''successfully'' to qualify processing methods, plant designs, and other parameters that have not yet been used in a commercial production of the valuable product from the mineralization under consideration because he believed that the term was vague.[1116] The commenter found the phrase ''successfully extract'' to be technically vague and questioned whether there is a particular scale at which extraction is successful and whether ''successful'' means economically profitable or technically demonstrated. The commenter recommended replacing ''successfully extract'' with ''commercially'' or ''in production.'' The commenter also stated that ''[f]urther clarification is warranted to clarify if demonstration plants or pilot plant operations can be used to warrant a process method as 'successful'.'' [1117]

Some commenters urged the Commission to modify the proposed

[1103] *See* letter from Amec.

[1104] *See* letters from Alliance, Amec, AngloGold, CRIRSCO, Eggleston, JORC, Midas, Newmont, NMA 1, Rio Tinto, SME 1, and SRK 1. *See also* letter from CBRR (stating that the proposed items are sufficient but suggesting that the Commission clarify that a registrant may add ''any other significant information that is relevant to the project'').

[1105] *See, e.g.,* letter from Alliance (''We believe that requiring disclosure of issues related to environmental, permitting and social or community factors, such as how the registrant is going to manage greenhouse gases, workforce health, safety and well-being, within the technical report summary could require a qualified person to attempt to estimate amounts or impacts for which they have no expertise. . . . We believe that a qualified person should include in the technical report those amounts that can be readily determined based on the professional qualifications of the qualified person'').

[1106] *See* letter from Newmont.

[1107] *See id.*

[1108] *See* letters from Carbon Tracker, Columbia, CRIRSCO, CSP², Earthworks, and SASB.

[1109] *See* letter from Carbon Tracker. Such a provision would require a qualified person, as part of his or her coal resource and reserve determinations, to consider, as a modifying factor, whether the reserve could be economically produced in a scenario in which demand is consistent with the climate change prevention goal of maintaining a global temperature increase of no greater than 2° C on an annual basis.

[1110] *See id.*

[1111] *See* letter from SASB.

[1112] *See id; see also* letter from CSP² (stressing the importance of identifying potential environmental liabilities in the technical report summary); letter from Columbia (recommending requiring in the technical report summary a detailed discussion of three particular areas of water-related risk: Water scarcity; tailings dam operation and extreme rainfall; and environmental performance); and letter from Earthworks (recommending requiring a registrant to disclose several additional material environmental and social risks associated with its mining operations, including: Externalized impacts resulting from a particular mining project that fall upon the local community rather than the mining company; risks resulting from a registrant's reliance on self-bonds and other corporate guarantees; the potential for acid mine drainage and heavy metal discharge as revealed by initial exploratory drilling; risks from litigation or permit challenges; and local, regional, and state government resolutions against a mining project).

[1113] *See* letter from CRIRSCO.

[1114] *See id.*

[1115] *See* letter from JORC.

[1116] *See* letter from Moats.

[1117] *Id.* Another commenter recommended substituting for proposed Instruction 2 to paragraph (b)(96)(iv)(B)(*16*) the following: ''If the processing method, plant design or other parameters have never been used to successfully extract the valuable product from such mineralization and is still under development, then it is the responsibility of the Qualified Person to assess the scale and type of testing that has been completed and the entirety of the metallurgical data to determine whether or not mineral resources or mineral reserves can be disclosed. Justifications for the disclosures must be fully reported and detailed.'' Letter from Newmont. That commenter suggested this revised instruction to avoid unnecessarily restricting the application of future processing methods or designs in delineating resource and reserve estimates.

technical report summary provision requiring a qualified person to describe the results of the economic analysis, including annual cash flow forecasts based on an annual production schedule for the life of the project. Those commenters requested that the Commission follow Canada's NI 43–101 by allowing producing registrants to omit annual cash flow forecasts unless a material expansion of existing production is planned on the grounds that detailed information regarding costs, production, and cash flow is confidential business information.[1118]

Most commenters that addressed the issue agreed with the Commission's proposal that the technical report summary not include large amounts of technical or other project data either in the report or as appendices to the report.[1119] One commenter, however, stated that technical reports must include sufficient data to demonstrate the viability of mineral resources and mineral reserves, questioned the point at which the number of data becomes ''large,'' and recommended that the Commission require the inclusion of as much summary data as practicable.[1120] Another commenter stated that it is not necessary that large amounts of technical data, such as hydrologic and geotechnical information, be included as appendices in the technical report as long as the information is publicly available and accessible, and references to the information are provided.[1121]

Most commenters that addressed the issue also supported the Commission's proposal to require the public filing of the technical report summary as an exhibit to the Commission filing in which the registrant first discloses mineral resources, mineral reserves, or material exploration results or reports a material change to the previously disclosed estimates.[1122] Some commenters, however, opposed the proposed public filing requirement of a technical report summary on the grounds that: Because currently only two jurisdictions (Canada and Australia) require the public filing of a technical report summary, the proposed requirement would result in an incremental reporting burden in the United States relative to most other jurisdictions;[1123] or the technical report summary would require the inclusion of voluminous amounts of technical data, some of which would be competitively sensitive, and most of which would not be meaningful to investors, and which would be burdensome to produce.[1124] In lieu of a technical report summary, one of those commenters suggested that the Commission allow registrants to prepare reports in accordance with the guidelines set forth in CRIRSCO Table 1 or JORC Table 1.[1125]

iii. Final Rules

Like the proposed rules, the final rules require a registrant disclosing information concerning its mineral resources or mineral reserves determined to be on a material property to file a technical report summary by one or more qualified persons to support such disclosure of mineral resources or reserves.[1126] While the disclosure requirements for the technical report summary are based in particular on Canada's NI 43–101F1, they are substantially similar to the criteria specified in CRIRSCO's Table 1 and JORC's Table 1, which must be considered by the qualified or competent person when preparing reports on exploration results, mineral resources, or mineral reserves.[1127]

Many commenters supported the Commission's proposal to require a registrant to obtain a technical report summary from the qualified person for each material property when first reporting estimates of mineral resources or mineral reserves, or when reporting a material change in previously reported estimates.[1128] As one commenter indicated, many mining companies, including U.S. registrants that are cross-listed, already prepare technical reports in CRIRSCO-based jurisdictions either for public filing or for internal use.[1129] In addition to Canada and Australia, other foreign jurisdictions have adopted formal requirements for a technical report by a qualified or competent person, which are substantially similar to our final rule requirements.[1130] This confirms our view that our technical report summary requirement is consistent with the CRIRSCO standards and will help promote comparability in the reporting by qualified persons.

The final rules require that, for each material property, the qualified person(s) must identify and summarize the scientific and technical information and conclusions reached concerning initial assessments used to support disclosure of mineral resources, or concerning preliminary or final feasibility studies used to support disclosure of mineral reserves, in the technical report summary.[1131] The requirements for the contents of the technical report summary are intended to elicit the scientific and technical information necessary to support the determination and disclosure of mineral resources, mineral reserves, and, as applicable, exploration results, to the extent they are material to investors. Because these requirements are similar in most respects to the items of information required for the summary report under Canada's NI 43–101 [1132] and the criteria specified in CRIRSCO Table 1 and JORC Table 1 as well as to the contents suggested in the mining engineering literature,[1133] we continue to believe that the specified sections of the technical report summary will provide relevant and useful information to facilitate an investor's understanding of a registrant's mineral resources, mineral reserves, and material exploration results.

[1118] *See* letters from Amec, Newmont, SME 1, and Vale.

[1119] *See* letters from Alliance, Amec, AngloGold, CBRR, Gold Resource, Midas, Northern Dynasty, Rio Tinto, and SRK 1.

[1120] *See* letter from Eggleston.

[1121] *See* letter from CSP².

[1122] *See* letters from Amec, AngloGold, Carbon Tracker, Eggleston, Gold Resource, Midas, Northern Dynasty, Rio Tinto, SME 1, SRK 1, and Willis. Amec and Gold Resource supported the proposed filing requirement for mineral resources and reserves but not for material exploration results.

[1123] *See* letter from Davis Polk.

[1124] *See* letters from Alliance and FCX.

[1125] *See* letter from FCX.

[1126] 17 CFR 229.601(b)(96)(i) [Item 601(b)(96)(i) of Regulation S–K].

[1127] There is substantial overlap in the substantive requirements under Canada's NI 43–101F1 and the criteria specified in CRIRSCO's Table 1 and JORC's Table 1. The primary difference between Canada's NI 43–101F1 and the latter two Tables is in the format and organization of the resulting report. The ''checklist'' format of the two Tables tends to result in more abbreviated reporting than the more formal requirements of Canada's NI 43–101F1.

[1128] *See supra* note 193 and accompanying text.

[1129] *See* letter from SRK 1.

[1130] For example, the South African SAMREC Code includes requirements for a competent person's report that are substantially similar to our final rule requirements and those under Canada's NI 43–101F1 both in terms of content and organizational format. The SAMREC code recommends that all public disclosure of exploration results, mineral resources, and mineral reserves include a competent person's report or a reference to one. *See* SAMREC Code (2016), *supra* note 267, Appendix 1. The London Stock Exchange and its Alternative Investment Market also require a competent person's report from mining issuers as part of their initial listing requirements. These requirements are also similar to our final rule requirements. *See* London Stock Exchange, *AIM Note for Mining and Oil & Gas Companies* (June 2009).

[1131] *See* Item 601(b)(96)(i) of Regulation S–K. As previously discussed, *see supra* Section II.C.1.iii., each qualified person who has prepared the technical report summary must sign and date the technical report summary. If more than one qualified person has prepared the technical report summary, the technical report summary must clearly delineate the section or sections of the summary prepared by each qualified person. *See* Item 1302(b)(1) of Regulation S–K. The qualified person's signature must comply with 17 CFR 230.402(e) or 17 CFR 240.12b–11(d).

[1132] *See supra* note 1075 and accompanying text.

[1133] *See supra* note 1076 and accompanying text.

While we are adopting the technical report summary requirements largely as proposed,[1134] in response to the concern of some commenters [1135] that the proposed technical report summary requirement would impose an undue compliance burden on registrants, we have made a number of changes in the required content of the technical report summary. For example, the final rules clarify that the information specified under the various sections of the technical report summary is to be provided only to the extent that it is material.[1136] This clarification recognizes that, due to the diversity of operations in the mining industry, some sections may require little to no disclosure for certain registrants because those sections are not material to an investor's understanding of their particular mining operations.

Other revisions to the required content of the technical report summary reflect changes to the proposed disclosure rules that have already been discussed in some detail. We believe these changes will help decrease the compliance burden of the technical report summary requirement, relative to the proposed requirement. For example, the final rules:

- No longer require the technical report summary to include a quantitative assessment of risk for resource determination; [1137]
- permit the qualified person to disclose mineral resource estimates that include mineral reserves; [1138]
- permit the qualified person to use any reasonable and justifiable price when determining both mineral resource and reserve estimates; [1139]
- permit the qualified person to estimate both mineral resources and mineral reserves at a single point of reference selected by the qualified person; [1140]
- permit the qualified person to include inferred resources in the technical report summary's economic analysis when determining and disclosing mineral resource estimates; [1141] and
- require the qualified person to provide information describing the underlying property in which a royalty company registrant holds an interest only to the extent known or reasonably available.[1142]

In addition, unlike the proposed rules, the final rules permit, but do not require, a registrant to file a technical report summary to support the disclosure of material exploration results.[1143] We believe that this elective treatment will also help limit the final rules' compliance burden.

In another change from the proposed rules, in response to comments received,[1144] the final rules do not require separate sections about hydrogeology and geotechnical data, including testing and analysis. We have instead included the requirements for hydrogeology and geotechnical data, including testing and analysis, in the requirements for exploration data.[1145] Consistent with the views of some commenters,[1146] we continue to believe that disclosure regarding these two items, to the extent that they are material, is important and will benefit investors. Hydrogeology and geotechnical data are the basis for determining several design parameters that directly affect the safety of the designed mine. Moreover, these design parameters can affect the operating and capital costs and can, therefore, directly affect the economics of the mine (*i.e.,* the determination of reserves). Detailed hydrogeology and geotechnical data will therefore provide insight into the adequacy and appropriateness of the mine's design parameters, which will allow investors and their advisors to evaluate fully the disclosed economic viability of the mine. Nevertheless, by moving the disclosure requirements for these two items in the section regarding exploration data, we believe that it will be easier for registrants to understand and comply with those requirements since they will be placed within their proper context.

In response to the commenter [1147] who suggested that our instructions to the required disclosure on ''processing and recovery methods'' were vague because we used the term ''successfully'' to qualify processing methods, plant designs, and other parameters that have not yet been used in a commercial production of the valuable product from the mineralization under consideration, we are adopting an alternative provision.[1148] This provision states that, if the processing method, plant design or other parameters have never been used to ''commercially'' extract the valuable product from such mineralization, the qualified person must so state and provide a justification for why he or she believes the approach will be successful in this instance.[1149] Similarly, an instruction provides that, if the processing method, plant design, or other parameter has never been used to ''commercially'' extract the valuable product from such mineralization and is still under development, then no mineral resources or reserves can be disclosed on the basis of that method, design, or other parameter.[1150] We are also clarifying, in response to a commenter's concern,[1151] that we consider a processing method or plant design that has been demonstrated to be effective in a demonstration or pilot plant to be adequate to meet the standard that it is no longer ''under development.'' Such a processing method, plant design, or other parameters resulting from the demonstration or pilot plant can, therefore, be the basis for disclosure of mineral resources or reserves.

Consistent with comments received,[1152] we are adopting final rules, as proposed, that restrict the technical report summary from including large amounts of technical or other project data, either in the report or as appendices to the report.[1153] In addition, the qualified person must draft the summary to conform, to the extent practicable, with the plain English principles set forth under the Securities Act and Exchange Act.[1154] These

[1134] 17 CFR 229.601(b)(96)(iii)(B) [Item 601(b)(96)(iii)(B) of Regulation S–K], which is set forth in its entirety in Section VII, below. A technical report summary that reports the results of a preliminary or final feasibility study must include all of the information specified in these sections. A technical report summary that reports the results of an initial assessment or that reports material exploration results could omit information required by certain of these sections. *See* 17 CFR 229.601(b)(96)(iii)(A) [Item 601(b)(96)(iii)(A) of Regulation S–K].

[1135] *See, e.g.,* letters from Chamber and NSSGA.

[1136] *See* Item 601(b)(96)(iii)(B) of Regulation S–K.

[1137] *See* 17 CFR 229.601(b)(96)(iii)(B)(*11*)(*v*).

[1138] *See* 17 CFR 229.601(b)(96)(iii)(B)(*11*)(*ii*) [Item 601(b)(96)(iii)(B)(*11*)(*ii*) of Regulation S–K ]. The qualified person must also disclose mineral resource estimates that exclude the mineral reserves.

[1139] *See* 17 CFR 229.601(b)(96)(iii)(B)(*11*)(*iii*) [Item 601(b)(96) )(iii)(B)(*11*)(*iii*) of Regulation S–K]; and 17 CFR 229.601(b)(96)(iii)(B)(*12*)(*iii*) [Item 601(b)(96) )(iii)(B)(*12*)(*iii*) of Regulation S–K ].

[1140] *See* 17 CFR 229.601(b)(96)(iii)(B)(*11*)(*i*) [Item 601(b)(96)(iii)(B)(*11*)(*i*) of Regulation S–K]; and 17 CFR 229.601(b)(96)(iii)(B)(*12*)(*i*) [Item 601(b)(96)(iii)(B)(*12*)(*i*) of Regulation S–K].

[1141] *See* 17 CFR 229.601(b)(96)(iii)(B)(*19*)(*iv*) [Item 601(b)(96)(iii)(B)(*19*)(*iv*) of Regulation S–K].

[1142] *See* 17 CFR 229.601(b)(96)(iii)(B)(*3*)(*vii*) [Item 601(b)(96)(iii)(B)(*3*)(*vii*) of Regulation S–K].

[1143] *See* Item 601(b)(96)(i) of Regulation S–K.

[1144] *See supra* notes 1097–1098 and accompanying text.

[1145] 17 CFR 229.601(b)(96)(iii)(B)(*7*) [Item 601(b)(96)(iii)(B)(*7*) of Regulation S–K].

[1146] *See, e.g.,* letters from Midas and MMSA.

[1147] *See* letter from Moats.

[1148] This provision is similar, although not identical, to the instruction suggested by another commenter. *See* letter from Newmont.

[1149] 17 CFR 229.601(b)(96)(iii)(B)(*14*)(*iv*) [Item 601(b)(96)(iii)(B)(*14*)(*iv*) of Regulation S–K].

[1150] Instruction 1 to 17 CFR 229.601(b)(96)(iii)(B)(*14*) [Item 601(b)(96)(iii)(B)(*14*) of Regulation S–K].

[1151] *See* letter from Amec.

[1152] *See supra* note 1119 and accompanying text.

[1153] 17 CFR 229.601(b)(96)(ii) [Item 601(b)(96)(ii) of Regulation S–K].

[1154] *See id; see also* Securities Act Rule 421 and Securities Exchange Act Rule 13a–20.

requirements should help improve the readability of the technical report summary for the benefit of investors, particularly for those who lack a scientific background, but also for more sophisticated investors who may be familiar with the mining industry but who are not geologists or mining engineers. These requirements are consistent with similar Canadian mining disclosure standards [1155] and also with the transparency principle under the CRIRSCO standards, which ''requires that the reader of a Public Report is provided with sufficient information, the presentation of which is clear and unambiguous, so as to understand the report and not to be misled.'' [1156]

While we acknowledge the concerns of those commenters [1157] that stated that we should use a different name, we continue to believe ''technical report summary'' more accurately reflects the disclosure we are requiring. By using this name, we do not mean to imply that there necessarily exists, in all cases, a single compilation of all the technical information and documentation (a ''technical report'') from which the qualified person will summarize the information and prepare the technical report summary. However, we believe that, in all cases, there will be such information and documentation (even if there is no single compilation), which forms the basis of the qualified person's (or persons') determination that there exist exploration results, mineral resources, or mineral reserves. Because, in preparing the technical report summary, the qualified person must summarize such information, we believe the name is appropriate.

We agree with those commenters that stated there is no need to expand the technical report summary provision to require the qualified person to describe in more detail the factors pertaining to environmental compliance, permitting, and local individuals or groups, which are related to the project. We do not believe it is necessary to prescribe more specific requirements about those factors because they are already required to be considered and disclosed by the qualified person as a technical or modifying factor.[1158] As is current industry practice, the final rules require the qualified person to describe all relevant factors pertaining to environmental compliance, permitting, and local individuals or groups, which are material to establishing reasonable prospects of economic extraction for mineral resources and economic viability for mineral reserves.[1159] The final rules require the technical report summary to include, among other matters: The results of environmental studies, such as environmental baseline studies or impact assessments; requirements and plans for waste and tailings disposal; project permitting requirements; plans, negotiations, and agreements with local individuals or groups; and mine closure plans, including remediation and reclamation plans, and the associated costs.[1160] The technical report summary must also include the qualified person's opinion on the adequacy of current plans to address any issues related to environmental compliance, permitting, and local individuals or groups. We believe the scope of these technical report summary requirements is sufficient to address the environmental and sustainability issues of concern to investors. We also agree with those commenters that stated that requiring additional disclosure on these issues in a registrant's technical report summary would be overly prescriptive and could duplicate disclosure that the registrant may provide in its corporate social responsibility report.[1161]

As proposed, the adopted rules require the qualified person to provide the results of the economic analysis in the technical report summary, which is filed as an exhibit to the registrant's disclosure.[1162] This further aligns our rules with the transparency principle underlying the CRIRSCO-based codes by requiring public disclosure of the underlying technical and economic analysis that is the basis for a disclosure of mineral resources or reserves. We note that Canada's NI 43–101 and Australia's JORC require disclosure of investment decision criteria such as net present value (NPV) and internal rate of return (IRR) to support the disclosure of mineral resources and reserves.[1163] Therefore, we believe this requirement should not impose an unduly high compliance burden, especially for those US registrants that are dual-listed in Canada or Australia.

The final rules do not provide exemptions for any particular class of registrants because we believe investors in all registrants with material mining operations will benefit from the requirement to file a technical report summary. This is generally consistent with the approach taken in those CRIRSCO-based jurisdictions that require disclosure of technical report summaries.[1164] Although some commenters requested that we permit producing registrants to omit cash flow forecasts under certain circumstances,[1165] we decline to do so because we believe that such an exemption could result in the omission of material information, to the detriment of investors. Cash flow forecasts are essential to establishing whether portions of indicated and measured mineral resources can be mined economically (at a profit) and, thus, meet the definition of a mineral reserve. Without this information, investors will have no basis to know the level of confidence to associate with any mineral reserve determination, especially since registrants, through management, choose what economic criteria to apply to make the determination that the mining is economic.

For similar reasons, we decline to exempt registrants from disclosing the qualified person's price assumption

[1155] *See* Instruction 3 to Canada's Form 43–101F1.

[1156] CRIRSCO International Reporting Template, *supra* note 20, at cl. 3. Also as proposed, the final rules similarly require a registrant, when providing either summary or individual property disclosure: To use plain English principles, to the extent practicable; to not include detailed illustrations and technical reports, full feasibility studies, or other highly technical data, but to furnish such reports and other material supplementally to the staff upon request; and to provide an appropriate glossary if the disclosure requires the use of technical terms relating to geology, mining, or related matters, which cannot readily be found in conventional dictionaries. *See* 17 CFR 229.1301(d). The first two requirements are consistent with Securities Act Rule 421 and Exchange Act Rule 13a–20. The third requirement is consistent with current practice pursuant to Guide 7's guidance that an appropriate glossary should be included in a Commission filing if technical terms relating to geology, mining, or related matters, whose definition cannot readily be found in conventional dictionaries, are used. *See* paragraph (b)(6) of Guide 7.

[1157] *See supra* note 1095 and accompanying text.

[1158] *See supra* note 1104 and accompanying text.

[1159] *See* Item 601(b)(96)(iii)(B)(*17*) of Regulation S–K.

[1160] *See id.*

[1161] *See, e.g.,* letter from CRIRSCO.

[1162] 17 CFR 229.601(b)(96)(iii)(B)(*19*) [Item 601(b)(96)(iii)(B)(*19*) of Regulation S–K].

[1163] *See, e.g.,* Canada's NI 43–101 F1, Item 22 (requesting the qualified person to ''[p]rovide an economic analysis that includes . . . (c) a discussion of net present value (NPV), internal rate of return (IRR), and payback period of capital with imputed or actual interest''). *See* also JORC Code, *supra* note 175, Table 1, Section 4 (requesting ''[t]he inputs to the economic analysis to produce the net present value (NPV) in the study, the source and confidence of these economic inputs including estimated inflation, discount rate, etc. NPV ranges and sensitivity to variations in the significant assumptions and inputs'').

[1164] For example, Canada's NI 43–101 and JORC provide no exemptions from the requirement to provide technical report summaries to support mining property disclosures. We also note that Canadian registrants are subject to a broader technical report summary requirement in NI 43–101, which requires all material properties to have a technical report regardless of whether the registrant is disclosing mineral resources and reserves or not.

[1165] *See supra* note 1118 and accompanying text.

used to determine whether portions of indicated and measured mineral resources can be mined economically, in the technical report summary. We note that CRIRSCO-based codes also consider the price assumption to be a material assumption that the registrant must disclose in the supporting documentation.[1166]

We also are not exempting registrants in the industrial minerals or aggregates industry from the technical report summary requirements, as requested by some commenters.[1167] We note that industrial minerals or aggregates registrants are much less likely to ever have to provide technical report summaries since most have no individually material mining properties. If such a registrant has individually material properties, then we believe it is appropriate to provide a technical report summary as any disclosure of mineral resources and reserves on those properties will likely be material to investors. Also, since industrial minerals and aggregates registrants go through the same scientific and engineering analysis to estimate mineral resources and reserves, they should already generate much of the information we are requesting in the technical report summaries.

The final rules also do not incorporate by reference or otherwise adopt on a going forward basis the technical report requirements in Canada's NI 43–101,[1168] JORC,[1169] or the SME Guide,[1170] as suggested by some commenters. As previously mentioned, we believe that doing so would effectively bind the Commission's rules to current and future iterations and interpretations of these requirements, over which the Commission would have little to no control or influence.[1171]

We also are not adopting a ''reciprocal recognition'' approach that would allow non-U.S. foreign issuers to file their home country (CRIRSCO-based) reports in satisfaction of the Commission's rules, as suggested by some commenters.[1172] We do not believe a reciprocal recognition approach is appropriate because, although we have more closely aligned our technical report summary requirements with the CRIRSCO standards and, in particular, with the Canadian technical report requirements, there are nevertheless important differences, such as the final rules' prohibition against disclaimers of liability for information provided by the qualified person based on the work of a third-party specialist who the qualified person has hired.[1173] We believe these differences provide meaningful protection for investors.

4. Requirements for Internal Controls Disclosure

i. Rule Proposal

We proposed to require that a registrant describe the internal controls[1174] that it uses in its exploration and mineral resource and reserve estimation efforts. As proposed, such disclosure should address quality control and quality assurance programs, verification of analytical procedures, and comprehensive risk inherent in the estimation.[1175] We proposed an instruction stating that a registrant must provide the required internal controls disclosure whether it is providing summary disclosure under proposed Item 1303, individual property disclosure under proposed Item 1304, or under both items.[1176]

ii. Comments on the Rule Proposal

Most commenters that addressed the issue supported the proposal to require registrants to describe the internal controls that they use to help ensure the reliability of their disclosure of exploration results and estimates of mineral resources and mineral reserves.[1177] One commenter, however, opposed such a requirement, other than for mineral reserve estimates, indicating that this information should already be included as part of management's discussion of internal controls over financial reporting. According to that commenter, anything beyond that would create a significant burden on registrants and greatly outweigh any marginal benefit to investors.[1178] A second commenter opposed an internal controls disclosure requirement as part of the Commission's revised mining property disclosure rules on the grounds that there should be a global alignment of minimum reporting requirements for mining registrants. According to that commenter, the proposed internal controls disclosure requirement would impose a greater disclosure requirement on registrants reporting under a CRIRSCO-based code, such as JORC or SAMREC.[1179]

One commenter suggested a more detailed framework for the disclosure of internal controls. This framework addressed the accountability of management in the assessment of exploration results and estimates of mineral resources and mineral reserves, the assessment of internal controls over the reporting of exploration results and estimates of mineral resources and reserves, and changes in internal controls over the reporting of exploration results and estimates of mineral resources and reserves.[1180]

Another commenter stated that it is common industry practice to have QA/QC programs when undertaking mineral exploration.[1181] According to the commenter, however, the Commission's proposed internal control provision may have inappropriately included internal controls for corporate governance purposes. That commenter therefore requested that the Commission provide clear instructions regarding how the mining industry can achieve the objective of the internal controls requirement.[1182]

iii. Final Rules

We are adopting rules that, as proposed, require a registrant to describe the internal controls that it uses in its exploration and mineral resource and reserve estimation efforts, as proposed.[1183] The final rules specify that such disclosure should address quality control and quality assurance programs, verification of analytical procedures, and comprehensive risk inherent in the estimation.[1184] We

[1166] For example, both CRIRSCO Table 1 and JORC Table 1 require disclosure of the price for mineral reserve disclosure under ''revenue factors.''

[1167] *See* letters from Alliance and NSSGA.

[1168] *See supra* note 1085 and accompanying text.

[1169] *See supra* note 1087 and accompanying text.

[1170] *See* letter from NMA 2 and SME 3.

[1171] *See supra* Section II.C.2.

[1172] *See, e.g.,* letters from Dorsey & Whitney and PDAC.

[1173] Other differences include the final rules' requirement that a registrant disclose resource estimates exclusive of reserves and the inclusion of mineral brines in the definition of mineral resources.

[1174] Internal controls in this context refers to the internal controls used to ensure reliable disclosure of exploration results and estimation of mineral resources and mineral reserves. It is not to be confused with internal control over financial reporting. In this regard, the Commission's disclosure requirements for registrants engaged in oil and gas producing activities require similar disclosure of internal controls over estimation efforts. *See* 17 CFR 229.1202(a)(7) [Item 1202(a)(7) of Regulation S–K].

[1175] *See* Proposing Release, *supra* note 5, at Section II.G.4.

[1176] *See id.*

[1177] *See, e.g.,* letters from AngloGold, CBRR, Eggleston, Midas and Rio Tinto.

[1178] *See* letter from Alliance.

[1179] *See* letter from Randgold.

[1180] *See* letter from AngloGold.

[1181] *See* letter from Amec.

[1182] *See id.*

[1183] 17 CFR 229.1305(a) [Item 1305(a) of Regulation S–K].

[1184] *See id.* In this regard we are not adopting the detailed internal controls disclosure framework suggested by one commenter. *See* letter from AngloGold. While we recognize that some registrants may find it useful to model their internal controls disclosure along the lines suggested by this commenter, other registrants may reasonably

continue to believe that such internal controls disclosure would be beneficial to investors as it would help them evaluate whether the registrant has established acceptable levels of certainty and precision during exploration and whether and how it has verified and validated the quality of the data used in its analyses. This requirement is consistent with disclosure requirements in most foreign mining jurisdictions. The CRIRSCO-based codes require the disclosure of quality control and quality assurance procedures as they relate to exploration results (data) and techniques and assumptions (analysis) used for mineral resource and reserve estimation.[1185] In addition, the listing rules of some of these jurisdictions specifically call for disclosure of the internal controls relating to estimates of mineral resources and reserves.[1186]

Although not called for by Guide 7, some registrants provide disclosure about their internal controls, including quality control and quality assurance measures, which they have put in place to help ensure the reliability of their disclosure of exploration results and estimates of mineral resources and mineral reserves. The staff has also requested, on a case by case basis, that registrants provide a brief description of the quality control and quality assurance protocols for sample preparation, controls, custody, assay precision and accuracy as they relate to exploration programs. This current practice reinforces our belief that requiring internal controls disclosure by registrants regarding their exploration results and mineral resource and reserve estimates is appropriate and should not impose an undue burden.

Another provision states that a registrant must provide the required internal controls disclosure whether it is providing summary disclosure under Item 1303, individual property disclosure under Item 1304, or under both items.[1187] Estimating mineral resources and reserves requires use of statistical techniques to estimate tonnages and grades based on data derived from laboratory analysis of representative samples. In any such scientific study, best practice requires the analyst to disclose the quality control and quality assurance techniques employed to ensure the data used in the analysis is reliable.[1188] We believe this same practice should apply when preparing and analyzing data for the purpose of individually material property disclosure as well as disclosure regarding properties that are only material in the aggregate. We also believe an internal controls disclosure requirement is particularly important for a company with multiple properties to ensure that best practice is followed across all properties.

In response to commenters,[1189] we are clarifying that Item 1305 requires disclosure of internal controls that the registrant has put in place to ensure that its exploration results and mineral resource and reserve estimates on its mining properties are reliable, and not for any other purpose. Given the similarity between our mining property internal controls requirement and those of other mining jurisdictions, our requirement should not significantly alter the disclosure practices of those registrants that are listed in these jurisdictions. For registrants that are not currently subject to an internal controls disclosure requirement, and for which providing such disclosure has not become current practice, we believe investors will benefit from such disclosure, though we recognize that registrants will incur additional costs.

### *H. Conforming Changes to Certain Forms Not Subject to Regulation S–K*

#### 1. Form 20–F

#### i. Rule Proposal

Foreign private issuers[1190] use Form 20–F[1191] as a registration statement under Section 12 of the Exchange Act[1192] or as an annual or transition report filed under Section 13(a)[1193] or 15(d) of the Exchange Act.[1194] Form 20–F also provides much of the substantive disclosure requirements for foreign private issuers filing Securities Act registration statements on Forms F–1,[1195] F–3[1196] and F–4.[1197]

The Commission revised Form 20–F in 1999 to conform its disclosure requirements to the international disclosure standards endorsed by the International Organization of Securities Commissions (''IOSCO'') in September 1998.[1198] As a result, Form 20–F, rather than Regulation S–K, provides the primary non-financial disclosure requirements for foreign private issuers under the Securities Act and the Exchange Act. For example, Item 4.D of Form 20–F sets forth the disclosure requirements for a foreign private issuer's property[1199] rather than Item 102 of Regulation S–K. An instruction to Item 4 directs the registrant to ''[f]urnish the information specified in any industry guide listed in subpart 229.800 of Regulation S–K.''[1200] Thus, like domestic registrants, foreign private issuers currently provide the disclosures set forth in Guide 7.

Because of our belief that the Commission's mining property disclosure rules should continue to apply to both foreign private issuers and domestic registrants, we proposed to amend Form 20–F by adding an instruction to Item 4 that issuers engaged in mining operations must refer to and, if required, provide the disclosure under subpart 1300 of Regulation S–K.[1201] We further proposed to remove in their entirety the current instructions to Item 4.D of Form 20–F, which, among other matters, limit

conclude that a different or more abbreviated format is suitable for their mining operations.

[1185] *See, e.g.,* JORC Code, *supra* note 175, Table 1; Canada's NI 43–101, *supra* note 123, at pt. 3.3; SAMREC Code, *supra* note 267, Table 1, at pt. 3.6. The SME Petition also recognized the need for and importance of appropriate internal and disclosure controls in the estimation of mineral reserves. *See* SME Petition for Rulemaking, *supra* note 6, at 17.

[1186] *See, e.g.,* ASX Listing Rule 5.21.5 (requiring registrants to disclose ''[a] summary of the governance arrangements and internal controls that the mining entity has put in place with respect to its estimates of mineral resources and ore reserves and the estimation process'').

[1187] *See* 17 CFR 229.1305(b) [Item 1305(b) of Regulation S–K].

[1188] *See* S. C. Kazmierczak, *Laboratory Quality Control: Using Patient Data to Assess Analytical Performance, Clinical Chemistry and Laboratory Medicine* 617–627 (2003); *see generally* M. J. Chandra, *Statistical Quality Control* (2001).

[1189] *See* letters by FCX and Amec.

[1190] A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that has more than 50% of its outstanding voting securities held of record by U.S. residents, and regarding which any of the following is true: A majority of its officers and directors are citizens or residents of the United States, more than 50 percent of its assets are located in the United States, or its business is principally administered in the United States. *See* Securities Act Rule 405 and 17 CFR 240.3b–4(c) [Exchange Act Rule 3b–4(c)].

[1191] 17 CFR 249.220f.

[1192] 15 U.S.C. 78l.

[1193] 15 U.S.C. 78m(a).

[1194] 15 U.S.C. 78o(d).

[1195] 17 CFR 239.31.

[1196] 17 CFR 239.33.

[1197] 17 CFR 239.34.

[1198] *See* Securities Act Release No. 33–7745 (September 28, 1999) [64 FR 53900].

[1199] Form 20–F Item 4.D provides that the registrant must provide information regarding any material tangible fixed assets, including leased properties, and any major encumbrances thereon, including a description of the size and uses of the property; productive capacity and extent of utilization of the company's facilities; how the assets are held; the products produced; and the location. The registrant must also describe any environmental issues that may affect the company's utilization of the assets. With regard to any material plans to construct, expand or improve facilities, the registrant must describe the nature of and reason for the plan, an estimate of the amount of expenditures including the amount of expenditures already paid, a description of the method of financing the activity, the estimated dates of start and completion of the activity, and the increase of production capacity anticipated after completion.

[1200] Instruction 1 to Item 4 of Form 20–F.

[1201] *See* Proposing Release, *supra* note 5, at Section II.H.1.

the disclosure of estimates to proven and probable reserves.[1202]

In addition, we proposed to add an instruction to the exhibits section of Form 20–F stating that a registrant that is required to file a technical report summary pursuant to Item 1302(b)(2) of Regulation S–K must provide the information specified in Item 601(b)(96) of Regulation S–K as an exhibit to its registration statement or annual report on Form 20–F.[1203]

As previously mentioned, we proposed to eliminate the ''foreign or state law'' exception under Item 102 and Guide 7 whereby Canadian registrants that report pursuant to Form 20–F and file registration statements on Forms F–1, F–3, and F–4 are currently permitted to provide mining disclosure that meets the requirements of Canada's NI 43–101.[1204] Thus, as proposed, the sole group of Canadian registrants that could continue to report pursuant to Canadian disclosure requirements following adoption of the revised mining disclosure rules would be those Canadian issuers that report pursuant to the Multijurisdictional Disclosure System (''MJDS'').[1205]

ii. Comments on the Rule Proposal

Commenters that addressed the issue supported the Commission's proposal to amend Form 20–F to conform it to the disclosure requirements of proposed subpart 1300 and proposed Item 601(b)(96) of Regulation S–K so that foreign private issuers that use or refer to Form 20–F for their Commission filings would be subject to the same mining disclosure requirements as domestic mining registrants.[1206] One commenter also approved of the proposal to preclude Canadian issuers, other than MJDS issuers, from providing reports pursuant to Canada's NI 43–101 in order to ensure comparability of reporting under the proposed rules.[1207]

Numerous commenters, however, recommended permitting Canadian registrants, including those that do not qualify for the MJDS, to continue providing mining disclosure that meets the requirements of Canada's NI 43–101.[1208] As one commenter explained, ''the Foreign Law Exception should remain in place for Canadian foreign private issuers of all sizes as a recognition of the sufficiency of NI 43–101 for the protection of investors and the burdens of dual compliance for Canadian 20–F Filers.'' [1209]

Some commenters recommended allowing non-Canadian issuers to file the disclosure documents produced under their home country listing requirements as long as those requirements met CRIRSCO standards, such as JORC or SAMREC.[1210] Some commenters stated that not permitting these issuers to file their CRIRSCO-based disclosure documents would be burdensome particularly if the Commission adopted the mining property disclosure requirements as proposed.[1211]

iii. Final Rules

We are adopting the proposed revisions to Form 20–F so that foreign private issuers that use Form 20–F to file their Exchange Act annual reports and registration statements, or that refer to Form 20–F for their Securities Act registration statements on Forms F–1, F–3, and F–4, will have to comply with the mining disclosure requirements of new subpart 1300 of Regulation S–K and the technical report summary requirements in Item 601(b)(96), as applicable. We continue to believe that, with the exception of MJDS registrants, foreign private issuers with material mining operations should be subject to the same mining property disclosure requirements as domestic registrants. This treatment will protect investors, who require information about the material mining operations of foreign registrants just as much as those of domestic registrants, and facilitate the comparison of mining property disclosure among most registrants.

The final rules do not permit Canadian registrants that are not MJDS-eligible to continue to provide disclosure that meets the requirements of Canada's NI 43–101, nor do they permit non-Canadian registrants to file disclosure documents that meet the requirements of another CRIRSCO-based code to satisfy their U.S. reporting obligations, as recommended by some commenters. Commenters that made these recommendations were concerned about the significant differences between the CRIRSCO standards and the proposed rules, and the correspondingly significant compliance burden that a dual-listed registrant would incur if the Commission adopted those rules as proposed.[1212] The final rules eliminate many of these differences, and are less prescriptive than the proposed rules in several respects.[1213] For example, the final rules permit the registrant and its qualified person to use any reasonable and justifiable price when determining and disclosing estimates of mineral resources or mineral reserves. The final rules also permit a qualified person to prepare a pre-feasibility study for reserve determination, even in high risk situations, without being required to justify its use instead of a final feasibility study. We believe that these changes to the proposed rules, together with many others that we are adopting, will significantly limit the incremental burden of the final rules for dual-listed issuers, and in particular for Canadian registrants. Furthermore, although most of the technical report summary requirements are based on the Canadian NI 43–101F1, there nevertheless are important differences between the Canadian technical report requirements and the final rules, such as the final rules' general prohibition against using disclaimers of liability. For these reasons, we do not believe it is necessary or appropriate to continue to permit Canadian issuers to prepare and submit their Commission filings in accordance with Canada's NI 43–101 under the ''foreign or state law'' exception or otherwise.

We are not requiring MJDS registrants to comply with new subpart 1300 because, as we explained in the Proposing Release,[1214] the ability of

[1202] These instructions provide, among other matters, that, in the case of an extractive enterprise, other than an oil and gas producing activity, the issuer must provide material information about production, reserves, locations, developments and the nature of its interest. If individual properties are of major significance, the issuer must provide more detailed information about those properties and use maps to disclose information about their location. These instructions further provide that, in documents filed publicly with the Commission, the issuer must not disclose estimates of reserves unless the reserves are proven or probable and must not give estimated values of those reserves, unless foreign or state law requires the issuer to disclose the information. *See* Instruction 1 to Item 4.D of Form 20–F.

[1203] *See* Proposing Release, Section II.H.1. Because Forms F–1, F–3, and F–4 are already subject to the exhibit requirements of Item 601 of Regulation S–K, registrants using those forms that meet the requirements of proposed Item 1302(b)(2) would be required to file a technical report summary as an exhibit pursuant to proposed Item 601(b)(96).

[1204] *See supra* Section II.E.1.

[1205] The MJDS permits seasoned Canadian issuers meeting certain other requirements to use their Canadian disclosure documents when filing their Exchange Act registration statements and annual reports on Form 40–F or their Securities Act registration statements on Forms F–10, F–7, F–8 and F–80.

[1206] *See* letters from Alliance, Amec, AngloGold, CBRR, Eggleston, Midas, Rio Tinto, SAMCODES 2, and SRK 1.

[1207] *See* letter from CBRR.

[1208] *See* letters from Amec, AngloGold, Dorsey & Whitney, Eggleston, Midas, SAMCODES 2, SME 1, SRK 1, and Troutman Sanders.

[1209] Letter from Troutman Sanders.

[1210] *See* letters from AngloGold, Midas, and Rio Tinto.

[1211] *See, e.g.,* letters from Eggleston, Energy Fuels, and SME 1.

[1212] *See, e.g.,* letters from Dorsey & Whitney, SME 1, and Troutman Sanders.

[1213] *See supra* Section I.B. for a summary of the principal changes to the proposed rules.

[1214] *See* Proposing Release, *supra* note 5, at Section II.H.1.

those registrants to use their Canadian disclosure documents for purposes of their Exchange Act and Securities Act filings is based on their eligibility to file under the MJDS, and not on the ''foreign or state law'' exception under Guide 7 and Item 102. At least one commenter expressly approved of the Commission's proposal to permit MJDS filers to continue to meet their mining property disclosure obligations pursuant to Canada's NI 43–101.[1215]

2. Form 1–A

i. Rule Proposal

Regulation A provides an exemption from the registration requirements of the Securities Act for certain securities offerings that satisfy specified conditions, such as filing an offering statement with the Commission,[1216] limiting the dollar amount of the offering[1217] and, in certain instances, filing ongoing reports with the Commission.[1218] Form 1–A is the offering statement used by issuers that are eligible to engage in securities offerings under Regulation A.[1219]

When the Commission amended Regulation A in 2015,[1220] it updated Item 7 of Part II of Form 1–A concerning the required ''Description of Business'' disclosure by adding a provision stating that the disclosure guidelines in all Securities Act Industry Guides must be followed. The provision also stated that, to the extent that the industry guides are codified into Regulation S–K, the Regulation S–K industry disclosure items must be followed.[1221]

Because this provision, however, only appears in Item 7(c) of Part II, which governs ''business'' disclosure, we proposed to amend Part II of Form 1–A to apply the scope of the requirement to the description of property for certain issuers by adding similar language under Item 8 of Part II to Form 1–A.[1222] Specifically, in order to require the Form 1–A property disclosure requirements to include the mining disclosure provisions under proposed subpart 1300 of Regulation S–K, we proposed to add a provision stating that issuers engaged in mining operations must refer to and, if required, provide the disclosure under subpart 1300 of Regulation S–K in addition to any disclosure required by Item 8.

We also proposed to amend the instruction to Item 8, which currently provides that ''[d]etailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required and should not be given.'' Because much of the disclosure under proposed subpart 1300 would require detailed descriptions of mining properties, we proposed to amend this instruction by excepting from its scope the disclosure required under the proposed rules, as referenced in paragraph (b) of Item 8.

In order to require Regulation A issuers engaged in mining operations to be subject to the new subpart's technical report summary filing requirement, we proposed to amend Item 17 (Description of Exhibits) of Part III under Form 1–A by adding a provision stating that an issuer that is required to file a technical report summary pursuant to Item 1302(b)(2) of Regulation S–K must provide the information specified in Item 601(b)(96) of Regulation S–K as an exhibit to its Form 1–A.[1223]

ii. Comments on the Rule Proposal

Several commenters addressed the Commission's proposal to amend Form 1–A to conform it to the disclosure requirements of proposed subpart 1300 and proposed Item 601(b)(96) of Regulation S–K so that Regulation A issuers engaged in mining operations would be subject to the same disclosure requirements as other issuers with mining operations.[1224] One commenter stated that because Form 1–A filers are subject to the property disclosures outlined in Guide 7, it would be appropriate to subject them to the new mining property disclosure requirements.[1225] Another commenter supported including Form 1–A filers within the scope of the new rules in order to align the mining property disclosure standards regardless of the type of registrant.[1226] The other commenters supported the proposal without explanation.[1227] No commenter opposed including Regulation A issuers within the scope of the new rules.

iii. Final Rules

We are adopting the proposed revisions to Form 1–A to require Regulation A issuers with material mining operations to comply with all of the disclosure requirements in subpart 1300 of Regulation S–K as well as the technical report summary requirements in Item 601(b)(96), as applicable. We continue to believe that investors in Regulation A offerings by issuers with material mining operations require the same information about those operations as investors in registered offerings. This treatment will also facilitate a comparison of mining property disclosure among issuers regardless of the type of issuer.

**I. Transition Period and Compliance Date**

Several commenters requested that the Commission provide a transition period in order to give registrants ample time to prepare their Commission filings in compliance with the new mining property disclosure regime.[1228] Several commenters recommended that the Commission provide a two-year transition period before the new regime would become mandatory.[1229] Other commenters recommended a three-year transition period.[1230] Commenters justified the need for a transition period based on the extensive changes to the current disclosure framework under Guide 7[1231] and because some registrants may not be subject to similar disclosure requirements under the CRIRSCO-based codes.[1232] One of the commenters suggested that the Commission should permit registrants to comply earlier on a voluntary basis.[1233]

Although we have made numerous changes to the proposed rules that will more closely align our mining property disclosure regime with the CRIRSCO standards, we are persuaded by commenters that adoption of an appropriate transition period would

[1215] *See* letter from Dorsey & Whitney.

[1216] *See* 17 CFR 230.251(d) [Securities Act Rule 251(d)].

[1217] *See* 17 CFR 230.251(a) [Securities Act Rule 251(a)].

[1218] *See* 17 CFR 230.257 [Securities Act Rule 257].

[1219] 17 CFR 230.251–230.263.

[1220] *See* Securities Act Release No. 33–9741 (March 25, 2015) [80 FR 21806] (''Regulation A Adopting Release'').

[1221] *See* Form 1–A, Part II, Item 7(c).

[1222] *See* Proposing Release, *supra* note 5, at Section II.H.2. *See also* Item 8 of Part II to Form 1–A (Description of Property) (requiring that an issuer: ''[s]tate briefly the location and general character of any principal plants or other material physical properties of the issuer and its subsidiaries. If any such property is not held in fee or is held subject to any major encumbrance, so state and briefly describe how held. Include information regarding the suitability, adequacy, productive capacity and extent of utilization of the properties and facilities used in the issuer's business''). We proposed to designate this current provision as paragraph (a) of Item 8.

[1223] *See* Proposing Release, *supra* note 5, at Section II.H.2.

[1224] *See* letters from Alliance, AngloGold, CBRR, Midas, Rio Tinto, and SRK 1.

[1225] *See* letter from Alliance.

[1226] *See* letter from Rio Tinto.

[1227] *See* letters from AngloGold, CBRR, Midas, and SRK 1. One other commenter stated that he had no comment regarding the proposal. *See* letter from Eggleston.

[1228] The Proposing Release did not specify a particular compliance date for the proposed rules.

[1229] *See* letters from Cleary & Gottlieb, FCX, SME 1, and Vale.

[1230] *See* letters from Davis Polk and NMA 1.

[1231] *See* letter from Vale.

[1232] *See, e.g.,* letter from Davis Polk.

[1233] *See id.*

help to ease the burden of complying with the final rules. We are therefore adopting a two-year transition period so that a registrant will not be required to comply with the new rules until the first fiscal year beginning on or after January 1, 2021. Thus, for a calendar year-end company, a registrant will be required to comply with the final rules when filing Securities Act and Exchange Act registration statements on or after this date and when filing its Form 10–K or Form 20–F annual report for the fiscal year ended December 31, 2021.

We believe this transition period will provide ample time for mining registrants that are not familiar with the CRIRSCO standards to comply with the new rules. If any registrant not subject to the CRIRSCO standards finds that it faces unique challenges meeting the new disclosure requirements, we encourage such registrant to contact the staff.

The transition period also will help registrants that are currently subject to one or more of the CRIRSCO-based codes to comply with the few requirements under subpart 1300 that differ from the CRIRSCO standards (*e.g.,* the general prohibition against using disclaimers of liability). At the same time, we do not believe this transition period will significantly delay the benefits of the final rules for investors.

A registrant may decide that it would like to take advantage of the final rules (*e.g.,* by disclosing mineral resources in a Commission filing) prior to the completion of the transition period. Once the Commission has completed EDGAR reprogramming made necessary by the final rules, we will permit registrants to comply with the new mining property disclosure rules prior to the compliance date as long as they abide by all of subpart 1300's requirements.[1234] Until then, registrants should continue looking to Guide 7 for their mining property disclosures. Guide 7 will remain effective until all registrants are required to comply with the final rules, at which time Guide 7 will be rescinded.

## III. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

## IV. Economic Analysis

We are adopting amendments to modernize the property disclosure requirements for mining registrants, and related guidance, currently set forth in Item 102 of Regulation S–K and in Industry Guide 7. The discussion below addresses the economic effects of the final rules, including the likely costs and benefits of those rules, as well as the likely effect of the final rules on efficiency, competition, and capital formation.

We are mindful of the costs imposed by, and the benefits obtained from, the rules we adopt. Securities Act Section 2(b) and Exchange Act Section 3(f) require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[1235] Exchange Act Section 23(a)(2) requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition and to not adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.[1236] We have considered the likely costs and benefits that will result from the final rules, as well as the potential effects on efficiency, competition, and capital formation.

We also have analyzed the potential benefits and costs of reasonable alternatives to the final rules. The alternatives we consider below represent different approaches to achieving the goal of modernizing the Commission's mining property disclosure requirements and policies. Given the goal of updating the existing regulatory framework, we evaluate the potential costs and benefits of these alternative approaches against the potential costs and benefits of the final rules' disclosure requirements, rather than against the baseline.

The final rules are intended to modernize the Commission's mining property disclosure requirements by providing investors with a more comprehensive and accurate understanding of a registrant's mining properties, all of which should help investors make more informed investment decisions. This, in turn, will reduce the cost of capital and enhance capital formation. As suggested by several commenters,[1237] the U.S. capital markets may be comparatively less attractive to potential mining registrants due, in part, to the Commission's current disclosure regime, with some commenters[1238] citing the comparatively low amount of capital among mining companies in the U.S. markets. The final rules will also align more closely with industry practices and standards as reflected in CRIRSCO-based disclosure standards.

### *A. Baseline*

To assess the economic impact of the final rules, we consider, as part of our baseline, the current disclosure requirements and policies in Item 102 of Regulation S–K, Guide 7, Form 20–F, and Form 1–A, as well as current market practices. We also consider the disclosure standards of various CRIRSCO-based disclosure standards, because mining registrants compete in the international commodities and capital markets, making international disclosure standards an important benchmark for analysts and investors evaluating mining companies. Furthermore, these standards are relevant to consider because, as discussed above, many mining registrants are foreign private issuers or U.S.-incorporated registrants with reporting obligations in foreign jurisdictions. Thus, to the extent that the final rules align the Commission's requirements with CRIRSCO-based disclosure standards, we expect their economic impact to be less for these registrants.

#### 1. Affected Parties

The final rules will primarily affect registrants with mining activities that are subject to the mining disclosure requirements and policies contained in Item 102 of Regulation S–K and in Guide 7. In addition to U.S. registrants with mining operations that are required to report under Regulation S–K in their annual reports and registration statements, the final rules will affect foreign private issuers with mining operations that file their Exchange Act annual reports and registration statements using Form 20–F or that refer to Form 20–F for certain of their disclosure obligations under Securities Act registration statements filed on Forms F–1, F–3, and F–4. Moreover, the affected registrants will include mining companies filing Form 1–A offering statements under Regulation A. Investors, analysts, and other users of

[1234] Notice of EDGAR system readiness will be provided in a manner similar to notices of EDGAR Filer Manual updates.

[1235] 15 U.S.C. 77b(b) and 15 U.S.C. 78c(f).

[1236] 15 U.S.C. 78w(a)(2).

[1237] *See* letters from Coeur, Midas Gold, NMA, SME 1, SRK 1, and Ur-Energy.

[1238] *See* letters from SRK 1 and Royal Gold.

the information in annual reports, registration statements, and offering statements filed with the Commission also will be affected by the final rules. Finally, mining professionals, such as geologists and mining engineers, who provide services to registrants related to exploration and estimation of mineral resources and reserves will potentially be affected due to the qualified person requirement and related provisions.

To estimate the number of current registrants that will potentially be affected by the final rules, we first identify those registrants as of December 2017 that filed annual reports or relevant registration statements at least once from January 2016 through December 2017. We then identify registrants with mining primary Standard Industrial Classification (''SIC'') codes.[1239] We also identify those registrants without mining primary SIC codes that provide disclosure concerning their mining operations in their SEC filings pursuant to Item 102 of Regulation S–K and Guide 7. Based on this approach, we estimate that the total number of potentially affected registrants is 267 (46 of which are registrants that do not have mining primary SIC codes), which includes one Regulation A issuer.

Among these registrants, we anticipate that the final rules will have a more significant effect on those mining registrants that are not currently reporting consistent with CRIRSCO-based disclosure standards. To estimate the number of registrants reporting consistent with CRIRSCO-based disclosure standards, we identify those registrants disclosing mining operations in jurisdictions using CRIRSCO-based codes in addition to those U.S.-incorporated registrants that we can manually verify are cross- or dual-listed, or otherwise reporting, in CRIRSCO jurisdictions. Out of 267 registrants, we identify 107 registrants—70 foreign private issuers and 37 U.S. registrants—that are potentially reporting mining operations according to CRIRSCO-based disclosure standards. Accordingly, we estimate that there are 160 identified registrants that report solely to the Commission and will therefore potentially be more affected by the final rules than registrants that currently report elsewhere according to CRIRSCO-based disclosure standards.

Included among the 107 registrants that are potentially reporting mining operations according to CRIRSCO-based disclosure standards are 85 registrants that are registered with one of the Canadian provincial securities administrators and therefore subject to the disclosure requirements of Canada's NI 43–101. Out of these registrants, 37 are U.S. domestic registrants and 48 are foreign private issuers (mainly companies incorporated in Canada). Among the 48 foreign private issuers registered in Canada, 10 voluntarily file with the Commission using domestic forms and 38 use the forms for foreign private issuers. As discussed above, Canadian registrants are currently able to provide disclosure in their Commission filings pursuant to NI 43–101, in addition to the disclosure called for by Guide 7 or Form 20–F. A number of the provisions in the final rules will more closely align our disclosure requirements with those in NI 43–101. As such, we estimate that the 38 Canadian registrants that are currently providing disclosure pursuant to NI 43–101 in their filings with the Commission will likely be the least affected by the final rules. In addition, we expect the 47 domestic registrants and foreign private issuers filing disclosures pursuant to NI 43–101 with Canadian securities administrators will be less affected than the remaining 22 foreign private issuers that are not Canadian registrants, but that are potentially reporting mining operations according to CRIRSCO-based disclosure standards.

Among the 22 foreign private issuers that are potentially reporting mining operations according to CRIRSCO-based (but not Canadian) disclosure standards are 14 companies listed in foreign jurisdictions with CRIRSCO-based codes that require technical reports similar to our final rule requirements.[1240] The degree of similarity of foreign jurisdictions' requirements to our final rule requirements should limit the degree to which foreign private issuers experience any increases in compliance costs. However, to the extent the requirements in these jurisdictions are less closely aligned with Canada's NI 43–101F1 compared to the requirements for the technical report summary in the final rules, we expect that these foreign private issuers will be affected by the final rules more than Canadian registrants, as the final rules are quite similar to Canadian disclosure requirements. On the other hand, we expect these foreign private issuers to be affected by the final rules less than foreign private issuers listed in other non-Canadian jurisdictions that have adopted CRIRSCO-based standards, but do not have requirements for technical reports, as these foreign private issuers will be familiar with a technical report requirement.

As discussed above, we believe that some domestic mining registrants are currently following certain of the CRIRSCO-based disclosure standards, such as those relating to the determination of mineral resources, for their own internal purposes, even if they are not currently permitted to disclose mineral resources in their Commission filings.[1241] These registrants also will be less affected by the final rules. Based on the comments received, it appears that domestic registrants in the industrial minerals and aggregates sector of the mining industry currently are least likely to follow CRIRSCO standards, such as those relating to mineral resources.[1242] Accordingly, we expect that registrants in the industrial minerals and aggregates sector will be more affected on average by the final rules. We estimate that 33 of the 267 registrants potentially affected by the final rules operate in the industrial minerals/aggregates industry. Five of those registrants may already be subject to the CRIRSCO standards.

We estimate that 43% of mining registrants (114 out of the 267 registrants identified above) have $5 million or less in total assets. Exploration-stage issuers, by definition, have no disclosed mineral reserves and are therefore likely to be under the $5 million asset threshold. In contrast, development-stage and production-stage issuers, by definition, have mineral reserves on material properties and are therefore likely to have assets that will push them above the $5 million threshold. Thus, it is likely that many of these smaller mining registrants are exploration-stage issuers. We expect that these smaller registrants may be comparatively more affected by the final rules compared to larger registrants. For example, the benefits of being able to disclose exploration targets and mineral resources may be relatively larger for these firms, as by definition they have no mineral reserves to disclose. In addition, although many of the disclosure requirements are qualified by a materiality standard, the effect of the final rules' compliance costs may be disproportionately larger for these

[1239] Specifically, the mining SIC codes considered are 1000, 1011, 1021, 1031, 1040, 1041, 1044, 1061, 1081, 1090, 1094, 1099, 1220, 1221, 1222, 1231, 1400, 1422, 1423, 1429, 1442, 1446, 1455, 1459, 1474, 1475, 1479, 1481, 1499, 3330, 3334, and 6795.

[1240] Among these companies are four companies listed in Australia and reporting pursuant to JORC, six companies listed on the London Stock Exchange and reporting pursuant to PERC, and six companies listed in South Africa and reporting pursuant to SAMREC. For a discussion of the requirements for technical reports in these codes, *see supra* notes 1127 and 1130, and accompanying text.

[1241] *See supra* note 447 and accompanying text.

[1242] *See supra* notes 438–439 and accompanying text.

registrants to the extent such compliance costs have a fixed cost component.

The final rules will also affect mining professionals, in particular those individuals who conduct the work that forms the basis for disclosure of exploration results, mineral resources, and mineral reserves. Commenters noted that many registrants already employ or hire professionals who meet the definition of a qualified person.[1243] More generally, we estimate that there are currently a large number of professionals in the United States who would meet the definition of qualified person. For example, the Society for Mining, Metallurgy, and Exploration currently has 15,000 members around the world.[1244] More than 800 of these members are registered with the organization and already meet the definition of a qualified person.[1245] Moreover, a study by the Bureau of Labor Statistics reported that in 2014 there were 34,000 geoscientists, 16,500 geological and petroleum technicians, and 8,300 mining and geological engineers employed in the United States.[1246] A significant fraction of these professionals likely meet the definition of qualified person, or could meet it after some professional development. For example, California alone had more than 5,000 recorded licensed professional geologists as of November 2014.[1247] We note that these estimates largely exclude professionals who are active in foreign markets and who could also qualify. Although we do not have access to information that would allow us to estimate how many foreign professionals may qualify as qualified persons, we believe there will be a significant number of such professionals who meet the criteria because similar requirements are in place in jurisdictions, such as Canada and Australia, that together have more than 1,800 publicly-listed mining companies.[1248]

2. Current Regulatory Framework and Market Practices

As discussed above, we evaluate the economic effects of the final rules against the Commission's current disclosure requirements and policies. Below we highlight three economically important aspects: (1) The structure and detail of the current disclosure framework, (2) the scope of the current disclosure framework, and (3) the lack of an expertise requirement for the preparer of technical information in the disclosures.[1249]

i. Structure and Detail of Current Disclosure Framework

The following aspects of the current disclosure regime can give rise to compliance burdens for mining registrants:

- *Overlapping disclosure framework.* The current disclosure framework is set forth in Item 102 of Regulation S–K, which is a Commission rule, Form 20–F, which is a form used by foreign private issuers that contains disclosure requirements,[1250] and Industry Guide 7, which represents the disclosure policies and practices followed by the Division of Corporation Finance. This overlapping structure may give rise to unnecessary complexity and uncertainty for mining registrants.[1251]
- *Multiple thresholds for disclosure.* Item 102 of Regulation S–K currently implies a two-tiered reporting standard. Registrants with ''significant'' mining operations are referred to the more extensive disclosure policies in Guide 7, whereas registrants without significant mining operations, but with one or more ''principal'' mines or other ''materially important'' properties, are required to comply with the more limited disclosure requirements in Item 102. As discussed above, Commission staff historically has advised that registrants apply a materiality standard for disclosure and, when that standard is met, provide disclosure according to both Item 102 and Guide 7.
- *Level of detail.* Because the disclosure policies in Guide 7 are broadly drafted, registrants often look to staff guidance to apply those policies. For example, as discussed above, Guide 7 calls for the disclosure of mineral reserves, defined as the part of a mineral deposit that can be economically and legally extracted or produced. It does not, however, specify the level of geological evidence or the analysis, such as the modifying factors the registrant should consider, to convert existing mineral deposits to reserves. By contrast, CRIRSCO-based disclosure standards specify a more detailed framework for determination and disclosure of mineral reserves that specifically addresses such issues. These aspects of the current disclosure framework can be burdensome for mining registrants, especially new registrants. In this regard, some industry participants have raised concerns regarding the need to look to informal staff guidance to achieve compliance.[1252]

ii. Scope of the Current Disclosure Requirements and Policies

As discussed above, Item 102 of Regulation S–K, Guide 7, and Form 20–F currently call for the disclosure of mineral reserves and preclude the disclosure of non-reserve estimates such as mineral resources, unless required by foreign or state law.[1253] Further, none of these provisions requires disclosure of mineral exploration results. By contrast, for mining companies providing disclosure in certain foreign jurisdictions, CRIRSCO-based codes require disclosure of material mineral resources in addition to material mineral reserves and require the disclosure of exploration results when they become material to investors.

The scope of the Commission's current disclosure regime relative to current industry practices for evaluating the prospects of mining properties can result in mining registrants omitting from their disclosures information about mineral resources they possess but are not allowed to disclose. Omitting such information may increase information asymmetries between mining registrants and investors, which could lead to potentially negative capital market consequences, such as reduced stock market liquidity and higher cost of capital.[1254] Moreover, because mining companies providing disclosure

[1243] *See* letters from AIPG, Alliance, Amec, Davis Polk, Eggleston, FCX, Golder, Graves, JORC, Rio Tinto, Shearman & Sterling, SME 1, SRK 1, Vale, and Willis.

[1244] *See* the SME website at: *https://www.smenet.org/about-sme/overview.*

[1245] *See* the SME website at: *http://www.smenet.org/membership/registered-member-directory.*

[1246] *See* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2016–17 Edition,* Geoscientists (available at: *http://www.bls.gov/ooh/life-physical-and-social-science/geoscientists.htm*), Geological and Petroleum Technicians (available at: *http://www.bls.gov/ooh/life-physical-and-social-science/geological-and-petroleum-technicians.htm*), and Mining and Geological Engineers (available at: *http://www.bls.gov/ooh/architecture-and-engineering/mining-and-geological-engineers.htm*).

[1247] *See* the website of the National Association of State Boards of Geology, *http://asbog.org/states/cd_states.htm#California.* A geologist licensed by any state in the United States, provided he or she has five years' relevant experience in mining with respect to the type of mineralization under consideration, will likely meet the definition of a qualified person.

[1248] For statistics on the number of listed mining issuers in Canada, *see https://www.tsx.com/listings/listing-with-us/sector-and-product-profiles/mining.* For statistics on the number of listed mining issuers in Australia, *see https://www.asx.com.au/documents/resources/00180_MetalsMiningSector_FactSheet_web.pdf.*

[1249] In addition, the current regulatory requirements impose Section 11 liability on the named person who prepares mineral reserve estimates. *See supra* note 278 and accompanying discussion.

[1250] *See* 17 CFR 249.220f.

[1251] *See supra* Section II.A. and note 36 and accompanying text.

[1252] *See supra* note 28 and accompanying text.

[1253] In practice, only Canadian issuers have been able to take advantage of this exception because only Canada has adopted its mining disclosure requirements as a matter of law. *See supra* note 423 and accompanying text.

[1254] The link between asymmetric information and cost of capital is well established in the academic literature. *See, e.g.,* Douglas W. Diamond and Robert E. Verrecchia ''Disclosure, Liquidity, and the Cost of Capital'' (1991), *Journal of Finance,* Volume 46, Issue 4, pp. 1325–1359, and David Easley and Maureen O'Hara, ''Information and the cost of capital'' (2004), *Journal of Finance,* Volume 59, Issue 4, pp. 1553–1583.

consistent with CRIRSCO-based disclosure standards in foreign jurisdictions are required to disclose mineral resources, U.S. registrants may suffer adverse competitive effects to the extent that the more limited scope of their disclosures has negative capital market effects. Industry participants have raised concerns regarding the adverse competitive effects potentially stemming from the current disclosure regime and, in particular, from the inability to disclose mineral resources.[1255]

Currently, registrants can supplement, to some extent, the scope of their mining property disclosures in several ways. First, although there is no requirement to disclose exploration results, registrants can voluntarily disclose such information in their SEC filings. While voluntary disclosures can serve as a useful signaling device for investors, the value of voluntary disclosures may be limited in the absence of a requirement that ensures consistency and quality of the disclosures.

Second, regarding the disclosure of mineral resources, Commission staff has periodically, on a case-by-case basis, not objected to disclosure of non-reserve mineral deposits in the form of ''mineralized material.'' [1256] In practice, the mineral resources covered by the definition of ''mineralized material'' generally correspond with the indicated and measured mineral resource categories defined in CRIRSCO-based disclosure standards. Commission staff previously has advised registrants that they should not disclose as mineralized material in their SEC filings non-reserve mineral deposits that would be equivalent to inferred resources. The absence of specific, published guidelines establishing how registrants should estimate and report mineralized materials may have contributed to compliance uncertainty and lack of consistency in disclosures.

Further, under the exception for disclosure of mineral resources, if required by foreign or state law, issuers registered in Canada are able to disclose mineral resources in SEC filings if they do so in their Canadian filings. Therefore, any potential competitive disadvantage of not being allowed to disclose mineral resources in SEC filings primarily affects registrants not also registered in Canada,[1257] which in our estimates represent about 82% of the registrants potentially affected by the final rules.[1258]

Given this, and also given that the disclosures of mineralized material that are currently permitted in SEC filings are not directly comparable to the disclosures of mineral resources required by CRIRSCO-based disclosure standards, some registrants have reported their mineral resources in press releases, on their website, or in their annual reports. Such disclosures, made outside of SEC filings, may present risks for investors who rely on them. These disclosures are not subject to the full range of disclosure rules and regulations, including corresponding liability provisions, to which SEC filings are subject (although disclosures outside SEC filings would be subject to the anti-fraud provisions of the federal securities laws). They also are not subject to staff review and comment, and may not be reported using commonly recognized standards.

iii. Role of Experts in Support of Disclosures of Mineral Reserves

Guide 7 provides, and Form 20–F requires, that a registrant disclose the name of the person estimating mineral reserves and describe the nature of his or her relationship to the registrant. There is, however, no current disclosure policy or requirement in Guide 7, Item 102, or Form 20–F that a registrant must base disclosures of mineral reserves (or a study or technical report supporting such disclosures) on findings of a professional with a particular level of expertise. The absence of an expertise requirement is in contrast to CRIRSCO-based disclosure standards, which require that disclosures of mineral reserves—as well as exploration targets, exploration results, and mineral resources—be based on information and supporting documentation prepared by a ''competent'' or ''qualified person.'' [1259]

In the absence of an expertise requirement, disclosures of exploration targets, exploration results, mineral resources, and mineral reserves may be viewed by investors as less credible.[1260] An expertise requirement provides greater assurance that the information provided by the qualified person is accurate. The lack of an expertise requirement may put U.S. registrants at a comparative disadvantage in terms of how investors value the disclosed information compared to companies disclosing exploration targets, exploration results, mineral resources, and mineral reserves according to CRIRSCO-based disclosure standards.[1261]

*B. Analysis of Potential Economic Effects*

In this section, we analyze the anticipated costs and benefits associated with the final rules against the baseline described above. We have attempted to quantify to the extent feasible the costs, benefits, and effects on efficiency, competition, and capital formation expected to result from the final rules. In many cases, however, we are unable to quantify the economic effects. Many of the relevant economic effects, such as the effects of disclosure on information asymmetries experienced by investors, are inherently difficult to quantify. In other cases, we lack the information necessary to provide reasonable estimates, including costs of incomplete convergence with CRIRSCO-based disclosure standards, benefits of disclosing mineral resources, or additional costs of hiring a qualified person subject to Section 11 liability, because, to our knowledge, no such data are publicly available and commenters have not provided data to allow such quantification. To the extent commenters have provided data to allow quantification of the expected economic effects of the final rules, including cost estimates, we examine that data below.

1. Broad Economic Effects of the Final Rules and Impact on Efficiency, Competition, and Capital Formation

We expect the final rules to increase the quality and availability of information about registrants' mining properties and thereby promote efficiency, competition, and capital formation. For example, the final rules require registrants with material mining

[1255] *See supra* note 34 and accompanying text.

[1256] *See supra* Section II.A.

[1257] *See* SME Petition for Rulemaking, *supra* note 6, at 14.

[1258] We do not include foreign private issuers that are registered in Canada but are voluntarily reporting on domestic forms in this estimate, as such registrants can transition to filing on Form 20–F instead of domestic forms if they perceive the burden of continuing to voluntarily file on domestic forms to be too large, for example due to competitive reasons.

[1259] An author of a study or technical report that forms the basis of mineral reserves disclosure in a Securities Act registration statement is required to consent to the use of his or her name as an expert and thereby becomes subject to expert liability under Section 11 of the Securities Act. *See* 17 CFR 230.436 and 17 CFR 229.601(b)(23). While this provides some assurance that the disclosure accurately reflects the technical study or report, it does not require that the author have any minimum level of technical expertise. CRIRSCO-based disclosure codes are based on the mutually reinforcing principles of transparency, materiality, and competence.

[1260] *See infra* Section IV.B.4.i.

[1261] Under the current disclosure regime, registrants can choose to hire an expert with similar qualifications as those required by CRIRSCO-based disclosure standards and voluntarily disclose this fact to mitigate any competitive disadvantage.

operations to disclose determined mineral reserves, mineral resources, and material exploration results. These requirements better align the Commission's disclosure requirements with the current practices used by mining companies to evaluate their projects, thereby reducing information asymmetries between registrants and investors about the prospects of mining operations. In addition, the qualified person requirement, together with detailed requirements for the supporting technical studies, should generate higher quality and more consistent disclosures, which should reduce uncertainty surrounding the disclosures. In turn, reduced information asymmetries and reduced uncertainty about the disclosures may help investors achieve a more efficient capital allocation while increasing demand for securities offerings, reducing the cost of capital, and enhancing capital formation for registrants.[1262]

In particular, we believe that the requirements for disclosure of material exploration results and mineral resources will reduce information asymmetries and uncertainty for smaller mining registrants, as these registrants tend to have mining properties in earlier stages of development with relatively fewer, if any, reported mineral reserves. As a result, we expect the anticipated positive effects on efficiency and capital formation to be relatively larger for smaller registrants. However, these effects may only materialize to the extent smaller registrants are able to pay for the studies that are required to support disclosure in the first place. We anticipate that there may be some smaller registrants who do not have access to the liquid funds needed to make that investment.

Although we expect the overall amount of disclosed information to increase under the final rules, there may be exceptions. We expect that the adopted disclosure requirements may increase the compliance costs for disclosure of material exploration results and the currently allowed (on a case-by-case basis) equivalent of mineral resources (*i.e.,* mineralized material). Registrants may also bear costs to the extent that the disclosure requirements will result in the disclosure of commercially-sensitive information to competitors.[1263] Therefore, despite the anticipated benefits from the final disclosure requirements, some registrants may, for certain expected lower-value exploration projects, find that these benefits do not outweigh the compliance and competitive costs and may not undertake the work necessary to disclose exploration targets or exploration results or to determine mineral reserves or mineral resources in accordance with the final rules. In such cases, this will reduce the information available to investors about a registrants' full range of projects and could have a negative impact on cost of capital and capital formation. However, this effect may be limited, in that expected lower-value projects are less likely to attract capital even if they were fully disclosed, whether voluntarily or not.

The positive effects we expect on efficiency and capital formation from the final rules may be lower for registrants that currently report in foreign jurisdictions with CRIRSCO-based disclosure codes. These registrants to a large degree already provide the disclosures required by the final rules. This is particularly the case for Canadian registrants, who disclose information pursuant to NI 43–101 standards in their Forms 20–F under the ''foreign or state law'' exception.

We expect the final rules to have certain competitive effects. For example, there may be reallocation of capital as registrants that previously could not disclose mineral resources or could not afford the feasibility studies required for disclosure of mineral reserves (but could afford pre-feasibility studies) may start to disclose a broader range of their business prospects, making it easier for these registrants to raise capital and compete with the mining companies that already report material mineral resources and reserves. We also anticipate that by aligning our disclosure requirements with CRIRSCO-based disclosure standards, the final rules will improve the competitiveness of U.S. securities markets and increase the likelihood of prospective registrants listing their securities in the United States, while decreasing the likelihood that current registrants would exit U.S. markets.[1264] In particular the qualified person requirement and associated requirements for the supporting technical studies may improve the global competiveness of U.S. registrants because such quality assurances have become internationally recognized practice and may help signal to market participants that U.S. registrants are able to meet the standards codified by the final rules.

There could be an opposite effect in some cases. Among foreign private issuers, registrants not currently reporting in foreign jurisdictions with CRIRSCO-based disclosure standards are most likely to experience an increase in compliance costs. If these compliance costs become too burdensome, some of these foreign private issuers may choose to withdraw from U.S securities markets. The impact of such a potential outcome is limited, however, as we have only identified six (as of December 31, 2017) foreign private issuers that are not subject to CRIRSCO-based reporting standards. Moreover, a company that did not want to comply with these or similar disclosure standards would only have a limited number of alternative jurisdictions in which to list, none of whose markets are as developed or robust as the U.S. or other financial markets that have such standards.

Some aspects of the final rules that are different from CRIRSCO-based disclosure standards, such as the imposition of Section 11 liability for qualified persons, may discourage prospective registrants from conducting registered offerings in the United States to the extent registrants will incur additional costs related to this liability.[1265] However, the final rules

[1262] The significant risk and negative impact on capital formation from uncertainty surrounding mining disclosure is illustrated by the evidence in William O. Brown, Jr. and Richard C.K. Burdekin, ''Fraud and Financial Markets: The 1997 Collapse of the Junior Mining Stocks'' (2000), Journal of Economics and Business, Volume 52, Issue 3, pp. 277–288. The authors utilize an event study methodology to analyze the effect on Canadian mining companies' stock returns around the revelations in spring 1997 of fraudulent disclosures of gold resources by the Canadian mining company Bre-X. The study documents that a portfolio of 59 Canadian gold mining stocks experienced significantly negative abnormal stock returns around the Bre-X fraud revelations. Similarly, the Vancouver Composite Index, which at the time was dominated by natural resource companies, also experienced significantly negative abnormal returns for the same event time period. We note that the Bre-X fraud contributed to the development of the Canadian NI 43–101 mining disclosure standards.

[1263] As discussed in *supra* Section II.D.3, we believe that the underlying documentation for exploration results is most likely to be associated with concerns about disclosing commercially sensitive information. To mitigate these concerns, the final rules make filing a technical report summary to support disclosure of material exploration results optional for registrants.

[1264] All else equal, the limited ability to provide valuable disclosure (*e.g.,* the full range of mineral resources or exploration targets) decreases the attractiveness of the U.S. capital markets for mining registrants relative to jurisdictions in which fuller disclosure is possible (if not required, as in Canada).

[1265] Several commenters noted the increased costs that subjecting qualified persons to Section 11 liability would likely impose on registrants and the chilling effect it could have on qualified persons' willingness to provide the required supporting documentation. *See* letters from Alliance, Amec, Andrews Kurth, Chamber, Cloud Peak, Davis Polk, Eggleston, Energy Fuels, Gold Resource, FCX, MMSA, NMA, NSSGA 1, Rio Tinto, Shearman & Sterling, Ur-Energy, and Vale. *See* also note 230 and accompanying discussion. Commenters also noted that such costs could fall disproportionately on small registrants. *See* letters from Gold Resource and Shearman & Sterling.

provide for some limitations on qualified persons' individual Section 11 liability with respect to when they rely on certain information outside their expertise provided by registrants, or when they are employed by third-party firms,[1266] which should mitigate such effects. Overall, we expect that the alignment of our disclosure requirements with international practices, as embodied in CRIRSCO-based disclosure standards, will make U.S. capital markets more competitive, notwithstanding these differences.

2. Consolidation of the Mining Disclosure Requirements

The final rules consolidate the mining disclosure requirements and policies of Regulation S–K and Industry Guide 7 into new subpart 1300 of Regulation S–K and rescind Industry Guide 7. Codifying the Commission's mining disclosure requirements in Regulation S–K will provide a single source for a mining registrant's disclosure obligations, eliminating the complexity and uncertainty associated with the fact that Guide 7 provides staff guidance and is not incorporated in Commission rules, such as in Regulation S–K, thus facilitating compliance and promoting more consistent disclosures to investors. The benefits of consolidation were confirmed by several commenters, who stated that the Commission's current disclosure regime for mining properties has caused compliance uncertainty for mining registrants.[1267] In contrast, one commenter [1268] noted that the status of Guide 7 was well understood by and presented little uncertainty for its members. For registrants in this category the benefits of reducing complexity and uncertainty by codifying and consolidating the Commission's mining disclosure requirements may be limited.

3. The Standard for Mining-Related Disclosure

i. Threshold Materiality Standard

The final rules replace the multiple standards of materiality in the current rules with a single materiality standard for when a registrant must provide disclosure about its mining properties or operations.[1269] In response to comments,[1270] the final rules do not include an instruction stating that a registrant's mining operations are presumed to be material if they consist of 10% or more of its total assets and emphasize that registrants may consider other quantitative or qualitative factors to evaluate materiality. These clarifications should help avoid the potential costs to investors of disclosing immaterial information and the potential burden for registrants of creating different disclosures for different jurisdictions.

The final rules will increase clarity in terms of the conditions under which registrants must provide disclosure and may facilitate compliance by more closely aligning the disclosure standard in the final rules with CRIRSCO-based disclosure standards. The final rules also will promote consistency in mining property disclosures, which may benefit investors' ability to compare and evaluate these disclosures over time and across registrants, thus fostering more efficient investment decisions.

ii. Treatment of Vertically-Integrated Companies

New subpart 1300 of Regulation S–K will apply to all registrants with material mining operations, including vertically-integrated manufacturers.[1271] Because requiring disclosure of mining operations by vertically-integrated manufacturers is consistent with the disclosure currently provided in Commission filings and under CRIRSCO-based disclosure codes, we do not expect this requirement will impose new compliance costs on registrants. By including vertically-integrated manufacturers in the requirement to disclose material mining operations, the final rules will provide investors with material information about such operations that will help with investment decisions, regardless of whether the company's primary business is mining.[1272]

iii. Treatment of Multiple Property Ownership

We are adopting the proposed treatment of multiple property ownership and the proposed treatment of ancillary properties, which, depending on the facts and circumstances, could give rise to disclosure obligations under the final rules.[1273] These provisions require a registrant to consider all of its mining properties in the aggregate, as well as individually, when assessing the materiality of its mining operations. These provisions should facilitate compliance for companies with multiple mining properties while eliciting material information for investors in appropriate circumstances. We also expect that the treatment of multiple property ownership will result in more efficient and more effective disclosure compared to current practice, as registrants will be able to provide summary disclosure about all of their mining properties where some or all of the properties are not individually material.

iv. Treatment of Royalty Companies

Because the value of a royalty company or similar registrant derives from the underlying mining properties that generate payments to the registrant, the final rules require these registrants to provide disclosure of the material underlying mining properties, analogous to that of mining companies. While the final rules are consistent with prior disclosure practices, we expect that consistent application of this requirement will provide investors with information useful to making informed investment decisions.[1274] To the extent the final rules will increase the quality and amount of disclosure by royalty companies and similar registrants about underlying material mining properties, we expect investors to benefit from access to more and higher quality information to aid their investment decisions. To the extent that royalty companies and similar registrants are able to omit information about underlying material mining properties that is not otherwise available, including not having to file a technical report summary, the benefits to investors will be limited.[1275]

We expect all royalty companies and similar registrants will incur compliance costs related to assessment of access to required information about underlying mining properties and/or the materiality of the underlying properties. These compliance costs will be limited for those royalty companies that already have access to the information required to comply with the final rules. These compliance costs also will be limited for those royalty companies that do not

[1266] *See supra* Section II.C.1.iii.

[1267] *See supra* note 28 and accompanying text.

[1268] *See* letter from NSSGA 1.

[1269] *See supra* Section II.B.1. The definition of ''material'' in the final rule is the same as under Securities Act Rule 405 and Exchange Act Rule 12b–2. Establishing materiality as the threshold for disclosure is also consistent with the disclosure standard under CRIRSCO-based disclosure standards.

[1270] *See* letters from Alliance, Amec, AngloGold, BHP, Eggleston, JORC, Rio Tinto, SAMCODES 1 and 2, SME 1, and SRK 1.

[1271] *See supra* Section II.B.2.iii.

[1272] *See supra* Section IV.B.1., regarding the broader economic benefits of disclosure.

[1273] *See supra* Section II.B.3.

[1274] *See supra* Section II.B.4.iii.

[1275] We have identified three mining royalty companies registered with the Commission as of December 31, 2017. Similarly, one commenter noted they were not aware of any ''primarily mining finance companies that participate in any mining or processing activities.'' *See* letter from Crowell & Moring.

have access to such information, as the final rules require disclosure about underlying mining properties only insofar as the information is known or reasonably available to the registrant.[1276]

In addition, we expect royalty companies and similar registrants that must provide disclosures and file technical report summaries about underlying material mining properties to incur additional compliance costs related to the preparation of those disclosures and reports. These will include both direct and indirect costs related to gathering the required information, potential payments to consultants, including qualified persons, and costs associated with reporting the required information in annual reports and registration statements filed with the Commission. One commenter asserted that for royalty interests, the costs of preparing the required disclosure for annual reports on Form 10–K could exceed $500,000.[1277] However, it is not clear whether this was a total cost or an incremental cost, or whether this was specific to royalty companies. In the instances where a material property is already covered by a technical report summary filed by the producing registrant, we expect these additional compliance costs to be substantially lower as the royalty company will be able to refer to the producing registrant's report. As noted above, compliance costs also will be limited to the extent the royalty company does not have access to such information and the information is not otherwise known or reasonably available to the registrant.

Many commenters opposed the requirement for royalty companies to provide disclosure for underlying mining properties that are material,[1278] but did not provide alternatives that would ensure that investors have access to relevant information about these properties. Excluding royalty companies from the final rules would eliminate the practical difficulties and compliance costs associated with providing disclosure about underlying mining properties. However, it also could leave investors in royalty and similar companies with less information about material mining properties than investors in other mining registrants and thereby undermine the goal of providing enhanced mining disclosure to the market generally. Some commenters noted that royalty and other similar companies are unlike other mining registrants, in that their revenue is based on royalty contracts and thus information about these contracts may be more relevant for investors in such companies.[1279] However, the properties underlying the contracts are the source of the revenue stream defined by those contracts. Thus, as noted by other commenters,[1280] royalty companies have an economic interest in such properties. Consequently, providing information about such properties' potential future production would enable investors in royalty and other similar companies to make more informed investment decisions.

v. Definitions of Exploration, Development, and Production Stage

The definitions adopted in the final rules of ''exploration stage property,'' ''development stage property,'' and ''production stage property,'' as well as the definitions of ''exploration stage issuer,'' ''development stage issuer,'' and ''production stage issuer'' will provide investors with clear, accurate, and consistent disclosure about the type of company and level of risk.[1281] For example, because the classification at issuer level would be derived from the individual property classifications, the final rules would prevent a registrant without material reserves from characterizing itself as a development stage or production stage issuer, which is possible under the current classification scheme. By clarifying and codifying existing practices, the final rules will also benefit registrants by reducing regulatory uncertainty.

Because registrants already possess the information necessary to be able to classify properties at the individual property level and because the final classifications are consistent with prior disclosure practices, we do not expect these provisions to increase compliance costs for most registrants. However, because the final rules change how registrants can classify themselves at the issuer level, there may be some issuers that incur costs because they cannot continue to identify themselves as development or production stage issuers under the final rules. For example, some current production stage issuers (who under the new rules will not be able to classify themselves as such) may find it more costly to raise capital to the extent investors assign a higher risk to the company's mining operations based on the change in classification. Moreover, some current production stage issuers that are able to continue classifying themselves as such under the new rules may need to undertake additional work in order to do so (*e.g.,* hiring a qualified person to make a determination about mineral resources and mineral reserves) and would therefore incur additional compliance costs.

4. Qualified Person and Responsibility for Disclosure

i. The ''Qualified Person'' Requirement

We are adopting the proposed requirement that every disclosure of mineral resources, mineral reserves, and material exploration results be based on, and accurately reflect, information and supporting documentation prepared by a qualified person.[1282] In a change from the proposed rules, the final rules will also permit the disclosure of exploration targets, with the same requirement that such disclosure be based on, and accurately reflect, information and supporting documentation prepared by a qualified person. We anticipate that the qualified person requirement, together with the technical report summary requirement, will benefit investors by enhancing the accuracy and transparency of disclosures. For example, the requirement that the qualified person have at least five years of relevant experience and be an eligible member or licensee in good standing of a recognized professional association helps ensure that estimates provided in disclosures are based on work consistent with current professional practice. This should, in turn, increase the reliability and informational value of the disclosures. Several commenters supported the qualified person requirement, citing similar benefits.[1283] For example, one commenter noted that ''[e]xperience in consulting firms has shown that when individual members of the firm are specifically identified as qualified persons, the work undertaken by the members of the firm in preparing or reviewing technical reports is more careful.'' [1284] Other commenters similarly expected the qualified person requirement to result in higher quality disclosure.[1285] In addition, the written consent requirement will help ensure that the qualified person's findings and conclusions are accurately represented by the registrant and should further increase the reliability of the disclosures.

Moreover, because the qualified person requirement in the final rules is

[1276] *Id.*

[1277] *See* letter from Royal Gold.

[1278] *See supra* note 127 and accompanying text.

[1279] *See* letters from Crowell & Moring, NRP, Royal Gold, and SME 2.

[1280] *See* letters from Rio Tinto and SAMCODES 2.

[1281] *See* 17 CFR 229.1304(c)(1).

[1282] *See supra* Section II.C.1.

[1283] *See* note 183 and accompanying text.

[1284] *See* SME 1.

[1285] *See* letters from BHP, Eggleston, Rio Tinto, and SRK 1.

consistent with most foreign jurisdictions' mining disclosure requirements, it should improve comparability between U.S. registrants and foreign companies reporting in those other jurisdictions, which will further benefit investors. A qualified person requirement helps ensure that the individual preparing documentation to support mining property disclosures in Commission filings possesses certain professional credentials and relevant experience. Comparability should therefore be improved, because qualified persons engaged by registrants are likely to adhere to a common set of professional standards.

These benefits to investors from the qualified person requirement will be accompanied by costs for mining registrants.[1286] We expect the increase in compliance costs to be primarily related to search and hiring costs for qualified persons. Registrants that wish to disclose mineral resources and reserves, but are not currently employing or contracting with professionals meeting the definition of qualified person, will incur expenses to identify a pool of professionals who meet the definition of qualified person and are willing to provide their services. The costs for services of a qualified person may also be higher than the costs for services of the professionals currently hired by such registrants due to the level of expertise required under the final rules and the liability that professionals will face under the final rules. In this regard, one commenter noted that a qualified person likely commands a 15–25% salary premium over a non-qualified person,[1287] although that premium does not appear to include any premium for accepting Section 11 liability.

Because the required disclosures derive from activities mining registrants already perform as a crucial part of their businesses (*i.e.,* mineral exploration and estimation of mineral resources and reserves), we believe that most registrants likely already engage experienced professionals meeting the required level of expertise, either as employees or as contractors.[1288] In particular, this should be the case for registrants reporting consistent with CRIRSCO-based disclosure standards, as those standards already require a similarly defined ''qualified'' or ''competent'' person to support the disclosures.[1289] To the extent registrants already engage professionals meeting the final qualified person requirement, they will not incur costs related to searching for qualified persons, as long as currently engaged professionals agree to act in the capacity of a qualified person to support disclosures.

Even if registrants that are currently employing or contracting with professionals meeting the final definition of a qualified person do not incur additional costs associated with searching for and initial hiring of such a person, they may nevertheless experience an increase in compensation costs for these professionals. First, these professionals may demand increased compensation due to increased competition for the services of professionals meeting the definition of a qualified person. We expect an increase in competition for these services because registrants currently not hiring such professionals will need to do so under the final rules to support disclosures of mineral resources and reserves. Second, several commenters stated that subjecting qualified persons to Section 11 liability would likely reduce the willingness of individuals to serve in that role, which would, in turn, limit the available supply and increase the cost of hiring qualified persons. In a change from the proposed rules, the final rules provide that the qualified person will not be subject to Section 11 liability for any description of the procedures, findings, and conclusions reached about matters based on information provided by the registrant in certain required areas outside of the qualified person's experience and expertise, which will limit a qualified person's exposure to Section 11 liability.[1290] Nevertheless, as a general matter, we expect mining professionals who are already engaged by registrants and who meet the definition of a qualified person would request additional compensation for the imposition of Section 11 liability. However, given the nature of individual risk aversion and the sunk costs in professional development, as well as the additional factors of increased compensation and the ability to allocate potential liability between individuals and firms (as discussed below), it is difficult to reliably estimate the behavioral response of individuals and firms to the imposition of Section 11 liability.

Rather than exiting the market entirely, professionals who currently meet the definition of qualified person may be willing to accept Section 11 liability, but only for a reduced scope of work. For example, a technical report summary may involve the introduction of analyses that draw on the range of experience and educational backgrounds within the definition of qualified person under the final rules.[1291] Due to liability concerns, a qualified person—who would be willing to assume responsibility for such items in a jurisdiction without Section 11 liability—may be willing to assume responsibility for only a subset of such items in Commission filings. In this case, the registrant would need to hire or engage a greater number of qualified persons to complete its technical report summary. For larger registrants, this may not be a significant issue because they are likely to already have access to multiple qualified persons. For smaller registrants, this may be more costly, especially, as noted by one commenter,[1292] where the only qualified persons are executives of the firm or, as noted by another commenter,[1293] where exploration and development companies with no production may not have qualified persons with specific experience on their staff. To the extent hiring of qualified persons to support disclosures becomes prohibitively costly for some registrants, for example, due to search costs or increased compensation demands in light of Section 11 liability, these registrants may choose to forgo making disclosure about mineral resources and reserves in their Commission filings, which would reduce the benefit of such disclosure for both investors and registrants.

It is difficult to assess the likelihood of these potential negative outcomes, but we note that, based on the statistics reported above in Section IV.A.1., there are many professionals who potentially meet the definition of a qualified person in the United States alone, and

[1286] Quantifying these costs is challenging due to data limitations. For example, we do not have access to data that would allow us to more precisely measure the current supply of mining professionals meeting the definition of a ''qualified person'' outside of the United States. We also do not have access to readily available data sources of comprehensive compensation data for geologists and mining engineers (in the United Sates or other countries) that would help us estimate the incremental cost of hiring a qualified person with the minimum level of expertise versus professionals who do not qualify as qualified persons.

[1287] *See* letter from SRK 1.

[1288] This view was affirmed by several commenters. *See supra* note 1243.

[1289] *See, e.g.,* letter from SRK 1.

[1290] *See supra* Section II.C.1.iii.

[1291] *See* letters from MMSA and SASB. For similar reasons, commenters requested that limited disclaimers be permitted. *See supra* note 229. The final rules clarify that multiple qualified persons may expertize a technical report summary, allowing a qualified person to limit their liability to a scope of work with which he or she is comfortable applying his or her competence, education, and experience.

[1292] *See* letter from SME 1.

[1293] *See* letter from Eggleston.

therefore, broadly speaking, we believe it is unlikely that there will not be a sufficient supply of qualified persons available to support disclosures for at least larger-scale material mining properties, where the benefits of disclosure for registrants likely outweigh any increase in costs of qualified persons due to Section 11 liability. Moreover, mining companies and mining consulting companies presently employ many professionals who already meet the definition of qualified person.[1294] Nevertheless, because the mining industry is not homogeneous, there may be segments of the mining industry for which the supply of professionals meeting the qualified person requirement is more limited, thus making it more difficult or costly for these registrants to satisfy this requirement.

Holding all else constant, the increased demand for qualified persons' services is likely to incentivize more professionals to become qualified, especially in areas in which the supply of qualified persons is currently more limited, although there could be a lag in the time required to obtain the relevant five years of experience. For smaller registrants, whose material properties will be relatively less valuable than the material properties of larger registrants, or registrants engaged in mining of certain minerals, for which there is a limited supply of professionals with the relevant experience, the potential negative effects of Section 11 liability may be more pronounced.

Several additional factors may mitigate the costs of subjecting qualified persons to Section 11 liability. Requiring the registrant to obtain the qualified person's written consent is consistent with the Commission's longstanding approach to the use of an expert's report in Securities Act filings.[1295] Because a mining registrant is currently required to file the written consent of the mining engineer, geologist, or other expert upon whom it has relied when filing a Securities Act registration statement, and such consent is already given today, the adopted written consent requirement may not impose a significant additional burden.

Additionally, in a change from the proposed rules, the final rules provide that a third-party firm comprising mining experts, such as professional geologists or mining engineers, may sign the technical report summary and provide the written consent instead of its employee, member, or other affiliated person who prepared the summary, and need not identify such individual.[1296] Because the third-party firm will be treated as the mining expert subject to potential Section 11 liability rather than the individual qualified person in these circumstances, this provision could further mitigate the costs of Section 11 liability for those individual professionals who are employed by third-party firms by shifting liability to an entity that is more equipped to bear it.

Furthermore, as noted above, the final rules provide that a qualified person will not be subject to Section 11 liability for certain information provided by the registrant upon which the qualified person relies.[1297] Qualified persons likely would be most concerned about being subjected to Section 11 liability for information outside their expertise that has been provided by others. By limiting qualified persons' individual liability exposure in cases where such information has been proved by the registrant, this provision, when applicable, will serve to limit the costs of Section 11 liability. At the same time, the provision is not likely to come at the expense of reduced assurance of quality in mining disclosures, as the registrant who is providing the information will retain residual Section 11 liability for the information and therefore will be incentivized to exercise care its preparation.

Although the final rules do not provide a complete exemption from Section 11 liability, it may be possible, as suggested by several commenters, to obtain insurance to protect against costs that could arise out of Section 11 litigation.[1298] As commenters noted,[1299] this would effectively impose an additional cost on registrants.[1300] While insurance may reduce qualified persons' reluctance to accept liability, we do not have access to data or other information that would allow us to quantify how much registrants' costs will increase due to higher compensation or provision of insurance.

Finally, the qualified persons will not be subject to strict liability. Under Section 11, a qualified person, as an expert, would have an affirmative defense against liability for misstatements or omissions made on the authority of another expert if the qualified person ''had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert.'' [1301] This framework may mitigate the costs of subjecting qualified persons to Section 11 liability.

The final rules do not require the qualified person to be independent of the registrant. The absence of an independence requirement is consistent with CRIRSCO-based disclosure codes, with the exception of Canada, where the qualified person must be independent of the company for new registrants or, in cases of significant changes to existing disclosures, for established registrants.[1302] Although there is some evidence that outside experts reduce information asymmetries about companies' valuations more than internal experts in related circumstances,[1303] this benefit must be balanced against the additional cost of having to find and hire an outside expert, instead of using an existing affiliated expert. Moreover, an outside expert may in practice not be independent of the company if the person derives a large fraction of overall compensation from that same company.

As an alternative we could have exempted qualified persons from Section 11 liability altogether. This would avoid the increased costs associated with potential liability while retaining the benefit to both registrants and investors of having qualified persons with relevant credentials and experience provide the basis for disclosure of exploration targets, exploration results, mineral resources, and mineral reserves. The experience of other jurisdictions using CRIRSCO-based codes that do not impose Section

[1294] *See supra* note 1288 and accompanying discussion.

[1295] *See supra* note 268 and accompanying text.

[1296] *See supra* Section II.C.1.iii.

[1297] *See id.*

[1298] *See* letters from Chamber, Cleary Gottlieb, Energy Fuels, FCX, Gold Resource, MMSA, NSSGA 1, Rio Tinto, Shearman & Sterling, SME 1, and Vale.

[1299] *See* letters from Energy Fuels, FCX, MMSA, NSSGA 1, Rio Tinto, Shearman & Sterling, and Vale.

[1300] One commenter cited increases in liability insurance costs for registrants ''well into six figures.'' *See* letter from MMSA.

[1301] 15 U.S.C. 77k(a)(4).

[1302] *See* Canada's NI 43–101, *supra* note 123, at pt. 5.3.

[1303] *See, e.g.,* Karl A. Muller III and Edward J. Riedl, ''External Monitoring of Property Appraisal Estimates and Information Asymmetry'' (2002), *Journal of Accounting Research,* Volume 40, Issue 3, pp. 865–881. Using a sample of UK investment property firms, the paper finds that bid-ask spreads are lower for firms employing external appraisers of property values versus those employing internal appraisers, suggesting the information asymmetry about the value of the company is lower in the former case.

11-type liability (but may have some other source of liability) suggests that Section 11 liability is not necessary to obtain some benefit from having a qualified person. However, relative to the final rules, an outright exemption from Section 11 liability could reduce the incentives for qualified persons to perform a thorough analysis of the relevant properties and ensure that the disclosure in Commission filings is complete and accurate.[1304] In this way, we expect that Section 11 liability will amplify the benefits of a qualified person requirement and, thus, enhance investor protection relative to an alternative that does not impose such liability, although we acknowledge that such liability will come at a cost to mining companies and investors in those companies.

ii. The Definition of ''Qualified Person''

We are adopting the proposed definition of a ''qualified person'' and related proposed criteria and provisions.[1305] We believe this definition will help ensure that disclosure of mineral resources, mineral reserves, and material exploration results in Commission filings is based on work by professionals who have the qualifications necessary for the disclosure to be consistent with current professional practices and accurately reflects the information and supporting documentation.

Providing a definition of qualified person will benefit investors by establishing common criteria for persons supporting disclosures of exploration results, mineral resources, and mineral reserves, thereby increasing the reliability and comparability of those disclosures for investors. As discussed above, however, the selection and hiring of qualified persons will impose costs on registrants. As noted above, these costs could be higher as a result of the level of expertise and other professional credentials required by the adopted definition. To the extent that professionals meeting all of the requirements are scarce, the cost of hiring such professionals will tend to increase, although this could draw more professionals into the field, thereby bringing costs back down.

As an alternative, we could have added an educational requirement to the definition (*e.g.,* the attainment of a bachelor's or equivalent degree in an area of geoscience, metallurgy, or mining engineering), as recommended by several commenters.[1306] An educational requirement may help ensure subject matter expertise and increase the quality and credibility of the mining disclosures. However, because the recognized professional organizations typically address such a requirement in their membership criteria,[1307] we believe the incremental benefit from adding such a requirement to the definition would be minimal as it would be largely redundant.

As another alternative, we could have required that the qualified person be a member of an approved list of ''recognized professional organizations,'' similar to the approach under CRIRSCO-based standards. This was recommended by numerous commenters.[1308] This alternative could provide more clarity for registrants about which organizations are considered to be ''recognized professional organizations,'' thereby facilitating compliance. However, as compared to the principles-based approach in the final rules, an approved list would be less flexible and could unduly restrict the pool of eligible qualified persons. In addition, a specific list of organizations risks becoming outdated over time as circumstances change, which could lead to deterioration in the credentials of qualified persons and a corresponding reduction in disclosure quality.

5. Treatment of Exploration Results

The final rules require a registrant to disclose exploration results and corresponding exploration activity if they are material to investors.[1309] This approach aligns the Commission's disclosure requirements for exploration results with those in CRIRSCO-based disclosure standards in that the disclosure of exploration results and corresponding exploration activity is largely voluntary until they become material to investors. Compared to the proposed rules, the final rules provide additional guidance for registrants to help them determine when exploration results are material, which should facilitate compliance to the benefit of both registrants and investors.

Because exploration results can guide a registrants' economic decision-making, such as internal decisions regarding whether to continue a project and enter into the determination of mineral resources and mineral reserves, we expect the disclosure of material exploration results to benefit investors by providing material information about registrants' mining operations and potential growth opportunities. Several commenters generally supported requiring the disclosure of material exploration results on material properties for similar reasons.[1310] We expect that exploration results by smaller mining registrants are especially likely to be considered material to investors because such registrants tend to have a narrower range of mining operations and fewer individual projects. Investors in such companies are therefore especially likely to benefit from this aspect of the final rules.

Exploration results, by themselves, are inherently associated with some level of uncertainty. Thus, it may be difficult for investors to evaluate exploration results accurately. There is a risk that some investors may weigh this information inappropriately, which, in turn, could lead to inefficient investment decisions. The final rules mitigate potential costs to investors related to both the reliability of and the uncertainty associated with the disclosure of exploration results in several ways. First, the final rules only require disclosure of material exploration results, which should reduce the risk of investors having to assess and possibly misconstrue the significance of exploration results that inherently are of low informational value. Second, the final rules preclude the use of exploration results, by themselves, to derive estimates of tonnage, grade, and production rates, or in an assessment of economic viability, which should decrease the risk of conveying inaccurate information. As such, these provisions should reduce the potential for investors to incorrectly value any disclosed exploration results. Third, because the disclosure of exploration results must be based on the analysis of a qualified person, the accuracy and reliability of the disclosed exploration results should be enhanced and the comparability of disclosures across registrants may increase.

In addition, the final rules will align the disclosure of exploration results in Commission filings with the requirements in CRIRSCO-based disclosure standards, which may further improve the comparability of the disclosed information relative to similar disclosures by mining companies in jurisdictions such as Canada and Australia, thereby improving the usefulness of this information for investors.

Findings from an academic study suggest that disclosures of exploration

[1304] An outright exemption from Section 11 liability would also be inconsistent with current requirements. *See supra* Section II.C.1.iii. and notes 278 and 279.

[1305] *See supra* Section II.C.2.

[1306] *See supra* note 322 and accompanying text.

[1307] *See supra* note 324 and accompanying text.

[1308] *See supra* note 331 and accompanying text.

[1309] *See supra* Section II.D.3.

[1310] *See supra* note 365 and accompanying text.

results can be valuable to investors in mining stocks. The study analyzes a sample of 1,260 exploration results announcements made by 307 unique Australian mining companies over the 2005–2008 time period and documents an average abnormal stock return of 2.8% on the announcement day.[1311] For each such company, the abnormal return was calculated relative to the return on the same day for a size-matched non-announcing commodity peer. Consistent with the disclosed exploration results being more value-relevant for smaller firms, the study also finds a significantly higher announcement-day return for smaller firms, where size is measured by pre-announcement market capitalization. We note that the announcements of explorations results in the sample were compliant with the 2004 edition of the Australian JORC code for mining disclosure, which contains requirements for disclosure of exploration results that are similar to the final requirements.[1312] Because it is unclear to what extent the companies in the study were able to selectively disclose only positive exploration results, the results should mainly be viewed as evidence of exploration results having significant informational value, rather than implying that all exploration results would be met by positive stock market reactions.[1313]

In terms of benefits to registrants, the final rules should help limit compliance costs by more closely aligning the Commission's disclosure requirements with CRIRSCO-based disclosure standards and may reduce regulatory uncertainty by directly addressing the treatment of material exploration results. As noted by one commenter, U.S. registrants will be on a more equal footing if they are ''able to disclose the potential value of their properties through the disclosure of exploration results.'' [1314]

While a registrant is required to base disclosure of exploration results on information and supporting documentation provided by a qualified person, the final rules do not require a technical report summary for disclosure. A commenter noted that exploration results are the basis of valuation for small exploration-stage and even some development-stage issuers, so the ability to disclose exploration results without incurring the cost of a technical report summary could yield significant cost savings for such registrants.[1315] Even larger registrants—regardless of production stage—may wish to disclose exploration results. In general, being able to disclose exploration results without a technical report summary constitutes a cost saving of the final rules relative to the proposed rules for any registrant. For example, one commenter estimated costs in Canada and Australia to range between $20,000 and $40,000 if a company has to hire a qualified person working for a third-party consulting firm to prepare a technical report in support of material exploration results.[1316] Another commenter also noted that, although exploration results support the disclosure of mineral resources and mineral reserves, ''exploration results are the only non-speculative information that an exploration program has.'' [1317] We believe maintaining the requirement for a qualified person to prepare the supporting documentation and analysis for material exploration results without requiring the filing of a technical report summary will promote meaningful disclosure without unduly burdening registrants.

Due to the lack of data, heterogeneity among registrants, and inability to know the precise tradeoffs faced by registrants, we are not able to quantify the costs and benefits associated with requiring registrants to disclose material exploration results. We expect an increase in compliance costs for those registrants that disclose material exploration results for the first time for any particular project. These costs may include the assessment of materiality, the costs of employing a qualified person to prepare the findings and conclusions, and the costs of reporting the results in annual reports and registration statements filed with the Commission. To the extent that these costs are fixed and do not scale with the size of the project, the cost burden may be relatively larger for smaller registrants. We believe many registrants are already likely to engage professionals who meet the definition of qualified person to conduct exploration and to document and analyze exploration results, in which case the additional compliance costs will be associated mainly with producing required disclosures. In addition, the compliance costs should be substantially mitigated for registrants that already report according to CRIRSCO-based disclosure standards, as those standards have similar disclosure requirements for material exploration results. However, as Section 11 liability likely will lead professionals that meet the definition of qualified person to demand increased compensation for their services, costs also may increase for registrants currently employing such professionals for exploration activities, including those registrants that report in jurisdictions with CRIRSCO-based disclosure standards.[1318]

Several commenters expressed concern that requiring the disclosure of material exploration results could come at the cost of disclosing commercially sensitive information or potentially violating confidentiality agreements with joint venture partners and other mining operators.[1319] We acknowledge that disclosure of material exploration results in this situation would impose costs for both registrants and their investors. However, the final rules do not require the filing of a technical report summary to support the disclosure of exploration results, which may help mitigate concerns about disclosure of commercially sensitive information. This is because such information is more likely to be found in the technical report summary's detailed disclosure requirements for exploration activity and exploration results (compared to the disclosure required in the narrative part of the Commission filing). We also note that the final requirement to disclose material exploration results does not impose an affirmative obligation to hire a qualified person to undertake the work necessary to make a determination about exploration results for purposes of disclosing such results in Commission filings.

A few commenters urged us to make disclosure of material exploration results (and mineral resources) optional in all cases.[1320] Making disclosure of material exploration results (and mineral resources) optional in all cases would reduce the costs associated with developing the required documentation by a qualified person and any costs associated with disclosing commercially sensitive information, because registrants would only choose to disclose when it is economically beneficial to do so. However, making disclosure optional in all cases would

[1311] *See* Ron Bird, Matthew Grosse, and Danny Yeung, ''The market response to exploration, resources, and reserve announcements by mining companies: Australian data'' (2013), *Australian Journal of Management,* Volume 38, Issue 2, pp. 311–331.

[1312] *See* JORC Code *supra* note 175, at pts. 16–18.

[1313] We also note that the study does not provide results for different sub-sectors of the mining industry (*e.g.,* aggregates and industrial materials) and therefore any inferences drawn may not be true across all types of mining companies.

[1314] *See* letter from Northern Dynasty.

[1315] *See* letter from Eggleston.

[1316] *See* letter from SRK 1.

[1317] *See* letter from Eggleston.

[1318] *See supra* Section IV.B.4.i.

[1319] *See supra* note 371 and accompanying text.

[1320] *See* letters from Davis Polk and Royal Gold.

undercut the benefits of disclosure that the rules are intended to achieve and would not align with CRIRSCO-based disclosure standards. Under this alternative, investors could be deprived of material information developed by the registrant for its own decision-making, but that is not in the registrant's best interest to disclose. In addition, where a registrant also produces disclosure in a jurisdiction that adheres to CRIRSCO-based disclosure standards (and would thus disclose such information), there could be a lack of comparability and confusion among investors.

As noted above, the final rule will permit the disclosure of exploration targets in Commission filings. This change more closely aligns the final rule with CRIRSCO-based disclosure standards. Moreover, allowing registrants to disclose exploration targets provides registrants with a credible way to communicate value-relevant information that could be important for investors' decision making. This will put U.S. registrants on a more equal footing with other registrants who may be able to disclose exploration targets in other jurisdictions. In addition, as suggested by one commenter, exploration targets may reflect a significant portion of the value of the company for small registrants.[1321] As such, permitting the disclosure of exploration targets in Commission filings could reduce registrants' cost of capital, especially for small registrants. Finally, registrants will be able to provide investors with information in their Commission filings that, due to the qualified person requirement, should be of higher quality and reliability than if this information is otherwise provided by the mining registrants outside Commission filings, such as on company websites.

Because exploration targets may have no or limited empirical basis, allowing the disclosure of exploration targets, even with cautionary language, could result in misleading or confusing disclosures, causing investors to misconstrue exploration targets as actual findings of exploration results or even mineral resources. However, industry and CRIRSCO definitions of exploration targets as well as the disclosure requirements in the final rules [1322] mitigate this risk of investor confusion.

As an alternative, we could have prohibited disclosure of exploration targets in Commission filings. We note that such a prohibition would not preclude a registrant from releasing the information about exploration targets in other media (*e.g.,* websites, blog posts, newsletters, or analysts' discussions). Because exploration targets could still be communicated by registrants outside of Commission filings, the availability of such information without the assurances provided by a qualified person requirement and the other protections associated with Commission filings could put investors at risk of being misled. Moreover, the benefits from allowing the disclosure of exploration targets discussed above would be foregone.

6. Treatment of Mineral Resources

i. Mineral Resource Disclosure Requirement

The final rules provide that a registrant with material mining operations must disclose specified information in its Securities Act and Exchange Act filings concerning mineral resources that have been determined based on information and supporting documentation from a qualified person.[1323] Absent such information and supporting documentation, the registrant would not have determined mineral resources as defined in the final rules and, as such, would not be required or allowed to disclose mineral resources in a Commission filing. Because disclosure of mineral resources is currently precluded in Commission filings unless required pursuant to foreign or state law, this provision will expand the scope of the current disclosure regime, while aligning the Commission's mining disclosure requirements with those in foreign jurisdictions that adopt CRIRSCO-based disclosure standards. Industry participants have raised concerns regarding the adverse competitive effects potentially stemming from the inability of U.S. registrants to disclose mineral resources. These industry participants have stated that mining companies and their investors consider mineral resource estimates to be material and fundamental information about a company and its projects.[1324]

We expect the final rules will result in investors gaining access to additional useful information concerning a mining registrant's operations and prospects, which will help improve their investment decisions. Because mining registrants assess mineral resources in the course of developing mining projects, requiring information about mineral resources to be disclosed will significantly reduce information asymmetries between investors and registrants and should lower registrants' cost of capital, promote capital formation, and improve the efficiency of investors' capital allocation.

As discussed above, allowing the disclosure of mineral resources is consistent with CRIRSCO-based disclosure standards. Closer alignment with international practice will enable U.S. registrants to provide disclosure that more closely matches that of Canadian mining registrants and non-U.S. mining companies that are subject to one or more of the other CRIRSCO-based mining disclosure codes. As such, the final rules will improve the ability of U.S. registrants to provide valuable information that analysts and investors are accustomed to receiving from non-U.S. companies, thus removing a competitive disadvantage and placing U.S. registrants on a more equal footing with non-U.S. registrants in terms of accessing capital markets. The ability to disclose mineral resources in Commission filings may be particularly beneficial to smaller exploration stage mining registrants (and their investors) as their valuations may be more dependent on non-reserve mineral deposits. The ability to disclose mineral resources may also improve the attractiveness of U.S. capital markets for mining companies more generally and encourage entry of new registrants, both domestic and foreign, in particular exploration and development stage companies that are not permitted to disclose mineral resources in filings with the Commission under the current rules.[1325]

For registrants that currently disclose ''mineralized materials'' there should be a comparatively lower incremental reduction in information asymmetries. Nonetheless, we expect the final rules to result in disclosures that are more consistently presented and more transparent to investors, thereby increasing comparability of such information across mining registrants. For example, the differences between measured and indicated mineral resources will be clearer under the final rules since they are distinct and not aggregated as mineralized material. In addition, the final rules require a registrant with material mining operations to disclose inferred resources, which are not included in the definition of mineralized material. The requirement that disclosures must be supported by information and

[1321] *See* letter from Eggleston.

[1322] *See supra* Section II.D.3.

[1323] *See supra* Section II.E.1.iii.

[1324] *See supra* Section II.E.1.ii.

[1325] Similar arguments were made by several commenters. *See, e.g.,* letters from Rio Tinto, SME 1, and SRK 1.

documentation provided by a qualified person also will improve the quality and reliability of the disclosures compared to the current disclosures of mineralized material, which will benefit investors. To the extent the above expected improvement in disclosure to investors reduces information asymmetries, the efficiency of investment decisions will increase and registrants that currently disclose mineralized material may experience a reduction in the cost of capital.

There is some empirical evidence suggesting that investors respond favorably to disclosures of mineral resources. For example, the previously discussed study regarding the disclosure of exploration results also analyzes the announcement returns to disclosures of mineral resources.[1326] Analyzing 624 resource announcements by 278 publicly-traded Australian firms between 2005 and 2008, the authors document an average abnormal stock return of 2.5% on the announcement day. As for the exploration results announcements, the abnormal return was calculated relative to the return on the same day for a size-matched non-announcing commodity peer. Unlike the announcements of exploration results, the authors find no relation between company size and abnormal returns. However, abnormal returns are significantly greater when a mining company announces mineral resources for the first time.[1327] The authors suggest this may be the case because much of the existing information asymmetry is resolved at the time of the first announcement.

The final rules will generate compliance costs for registrants that are required to disclose mineral resources. The incremental compliance costs will be greater for registrants not currently disclosing mineralized material. These include incremental costs (above the registrant's regular mineral resource assessment practices) of an initial assessment when first determining mineral resources and when disclosing a material change to mineral resource estimates that have been previously reported.[1328]

The compliance costs associated with disclosure of mineral resources may be mitigated to some extent for registrants that report in foreign jurisdictions with CRIRSCO-based disclosure codes given the similarity between the requirements in those codes and the final rules. In this regard, however, although all CRIRSCO-based disclosure codes require some type of documentation to support the determination and disclosure of mineral resources, most do not define a specific type of study. As such, the final requirement for an initial assessment (discussed further below) could result in increased burdens for these mining registrants to the extent that the initial assessment differs from registrants' prior practices for determining resources. To the extent industry practice in other jurisdictions is already largely consistent with CRIRSCO-based disclosure standards, whether or not such jurisdictions' disclosure codes are based on those standards, the marginal increase in costs to comply with the final rules is likely to be limited and to comprise a one-time switching cost to new disclosure formats and terminology, though this new terminology reflects current industry practice and usage.

ii. Definition of Mineral Resource

We are adopting the definition of mineral resource, as proposed, to mean a concentration or occurrence of material of economic interest in or on the Earth's crust in such form, grade or quality, and quantity that there are reasonable prospects for economic extraction.[1329] This definition generally aligns with the definition used in CRIRSCO-based disclosure standards and industry practice, and should therefore benefit investors by making the disclosure of mineral resources by U.S. mining registrants comparable to the disclosures in foreign jurisdictions.

We do not expect the adopted definition of mineral resources to impose any significant compliance costs, by itself, on registrants who are currently estimating mineral resources based on a similar definition for internal purposes and for reporting in foreign jurisdictions with CRISCO-based mining disclosure requirements. To the extent that registrants do not currently estimate resources similar to the definition in the final rules, they may incur incremental costs from having to change their estimation practices to meet the specific definition of mineral resources in the final rules. We note that these costs would need to be incurred only insofar as such registrants desire to disclose mineral resources in Commission filings. Registrants that find the benefit of disclosing mineral resources does not exceed the costs of determining mineral resources according to the definition in the final rules have no obligation to do so. It is possible to engage in mineral production without disclosing mineral resources or mineral reserves. Such issuers, however, absent any other material mineral reserves, would be classified as exploration-stage issuers. Registrants that currently find disclosure of mineral reserves to be valuable will have to incur the cost of determining and disclosing mineral resources in order to disclose mineral reserves. We believe, however, that it is reasonable to expect a mining industry participant that wishes to monetize mineral material (that could be disclosed as a mineral resource) would choose to determine the value of the mineral material, especially if the company is currently estimating and disclosing mineral reserves.

As an alternative to the final rules, we could have excluded mineral brines from the definition of mineral resource, as suggested by several commenters.[1330] This would further align our definition with CRIRSCO-based standards, which define a mineral resource as ''solid material,'' and could reduce compliance costs for registrants extracting minerals brines, especially if they are also reporting in jurisdictions where mineral brines do not need to be included in disclosure of mineral resources. To the extent the industry practice regarding extracting mineral brines is different from the industry practice of extracting solid minerals, subjecting such firms to a disclosure regime developed for solid mineral extraction may increase compliance costs related to reporting. However, as discussed above, mineral brines are regulated under Canada's NI 43-101 code by at least one Canadian provincial securities administrator,[1331] which suggests it may not be outside industry practice to treat extraction of mineral brines in a similar way to extraction of solid minerals. In addition, the scientific and engineering principles used to characterize mineral brine and resources and reserves are substantially similar to those used to characterize solid mineral resources and reserves, and Guide 7 has been applied historically to registrants that own or operate mining properties containing mineral brines.[1332] Therefore, excluding mineral brines from the definition of mineral resource could result in investors receiving less information about these resources than under the current disclosure framework.

iii. Classification of Mineral Resources

We are adopting the proposed requirement that a registrant with

[1326] *See supra* note 1311 and accompanying text.

[1327] *See supra* note 1313 on the generalizability of the results.

[1328] *See supra* Section IV.B.4.i., for discussion of the additional search costs and compensation costs that registrants also may incur.

[1329] *See supra* Section II.E.2.

[1330] *See supra* note 479 and accompanying text.

[1331] *See supra* note 502 and accompanying text.

[1332] *See supra* Section II.E.2.iii.

material mining operations classify its mineral resources into inferred, indicated, and measured mineral resources, in order of increasing confidence based on the level of underlying geological evidence.[1333] This more closely aligns the Commission's disclosure framework for mining registrants with CRIRSCO-based disclosure standards. We do not expect this requirement to result in significant compliance costs for registrants.

Estimates of mineral resources are associated with a greater geological uncertainty than estimates of mineral reserves. As discussed above, geological uncertainty is a crucial factor in a registrant's determination of mineral resources.[1334] As such, the classification of mineral resources in the final rules, which is based on the level of geological uncertainty, will benefit investors by helping them better assess the uncertainty surrounding mineral resource estimates.

The adopted definition of inferred mineral resource provides that the level of geological uncertainty associated with an inferred mineral resource is too high to apply relevant technical and economic factors likely to influence prospects of economic extraction in a manner useful for evaluation of economic viability.[1335] This change from the proposal will make the adopted definition substantially similar to the definition under CRIRSCO-based disclosure standards, further increasing the comparability of registrants' mineral resource disclosures with those in foreign jurisdictions.

Despite the low level of geological confidence in inferred resources, we believe investors' understanding of a registrant's mining operations will be increased by the required disclosure of inferred resources because these resources may be converted into indicated or measure mineral resources. However, such disclosure could lead to inefficient capital allocation decisions if investors overestimate the value of these resources. The risk that investors will overestimate the value of inferred resources is mitigated by the fact that the definition of inferred resources clearly indicates to investors that these are the mineral resources with the highest degree of geological uncertainty. Moreover, registrants are precluded from using inferred mineral resources as a direct basis for determining mineral reserves (they would first have to be converted into indicated or measured mineral resources). Therefore, registrants will have limited incentive to aggressively report inferred resources, because the likelihood that these mineral resources will ultimately be determined to be mineral reserves in the future is low.

The final rules do not require that a qualified person quantify the minimum percentage of inferred mineral resources he or she believes will be converted to indicated and measured mineral resources with further exploration. The final rules also do not require the qualified person to disclose the uncertainty associated with indicated and measured mineral resources by providing the confidence limits of relative accuracy, at a specific confidence level, of the preliminarily estimated production quantities per period derived from these resources.[1336] Although this approach for reporting the level of uncertainty is consistent with current practice in the industry,[1337] several commenters indicated that it could be impractical or inappropriate, unduly burdensome, and costly for many registrants.[1338] The less prescriptive approach we are adopting will avoid these potential costs. It will also mitigate potential misinterpretation of the information by investors, who—under the more prescriptive approach—might have misconstrued information to be more precise than it, in fact, is. In turn, investors may have made insufficiently informed decisions, leading to inefficient capital allocation. Additionally, the final rule will ensure greater consistency with CRIRSCO-based disclosure standards. As noted elsewhere, consistency with CRIRSCO-based disclosure standards reduces the compliance burden and costs associated with duplication of effort for registrants who are required to provide disclosure in multiple jurisdictions. Consistency also reduces the scope for investor confusion arising from differing standards of disclosure in different jurisdictions and the costs of gathering and processing information for investors.

iv. Initial Assessment Requirement

Mineral resource disclosures must be supported by an initial assessment by a qualified person. This assessment, at a minimum, must include a qualitative evaluation of technical and economic factors to establish the economic potential of the mining property or project.[1339] Compared to the proposed rule, which required the application of modifying factors, the final rule is closer to CRIRSCO-based disclosure codes. The initial assessment requirement—by supporting the disclosure of mineral resources—yields the benefits noted above from permitting the disclosure of mineral resources and serves to improve the accuracy and reliability of the mineral resource estimates for investors.[1340] The term ''initial assessment'' varies from the term ''resource report,'' as is commonly used in jurisdictions adhering to CRIRSCO-based disclosure standards. As noted by some commenters,[1341] this variation, in addition to other minor differences, could create uncertainty for registrants. However, given that the final rules are in much greater alignment with CRIRSCO-based disclosure standards, we do not expect these differences to result in significant additional compliance burdens for the majority of registrants reporting in jurisdictions adhering to CRIRSCO-based disclosure standards.

However, some registrants may face duplication costs or additional compliance costs to the extent that the different requirements are not interchangeable or do impose additional requirements. For example, since the final rules require qualified persons who choose to include inferred mineral resources in cash flow analysis in an initial assessment to disclose the results of the analysis with and without inferred mineral resources,[1342] which is not required by Canada's NI 43–101, a registrant that is dual-listed in Canada may be required to conduct the extra analysis and produce further documentation to comply with both disclosure standards. In these situations, there could be a cost to investors in terms of processing information, as investors may be unsure of how to reconcile and interpret differences. However, if the differences (*e.g.,* analysis with and without inferred resources) in the final rules vis-à-vis CRIRSCO-based disclosure standards enhance the quality of disclosure, then investors will benefit.

An alternative suggested by some commenters is to not define ''initial assessment,'' but instead adopt the standard used in CRIRSCO-based codes to make determinations of mineral resources. It is difficult to assess whether this alternative would result in lower costs for registrants since CRIRSCO-based disclosure standards do

[1333] See *supra* Section II.E.3.

[1334] See *supra* Section II.E.3.iii.

[1335] *See id.*

[1336] *See supra* Section II.E.3.iii.c.

[1337] *See supra* note 531 and accompanying text, affirmed by SME 1.

[1338] *See, e .g.,* letters from CBRR, MMSA, Rio Tinto, SME 1, and Vale.

[1339] *See supra* Section II.E.4.

[1340] *See supra* Section IV.B.6.i.

[1341] See letters from AngloGold, BHP, Eggleston, MMSA, and SRK 1.

[1342] *See* Item 1302(d)(4)(ii) of Regulation S–K.

not prescribe the specific requirements that a technical report must satisfy to support a determination of resources. For registrants not disclosing under CRIRSCO-based disclosure codes, there is likely to be no significant difference in the additional costs between adopting the final rules or simply adopting CRIRSCO-based disclosure standards. However, for registrants that already provide disclosure of resources in jurisdictions that conform to CRIRSCO-based disclosure standards, there may be lower compliance costs under this alternative to the extent the initial assessment requirement is different from the type of study the registrants currently conduct to determine and support disclosure of mineral resources.

In a change from the proposed rules in response to comments received, we are not requiring that the qualified person use a commodity price that is no higher than the average spot price during the 24-month period prior to the end of the last fiscal year, unless prices are defined by contractual arrangements.[1343] The final rules instead provide that, when estimating mineral prices, the qualified person must use a price assumption that is current as of the end of the registrant's most recently completed fiscal year for each commodity that provides a reasonable basis for establishing the prospects of economic extraction for mineral resources.[1344] Similar to the proposed rules, the qualified person may use a price set by contractual arrangement, provided that such price is reasonable, and that the use of such a contractual price is disclosed.[1345]

Providing greater flexibility in the methodology used for estimating prices will bring the Commission's requirements closer to global industry practice as well as the practice that registrants use for economic decision-making.[1346] In this regard, the final rules will allow registrants to use the same prices for disclosing mineral resources in Commission filings as they do for their own internal management purposes and when reporting in CRIRSCO-based jurisdictions, which should significantly limit the compliance costs of the final rules while allowing the qualified person to exercise professional judgment commensurate and consistent with the regulatory intent of the qualified person requirement. A potential cost of the increased flexibility of the final rules is that registrants may use this discretion to select overly optimistic prices, which the proposed rules restricted through a ceiling price feature. Overly optimistic prices may mislead investors about the actual prospects of the mining operations by inflating the value of the estimated mineral resources. Any tendency for registrants to select overly optimistic prices in an attempt to inflate estimates is mitigated under the final rules by the requirement that the qualified person disclose the price used and explain his or her reasons for selecting the particular price, including the material assumptions underlying the selection.

An alternative to the final rule would be to require registrants also to provide a sensitivity analysis of the estimates of mineral resources and reserves with respect to the commodity price used, where the price points used in the sensitivity analysis surrounding the base price would be selected by the registrant. A sensitivity analysis with respect to price would help investors better assess the price risk associated with the estimated mineral resources and reserves and could, therefore, lead to more informed investment decisions. However, because a sensitivity analysis would require registrants to calculate at least three estimates of resources and reserves (the base prices, as well as one price each above and below the base price, respectively), compliance costs would be higher than under the final rules. These compliance costs would be mitigated to the extent that registrants are able to use estimates based on existing calculations from an internal sensitivity analysis.

Another alternative would be to use a ceiling price model as in the proposed rules, but calculate the ceiling price differently, for example, as spot, forward, or futures price as of the end of the last fiscal year to incorporate more quickly shifts in price trends. However, due to the volatility associated with prices from any given specific day, the disclosed estimates of mineral resources and reserves may fluctuate more than the underlying fundamental values of the resources and reserves, thus increasing the uncertainty of the estimates for investors. The higher volatility of this alternative ceiling price may create even higher compliance costs as registrants may have to provide more frequent recalculations of their mineral resources and reserves, solely for the purpose of their SEC filings.

7. Treatment of Mineral Reserves

i. Framework for Determining Mineral Reserves

We are revising, as proposed, the definition of mineral reserves to align it with CRIRSCO-based disclosure standards by requiring that a qualified person apply defined modifying factors to indicated and measured mineral resources in order to convert them to mineral reserves.[1347] The adopted framework requires a registrant's disclosure of mineral reserves to be based on a qualified person's detailed evaluation of the modifying factors as applied to indicated or measured mineral resources, which would demonstrate the economic viability of the mining property or project. The final rules require disclosure of reserves to be based on the work of a qualified person.[1348] Because the adopted treatment of mineral reserves is consistent with established practices in the mining industry, we do not expect a significant increase in compliance costs for most registrants beyond the potential cost increases related to the qualified person requirement and the filing of the technical report summary, as discussed above.

In a change from the proposed rules, the adopted definition of mineral reserve provides that a mineral reserve includes diluting materials and allowances for losses that may occur when the material is mined or extracted.[1349] In response to commenters' concerns, we have adopted this change to make the definition consistent with the comparable definition in CRIRSCO-based disclosure standards, and to remove an inconsistency in the proposed rules.[1350] By removing this inconsistency and more closely aligning with CRIRSCO-based disclosure codes, the final rules will facilitate compliance and avoid potential confusion for registrants and investors.

In another change to the proposed rules, as a result of comments received, the final rules no longer define modifying factors to include factors used to establish the economic prospects of mineral resources. Instead, the adopted definition provides that modifying factors are the factors that a qualified person must consider applying to indicated and measured resources and then evaluate in order to establish the economic viability of mineral

[1343] *See supra* Section II.E.4.iii.

[1344] *See* Item 1302(d)(2) of Regulation S–K.

[1345] *See id.* We are also adopting this estimated pricing methodology for the determination and disclosure of mineral reserves. *See infra* Section II.F.

[1346] *See supra* note 651.

[1347] *See supra* Section II.F.1.iii.

[1348] *See id.*

[1349] *See* the definition of mineral reserve in 17 CFR 229.1300.

[1350] *See supra* note 768 and accompanying text.

reserves.[1351] This change is consistent with the change made to the initial assessment requirement, which no longer requires application of the modifying factors at the resource determination stage.[1352] Referencing modifying factors solely in the context of mineral reserve determination aligns the final rules with CRIRSCO-based disclosure standards, which will benefit registrants and investors by clarifying the level of analysis required at the resource determination stage.

In response to comments received, the final rules no longer require the qualified person to use a price that is no higher than the 24-month trailing average price, as proposed. Instead, the qualified person must use a price for each commodity that provides a reasonable basis for establishing that the project is economically viable. The qualified person will be required to explain his or her reasons for selecting the price and the underlying material assumptions regarding the selection.[1353] We expect the same economic effects related to the final pricing requirement for mineral reserves estimation as those discussed in relation to the final pricing requirement for mineral resources estimation.[1354]

In addition, because of this change from the proposed rules, the final rules will fully allow the use of different prices for estimation of mineral resources and mineral reserves by not imposing a price ceiling, which would otherwise require the prices to be the same when the ceiling is binding. As noted by commenters,[1355] the use of different prices for resources and reserves is a common industry practice. A registrant develops prices and other financial inputs that align with its expected operational schedule. The timeframes for development of resources can differ significantly compared to those for reserves. For these reasons, the removal of a price ceiling will benefit registrants by giving the qualified person more flexibility than under the proposed rules to use different prices for estimation of resources and reserves.

ii. The Type of Study Required To Support a Reserve Determination

The final rules permit registrants to disclose mineral reserves based on a pre-feasibility study rather than a feasibility study as required by current practice. In a change from the proposed rules, we are not requiring the qualified person to justify the use of a pre-feasibility study in lieu of a feasibility study.[1356] In addition, we are not requiring the use of a feasibility study in high-risk situations as required by the proposed rules. Under the final rules, the qualified person will determine the appropriate level of study required to support the determination of mineral reserves under the circumstances based on his or her professional judgment.[1357]

Pre-feasibility studies, while adequate for disclosure of mineral reserves, require less time to produce than feasibility studies. For example, one study estimates that between 12% and 15% of the engineering work on a project is completed by the end of the pre-feasibility study compared to between 18% and 25% at the end of the feasibility study.[1358] One commenter, a professional mining consulting company, provided cost estimates for a third-party qualified person producing and filing technical reports in support of disclosure of reserves in Canada and Australia.[1359] For technical reports based on a pre-feasibility study the estimated cost range is $200,000–$500,000, whereas for technical reports based on a feasibility study, this commenter estimated the cost range to be $500,000–$1,500,000.[1360] Another commenter, a large multinational foreign private issuer, stated that: ''For major projects, Pre-Feasibility Studies can cost around 30 to 50% of the cost of Feasibility Studies.'' [1361] These estimates suggest that a pre-feasibility study will be significantly less costly than a feasibility study, but also that there is significant variability in the relative cost of pre-feasibility studies compared to feasibility studies.

Allowing pre-feasibility studies may be especially beneficial for registrants that already have studies meeting the pre-feasibility standard, but not the feasibility standard. The lower cost may also benefit smaller registrants more to the extent they are likely to be more capital constrained than larger registrants and to the extent feasibility studies are associated with greater fixed costs. Allowing the use of pre-feasibility studies may therefore facilitate disclosures of mineral reserves by smaller registrants, which should be beneficial both to the registrants and investors.

In addition to compliance cost savings, allowing the use of pre-feasibility studies could provide several ancillary benefits for registrants and investors. Because CRIRSCO-based disclosure standards already allow the use of pre-feasibility studies, allowing their use under the final rules will place U.S and non-Canadian foreign registrants on an equal footing with Canadian registrants availing themselves of the ''foreign or state law'' exception and with other mining companies reporting only in jurisdictions using CRIRSCO-based disclosure standards. Thus, allowing the use of a pre-feasibility study will allow U.S. and non-Canadian foreign registrants to avoid producing studies that they find unnecessary and, consequently, to avoid compliance costs that could place them at a competitive disadvantage. The final rules allow a qualified person to exercise the same discretion as qualified persons in other jurisdictions, thus providing a level of rigor appropriate for internal economic decision making and for investors. Finally, the detailed requirements for feasibility studies should facilitate compliance, while increasing consistency in disclosures where feasibility studies are used to determine mineral reserves.

A pre-feasibility study is typically associated with a lower confidence level than a feasibility study. Therefore, allowing the use of pre-feasibility studies may lead to higher uncertainty associated with mineral reserve disclosures. The greater uncertainty associated with the lower level of rigor of a pre-feasibility study vis-à-vis a feasibility study may lead to less accurate or less complete information being disclosed to investors, thus decreasing investors' ability to make efficient investment decisions. However, we note that the registrant has incentives to choose the level of rigor that is appropriate for its own economic

[1351] *See* the definition of modifying factors in 17 CFR 229.1300.

[1352] *See supra* Section II.E.4.

[1353] *See supra* Section II.F.2.

[1354] *See supra* Section IV.B.6.iv.

[1355] *See* letters from AIPG, Alliance, Amec, AngloGold, BHP, CBRR, CRIRSCO, Eggleston, MMSA, Rio Tinto, SAMCODES 1, SME 1, SRK 1, Vale, and Willis.

[1356] *See supra* Section II.F.2.

[1357] *See supra* note 845 and accompanying text.

[1358] *See* Richard L. Bullock, ''Mineral Property Feasibility Studies,'' in 1 *SME Mining Engineering Handbook,* at 227–261.

[1359] *See* letter from SRK 1.

[1360] These cost estimates are from a single comment letter, and we lack other data by which we can evaluate or verify these estimates. However, we use these cost estimates to generally illustrate the potential magnitude of the aggregate cost savings to all mining registrants from the permitted use of pre-feasibility studies. For example, assuming the 267 current mining registrants on average determines reserves on one property per year, if they use a feasibility study, the aggregate cost would be $267 million at the mid-range value of the estimated cost of a feasibility study (267 × $1,000,000). If they instead use a pre-feasibility study, the aggregate cost would be $97.5 million at the mid-range value of the estimated cost of a pre-feasibility study (267 × $350,000), which would represent aggregate cost savings of approximately $170 million relative to completing a feasibility study.

[1361] *See* letter from Rio Tinto.

decision making, and that is needed to attract investors and lower its cost of capital. We expect that registrants will balance the benefits (including the reduced costs of capital) of a feasibility study against the incremental cost of producing such a study (vis-à-vis a pre-feasibility study). Therefore, we expect some registrants will still find it beneficial to conduct feasibility studies in support of determination of mineral reserves, just as mining companies in other jurisdictions using CRIRSCO-based disclosure rules sometimes choose feasibility studies to support mineral reserve determination.

Moreover, several aspects of the final rules mitigate the risk resulting from permitting the use of a pre-feasibility study to support the determination and disclosure of mineral reserves.[1362] For example, a qualified person cannot convert an inferred mineral resource to a mineral reserve without first obtaining new evidence that justifies converting it to an indicated or measured mineral resource. This will help limit the uncertainty of mineral reserve estimates based on a pre-feasibility study. Another example is the provision that requires that the pre-feasibility study identify sources of uncertainty that require further refinement in a final feasibility study. The disclosure of these sources of uncertainty will help investors assess the risk of the mineral reserve estimates based on a pre-feasibility study. A third example is the requirement that the qualified person will have to perform additional evaluative work in high-risk situations to meet the level of certainty required for a pre-feasibility study.[1363]

Similar to the proposal, the final rules provide that a pre-feasibility or feasibility study must define, analyze, or otherwise address in detail, to the extent material, various factors such as environmental regulatory compliance, the ability to obtain necessary permits, and other legal challenges that can directly impact the economic viability of a mining project. Some commenters objected to this aspect of the proposed rules, with one commenter urging the Commission to remove these factors due to the potential for duplication or imposition of new, burdensome requirements.[1364] Another commenter noted that there are other regulatory agencies for such concerns,[1365] while other commenters observed that the factors are outside of the expertise of most qualified persons.[1366] Because registrants may already incorporate some of these concerns into the permitting process with state, federal, and other regulators, analyzing such items would, as noted above, impose a duplication cost. However, as suggested by commenters concerned with duplication, consideration of these factors is already part of industry practice. Moreover, investors may benefit from the discussion and analysis of these factors, as they become better informed about relevant constraints that face the registrant and that may decrease or eliminate the value of a registrant's project. This, in turn, would allow investors to incorporate this non-operational, but value-relevant, information into their decision making, thereby reducing information asymmetries between investors and registrants. In addition, modifications to this requirement, such as adding a materiality qualifier and simplifying and clarifying the description of the factors, will help mitigate any additional costs for registrants.

As noted by several commenters,[1367] some mining sectors are not as complex as others, allowing them to make reserve (or resource) determinations with more focus on modifying factors that ''may be significantly more critical than geoscientific knowledge of the deposit in determining mineral resources and mineral reserves.'' [1368] One coal mining company, in particular, objected to the requirement for either a pre-feasibility or feasibility study for reserve determination on the grounds that it would cost ''several million dollars'' without providing a benefit [1369] and also asserted that public disclosure of information contained in those studies would likely cause it competitive harm.[1370] To address concerns that certain registrants' practices do not meet industry standards for mineral reserves determination, one alternative to the final rules, as suggested by one commenter [1371] would be to allow reliance on on-going operations or other internally developed analyses, which may be less rigorous than the final rules' requirements to support a mineral reserves determination for certain less complex operations (*e.g.,* coal and certain industrial minerals such as aggregates). Such an alternative would impose no additional costs on these registrants. To the extent that such an accommodation would not diminish the value of information that investors receive vis-à-vis the requirements of the final rules, investors will not experience a reduction in benefits compared to the baseline. However, this alternative could come at a cost of the decreased rigor relative to that contained in a pre-feasibility or feasibility study that meets the requirements of the final rules. This lack of rigor may deprive investors of information that would better inform their investment decisions. Moreover, any such accommodations would dilute the harmonization efforts of the new rules.

8. Specific Disclosure Requirements

i. Requirements for Summary Disclosure

Guide 7 does not explicitly address what disclosure should be provided when a registrant has multiple mining properties. The final rules require that registrants that own or otherwise have economic interest in multiple mining properties provide summary disclosure of their mining operations.[1372]

We expect that, for registrants with material mining operations, requiring an overview of their mining operations, regardless of whether they have material individual properties, will be useful to investors and help foster more efficient and effective disclosure. The information required to be disclosed aligns with what most registrants already provide in their SEC filings, but the requirement will ensure that the summary information is provided by all registrants, thereby incrementally improving comparability across registrants. We believe the summary disclosure requirement will in particular be beneficial to investors in the cases where no individual mining property is material to the registrants but the mining operations in aggregate are material. In these cases, the summary disclosure requirement will

[1362] *See supra* II.F.2.iii.

[1363] *See supra* II.F.2.iii.

[1364] *See* letter from NMA 2.

[1365] *See* letter from SME 1.

[1366] See letters from AIPG, Amec, CIM, Davis Polk, Energy Fuels, FCX, NMA 2, SASB, SME 1, and Ur-Energy.

[1367] *See* letters from AIPG, Alliance, NSSGA 1, and NSSGA 2.

[1368] *See* letter from AIPG.

[1369] *See supra* note 851 and accompanying text.

[1370] *See supra* note 852 and accompanying text.

[1371] *See* letter from Alliance. The commenter states that ''coal companies operating in well-defined coal fields'' do not conduct ''formal studies'' because ''on-going operations provide all the feasibility information that is required.'' In such cases, it appears that the information required for a feasibility study (not to mention a pre-feasibility study) is already available. Moreover, the commenter acknowledges that ''coal companies have sufficient technical expertise on staff,'' ''the majority of reserve estimate reports prepared for the coal industry meet all the qualifications outlined in the proposal to define a qualified person,'' and ''A very large number of qualified persons are available to perform this work [resource and reserve determination under USGS Circulars 831 and 891],'' suggesting that coal companies already employ qualified persons who could readily prepare a pre-feasibility or feasibility study with extant information.

[1372] *See supra* Section II.G.1.

help ensure that investors are provided with at least an overview of the registrant's mining operations that can help them make investment decisions.

More specifically, we believe that the summary disclosure of mineral resources and mineral reserves operations at fiscal year's end will provide investors with information that is relevant for their valuation of registrants' mining operations.[1373] For example, the required breakdown of the mineral resources and reserves by category and source (geographic area and property) will provide investors with information helpful for assessing the risk of mining operations. In a change from the proposed rules, and consistent with some commenters' suggestion,[1374] the final rules require registrants to use separate tables when reporting mineral resources and reserves. This change will increase the clarity of the presented information about mineral resources and reserves while reducing the potential for confusion among investors.

The summary disclosure requirement will increase costs for registrants, albeit to a varying degree. Given that the requirement for summary disclosure in the final rules largely aligns with what most registrants already provide in their SEC filings, we expect any increase in costs to be limited for such registrants. For registrants that do not already provide summary disclosure, whether reporting pursuant to Guide 7 or under any of the CRIRSCO-based codes, there could be additional costs to comply with the summary disclosure requirements.

Based on the concern of some commenters that the proposed summary disclosure requirements were too prescriptive,[1375] the final rules have been revised to be more flexible and provide for discretion in choice of format for disclosure. For example, instead of requiring a presentation in tabular form of certain specified information about the 20 properties with the largest asset values, the final rules will permit a registrant to present an overview of its mining properties and operations in either narrative or tabular format.[1376] The less prescriptive nature of this requirement should reduce the reporting burden for registrants and could also result in more useful information being disclosed to investors as registrants can tailor the disclosure more to their own specific circumstances. This change will also align the summary disclosure requirements in the final rules more closely with the CRIRSCO-based disclosure standards.[1377]

A more prescriptive approach, such as in the proposed rules, which may have relatively increased comparability, would have reduced each registrant's ability to capture the specific circumstances of their operations in the disclosure, and could have imposed additional costs to registrants in preparing supplemental clarifying disclosure. As several commenters indicated, due to the diversity of operations in the mining industry, much of the required data will be specific to each registrant.[1378]

An alternative to the proposed summary requirements would be to also require the disclosure required in Tables 1 and 2 to paragraph (b) of Item 1303 to be made available in a structured data format, such as XBRL. When registrants provide disclosure items in a structured data format, investors and other data users (*e.g.,* analysts) can easily retrieve and use the information reported by registrants and perform comparisons. Because the final rules permit tailoring of the disclosures in Tables 1 and 2 to paragraph (b) of Item 1303 to registrants' unique facts and circumstances and provide filers with some flexibility in how to report the required information, the usefulness of requiring the data in these tables to be made available in the XBRL format will be decreased. As discussed above, several commenters indicated that much of the required data would be specific to each registrant.[1379] For these reasons we believe such a requirement would provide limited benefit to investors while increasing the compliance burden on registrants.

ii. Requirements for Individual Property Disclosure

We are adopting, with some modifications, the proposed requirement that a registrant with material mining operations must disclose certain information about each property that is material to its business or financial condition.[1380] The items required to be disclosed for material individual properties are substantially similar to items called for by Item 102 of Regulation S–K and Guide 7.[1381] Also, these disclosures are substantially similar to what is called for under CRIRSCO-based disclosure standards.[1382] However, we expect the individual disclosure requirements in the final rules will increase the amount and type of individual property information that registrants disclose. Much of this new information will be a direct consequence of the requirements in the final rules to disclose material exploration results and mineral resources. Another new item of information will be the required comparison of a registrant's mineral resources and mineral reserves as of the end of the last fiscal year against the mineral resources and mineral reserves as of the end of the preceding fiscal year, with an explanation of any change between the two.[1383]

The requirement for individual property disclosure in the final rules will benefit investors by providing more consistency in mining registrants' disclosures and increasing the amount of information about registrants' material mining properties available to investors, thereby improving their ability to assess the value and risk of these properties. By helping investors gain a more comprehensive understanding of a registrant's mining operations beyond the information provided in the summary disclosure, investors should be able to better assess the value and the risk associated with a registrant's material mining properties. In a change from the proposed rules, and for the same reasons as the corresponding change to the summary disclosure requirement, the final rules require registrants to use separate tables when reporting mineral resources and mineral reserves for material properties. As in the case of summary disclosure, we believe this change will reduce the potential for confusion among investors.

We expect that the individual property disclosure requirement will result in additional compliance costs for registrants to the extent they do not currently disclose substantially similar information. In particular, because the required year-over-year comparison of a registrant's mineral resources and reserves is not required by Guide 7, we expect registrants that are not currently complying with foreign codes requiring such disclosure to incur additional compliance costs related to this requirement. We expect the incremental compliance costs associated with property disclosure in Commission filings will be the largest the first time registrants prepare the disclosure and then may decline over time because companies should only incur the costs

[1373] *See supra* note 955 and accompanying discussion.

.

[1374] *See supra* note 931 and accompanying text.

[1375] *See, e.g., supra* note 923 and accompanying text.

[1376] *See supra* Section II.G.1.iii.

[1377] *See id.*

[1378] *See supra* note 925 and accompanying text.

[1379] *Id.*

[1380] *See supra* Section I.G.2

[1381] *See supra* note 1033

[1382] *See supra* note 1034.

[1383] *See supra* Section II.G.2.iii.

to update their systems and procedures to collect and format the required information once, and thereafter will only have to update the reported information.

Based on the concern of some commenters that the proposed individual property disclosure requirements were too prescriptive,[1384] the final rules have been revised to be more flexible and provide for discretion in choice of format for disclosure. In particular, the removal of the requirement for tabular formats for several of the required disclosures, including the year-over-year comparison of mineral resources and mineral reserves, will reduce compliance costs for registrants relative to the proposed rules, while still eliciting useful information for investors.[1385] The individual property disclosure requirement in the final rules is also more closely aligned with the CRIRSCO-based disclosure standards than the proposed rules, which should help limit the burden for registrants that are subject to one or more of the other CRIRSCO-based mining disclosure codes. For example, as with the summary disclosure requirement, the final rules provide that a qualified person must base each mineral resource and mineral reserve estimate on a reasonable and justifiable price, which will allow registrants to use the same prices for disclosing mineral resources and mineral reserves in Commission filings as they do for their own internal management purposes and when reporting in CRIRSCO-based jurisdictions.

In a change from the proposed rule, and as a result of comments received, a provision relating to the individual property disclosure requirement permits a registrant to include historical estimates of the quantity, grade, or metal or mineral content of a deposit or exploration results that a registrant has not verified as a current mineral resource, a current mineral reserve, or current exploration results, in a filing pertaining to mergers, acquisitions, or business combinations if the registrant is unable to update the estimate prior to completion of the relevant transaction.[1386] In such an instance, the registrant must disclose the source and date of the estimate, state that a qualified person has not done sufficient work to classify the estimate as a current estimate of mineral resources or mineral reserves, and state that the registrant is not treating the estimate as a current estimate of mineral resources or mineral reserves.[1387] Without this provision, certain value increasing acquisitions or other similar business transactions will be more difficult to complete, which could hamper the growth opportunities of registrants and impose an undue burden. However, permitting the use of historical estimates may increase the potential risk to investors because they will have to rely on information that is not current. To mitigate this risk, in the event historical estimates are permitted, the adopted provision will require that investors receive additional information to help them evaluate an investment in a registrant that has engaged in a merger or similar business transaction involving the use of a historical estimate.[1388]

Similar to the summary disclosure requirement, we could have, as an alternative, required the disclosures in Tables 1 and 2 to paragraph (d)(1) of Item 1304 to be made available in XBRL format. In light of the flexibility provided in the final rules for the disclosures in Tables 1 and 2 to paragraph (d)(1) of Item 1304, for similar reasons as those discussed above in the case of the summary disclosure requirement, we believe requiring this data to be presented in a structured format would provide limited benefits to investors while increasing the compliance burden on registrants. Several commenters opposed an XBRL requirement due to the cost burden and limited benefits for users of the information.[1389]

iii. Requirements for Technical Report Summaries

The final rules require a registrant disclosing information concerning its mineral resources or mineral reserves determined to be on a material property to file a technical report summary by one or more qualified persons to support such disclosure of mineral resources or mineral reserves.[1390] However, as previously discussed, unlike the proposed rules, the final rules permit, but do not require, a registrant to file a technical report summary to support the disclosure of material exploration results.[1391]

Requiring registrants to file a technical report summary in support of disclosure of mineral resources or mineral reserves will enhance the transparency and credibility of the disclosures and also provide investors and analysts with technical details to allow them to improve their own individual assessments of the value of the mining properties.[1392] These benefits should be especially pronounced in conjunction with the disclosure of mineral resources, which are typically associated with a higher degree of uncertainty compared to estimates of mineral reserves.

We expect that registrants will experience an increase in compliance costs related to the preparation of the technical report summaries for material mining properties. Even registrants that currently produce technical documentation and reports in compliance with similar requirements in other jurisdictions will likely incur additional costs to conform the reports to the specific requirements in the final rules. In this regard, the final rules seek to limit the additional compliance costs by requiring that a registrant only has to file a technical report for material properties, rather than for all its properties, and only when the registrant is first reporting, or reporting a material change in, mineral resources or mineral reserves. We also note that the technical report summary requirement may be relatively more burdensome for smaller registrants, as suggested by commenters,[1393] due to the fixed cost in preparing a technical report summary and because smaller registrants are likely to have a higher fraction of mining properties classified as material to the extent they have fewer mining properties than larger registrants. However, in response to such concerns, the final rules do not require the filing of technical report summaries when disclosing material exploration results. To the extent that smaller registrants are more likely to be engaged in exploration activities, this change in the final rules will help limit the regulatory burden for smaller registrants in particular. Nevertheless, smaller registrants conducting mining operations beyond exploration may still incur relatively larger compliance costs.

The technical report summary requirement is similar to the corresponding requirements in CRIRSCO-based disclosure standards, which generally should mitigate the incremental impact of the final rules on registrants currently reporting in jurisdictions that use these codes. However, some of the differences may

[1384] *See supra* note 982 and accompanying text.

[1385] *See supra* Section II.G.2.iii.

[1386] *See* Item 1304(h) of Regulation S–K

[1387] *See id.*

[1388] *See supra* note 1069 and accompanying text.

[1389] *See supra* notes 1015–1017 and accompanying text.

[1390] *See supra* Section II.G.3.

[1391] *See id.*

[1392] *See supra* notes 445, 959, and 1262 along with the accompanying discussions. *See* also, Kenneth A. Fox, ''The usefulness of NI 43–101 technical reports for financial analysts'' (2017), Resources Policy, Volume 51, pp. 225–233.

[1393] *See supra* note 205 and accompanying text.

be economically important. For example, although jurisdictions adopting CRIRSCO-based disclosure standards require that a company's mineral resources and mineral reserves be based on and fairly reflect information and supporting documentation prepared by a ''competent'' or ''qualified'' person, only some jurisdictions require the filing of a technical report to support such disclosure.[1394] Accordingly, we expect that the final technical report summary requirement will impose incremental compliance costs for registrants currently reporting in foreign jurisdictions without requirements to file technical reports that may approach the magnitude of the incremental costs for registrants not reporting in foreign jurisdictions. At the same time, these registrants may experience higher incremental benefits (as identified above) in connection with the requirement to file technical report summaries, since that information will not necessarily be disclosed elsewhere.

One commenter estimated that the cost of hiring a third-party qualified person to prepare a technical report in support of resource estimates would range from $40,000 to $80,000.[1395] Another commenter estimated that the cost of preparing a technical report summary will typically require 300 to 500 hours at a cost of over $100,000 ''when all the information is already available to the QP.'' [1396] This suggests the estimate is the incremental cost associated with the reporting requirement alone. It is not clear to what extent this estimate varies with property or company size, type of mining operations, or whether a company is already providing similar disclosures, for example on NI 43–101F1.

As an alternative to the final rule, and in line with some commenters' views,[1397] we could have omitted the requirement to file a technical report summary, which would reduce expected compliance costs and be consistent with the majority of CRIRSCO-based disclosure codes, although it would not be consistent with major markets for mining companies such as Canada, Australia, and South Africa. Under this alternative, the potential benefits discussed above that come from investors having access to the information in the technical report summary would be foregone. Any benefit from the increased accountability that comes with liability for filing the information with the Commission also would be foregone under this alternative. Another alternative would be not to require the preparation of a technical report summary to support disclosure of mineral reserve and mineral resource estimates in Commission filings. This alternative would further reduce compliance costs relative to the proposed rules. However, it also could reduce consistency in the required disclosures and increase the uncertainty about the quality of mineral resources estimates, given that the level of confidence is lower for mineral resource estimates than for mineral reserves estimates.

iv. Requirements for Internal Controls Disclosure

The final rules require a registrant to describe the internal controls that it uses in the disclosure of its exploration results and in its estimates of mineral resources and mineral reserves.[1398] This requirement aligns the Commission's disclosure regime with the requirements of CRIRSCO-based disclosure standards.

We expect disclosure of the internal controls that a registrant uses to improve investors' understanding of the risks related to the quality and reliability of a registrant's disclosure of exploration results and estimates of mineral resources and mineral reserves, which may help improve investment decisions. We also expect the requirement will increase compliance costs for registrants. However, registrants already disclosing internal controls in jurisdictions using CRIRSCO-based disclosure standards or currently voluntarily providing similar disclosures in their SEC filings should not face substantial additional compliance burdens.

9. Conforming Changes to Certain Forms Not Subject to Regulation S–K

i. Form 20–F

We are adopting conforming changes to Form 20–F that are intended to ensure consistency in mining disclosures across both domestic registrants and foreign private issuers (excluding Canadian Form 40–F filers).[1399] The changes may affect Canadian registrants that report pursuant to Form 20–F and are currently permitted to provide additional mining disclosure under NI 43–101 pursuant to the ''foreign or state law'' exception under Industry Guide 7.[1400] The final rules eliminate this exception, which may benefit investors by increasing comparability across all registrants.

Compliance costs for affected registrants may increase to the extent that, as discussed previously, the final disclosure requirements differ from NI 43–101. We do not generally expect these costs to be significant given that the adopted disclosure requirements are based on the NI 43-101 requirements.

ii. Form 1–A

We are adopting conforming changes to Form 1–A that will require Regulation A issuers with material mining operations to comply with the mining disclosure requirements in subpart 1300 of Regulation S–K.[1401] Thus, these issuers will incur the benefits and costs of these requirements, as previously discussed. Because Regulation A issuers are typically smaller companies, the economic considerations discussed above with respect to smaller companies may apply to this group of issuers. In general, we expect that the final rules may benefit Regulation A issuers, given that smaller companies typically experience a higher degree of information asymmetry between the company and investors, which may increase capital costs and reduce access to financing. In particular, we believe the new ability to disclose mineral resources provided by the requirements in the final rules may be beneficial to Regulation A issuers, given that smaller companies are more likely to be exploration stage issuers.

Nevertheless, the expected increase in compliance costs from the adopted mining disclosure requirements may be of particular importance for mining issuers that are likely to consider Regulation A offerings. If these costs are perceived to be too high, such issuers may choose to pursue alternative methods of financing, such as raising capital in private offerings pursuant to Regulation D or another exemption

[1394] *See supra* Section IV.A.1. We estimate that 99 out of the 267 identified mining registrants (approximately 37%) also report in foreign jurisdictions that require the filing of a technical report as of December 31, 2017.

[1396] *See* letter from MMSA. This estimate was provided in response to a question about the costs associated with producing and filing technical reports in Canada or Australia, and may not include the costs of a study like the initial assessment required under the final rules. As discussed above, to the extent these costs are also representative of the costs of a qualified person preparing a technical report summary in support of disclosure of mineral resource estimates under the final rules, we expect registrants that are reporting consistent with CRIRSCO-based disclosure standards to already incur these costs, and therefore will only incur limited additional costs in terms of conforming the reports to the specific requirements in the final rules.

[1397] *See supra* note 1090 and accompanying text.

[1398] *See supra* Section II.G.4.

[1399] *See supra* Section II.H.1.

[1400] As previously mentioned, Instruction 1 to Item 4 of Form 20–F directs a registrant to furnish the information specified in Industry Guide 7. *See supra* note 1200 and accompanying text.

[1401] *See supra* Section II.H.2.

under the Securities Act. To the extent these alternative methods of financing are less efficient or provide fewer investor protections than Regulation A offerings, there could be adverse consequences for both issuers and investors. Under the final rules, mining issuers may avoid the costs associated with the prescribed technical reports by forgoing disclosure of exploration results, mineral resources, and mineral reserves, as defined, which may mitigate any negative effect of increased compliance costs on the propensity to use a Regulation A offering. However, foregoing these disclosures may put such issuers at a competitive disadvantage relative to their peers that are raising capital with the benefit of these disclosures. In addition, in response to concerns about compliance costs, we have adopted several provisions that we believe will help limit the overall compliance burden for all issuers, including smaller companies.[1402] Overall, considering that we have identified only one Regulation A issuer that currently provides disclosure about its mining operations, we do not expect the Form 1–A conforming amendments to have a significant economic impact on Regulation A offering practices.

One alternative to the conforming amendments to Form 1–A would be to require the proposed mining disclosures for Tier 2 offerings only. Because Tier 2 offerings may be larger than Tier 1 offerings, the relative importance of fixed compliance costs could be lower for Tier 2 issuers, and thus the net benefit to Tier 2 issuers from the disclosure requirements could potentially be larger. However, under this alternative, the benefits from providing mining disclosure, as discussed above, would be foregone for Tier 1 issuers. We note that the sole Regulation A issuer that currently provides disclosure about its mining operations conducted a Tier 2 offering and would not be affected by this alternative. Another alternative would be to require disclosure only of the information in the summary disclosure requirement discussed in Section II.G.1., above, including for issuers that only own one material mining property. This would lower compliance costs, but would also reduce the information available to investors about material mining properties.

[1402] *See infra* Section VI.F. for examples of adopted provisions that we expect will help limit the overall compliance burden for registrants.

## V. Paperwork Reduction Act

### *A. Background*

Certain provisions of the proposed rules contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[1403] The Commission published a notice requesting comment on the collection of information requirements in the Proposing Release, and submitted the proposed rules to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[1404] While several commenters provided comments on the possible costs of the proposed rules, only a few commenters specifically addressed our PRA analysis and provided their own compliance estimates.[1405] We discuss these comments below. Where appropriate, we have revised our burden estimates in part after considering these comments as well as differences between the proposed and final rules.

An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:

- ''Regulation S–K'' (OMB Control No. 3235–007); [1406]
- ''Form S–1'' (OMB Control No. 3235–0065);
- ''Form S–4'' (OMB Control No. 3235–0324);
- ''Form F–1'' (OMB Control No. 3235–0258);
- ''Form F–4'' (OMB Control No. 3235–0325);
- ''Form 10'' (OMB Control No. 3235–0064);
- ''Form 10–K'' (OMB Control No. 3235–0063);
- ''Form 20–F'' (OMB Control No. 3235–0063);
- Regulation A (Form 1–A) (OMB Control No. 3235–0286); and
- Industry Guide 7 (OMB Control No. 3235–0069).

We adopted Regulation S–K and these forms pursuant to the Securities Act and/or the Exchange Act. Regulation S–K and the forms, other than Form 1–A, set forth the disclosure requirements for registration statements and annual reports that are prepared by registrants to provide investors with the information they need to make informed investment decisions in registered offerings and in secondary market transactions. We adopted Regulation A to provide an exemption from registration under the Securities Act for offerings that satisfy certain conditions, such as filing an offering statement with the Commission on Form 1–A, limiting the dollar amount of the offering and, in certain instances, filing ongoing reports with the Commission.

The hours and costs associated with preparing and filing the forms constitute reporting and cost burdens imposed by each collection of information. Compliance with the final rules is mandatory. Responses to the information collections will not be kept confidential, and there will be no mandatory retention period for the information disclosed.

### *B. Summary of Collection of Information Requirements*

Similar to the proposed rules, a principal purpose of the final rules is to modernize the Commission's disclosure requirements and policies for mining properties by more closely aligning them with current industry and global regulatory requirements under the CRIRSCO standards. Like the proposed rules, the final rules require a registrant with material mining operations to:

- Disclose its determined mineral resources, mineral reserves and exploration results in Securities Act registration statements filed on Forms S–1, S–4, F–1 and F–4, in Exchange Act registration statements on Forms 10 and 20–F, in Exchange Act annual reports on Forms 10–K and 20–F,[1407] and in Regulation A offering statements filed on Form 1–A;
- base its disclosure regarding mineral resources, mineral reserves and exploration results in Commission filings on information and supporting documentation by a qualified person; and
- file as an exhibit to its Securities Act registration statement, Exchange Act registration statement or report, or Form 1–A offering statement, in certain circumstances, a technical report summary prepared by the qualified person for each material property that summarizes the information and supporting documentation forming the basis of the registrant's disclosure in the Commission form.[1408]

[1403] 44 U.S.C. 3501 *et seq.*

[1404] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[1405] *See, e.g.,* letters from BHP and SRK 1.

[1406] The paperwork burden from Regulation S–K is imposed through the forms that are subject to the requirements in that regulation and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens and for administrative convenience, we assign a one hour burden to Regulation S–K. For similar reasons, we assign a one hour burden to the Industry Guides.

[1407] Form 20–F is the form used by a foreign private issuer to file either a registration statement or annual report under the Exchange Act. Because the rule amendments will impose the same substantive requirements for a registration statement and annual report filed under Form 20–F, we have not separately allocated the estimated reporting and cost burdens for a Form 20–F registration statement and Form 20–F annual report.

[1408] A registrant with one or more material mining properties must file the technical report summary when it first reports mineral resources or

The Commission's existing disclosure regime for mining registrants precludes the disclosure of non-reserves, such as mineral resources, unless such disclosure is required by foreign or state law.[1409] In addition, the existing regime permits, but does not require, the disclosure of exploration results. The existing regime also does not currently require a registrant to base its mining disclosure on information and supporting documentation of a qualified person or to file a technical report.

Accordingly, we expect the final rules to increase the reporting and cost burdens for each collection of information. Because the additional requirements imposed by the final rules will be similar to requirements under the CRIRSCO-based mining codes, we expect the increase in reporting and cost burdens to be less for those registrants that are already subject to the CRIRSCO standards. Nevertheless, because there are differences between the final rules' requirements and those under the CRIRSCO-based codes, we expect there will be some increase in reporting and cost burdens even for those registrants already subject to foreign mining code requirements.[1410]

*C. Estimate of Potentially Affected Registrants*

We estimate the number of registrants potentially affected by the final rules to be 267.[1411] Of these registrants, we estimate that 107 are already subject to the disclosure requirements under one or more of the CRIRSCO-based codes and 160 are subject to only the Commission's disclosure requirements. We therefore expect that 107 registrants will likely incur a smaller increase in reporting and cost burdens to comply with the final rules' requirements [1412] compared with the 160 registrants that will bear the full paperwork burden of the final rules.

The following table summarizes the number of potentially affected registrants by the particular form expected to be filed and whether the registrant is subject to CRIRSCO-based code requirements in addition to the final rules.

PRA TABLE 1—ESTIMATED NUMBER OF AFFECTED REGISTRANTS PER FORM

| Form | S–1 | S–4 | F–1 | F–4 | 10 | 10–K | 20–F | 1–A | All forms |
|---|---|---|---|---|---|---|---|---|---|
| Number of Affected Registrants Subject to CRIRSCO Requirements | 4 | 2 | 1 | 1 | 0 | 40 | 58 | 1 | 107 |
| Number of Affected Registrants Not Subject to CRIRSCO Requirements | 14 | 3 | 1 | 0 | 4 | 129 | 9 | 0 | 160 |
| Total Number of Affected Registrants | 18 | 5 | 2 | 1 | 4 | 169 | 67 | 1 | 267 |

*D. Estimate of Reporting and Cost Burdens*

After considering the comments received, as discussed below, we have estimated the reporting and cost burdens of the final rules by estimating the average number of hours it will take a registrant to prepare, review and file the disclosure required by the final rules for each collection of information. In deriving our estimates, we recognize that the burdens will likely vary among individual registrants based on a number of factors, including the size and complexity of their mining operations. The estimates represent the average burden for all registrants, both large and small.

We believe that the resulting increase in reporting and cost burdens will be substantially the same for each collection of information since the final rules will require substantially the same disclosure for a Securities Act registration statement or Regulation A offering statement as they will for an Exchange Act registration statement or report. The sole difference between the final rules' effect on Securities Act registrants and Form 1–A issuers, on the one hand, and Exchange Act registrants, on the other, is that a Securities Act registrant and a Regulation A issuer will be required to obtain and file as an exhibit the written consent of each qualified person whose information and supporting documentation provides the basis for the disclosure required under the final rules.[1413] To account for this difference, we have allocated one additional hour to the reporting burdens estimated for the Securities Act registration statement forms and Regulation A's Form 1–A.

We have based our estimated burden hours and costs under the final rules on an assessment by the Commission's staff mining engineers of the work required to prepare the required information for disclosure. In particular, our estimates have been based on the staff engineers' assessment of similar reporting requirements under CRIRSCO standards (especially Canada's NI 43–101 and Australia's JORC).

mineral reserves or when it reports a material change in a prior disclosure of resources or reserves. When disclosing exploration results, a registrant may elect, but is not required, to file a supporting technical report summary.

[1409] Because only Canada has adopted its mining code as a matter of law, the disclosure of non-reserves in Commission filings has been limited to Canadian registrants.

[1410] For example, unlike most of the CRIRSCO-based codes, the final rules require a particular type of technical study, an ''initial assessment,'' to support the disclosure of mineral resources in Commission filings. Only Canada's NI 43–101 and Australia's JORC impose a technical report requirement. *See supra* Section II.E.4. In addition, unlike the CRIRSCO-based codes, the final rules prohibit a qualified person from disclaiming liability for work performed by other experts upon whom the qualified person has relied. *See supra* Section II.C.1.

[1411] We have based this estimate on the number of registrants with mining operations that filed the above described Securities Act and Exchange Act forms from January 2016 through December 2017. In contrast, we estimated that 345 registrants would be affected by the proposed rules based on the number of registrants with mining operations that filed Commission forms from January 2014 through December 2015.

[1412] Most of these registrants are subject to the disclosure requirements in Canada's NI 43–101.

[1413] A Securities Act registrant must file the written consent of an expert upon which it has relied pursuant to Securities Act Rule 436. A Regulation A issuer's obligation to file the written consent of an expert is based on Item 17(11)(a) of Form 1–A.

In addition, we have considered the views of commenters that addressed our PRA estimates for the proposed rules. One commenter is a global mining consulting firm that provides disclosure support for a wide range of mining companies reporting under Canada's NI 43–101 and Australia's JORC.[1414] That commenter indicated that, while our PRA estimates may be appropriate for larger registrants and those registrants that already follow the CRIRSCO standards, they are likely to be low for registrants that do not follow the CRIRSCO standards. The commenter estimated that the latter group of registrants would likely incur a compliance burden that is two to four times the PRA burden estimated for the proposed rules.[1415]

The second commenter is a large global mining company with mineral assets that encompass over 200 individual mineral resource and mineral reserve models, which are currently summarized into supporting technical documentation of approximately 20 separate qualified persons' reports.[1416] That commenter stated that we had significantly underestimated the incremental burden for the Form 20–F annual report, which we estimated would increase by 40 burden hours for registrants subject to the CRIRSCO standards. According to the commenter, the proposed rules would likely result in an increase of 12 FTE [1417] in the first year of compliance, which would eventually diminish to 7 FTE in subsequent years.

When estimating the incremental effects of the proposed rules, the second commenter focused primarily on how the proposed rules' 24-month trailing average pricing standard would affect its mineral resource and mineral reserve estimates.[1418] As previously discussed, we are not adopting the proposed pricing requirement and instead have substituted a pricing requirement that is substantially similar to the ''any reasonable and justifiable'' pricing standard under the CRIRSCO-based codes.[1419] We also note that, in several other respects, the final rules are more closely aligned to the CRIRSCO standards than were the proposed rules.[1420]

Because of the differences between the proposed and final rules, and because the second commenter's incremental burden estimates are those of a registrant that is significantly larger than many of the Commission's current mining registrants,[1421] we are adopting the same incremental burden and cost estimates for CRIRSCO-compliant issuers under the final rules as under the proposed rules, which as noted by the first commenter, may be appropriate for these issuers.[1422] We have not reduced the incremental burden and cost estimates of the final rules for such issuers, despite the increased symmetry between the final rules and the CRIRSCO standards, because we recognize that there are still differences between our rules and those standards, the impact of which will be experienced differently by various registrants, depending on their size and type of mining operation. We believe that, on average, the incremental burden and cost estimates of the final rules will be sufficient to account, for example, for a CRIRSCO-compliant issuer's adjustment to the general prohibition against disclaimers of liability by a qualified person in a technical report summary.

For registrants that are not currently subject to the CRIRSCO standards, we are following the suggestion of the first commenter and increasing our incremental burden and cost estimates.[1423] As commenters have noted,[1424] many registrants in this second category may already be adhering to some of the CRIRSCO standards because they have become accepted industry practice, such as by hiring a qualified person to determine mineral resources in order to eventually be able to determine mineral reserves. However, other registrants, such as those in the industrial minerals and aggregates industry,[1425] may not be complying with any of CRIRSCO's requirements. To the extent that registrants in this latter group intend to engage in public capital-raising, they will incur additional compliance costs and burdens. We believe that our increased incremental burden and cost estimates will on average account for these additional compliance costs and burdens.

We estimate that the final rules will cause a registrant that is not already subject to the CRIRSCO standards to incur an increase of 191 hours in the reporting burden for each Securities Act registration statement (Forms S–1, S–4, F–1, and F–4) and Form 1–A offering statement, and an increase of 190 hours in the reporting burden for each Exchange Act registration statement or annual report (Forms 10, 10–K and 20–F).[1426] For a registrant that is subject to the CRIRSCO standard, we estimate that the final rules will cause an increase of 41 hours in the reporting burden for Securities Act registration statements and Form 1–A offering statements, and an increase of 40 hours in the reporting burden for Exchange Act registration statements and annual reports.[1427]

The following tables summarize, respectively, the estimated incremental and total reporting costs and burdens resulting from the final rules. When determining these estimates, for all forms other than Form 10–K and Form 1–A, we have assumed that 25% of the burden of preparation is carried by the registrant internally and 75% of the burden of preparation is carried by outside professionals retained by the registrant at an average cost of $400 per hour.[1428] For Form 10–K and Form 1–A, we have assumed that 75% of the burden of preparation is carried by the registrant internally and 25% of the

[1414] *See* letter from SRK 1.

[1415] *See id.* Another commenter more generally indicated that we had significantly underestimated the PRA burdens for the proposed rules but did not provide alternative estimates of its own. *See* letter from NSSGA.

[1416] *See* letter from BHP.

[1417] FTE stands for ''full-time equivalent,'' which is the number of hours worked by one employee on a full-time basis.

[1418] *See id.*

[1419] *See, e.g., supra* Sections II.E.4., II.F.2., II.G.1.–2.

[1420] For example, similar to the CRIRSCO-based codes, the final rules permit: The inclusion of inferred mineral resources in a quantitative assessment of a deposit's potential economic viability (*see supra* Section II.E.4.); the use of historical estimates in the context of a merger, acquisition or business combination if certain conditions are met (*see supra* Section II.G.2.); the inclusion of diluting materials and allowances for losses when disclosing mineral reserve estimates (*see supra* Section II.F.1.); and the use of a pre-feasibility study, rather than a feasibility study, without requiring a justification for such use, even in high risk situations (*see supra* Section II.F.2.).

[1421] In this regard, based on the staff's review of Securities Act and Exchange Act filings made by registrants with mining operations from January 2016 through December 2017, we estimate that approximately 114 of the 267 registrants may be considered small entities.

[1422] *See* letter from SRK 1.

[1423] We are doubling our previous incremental burden and cost estimates, which is within the range suggested by the first commenter. *See* letter from SRK 1.

[1424] *See, e.g.,* letters from Eggleston and SRK 1.

[1425] The staff has estimated that 33 of the 267 registrants potentially affected by the final rules operate in the industrial minerals/aggregates industry. Five of those registrants may already be subject to the CRIRSCO standards.

[1426] This is in comparison to the proposed estimates of an increase of 96 and 95 reporting burdens, respectively.

[1427] For purposes of this PRA analysis, we estimate that registrants subject to the CRIRSCO standards would each incur 11 hours, and registrants not subject to those standards would each incur 100 hours, to prepare the required technical report summary.

[1428] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This is the rate we typically estimate for outside services used in connection with public company reporting.

burden of preparation is carried by outside professionals at an average cost of $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the registrant internally is reflected in hours.

We have determined the estimated total incremental burden hours for each form under the final rules by first determining the hour burden per registrant response estimated as a weighted average of the burden hours of registrants subject to, and those not subject to, the CRIRSCO standards.[1429] We then multiplied this average burden hour per response by the total number of responses for each form estimated to occur annually. We similarly estimated the incremental professional costs for each form by first estimating the incremental professional costs as a weighted average of the incremental professional costs estimated to be incurred by registrants subject to, and not subject to, the CRIRSCO requirements. We then multiplied the average incremental professional costs by the total number of annual responses estimated to occur for each form.[1430]

Based on these calculations, as set forth below, we estimate that the total number of incremental burden hours for all forms resulting from complying with the final rules is 21,753 burden hours. We further estimate that the resulting total incremental professional costs for all forms under the final rules is $5,181,900.[1431]

PRA TABLE 2—ESTIMATED INCREMENTAL BURDEN AND COSTS UNDER THE FINAL RULES

| | Number of annual responses (A) | Hour burden per response (B) | Total incremental registrant burden hours * (C) = (A) × (B) | Incremental professional costs (D) | Total incremental professional costs * (E) = (A) × (D) |
|---|---|---|---|---|---|
| Form S–1 | 18 | 39.42 | 710 | $47,300 | $851,400 |
| Form S–4 | 5 | 32.75 | 164 | 39,300 | 196,500 |
| Form F–1 | 2 | 29 | 58 | 34,800 | 69,600 |
| Form F–4 | 1 | 10.25 | 10 | 12,300 | 12,300 |
| Form 10 | 4 | 47.5 | 190 | 57,000 | 228,000 |
| Form 10–K | 169 | 115.87 | 19,582 | 15,449.704 | 2,611,000 |
| Form 20–F | 67 | 15.04 | 1,008 | 18,044.78 | 1,209,000 |
| Regulation A (Form 1–A) | 1 | 30.75 | 31 | 4,100 | 4,100 |
| Total | 267 | ..... | 21,753 | ..... | 5,181,900 |

* Rounded to nearest whole number.

We have determined the estimated total burden of complying with the final rules for each form by adding the above described estimated incremental company burden hours to the current burden hours estimated for each form. We have similarly determined the estimated total professional costs for each form by adding the estimated total incremental professional costs to the current professional costs estimated for each form. Based on these calculations, as summarized below, we estimate that, as a result of the final rules, the estimated annual burden for all forms will increase to 15,551,483 hours, compared to the current annual estimate of 15,529,730 hours. We further estimate that the final rules will result in estimated annual professional costs for all forms of $3,409,023,661, compared to the current annual estimate of $3,403,841,761.

PRA TABLE 3—ESTIMATED TOTAL BURDEN AND COSTS UNDER THE FINAL RULES

| | Current annual responses | Revised annual responses | Current burden hours | Increase in burden hours | Revised burden hours | Current professional costs | Increase in professional costs | Revised professional costs |
|---|---|---|---|---|---|---|---|---|
| Form S–1 | 901 | 901 | 150,998 | 710 | 151,708 | $181,197,300 | $851,400 | $182,048,700 |
| Form S–4 | 551 | 551 | 565,079 | 164 | 565,243 | 678,094,704 | 196,500 | 678,291,204 |
| Form F–1 | 63 | 63 | 26,980 | 58 | 27,038 | $32,375,700 | $69,600 | $32,445,300 |
| Form F–4 | 39 | 39 | 14,245 | 10 | 14,255 | 17,093,700 | 12,300 | 17,106,000 |
| Form 10 | 216 | 216 | 11,774 | 190 | 11,964 | 14,128,888 | 228,000 | 14,356,888 |
| Form 10–K | 8,137 | 8,137 | 14,217,344 | 19,582 | 14,236,926 | 1,896,280,869 | 2,611,000 | 1,898,891,869 |
| Form 20–F | 725 | 725 | 480,226 | 1,008 | 481,234 | 576,270,600 | 1,209,000 | 577,479,600 |
| Reg. A (Form 1–A) | 112 | 112 | 63,084 | 31 | 63,115 | 8,400,000 | 4,100 | 8,404,100 |
| Total | 10,744 | 10,744 | 15,529,730 | 21,753 | 15,551,483 | 3,403,841,761 | 5,181,900 | 3,409,023,661 |

[1429] For example, we determined the estimated incremental burden hours for Form S–1 as follows: 41 hours × 0.25 = 10.25 internal burden hours for CRIRSCO filers; 10.25 hours × 4 = 41 total incremental hours for CRIRSCO filers. 191 hours × 0.25 = 47.75 internal burden hours for non-CRIRSCO filers; 47.75 hours × 14 = 668.5 total incremental burden hours for non-CRIRSCO filers. 41 hours + 668.5 hours = 709.5 total internal hours. 709.5 hours/18 = 39.42 avg. incremental burden hours.

[1430] For example, we determined the estimated incremental professional costs for Form S–1 as follows: 41 hours × 0.75 = 30.75 outside hours for CRIRSCO filers; 30.75 hours × 4 = 123 total outside hours for CRIRSCO filers. 191 hours × 0.75 = 143.25 outside hours for non-CRIRSCO filers; 143.25 hours × 14 = 2,005.5 total outside hours for non-CRIRSCO filers. 123 hours + 2005.5 hours = 2,128.5 total outside hours. 2128.5 hours × $400 = $851,400 total incremental professional costs.

[1431] The total incremental burden hours and total incremental professional costs are rounded to the nearest whole number.

## VI. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Act Analysis (''FRFA'') has been prepared in accordance with the Regulatory Flexibility Act.[1432] It relates to rule and form amendments that we are adopting today to revise the mining property disclosure requirements for registrants engaged in mining operations. An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the Regulatory Flexibility Act and included in the Proposing Release.

### *A. Need for, and Objectives of, the Final Rules*

The Commission's mining property disclosure requirements and policies have not been updated since 1982. In the ensuing decades, mining has become an increasingly globalized industry, and several foreign mining disclosure codes have been adopted based on the CRIRSCO standards that significantly differ from the Commission's mining disclosure requirements and guidance. The rule and form amendments that we are adopting are intended to modernize the Commission's mining property disclosure requirements and policies by more closely aligning them with current industry and global regulatory practices and disclosure requirements, as embodied in the CRIRSCO standards. In so doing, the final amendments will provide investors with a more comprehensive understanding of a registrant's mining operations, which should help them make more informed investment decisions.[1433]

### *B. Significant Issues Raised by Public Comments*

In the Proposing Release, we requested comment on every aspect of the IRFA. We received one comment letter that specifically addressed the IRFA.[1434] That commenter stated that it would be a disservice to investors if the Commission were to reduce or streamline the disclosure requirements for small entities that are funded entirely by outside investment. That commenter also stated that, because there are only a few small mining companies that currently use U.S. exchanges for their primary listing, the impact on small entities from the proposed amendments would be limited, but could vary depending on the final disclosure requirements. According to the commenter, if the Commission adopted the amendments as proposed, small entities would have little interest in listing on U.S. exchanges as they would find more attractive the current disclosure requirements under foreign jurisdictions, such as Canada's NI 43–101 or Australia's JORC. However, the commenter also indicated that, if the Commission were to adopt amendments that aligned with Canada's NI 43–101, there would be a significant number of small entities that would choose to list in the United States. We have considered these comments when revising the proposed amendments to more closely align with CRIRSCO's standards, including Canada's NI 43–101.

Although not specifically addressing the IRFA, other commenters indicated that the proposed rules would impose the greatest proportionate compliance burden on small entities. For example, one commenter stated that, because the proposed rules would require the disclosure of voluminous amounts of information, they would discourage many companies from seeking or maintaining a public listing, and that this effect would be most acute for smaller companies that lack the internal resources to compile and report on all the proposed required information.[1435] This commenter further stated that smaller companies would be placed at a significant competitive disadvantage if they were required to disclose sensitive operational information to larger competitors.[1436]

Other commenters stated that the proposed requirement to obtain a technical report summary for material mining properties would be especially burdensome for smaller entities, but that the Commission could alleviate this burden by adopting certain measures, such as by not requiring the filing of the technical report summary more frequently than under the CRIRSCO-based codes, not requiring the disclosure of exploration results, or minimizing the required use of an independent qualified person.[1437] Another commenter maintained that the proposed requirement to quantify the percentage of inferred mineral resources that would likely be converted to indicated mineral resources would be difficult for smaller entities to meet.[1438] As discussed below, we have considered all of these comments when evaluating alternatives to, and revising, the proposed rules.[1439]

### *C. Small Entities Subject to the Final Rules*

The final rules will affect small entities that have material mining operations, and which file registration statements under Section 6 of the Securities Act[1440] or Section 12 of the Exchange Act, and reports under Section 13(a) or 15(d) of the Exchange Act. For purposes of the RFA, under our rules, an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it has total assets of $5 million or less as of the end of its most recent fiscal year and is engaged or proposing to engage in an offering of securities that does not exceed $5 million.[1441] From staff review of Securities Act and Exchange Act filings made by registrants with mining operations from January 2016 through December 2017, we estimate that there are approximately 114 issuers that may be considered small entities.[1442] One of those small entities was a filer of a Form 1–A offering statement.

### *D. Reporting, Recordkeeping, and Other Compliance Requirements*

As described in greater detail above, the final rules will enhance the Securities Act and Exchange Act disclosure requirements of registrants, including small entities, with material mining operations by requiring:

- The disclosure of estimates and other information about determined mineral resources and exploration results that are material to investors in addition to mineral reserves;
- the disclosure of exploration results, mineral resources and mineral reserves in Commission filings to be based on and accurately reflect information and supporting documentation prepared by a qualified person; and
- the filing of a technical report summary prepared by a qualified person for each material property for certain Commission filings.

The final rules also will codify certain existing disclosure policies for registrants with material mining operations, including small entities. The same mining disclosure requirements will apply to both U.S. and foreign registrants.[1443] The professional skills

[1432] 5 U.S.C. 603.

[1433] The need for, and objectives of, the final rules are discussed in more detail throughout this release, particularly in Sections I and II, *supra.*

[1434] *See* letter from SRK 1.

[1435] *See, e.g.* letter from NSSGA.

[1436] *See id.*

[1437] *See, e.g.,* letters from AngloGold, Eggleston and Gold Resource.

[1438] *See* letter from MMSA.

[1439] *See infra* Section VI.F.

[1440] 15 U.S.C. 77f.

[1441] *See* 17 CFR 230.157 [Securities Act Rule 157]; and 17 CFR 240.0–10(a) [Exchange Act Rule 0–10(a)].

[1442] *See supra* Section IV.A.1. for a discussion of how the staff estimated the number of registrants, including small entities, that will be subject to the final rules.

[1443] The final rules are discussed in detail in Section II, *supra.* We discuss the economic impact,

necessary to comply with the final rules include legal, accounting, and information technology skills. In addition, the final rules require the involvement of qualified persons with certain specified credentials and relevant experience.[1444]

*E. Duplicative, Overlapping or Conflicting Federal Rules*

As noted above, the final rules will generally establish new mining disclosure requirements that we believe will not duplicate or overlap with other federal rules. The final rules will consolidate and codify all of the Commission's mining property disclosure requirements and policies, which currently exist in Item 102 of Regulation S–K and in Guide 7, the status and overlapping structure of which has caused some uncertainty for mining registrants.[1445] We believe that this consolidation and codification will help a mining registrant, including a small entity, comply with its disclosure obligations under the Securities Act and Exchange Act, which could mitigate its reporting burden. The final rules also will more closely align our mining property disclosure requirements with global industry practices and standards, which should also mitigate a registrant's, including a small entity's, reporting burden to the extent that it is already subject to one or more of the CRIRSCO-based codes. We do not believe that the final rules will conflict with other federal rules.

*F. Agency Action To Minimize Effect on Small Entities*

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with adopting the final rules, we considered, as alternatives: Establishing different compliance or reporting requirements that take into account the resources available to smaller entities; exempting smaller entities from coverage of the disclosure requirements, or any part thereof; clarifying, consolidating, or simplifying the disclosure requirements for small entities; and using performance standards rather than design standards.

Neither the current mining disclosure requirements nor the final rules exempt or treat differently a small entity with material mining operations. Providing an exemption for, or imposing less extensive disclosure requirements on, small entities with material mining operations would likely increase the risk of inaccurate or incomplete disclosure concerning those entities' mineral resources, mineral reserves and exploration results, to the detriment of investors.[1446] Moreover, as noted above, a primary goal of the final rules is generally to align the Commission's mining disclosure regime with the standards that have developed under the CRIRSCO-based codes so that investors will have a more complete understanding of a registrant's mining operations and be able to make more informed investment decisions. The CRIRSCO-based codes do not provide an exemption for small entities or otherwise treat such entities differently. Therefore, we believe it would be inappropriate for our rules to provide an exemption for, or otherwise treat differently, small entities with material mining operations.

We also note that, because a significant percentage of mining registrants (approximately 43% based on the staff's most recent review of Commission filings) [1447] are small entities, exempting them from the final rules will effectively disapply the Commission's mining disclosure regime to a large segment of the companies for which such disclosure would be potentially beneficial. By exempting small entities from the final rules, we would be creating a significant gap in the transparency of registrants' disclosure concerning their mining properties, which would defeat one of the primary purposes of the final rules.

In accordance with the Regulatory Flexibility Act, and in response to commenters' concerns described above, we have considered and adopted alternatives to several of the proposed disclosure requirements, which we believe will limit the compliance burden for registrants, including small entities. For example, the final rules:

- Clarify that a registrant is not required to disclose exploration results until they become material to investors;
- do not require the filing of a technical report summary to support the disclosure of exploration results;
- limit the required filing of a technical report summary that supports the disclosure of determined mineral resources and reserves to when the registrant first discloses resource or reserve estimates, or when it discloses a material change in the previously disclosed estimates;
- eliminate the proposed requirement to quantify the level of risk concerning mineral resources, including inferred mineral resources;
- reduce the number of required tables from seven to two, and permit most of the required disclosure concerning material mining properties and mineral resources, mineral reserves, and exploration results to be disclosed in either narrative or tabular format;
- permit the use of a pre-feasibility study instead of a final feasibility study without requiring justification for such use, and even when used for high-risk situations; and
- align our mining property disclosure requirements with the CRIRSCO standards in many significant respects, such as by adopting a reasonable and justifiable price standard for the determination and disclosure of mineral resources and mineral reserves, which could include a forward-looking price, instead of the proposed 24-month trailing average price requirement.

We believe that all of the above revisions to the proposed rules will limit the final rules' compliance burden for registrants, including small entities.[1448] We also believe that certain of these changes, in particular those regarding the disclosure of exploration results, will reduce the final rules' potential for the disclosure of proprietary, commercially sensitive information for registrants, including small entities.

As noted above, the final rules will consolidate and codify the Commission's mining property disclosure rules and policies and thereby facilitate compliance for all registrants, including small entities. We have used design rather than performance standards in connection with the final rules because, based on our past experience, we believe the final rules will be more beneficial to investors if there are specific disclosure requirements that are uniform for all registrants with material mining operations. Nevertheless, we have made revisions to the proposed rules to make the disclosure requirements less prescriptive and provide more flexibility in how the required information is presented, which should help ease the compliance burden associated with these requirements.

including the estimated compliance costs and burdens, of the final rules in Section IV (Economic Analysis) and Section V (Paperwork Reduction Act), *supra.*

[1444] *See supra* Section II.C.

[1445] *See supra* note 28 and accompanying text.

[1446] In this regard, only one commenter directly addressed the IRFA and whether we should adopt alternatives to the proposed rules, including exempting or treating differently small entities. That commenter opposed such alternative treatment for small entities, stating that such alternative treatment would be a disservice to investors. *See* letter from SRK 1.

[1447] *See supra* Section IV.A.1.

[1448] Under the final rules, the qualified person is not required to be independent of the registrant. As commenters noted, this approach should also help to limit the compliance burden for registrants, including small entities. *See supra* note 1437 and accompanying text.

## VII. Statutory Authority

We are adopting the amendments contained in this document pursuant to Sections 3(b), 7, 10, 19(a), and 28 of the Securities Act and Sections 3(b), 12, 13, 15(d), 23(a), and 36(a) of the Exchange Act.

## List of Subjects

*17 CFR Part 229, 17 CFR Part 230, 17 CFR Part 239*

Reporting and recordkeeping requirements, Securities.

*17 CFR Part 249*

Brokers, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

## PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

■ 1. The authority citation for part 229 continues to read as follows:

**Authority:** 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j–3, 78*l,* 78m, 78n, 78n–1, 78*o,* 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11 and 7201 *et seq.;* 18 U.S.C. 1350; sec. 953(b), Pub. L. 111–203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112–106, 126 Stat. 310 (2012).

■ 2. Amend § 229.102 by:

■ a. Removing ‘‘, mines’’ in the introductory text;

■ b. Removing the heading ‘‘Instructions to Item 102:’’;

■ c. Redesignating Instructions 1, 2, 3, and 4 as ‘‘Instruction 1 to Item 102:’’, ‘‘Instruction 2 to Item 102:’’, ‘‘Instruction 3 to Item 102:’’, and ‘‘Instruction 4 to Item 102:’’;

■ d. Revising newly redesignated Instruction 3 to Item 102;

■ e. Removing Instructions 5 and 7 to Item 102; and

■ f. Redesignating instruction 6 as ‘‘Instruction 5 to Item 102:’’ and Instructions 8 and 9 as ‘‘Instruction 6 to Item 102:’’ and ‘‘Instruction 7 to Item 102:’’, respectively.

The revision reads as follows:

**§ 229.102 (Item 102) Description of property.**

* * * * *

*Instruction 3 to Item 102:* Registrants engaged in mining operations must refer to and, if required, provide the disclosure under §§ 229.1300 through 229.1305 (subpart 1300 of Regulation S–K), in addition to any disclosure required by this section.

* * * * *

■ 3. Amend § 229.601 by:

■ a. In the exhibit table in paragraph (a), adding entry (96) and footnote 7; and

■ b. Adding paragraph (b)(96).

The additions read as follows:

**§ 229.601 (Item 601) Exhibits.**

(a) * * *

EXHIBIT TABLE

| | Securities Act Forms | | | | | | | | | | Exchange Act Forms | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | S–1 | S–3 | SF–1 | SF–3 | S–4 [1] | S–8 | S–11 | F–1 | F–3 | F–4 [1] | 10 | 8–K [2] | 10–D | 10–Q | 10–K | ABS–EE |
| | * | | * | | | * | | * | | * | | * | | | * | |
| (96) Technical report summary [7]. | X | X | | | X | | | X | X | X | X | | | | X | |
| | * | | * | | | * | | * | | * | | * | | | * | |

* * * * * * *

[7] If required pursuant to § 229.1302 (Item 1302 of Regulation S–K).

(b) * * *

(96) *Technical report summary.* (i) A registrant that, pursuant to §§ 229.1300 through 229.1305 (subpart 229.1300 of Regulation S–K), discloses information concerning its mineral resources or mineral reserves must file a technical report summary by one or more qualified persons that, for each material property, identifies and summarizes the scientific and technical information and conclusions reached concerning an initial assessment used to support disclosure of mineral resources, or concerning a preliminary or final feasibility study used to support disclosure of mineral reserves. At its election, a registrant may also file a technical report summary from a qualified person that identifies and summarizes the information reviewed and conclusions reached by the qualified person about the registrant's exploration results. Please refer to § 229.1302(b) (Item 1302(b) of Regulation S–K) for when a registrant must file the technical report summary as an exhibit to its Securities Act registration statement or Exchange Act registration statement or report.

(ii) The technical report summary must not include large amounts of technical or other project data, either in the report or as appendices to the report. The qualified person must draft the summary to conform, to the extent practicable, with the plain English principles set forth in § 230.421 or § 240.13a–20 of this chapter.

(iii)(A) A technical report summary that reports the results of a preliminary or final feasibility study must provide all of the information specified in paragraph (b)(96)(iii)(B) of this section. A technical report summary that reports the results of an initial assessment must, at a minimum, provide the information specified in paragraphs (b)(96)(iii)(B)(*1*) through (*11*) and (*20*) through (*25*) of this section, and may also include the information specified in paragraph (b)(96)(iii)(B)(*19*) of this section. A technical report summary that reports exploration results must, at a minimum, provide the information specified in paragraphs (b)(96)(iii)(B)(*1*) through (*9*) and (*20*) through (*25*) of this section.

(B) A qualified person must include the following information in the technical report summary, as required by paragraph (b)(96)(iii)(A) of this section, to the extent the information is material.

(*1*) *Executive summary.* Briefly summarize the most significant information in the technical report

summary, including property description (including mineral rights) and ownership, geology and mineralization, the status of exploration, development and operations, mineral resource and mineral reserve estimates, summary capital and operating cost estimates, permitting requirements, and the qualified person's conclusions and recommendations. The executive summary must be brief and should not contain all of the detailed information in the technical support summary.

(*2*) *Introduction.* Disclose:

(*i*) The registrant for whom the technical report summary was prepared;

(*ii*) The terms of reference and purpose for which the technical report summary was prepared, including whether the technical report summary's purpose was to report mineral resources, mineral reserves, or exploration results;

(*iii*) The sources of information and data contained in the technical report summary or used in its preparation, with citations if applicable;

(*iv*) The details of the personal inspection on the property by each qualified person or, if applicable, the reason why a personal inspection has not been completed; and

(*v*) That the technical report summary updates a previously filed technical report summary, identified by name and date, when applicable.

(*3*) *Property description.* (*i*) Describe the location of the property, accurate to within one mile, using an easily recognizable coordinate system. The qualified person must provide appropriate maps, with proper engineering detail (such as scale, orientation, and titles) to portray the location of the property. Such maps must be legible on the page when printed.

(*ii*) Disclose the area of the property.

(*iii*) Disclose the name or number of each title, claim, mineral right, lease, or option under which the registrant and its subsidiaries have or will have the right to hold or operate the property. If held by leases or options, the registrant must provide the expiration dates of such leases or options and associated payments.

(*iv*) Describe the mineral rights, and how such rights have been obtained at this location, indicating any conditions that the registrant must meet in order to obtain or retain the property.

(*v*) Describe any significant encumbrances to the property, including current and future permitting requirements and associated timelines, permit conditions, and violations and fines.

(*vi*) Disclose any other significant factors and risks that may affect access, title, or the right or ability to perform work on the property.

(*vii*) If the registrant holds a royalty or similar interest in the property, except as provided under §§ 229.1303(a)(3) and 229.1304(a)(2), the information in paragraph (b)(96)(iii)(B)(*3*) of this section must be provided for the property that is owned or operated by a party other than the registrant. In this event, for example, the report must address the documents under which the owner or operator holds or operates the property, the mineral rights held by the owner or operator, conditions required to be met by the owner or operator, significant encumbrances, and significant factors and risks relating to the property or work on the property.

(*4*) *Accessibility, climate, local resources, infrastructure and physiography.* Describe:

(*i*) The topography, elevation, and vegetation;

(*ii*) The means of access to the property, including highways, towns, rivers, railroads, and airports;

(*iii*) The climate and the length of the operating season, as applicable; and

(*iv*) The availability of and required infrastructure, including sources of water, electricity, personnel, and supplies.

(*5*) *History.* Describe:

(*i*) Previous operations, including the names of previous operators, insofar as known; and

(*ii*) The type, amount, quantity, and general results of exploration and development work undertaken by any previous owners or operators.

(*6*) *Geological setting, mineralization, and deposit.* (*i*) Describe briefly the regional, local, and property geology and the significant mineralized zones encountered on the property, including a summary of the surrounding rock types, relevant geological controls, and the length, width, depth, and continuity of the mineralization, together with a description of the type, character, and distribution of the mineralization.

(*ii*) Each mineral deposit type that is the subject of investigation or exploration together with the geological model or concepts being applied in the investigation or forming the basis of the exploration program.

(*iii*) The qualified person must include at least one stratigraphic column and one cross-section of the local geology to meet the requirements of paragraph (b)(96)(iii)(B)(*6*) of this section.

(*7*) *Exploration.* Describe the nature and extent of all relevant exploration work, conducted by or on behalf of, the registrant.

(*i*) For all exploration work other than drilling, describe: The procedures and parameters relating to the surveys and investigations; the sampling methods and sample quality, including whether the samples are representative, and any factors that may have resulted in sample biases; the location, number, type, nature, and spacing or density of samples collected, and the size of the area covered; and the significant results of and the qualified person's interpretation of the exploration information.

(*ii*) For drilling, describe: The type and extent of drilling including the procedures followed; any drilling, sampling, or recovery factors that could materially affect the accuracy and reliability of the results; and the material results and interpretation of the drilling results. For a technical report summary to support disclosure of exploration results, the qualified person must provide information on all samples or drill holes to meet the requirements of this paragraph. If some information is excluded, the qualified person must identify the omitted information and explain why that information is not material.

(*iii*) For characterization of hydrogeology, describe: The nature and quality of the sampling methods used to acquire data on surface and groundwater parameters; the type and appropriateness of laboratory techniques used to test for groundwater flow parameters such as permeability, and include discussions of the quality control and quality assurance procedures; results of laboratory testing and the qualified person's interpretation, including any material assumptions, which must include descriptions of permeable zones or aquifers, flow rates, in-situ saturation, recharge rates and water balance; and the groundwater models used to characterize aquifers, including material assumptions used in the modeling.

(*iv*) For geotechnical data, testing and analysis, describe: The nature and quality of the sampling methods used to acquire geotechnical data; the type and appropriateness of laboratory techniques used to test for soil and rock strength parameters, including discussions of the quality control and quality assurance procedures; and results of laboratory testing and the qualified person's interpretation, including any material assumptions.

(*v*) Reports must include a plan view of the property showing locations of all drill holes and other samples.

(*vi*) The technical report summary must include a description of data concerning drilling, hydrogeology, or geotechnical data only to the extent such data is relevant and available.

*Instruction 1 to paragraph (b)(96)(iii)(B)(7):* The technical report summary must comply with all disclosure standards for exploration results under §§ 229.1300 through 229.1305 (subpart 229.1300 of Regulation S–K).

*Instruction 2 to paragraph (b)(96)(iii)(B)(7)*: For a technical report summary to support disclosure of mineral resources or mineral reserves, the qualified person can meet the requirements of paragraph (b)(96)(iii)(B)(*7*)(*ii*) of this section by providing sampling (including drilling) plans, representative plans, and cross-sections of results.

*Instruction 3 to paragraph (b)(96)(iii)(B)(7)*: If disclosing an exploration target, provide such disclosure in a subsection of the *Exploration* section of the technical report summary that is clearly captioned as a discussion of an exploration target. That section must include all of the disclosure required under § 229.1302(c).

(*8*) *Sample preparation, analyses, and security.* Describe:

(*i*) Sample preparation methods and quality control measures employed prior to sending samples to an analytical or testing laboratory, sample splitting and reduction methods, and the security measures taken to ensure the validity and integrity of samples;

(*ii*) Sample preparation, assaying and analytical procedures used, the name and location of the analytical or testing laboratories, the relationship of the laboratory to the registrant, and whether the laboratories are certified by any standards association and the particulars of such certification;

(*iii*) The nature, extent, and results of quality control procedures and quality assurance actions taken or recommended to provide adequate confidence in the data collection and estimation process;

(*iv*) The adequacy of sample preparation, security, and analytical procedures, in the opinion of the qualified person; and

(*v*) If the analytical procedures used are not part of conventional industry practice, a justification by the qualified person for why he or she believes the procedure is appropriate in this instance.

(*9*) *Data verification.* Describe the steps taken by the qualified person to verify the data being reported on or which is the basis of this technical report summary, including:

(*i*) Data verification procedures applied by the qualified person;

(*ii*) Any limitations on or failure to conduct such verification, and the reasons for any such limitations or failure; and

(*iii*) The qualified person's opinion on the adequacy of the data for the purposes used in the technical report summary.

(*10*) *Mineral processing and metallurgical testing.* Describe:

(*i*) The nature and extent of the mineral processing or metallurgical testing and analytical procedures;

(*ii*) The degree to which the test samples are representative of the various types and styles of mineralization and the mineral deposit as a whole;

(*iii*) The name and location of the analytical or testing laboratories, the relationship of the laboratory to the registrant, whether the laboratories are certified by any standards association and the particulars of such certification;

(*iv*) The relevant results including the basis for any assumptions or predictions about recovery estimates. Discuss any processing factors or deleterious elements that could have a significant effect on potential economic extraction; and

(*v*) The adequacy of the data for the purposes used in the technical report summary, in the opinion of the qualified person. If the analytical procedures used in the analysis are not part of conventional industry practice, the qualified person must state so and provide a justification for why he or she believes the procedure is appropriate in this instance.

(*11*) *Mineral resource estimates.* If this item is included, the technical report summary must:

(*i*) Describe the key assumptions, parameters, and methods used to estimate the mineral resources, in sufficient detail for a reasonably informed person to understand the basis for and how the qualified person estimated the mineral resources. The technical report summary must include mineral resource estimates at a specific point of reference selected by the qualified person. The selected point of reference must be disclosed in the technical report summary;

(*ii*) Provide the qualified person's estimates of mineral resources for all commodities, including estimates of quantities, grade or quality, cut-off grades, and metallurgical or processing recoveries. Unless otherwise stated, cut-off grades also refer to net smelter returns, pay limits, and other similar terms. The qualified person preparing the mineral resource estimates must round off, to appropriate significant figures chosen to reflect order of accuracy, any estimates of quantity and grade or quality. If the qualified person chooses to disclose mineral resources inclusive of mineral reserves, he or she must also clearly state the mineral resources exclusive of mineral reserves in the technical report summary;

(*iii*) Include the qualified person's estimates of cut-off grades based on assumed costs for surface or underground operations and commodity prices that provide a reasonable basis for establishing the prospects of economic extraction for mineral resources. The qualified person must disclose the price used for each commodity and explain, with particularity, his or her reasons for using the selected price, including the material assumptions underlying the selection. This explanation must include disclosure of the time frame used to estimate the commodity price and unit costs for cut-off grade estimation and the reasons justifying the selection of that time frame. The qualified person may use a price set by contractual arrangement, provided that such price is reasonable, and the qualified person discloses that he or she is using a contractual price when disclosing the price used;

(*iv*) Provide the qualified person's classification of mineral resources into inferred, indicated, and measured mineral resources in accordance with § 229.1302(d)(1)(iii)(A) (Item 1302(d)(1)(iii)(A) of Regulation S–K). The qualified person must disclose the criteria used to classify a resource as inferred, indicated, or measured and must justify the classification;

(*v*) Discuss the uncertainty in the estimates of inferred, indicated, and measured mineral resources, and explain the sources of uncertainty and how they were considered in the uncertainty estimates. The qualified person must consider all sources of uncertainty associated with each class of mineral resources. Sources of uncertainty that affect such reporting of uncertainty include sampling or drilling methods, data processing and handling, geologic modeling, and estimation. The qualified person must support the disclosure of uncertainty associated with each class of mineral resources with a list of all factors considered and explain how those factors contributed to the final conclusion about the level of uncertainty underlying the resource estimates. The qualified person is not required to use estimates of confidence limits derived from geostatistics or other numerical methods to support the disclosure of uncertainty surrounding

mineral resource classification. If the qualified person chooses to use confidence limit estimates from geostatistics or other numerical methods, he or she should consider the limitations of these methods and adjust the estimates appropriately to reflect sources of uncertainty that are not accounted for by these methods;

(*vi*) When reporting the grade or quality for a multiple commodity mineral resource as metal or mineral equivalent, disclose the individual grade of each metal or mineral and the commodity prices, recoveries, and any other relevant conversion factors used to estimate the metal or mineral equivalent grade; and

(*vii*) Provide the qualified person's opinion on whether all issues relating to all relevant technical and economic factors likely to influence the prospect of economic extraction can be resolved with further work.

*Instruction 1 to paragraph (b)(96)(iii)(B)(11*): The technical report summary must comply with all disclosure standards for mineral resources under §§ 229.1300 through 229.1305 (subpart 229.1300 of Regulation S–K).

*Instruction 2 to paragraph(b)(96)(iii)(B)(11*): Sections 229.1303 and 229.1304 (Items 1303 and 1304 of Regulation S–K) notwithstanding, in this technical report summary, mineral resource estimates may be inclusive of mineral reserves so long as this is clearly stated with equal prominence to the rest of the item.

(*12*) *Mineral reserve estimates.* If this item is included, the technical report summary must:

(*i*) Describe the key assumptions, parameters, and methods used to estimate the mineral reserves, in sufficient detail for a reasonably informed person to understand the basis for converting, and how the qualified person converted, indicated and measured mineral resources into the mineral reserves. The technical report summary must include mineral reserve estimates at a specific point of reference selected by the qualified person. The qualified person must disclose the selected point of reference in the technical report summary;

(*ii*) Provide the qualified person's estimates of mineral reserves for all commodities, including estimates of quantities, grade or quality, cut-off grades, and metallurgical or processing recoveries. The qualified person preparing the mineral resource estimates must round off, to appropriate significant figures chosen to reflect order of accuracy, any estimates of quantity and grade or quality;

(*iii*) Include the qualified person's estimates of cut-off grades based on detailed cut-off grade analysis that includes a long term price that provides a reasonable basis for establishing that the project is economically viable. The qualified person must disclose the price used for each commodity and explain, with particularity, his or her reasons for using the selected price, including the material assumptions underlying the selection. This explanation must include disclosure of the time frame used to estimate the price and costs and the reasons justifying the selection of that time frame. The qualified person may use a price set by contractual arrangement, provided that such price is reasonable, and the qualified person discloses that he or she is using a contractual price when disclosing the price used;

(*iv*) Provide the qualified person's classification of mineral reserves into probable and proven mineral reserves in accordance with § 229.1302(e)(2) (Item 1302(e)(2) of Regulation S–K);

(*v*) When reporting the grade or quality for a multiple commodity mineral reserve as metal or mineral equivalent, disclose the individual grade of each metal or mineral and the commodity prices, recoveries, and any other relevant conversion factors used to estimate the metal or mineral equivalent grade; and

(*vi*) Provide the qualified person's opinion on how the mineral reserve estimates could be materially affected by risk factors associated with or changes to any aspect of the modifying factors.

*Instruction 1 to paragraph (b)(96)(iii)(B)(12):* The technical report summary must comply with all disclosure standards for mineral reserves under §§ 229.1300 through 1305 (subpart 229.1300 of Regulation S–K).

(*13*) *Mining methods.* Describe the current or proposed mining methods and the reasons for selecting these methods as the most suitable for the mineral reserves under consideration. Include:

(*i*) Geotechnical and hydrological models, and other parameters relevant to mine designs and plans;

(*ii*) Production rates, expected mine life, mining unit dimensions, and mining dilution and recovery factors;

(*iii*) Requirements for stripping, underground development, and backfilling;

(*iv*) Required mining equipment fleet and machinery, and personnel; and

(*v*) At least one map of the final mine outline.

(*14*) *Processing and recovery methods.* Describe the current or proposed mineral processing methods and the reasons for selecting these methods as the most suitable for extracting the valuable products from the mineralization under consideration. Include:

(*i*) A description or flow sheet of any current or proposed process plant;

(*ii*) Plant throughput and design, equipment characteristics and specifications;

(*iii*) Current or projected requirements for energy, water, process materials, and personnel; and

(*iv*) If the processing method, plant design, or other parameter has never been used to commercially extract the valuable product from such mineralization, a justification by the qualified person for why he or she believes the approach will be successful in this instance.

*Instruction 1 to paragraph (b)(96)(iii)(B)(14):* If the processing method, plant design, or other parameter has never been used to commercially extract the valuable product from such mineralization and is still under development, then no mineral resources or reserves can be disclosed on the basis of that method, design, or other parameter.

(*15*) *Infrastructure.* Describe the required infrastructure for the project, including roads, rail, port facilities, dams, dumps and leach pads, tailings disposal, power, water, and pipelines, as applicable. Include at least one map showing the layout of the infrastructure.

(*16*) *Market studies.* Describe the market for the products of the mine, including justification for demand or sales over the life of the mine (or length of cash flow projections). Include:

(*i*) Information concerning markets for the property's production, including the nature and material terms of any agency relationships and the results of any relevant market studies, commodity price projections, product valuation, market entry strategies, and product specification requirements; and

(*ii*) Descriptions of all material contracts required for the issuer to develop the property, including mining, concentrating, smelting, refining, transportation, handling, hedging arrangements, and forward sales contracts. State which contracts have been executed and which are still under negotiation. For all contracts with affiliated parties, discuss whether the registrant obtained the same terms, rates or charges as could be obtained had the contract been negotiated at arm's length with an unaffiliated third party.

(*17*) *Environmental studies, permitting, and plans, negotiations, or agreements with local individuals or groups.* Describe the factors pertaining to environmental compliance, permitting, and local individuals or groups, which are related to the project. Include:

(*i*) The results of environmental studies (*e.g.,* environmental baseline studies or impact assessments);

(*ii*) Requirements and plans for waste and tailings disposal, site monitoring, and water management during operations and after mine closure;

(*iii*) Project permitting requirements, the status of any permit applications, and any known requirements to post performance or reclamation bonds;

(*iv*) Plans, negotiations, or agreements with local individuals or groups;

(*v*) Mine closure plans, including remediation and reclamation plans, and the associated costs;

(*vi*) The qualified person's opinion on the adequacy of current plans to address any issues related to environmental compliance, permitting, and local individuals or groups; and

(*vii*) Descriptions of any commitments to ensure local procurement and hiring.

(*18*) *Capital and operating costs.* (*i*) Provide estimates of capital and operating costs, with the major components set out in tabular form. Explain and justify the basis for the cost estimates including any contingency budget estimates. State the accuracy level of the capital and operating cost estimates.

(*ii*) To assess the accuracy of the capital and operating cost estimates, the qualified person must take into account the risks associated with the specific engineering estimation methods used to arrive at the estimates. As part of this analysis, the qualified person must take into consideration the accuracy of the estimation methods in prior similar environments. The accuracy of capital and operating cost estimates must comply with § 229.1302 (Item 1302 of Regulation S–K).

(*19*) *Economic analysis.* (*i*) Describe the key assumptions, parameters, and methods used to demonstrate economic viability, and provide all material assumptions including discount rates, exchange rates, commodity prices, and taxes, royalties, and other government levies or interests applicable to the mineral project or to production, and to revenues or income from the mineral project.

(*ii*) Disclose the results of the economic analysis, including annual cash flow forecasts based on an annual production schedule for the life of project, and measures of economic viability such as net present value (NPV), internal rate of return (IRR), and payback period of capital.

(*iii*) Include sensitivity analysis results using variants in commodity price, grade, capital and operating costs, or other significant input parameters, as appropriate, and discuss the impact on the results of the economic analysis.

(*iv*) The qualified person may, but is not required to, include an economic analysis in an initial assessment. If the qualified person includes an economic analysis in an initial assessment, the qualified person must also include a statement, of equal prominence to the rest of this section, that, unlike mineral reserves, mineral resources do not have demonstrated economic viability. The qualified person may include inferred mineral resources in the economic analysis only if he or she satisfies the conditions set forth in § 229.1302(d)(4)(ii) (Item 1302(d)(4)(ii) of Regulation S–K).

(*20*) *Adjacent properties.* Where applicable, a qualified person may include relevant information concerning an adjacent property if:

(*i*) Such information was publicly disclosed by the owner or operator of the adjacent property;

(*ii*) The source of the information is identified;

(*iii*) The qualified person states that he or she has been unable to verify the information and that the information is not necessarily indicative of the mineralization on the property that is the subject of the technical report summary; and

(*iv*) The technical report summary clearly distinguishes between the information from the adjacent property and the information from the property that is the subject of the technical report summary.

(*21*) *Other relevant data and information.* Include any additional information or explanation necessary to provide a complete and balanced presentation of the value of the property to the registrant. Information included in this item must comply with §§ 229.1300 through 229.1305 (subpart 229.1300 of Regulation S–K).

(*22*) *Interpretation and conclusions.* The qualified person must summarize the interpretations of and conclusions based on the data and analysis in the technical report summary. He or she must also discuss any significant risks and uncertainties that could reasonably be expected to affect the reliability or confidence in the exploration results, mineral resource or mineral reserve estimates, or projected economic outcomes.

(*23*) *Recommendations.* If applicable, the qualified person must describe the recommendations for additional work with associated costs. If the additional work program is divided into phases, the costs for each phase must be provided along with decision points at the end of each phase.

(*24*) *References.* Include a list of all references cited in the technical report summary in sufficient detail so that a reader can locate each reference.

(*25*) *Reliance on information provided by the registrant.* If relying on information provided by the registrant for matters discussed in the technical report summary, as permitted under § 229.1302(f), provide the disclosure required pursuant to § 229.1302(f)(2).

* * * * *

**§ 229.801 [Amended]**

■ 4. Amend § 229.801 by removing paragraph (g).

**§ 229.802 [Amended]**

■ 5. Amend § 229.802 by removing paragraph (g).

■ 6. Add subpart 229.1300 to read as follows:

**Subpart 229.1300—Disclosure by Registrants Engaged in Mining Operations**

Sec.
229.1300 (Item 1300) Definitions.
229.1301 (Item 1301) General instructions.
229.1302 (Item 1302) Qualified person, technical report summary, and technical studies.
229.1303 (Item 1303) Summary disclosure.
229.1304 (Item 1304) Individual property disclosure.
229.1305 (Item 1305) Internal controls disclosure.

## Subpart 229.1300—Disclosure by Registrants Engaged in Mining Operations

**§ 229.1300 (Item 1300) Definitions.**

As used in this subpart, these terms have the following meanings:

*Adequate geological evidence,* when used in the context of mineral resource determination, means evidence that is sufficient to establish geological and grade or quality continuity with reasonable certainty.

*Conclusive geological evidence,* when used in the context of mineral resource determination, means evidence that is sufficient to test and confirm geological and grade or quality continuity.

*Cut-off grade* is the grade (*i.e.,* the concentration of metal or mineral in rock) that determines the destination of the material during mining. For purposes of establishing ''prospects of economic extraction,'' the cut-off grade is the grade that distinguishes material

deemed to have no economic value (it will not be mined in underground mining or if mined in surface mining, its destination will be the waste dump) from material deemed to have economic value (its ultimate destination during mining will be a processing facility). Other terms used in similar fashion as cut-off grade include net smelter return, pay limit, and break-even stripping ratio.

*Development stage issuer* is an issuer that is engaged in the preparation of mineral reserves for extraction on at least one material property.

*Development stage property* is a property that has mineral reserves disclosed, pursuant to this subpart, but no material extraction.

*Economically viable,* when used in the context of mineral reserve determination, means that the qualified person has determined, using a discounted cash flow analysis, or has otherwise analytically determined, that extraction of the mineral reserve is economically viable under reasonable investment and market assumptions.

*Exploration results* are data and information generated by mineral exploration programs (*i.e.,* programs consisting of sampling, drilling, trenching, analytical testing, assaying, and other similar activities undertaken to locate, investigate, define or delineate a mineral prospect or mineral deposit) that are not part of a disclosure of mineral resources or reserves. A registrant must not use exploration results alone to derive estimates of tonnage, grade, and production rates, or in an assessment of economic viability.

*Exploration stage issuer* is an issuer that has no material property with mineral reserves disclosed.

*Exploration stage property* is a property that has no mineral reserves disclosed.

*Exploration target* is a statement or estimate of the exploration potential of a mineral deposit in a defined geological setting where the statement or estimate, quoted as a range of tonnage and a range of grade (or quality), relates to mineralization for which there has been insufficient exploration to estimate a mineral resource.

*Feasibility study* is a comprehensive technical and economic study of the selected development option for a mineral project, which includes detailed assessments of all applicable modifying factors, as defined by this section, together with any other relevant operational factors, and detailed financial analysis that are necessary to demonstrate, at the time of reporting, that extraction is economically viable. The results of the study may serve as the basis for a final decision by a proponent or financial institution to proceed with, or finance, the development of the project.

(1) A feasibility study is more comprehensive, and with a higher degree of accuracy, than a pre-feasibility study. It must contain mining, infrastructure, and process designs completed with sufficient rigor to serve as the basis for an investment decision or to support project financing.

(2) The confidence level in the results of a feasibility study is higher than the confidence level in the results of a pre-feasibility study. Terms such as *full, final, comprehensive, bankable,* or *definitive* feasibility study are equivalent to a feasibility study.

*Final market study* is a comprehensive study to determine and support the existence of a readily accessible market for the mineral. It must, at a minimum, include product specifications based on final geologic and metallurgical testing, supply and demand forecasts, historical prices for the preceding five or more years, estimated long term prices, evaluation of competitors (including products and estimates of production volumes, sales, and prices), customer evaluation of product specifications, and market entry strategies or sales contracts. The study must provide justification for all assumptions, which must include assumptions concerning the material contracts required to develop and sell the mineral reserves.

*Indicated mineral resource* is that part of a mineral resource for which quantity and grade or quality are estimated on the basis of adequate geological evidence and sampling. The level of geological certainty associated with an indicated mineral resource is sufficient to allow a qualified person to apply modifying factors in sufficient detail to support mine planning and evaluation of the economic viability of the deposit. Because an indicated mineral resource has a lower level of confidence than the level of confidence of a measured mineral resource, an indicated mineral resource may only be converted to a probable mineral reserve.

*Inferred mineral resource* is that part of a mineral resource for which quantity and grade or quality are estimated on the basis of limited geological evidence and sampling. The level of geological uncertainty associated with an inferred mineral resource is too high to apply relevant technical and economic factors likely to influence the prospects of economic extraction in a manner useful for evaluation of economic viability. Because an inferred mineral resource has the lowest level of geological confidence of all mineral resources, which prevents the application of the modifying factors in a manner useful for evaluation of economic viability, an inferred mineral resource may not be considered when assessing the economic viability of a mining project, and may not be converted to a mineral reserve.

*Initial assessment* is a preliminary technical and economic study of the economic potential of all or parts of mineralization to support the disclosure of mineral resources. The initial assessment must be prepared by a qualified person and must include appropriate assessments of reasonably assumed technical and economic factors, together with any other relevant operational factors, that are necessary to demonstrate at the time of reporting that there are reasonable prospects for economic extraction. An initial assessment is required for disclosure of mineral resources but cannot be used as the basis for disclosure of mineral reserves.

*Investment and market assumptions,* when used in the context of mineral reserve determination, includes all assumptions made about the prices, exchange rates, interest and discount rates, sales volumes, and costs that are necessary to determine the economic viability of the mineral reserves. The qualified person must use a price for each commodity that provides a reasonable basis for establishing that the project is economically viable.

*Limited geological evidence,* when used in the context of mineral resource determination, means evidence that is only sufficient to establish that geological and grade or quality continuity are more likely than not.

*Material* has the same meaning as under § 230.405 or § 240.12b–2 of this chapter.

*Material of economic interest,* when used in the context of mineral resource determination, includes mineralization, including dumps and tailings, mineral brines, and other resources extracted on or within the earth's crust. It does not include oil and gas resources resulting from oil and gas producing activities, as defined in § 210.4–10(a)(16)(i) of this chapter, gases (*e.g.,* helium and carbon dioxide), geothermal fields, and water.

*Measured mineral resource* is that part of a mineral resource for which quantity and grade or quality are estimated on the basis of conclusive geological evidence and sampling. The level of geological certainty associated with a measured mineral resource is sufficient to allow a qualified person to apply modifying factors, as defined in this section, in sufficient detail to

support detailed mine planning and final evaluation of the economic viability of the deposit. Because a measured mineral resource has a higher level of confidence than the level of confidence of either an indicated mineral resource or an inferred mineral resource, a measured mineral resource may be converted to a proven mineral reserve or to a probable mineral reserve.

*Mineral reserve* is an estimate of tonnage and grade or quality of indicated and measured mineral resources that, in the opinion of the qualified person, can be the basis of an economically viable project. More specifically, it is the economically mineable part of a measured or indicated mineral resource, which includes diluting materials and allowances for losses that may occur when the material is mined or extracted.

*Mineral resource* is a concentration or occurrence of material of economic interest in or on the Earth's crust in such form, grade or quality, and quantity that there are reasonable prospects for economic extraction. A mineral resource is a reasonable estimate of mineralization, taking into account relevant factors such as cut-off grade, likely mining dimensions, location or continuity, that, with the assumed and justifiable technical and economic conditions, is likely to, in whole or in part, become economically extractable. It is not merely an inventory of all mineralization drilled or sampled.

*Modifying factors* are the factors that a qualified person must apply to indicated and measured mineral resources and then evaluate in order to establish the economic viability of mineral reserves. A qualified person must apply and evaluate modifying factors to convert measured and indicated mineral resources to proven and probable mineral reserves. These factors include, but are not restricted to: Mining; processing; metallurgical; infrastructure; economic; marketing; legal; environmental compliance; plans, negotiations, or agreements with local individuals or groups; and governmental factors. The number, type and specific characteristics of the modifying factors applied will necessarily be a function of and depend upon the mineral, mine, property, or project.

*Preliminary feasibility study* (or *pre-feasibility study*) is a comprehensive study of a range of options for the technical and economic viability of a mineral project that has advanced to a stage where a qualified person has determined (in the case of underground mining) a preferred mining method, or (in the case of surface mining) a pit configuration, and in all cases has determined an effective method of mineral processing and an effective plan to sell the product.

(1) A pre-feasibility study includes a financial analysis based on reasonable assumptions, based on appropriate testing, about the modifying factors and the evaluation of any other relevant factors that are sufficient for a qualified person to determine if all or part of the indicated and measured mineral resources may be converted to mineral reserves at the time of reporting. The financial analysis must have the level of detail necessary to demonstrate, at the time of reporting, that extraction is economically viable.

(2) A pre-feasibility study is less comprehensive and results in a lower confidence level than a feasibility study. A pre-feasibility study is more comprehensive and results in a higher confidence level than an initial assessment.

*Preliminary market study* is a study that is sufficiently rigorous and comprehensive to determine and support the existence of a readily accessible market for the mineral. It must, at a minimum, include product specifications based on preliminary geologic and metallurgical testing, supply and demand forecasts, historical prices for the preceding five or more years, estimated long term prices, evaluation of competitors (including products and estimates of production volumes, sales, and prices), customer evaluation of product specifications, and market entry strategies. The study must provide justification for all assumptions. It can, however, be less rigorous and comprehensive than a final market study, which is required for a full feasibility study.

*Probable mineral reserve* is the economically mineable part of an indicated and, in some cases, a measured mineral resource.

*Production stage issuer* is an issuer that is engaged in material extraction of mineral reserves on at least one material property.

*Production stage property* is a property with material extraction of mineral reserves.

*Proven mineral reserve* is the economically mineable part of a measured mineral resource and can only result from conversion of a measured mineral resource.

*Qualified person* is an individual who is:

(1) A mineral industry professional with at least five years of relevant experience in the type of mineralization and type of deposit under consideration and in the specific type of activity that person is undertaking on behalf of the registrant; and

(2) An eligible member or licensee in good standing of a recognized professional organization at the time the technical report is prepared. For an organization to be a recognized professional organization, it must:

(i) Be either:

(A) An organization recognized within the mining industry as a reputable professional association; or

(B) A board authorized by U.S. federal, state or foreign statute to regulate professionals in the mining, geoscience or related field;

(ii) Admit eligible members primarily on the basis of their academic qualifications and experience;

(iii) Establish and require compliance with professional standards of competence and ethics;

(iv) Require or encourage continuing professional development;

(v) Have and apply disciplinary powers, including the power to suspend or expel a member regardless of where the member practices or resides; and

(vi) Provide a public list of members in good standing.

*Relevant experience* means, for purposes of determining whether a party is a qualified person, that the party has experience in the specific type of activity that the person is undertaking on behalf of the registrant. If the qualified person is preparing or supervising the preparation of a technical report concerning exploration results, the relevant experience must be in exploration. If the qualified person is estimating, or supervising the estimation of mineral resources, the relevant experience must be in the estimation, assessment and evaluation of mineral resources and associated technical and economic factors likely to influence the prospect of economic extraction. If the qualified person is estimating, or supervising the estimation of mineral reserves, the relevant experience must be in engineering and other disciplines required for the estimation, assessment, evaluation and economic extraction of mineral reserves.

(1) Relevant experience also means, for purposes of determining whether a party is a qualified person, that the party has experience evaluating the specific type of mineral deposit under consideration (*e.g.,* coal, metal, base metal, industrial mineral, or mineral brine). The type of experience necessary to qualify as relevant is a facts and circumstances determination. For example, experience in a high-nugget, vein-type mineralization such as tin or tungsten would likely be relevant

experience for estimating mineral resources for vein-gold mineralization, whereas experience in a low grade disseminated gold deposit likely would not be relevant.

*Note 1 to paragraph (1) of the definition of relevant experience:* It is not always necessary for a person to have five years' experience in each and every type of deposit in order to be an eligible qualified person if that person has relevant experience in similar deposit types. For example, a person with 20 years' experience in estimating mineral resources for a variety of metalliferous hard-rock deposit types may not require as much as five years of specific experience in porphyry-copper deposits to act as a qualified person. Relevant experience in the other deposit types could count towards the experience in relation to porphyry-copper deposits.

(2) For a qualified person providing a technical report for exploration results or mineral resource estimates, relevant experience also requires, in addition to experience in the type of mineralization, sufficient experience with the sampling and analytical techniques, as well as extraction and processing techniques, relevant to the mineral deposit under consideration. Sufficient experience means that level of experience necessary to be able to identify, with substantial confidence, problems that could affect the reliability of data and issues associated with processing.

(3) For a qualified person applying the modifying factors, as defined by this section, to convert mineral resources to mineral reserves, relevant experience also requires:

(i) Sufficient knowledge and experience in the application of these factors to the mineral deposit under consideration; and

(ii) Experience with the geology, geostatistics, mining, extraction and processing that is applicable to the type of mineral and mining under consideration.

**§ 229.1301 (Item 1301) General instructions.**

(a) As used in this section, the term *mining operations* includes operations on all mining properties that a registrant:

(1) Owns or in which it has, or it is probable that it will have, a direct or indirect economic interest;

(2) Operates, or it is probable that it will operate, under a lease or other legal agreement that grants the registrant ownership or similar rights that authorize it, as principal, to sell or otherwise dispose of the mineral; or

(3) Has, or it is probable that it will have, an associated royalty or similar right.

(b) A registrant must provide the disclosure specified in this subpart if its mining operations are material to its business or financial condition.

(c) When determining whether its mining operations are material, a registrant must:

(1) Consider both quantitative and qualitative factors, assessed in the context of the registrant's overall business and financial condition;

(2) Aggregate mining operations on all of its mining properties, regardless of the stage of the mining property, and size or type of commodity produced, including coal, metalliferous minerals, industrial materials, and mineral brines; and

(3) Include, for each property, as applicable, all related activities from exploration through extraction to the first point of material external sale, including processing, transportation, and warehousing.

(d) Upon a determination that its mining operations are material, a registrant must provide summary disclosure concerning all of its mining activities, as specified in § 229.1303, as well as individual property disclosure concerning each of its mining properties that is material to its business or financial condition, as specified in § 229.1304. When providing either summary or individual property disclosure, the registrant:

(1) Should provide an appropriate glossary if the disclosure requires the use of technical terms relating to geology, mining or related matters, which cannot readily be found in conventional dictionaries;

(2) Should not include detailed illustrations and technical reports, full feasibility studies or other highly technical data. The registrant shall, however, furnish such reports and other material supplementally to the staff upon request; and

(3) Should use plain English principles, to the extent practicable, such as those provided in §§ 230.421 and 240.13a–20 of this chapter, to enhance the readability of the disclosure for investors.

**§ 229.1302 (Item 1302) Qualified person, technical report summary, and technical studies.**

(a)(1) A registrant's disclosure of exploration results, mineral resources, or mineral reserves, as required by §§ 229.1303 and 229.1304, must be based on and accurately reflect information and supporting documentation prepared by a qualified person, as defined in § 229.1300. As used in this section, the term *information* includes the findings and conclusions of a qualified person relating to exploration results or estimates of mineral resources or mineral reserves.

(2) The registrant is responsible for determining that the person meets the qualifications specified under the definition of qualified person in § 229.1300, and that the disclosure in the registrant's filing accurately reflects the information provided by the qualified person.

(3) If a registrant has relied on more than one qualified person to prepare the information and documentation supporting its disclosure of exploration results, mineral resources, or mineral reserves, the registrant's responsibilities as specified in this paragraph (a) pertain to each qualified person.

(b)(1) The registrant must obtain a dated and signed technical report summary from the qualified person that, pursuant to § 229.601(b)(96), identifies and summarizes the information reviewed and conclusions reached by the qualified person about the registrant's mineral resources or mineral reserves determined to be on each material property. At its election, the registrant may also obtain a dated and signed technical report summary from the qualified person that, pursuant to § 229.601(b)(96), identifies and summarizes the information reviewed and conclusions reached by the qualified person about the registrant's exploration results.

(i) Except as provided in paragraph (b)(1)(ii) of this section, if more than one qualified person has prepared the technical report summary, each qualified person must date and sign the technical report summary. The qualified person's signature must comply with § 230.402(e) or § 240.12b–11(d) of this chapter. The technical report summary must also clearly delineate the section or sections of the summary prepared by each qualified person.

(ii) A third-party firm comprising mining experts, such as professional geologists or mining engineers, may date and sign the technical report summary instead of, and without naming, its employee, member or other affiliated person who prepared the technical report summary.

(2)(i) The registrant must file the technical report summary as an exhibit to the relevant registration statement or other Commission filing when disclosing for the first time mineral reserves or mineral resources or when there is a material change in the mineral reserves or mineral resources from the

last technical report summary filed for the property.

(ii) If a registrant files a technical report summary to support the disclosure of exploration results, it must also file a technical report summary when there is a material change in the exploration results from the last technical report summary filed for the property. In each instance, the registrant must file the technical report summary as an exhibit to the relevant Commission filing.

(3)(i) A registrant that has a royalty, streaming, or other similar right is not required to submit a separate technical report summary for a property that is covered by a current technical report summary filed by the producing mining registrant. In that situation, the registrant holding the royalty, streaming, or other similar right should refer to the producing registrant's previously filed technical report summary in its filing with the Commission. Such a reference will not be deemed to incorporate by reference, pursuant to § 230.411 or § 240.12b–23 of this chapter, the previously filed technical report summary into the royalty company's or other similar company's filing absent an express statement to so incorporate by reference the previously filed technical report summary.

(ii) A registrant that has a royalty, streaming, or other similar right is not required to file a technical report summary for an underlying property if the registrant lacks access to the technical report summary because:

(A) Obtaining the information would result in an unreasonable burden or expense; or

(B) It requested the technical report summary from the owner, operator, or other person possessing the technical report summary, who is not affiliated with the registrant, and who denied the request.

(4)(i) The registrant must obtain the written consent of the qualified person to the use of the qualified person's name, or any quotation from, or summarization of, the technical report summary in the relevant registration statement or report, and to the filing of the technical report summary as an exhibit to the registration statement or report.

(ii) Except as provided in paragraph (b)(4)(iii) of this section, if more than one qualified person has prepared the technical report summary, the registrant must obtain the written consent required by this section from each qualified person pertaining to the particular section or sections of the technical report summary prepared by each qualified person.

(iii) If, pursuant to paragraph (b)(1)(ii) of this section, a third-party firm has signed the technical report summary, the third-party firm must provide the written consent. If a qualified person is an employee or person affiliated with the registrant, the qualified person must provide the written consent on an individual basis.

(iv) For Securities Act filings, the registrant must file the written consent as an exhibit to the registration statement pursuant to §§ 230.436 and 230.601(b)(23) of this chapter. For Exchange Act reports, the registrant is not required to file the written consent obtained from the qualified person, but should retain the written consent for as long as it is relying on the qualified person's information and supporting documentation for its current estimates regarding mineral resources, mineral reserves, or exploration results.

(5) The registrant must state in the filed registration statement or report whether each qualified person who prepared the technical report summary is an employee of the registrant. If the qualified person is not an employee of the registrant, the registrant must name the qualified person's employer, disclose whether the qualified person or the qualified person's employer is affiliated with the registrant or another entity that has an ownership, royalty, or other interest in the property that is the subject of the technical report summary, and if affiliated, describe the nature of the affiliation. As used in this section, *affiliate* or *affiliated* has the same meaning as in § 230.405 or § 240.12b–2 of this chapter.

(6)(i) A qualified person may include in the technical report summary information and documentation provided by a third-party specialist who is not a qualified person, as defined in § 229.1300, such as an attorney, appraiser, and economic or environmental consultant, upon which the qualified person has relied in preparing the technical report summary.

(ii) The qualified person may not disclaim responsibility for any information or documentation prepared by a third-party specialist upon which the qualified person has relied, or any part of the technical report summary based upon or related to that information and documentation.

(iii) A registrant is not required to file a written consent of any third-party specialist upon which a qualified person has relied pursuant to paragraph (b)(6)(i) of this section.

(c)(1) A registrant may disclose an exploration target, as defined in § 229.1300, for one or more of its properties that is based upon and accurately reflects information and supporting documentation of a qualified person. The qualified person may include a discussion of an exploration target in a technical report summary.

(2) Any disclosure of an exploration target must appear in a separate section of the Commission filing or technical report summary that is clearly captioned as a discussion of an exploration target. That section must include a clear and prominent statement that:

(i) The ranges of potential tonnage and grade (or quality) of the exploration target are conceptual in nature;

(ii) There has been insufficient exploration of the relevant property or properties to estimate a mineral resource;

(iii) It is uncertain if further exploration will result in the estimation of a mineral resource; and

(iv) The exploration target therefore does not represent, and should not be construed to be, an estimate of a mineral resource or mineral reserve.

(3) Any disclosure of an exploration target must also include:

(i) A detailed explanation of the basis for the exploration target, such as the conceptual geological model used to develop the target;

(ii) An explanation of the process used to determine the ranges of tonnage and grade, which must be expressed as approximations;

(iii) A statement clarifying whether the exploration target is based on actual exploration results or on one or more proposed exploration programs, which should include a description of the level of exploration activity already completed, the proposed exploration activities designed to test the validity of the exploration target, and the time frame in which those activities are expected to be completed; and

(iv) A statement that the ranges of tonnage and grade (or quality) of the exploration target could change as the proposed exploration activities are completed.

(d)(1) A registrant's disclosure of mineral resources under this subpart must be based upon a qualified person's initial assessment, as defined in § 229.1300, which includes and supports the qualified person's determination of mineral resources.

(i) When determining the existence of a mineral resource, a qualified person must:

(A) Be able to estimate or interpret the location, quantity, grade or quality continuity, and other geological characteristics of the mineral resource

from specific geological evidence and knowledge, including sampling; and

(B) Conclude that there are reasonable prospects for economic extraction of the mineral resource based on his or her initial assessment. At a minimum, the initial assessment must include the qualified person's qualitative evaluation of relevant technical and economic factors likely to influence the prospect of economic extraction to establish the economic potential of the mining property or project.

(ii) For a material property, the technical report summary submitted by the qualified person to support a determination of mineral resources must describe the procedures, findings and conclusions reached for the initial assessment, as required by § 229.601(b)(96).

(iii)(A) When determining mineral resources, a qualified person must subdivide mineral resources, in order of increasing geological confidence, into inferred, indicated, and measured mineral resources.

(B) For inferred mineral resources, a qualified person:

(*1*) Must have a reasonable expectation that the majority of inferred mineral resources could be upgraded to indicated or measured mineral resources with continued exploration; and

(*2*) Should be able to defend the basis of this expectation before his or her peers.

(iv) The qualified person should refer to Table 1 to paragraph (d) of this section for the assumptions permitted to be made when preparing the initial assessment.

(2) A qualified person must include cut-off grade estimation, based on assumed unit costs for surface or underground operations and estimated mineral prices, in the initial assessment. To estimate mineral prices, the qualified person must use a price for each commodity that provides a reasonable basis for establishing the prospects of economic extraction for mineral resources. The qualified person must disclose the price used and explain, with particularity, his or her reasons for using the selected price, including the material assumptions underlying the selection. This explanation must include disclosure of the time frame used to estimate the commodity price and unit costs for cut-off grade estimation and the reasons justifying the selection of that time frame. The qualified person may use a price set by contractual arrangement, provided that such price is reasonable, and the qualified person discloses that he or she is using a contractual price when disclosing the price used. The selected price required by this section and all material assumptions underlying it must be current as of the end of the registrant's most recently completed fiscal year.

(3) The qualified person must provide a qualitative assessment of all relevant technical and economic factors likely to influence the prospect of economic extraction to establish economic potential and justify why he or she believes that all issues can be resolved with further exploration and analysis. As provided by Table 1 to paragraph (d) of this section, those factors include, but are not limited to, to the extent material:

(i) Site infrastructure (*e.g.,* whether access to power and site is possible);

(ii) Mine design and planning (*e.g.,* what is the broadly defined mining method);

(iii) Processing plant (*e.g.,* whether all products used in assessing prospects of economic extraction can be processed with methods consistent with each other);

(iv) Environmental compliance and permitting (*e.g.,* what are the required permits and corresponding agencies and whether significant obstacles exist to obtaining those permits); and

(v) Any other reasonably assumed technical and economic factors, including plans, negotiations, or agreements with local individuals or groups, which are necessary to demonstrate reasonable prospects for economic extraction.

(4)(i) A qualified person may include cash flow analysis in an initial assessment to demonstrate economic potential. If the qualified person includes cash flow analysis in the initial assessment, then operating and capital cost estimates must have an accuracy level of at least approximately ±50% and a contingency level of no greater than 25%, as provided by Table 1 to paragraph (d) of this section. The qualified person must state the accuracy and contingency levels in the initial assessment.

(ii) If providing an economic analysis in the initial assessment, a qualified person may include inferred mineral resources in the economic analysis, provided that the qualified person:

(A) States with equal prominence to the disclosure of mineral resource estimates that the assessment is preliminary in nature, it includes inferred mineral resources that are considered too speculative geologically to have modifying factors applied to them that would enable them to be categorized as mineral reserves, and there is no certainty that this economic assessment will be realized;

(B) Discloses the percentage of the mineral resources used in the cash flow analysis that was classified as inferred mineral resources; and

(C) Discloses, with equal prominence, the results of the economic analysis excluding inferred mineral resources in addition to the results that include inferred mineral resources.

TABLE 1 TO PARAGRAPH (d)—SUMMARY DESCRIPTION OF RELEVANT FACTORS EVALUATED IN TECHNICAL STUDIES

| Factors [1] | Initial assessment | Preliminary feasibility study | Feasibility study |
|---|---|---|---|
| Site infrastructure .... | Establish whether or not access to power and site is possible. Assume infrastructure location, plant area required, type of power supply, site access roads, and camp/town site, if required. | Required access roads, infrastructure location and plant area defined. Source of all utilities (power, water, etc.) required for development and production defined with initial designs suitable for cost estimates. Camp/Town site finalized. | Required access roads, infrastructure location and plant area finalized. Source of all required utilities (power, water, etc.) for development and production finalized. Camp/Town site finalized. |
| Mine design & planning. | Mining method defined broadly as surface or underground. Production rates assumed. | Preferred underground mining method or the pit configuration for surface mine defined. Detailed mine layouts drawn for each alternative. Development and production plan defined for each alternative with required equipment fleet specified. | Mining method finalized. Detailed mine layouts finalized for preferred alternative. Development and production plan finalized for preferred alternative with required equipment fleet specified. |

TABLE 1 TO PARAGRAPH (d)—SUMMARY DESCRIPTION OF RELEVANT FACTORS EVALUATED IN TECHNICAL STUDIES—Continued

| Factors [1] | Initial assessment | Preliminary feasibility study | Feasibility study |
|---|---|---|---|
| Processing plant | Establish that all products used in assessing prospects of economic extraction can be processed with methods consistent with each other. Processing method and plant throughput assumed. | Detailed bench lab tests conducted. Detailed process flow sheet, equipment sizes, and general arrangement completed. Detailed plant throughput specified. | Detailed bench lab tests conducted. Pilot plant test completed, if required, based on risk. Process flow sheet, equipment sizes, and general arrangement finalized. Final plant throughput specified. |
| Environmental compliance & permitting. | List of required permits & agencies drawn. Determine if significant obstacles exist to obtaining permits. Identify pre-mining land uses. Assess requirements for baseline studies. Assume post-mining land uses. Assume tailings disposal, reclamation, and mitigation plans. | Identification and detailed analysis of environmental compliance and permitting requirements. Detailed baseline studies with preliminary impact assessment (internal). Detailed tailings disposal, reclamation, and mitigation plans. | Identification and detailed analysis of environmental compliance and permitting requirements finalized. Completed baseline studies with final impact assessment (internal). Tailings disposal, reclamation, and mitigation plans finalized. |
| Other relevant factors [2]. | Appropriate assessments of other reasonably assumed technical and economic factors necessary to demonstrate reasonable prospects for economic extraction. | Reasonable assumptions, based on appropriate testing, on the modifying factors sufficient to demonstrate that extraction is economically viable. | Detailed assessments of modifying factors necessary to demonstrate that extraction is economically viable. |
| Capital costs | Optional.[3] If included: Accuracy: ±50%. Contingency: ≤25%. | Accuracy: ±25% Contingency: ≤15%. | Accuracy: ±15%. Contingency: ≤10%. |
| Operating costs | Optional.[3] If included: Accuracy: ±50%. Contingency: ≤25%. | Accuracy: ±25% Contingency: ≤15%. | Accuracy: ±15%. Contingency: ≤10%. |
| Economic analysis [4] | Optional. If included: Taxes and revenues are assumed. Discounted cash flow analysis based on assumed production rates and revenues from available measured and indicated mineral resources. | Taxes described in detail; revenues are estimated based on at least a preliminary market study; economic viability assessed by detailed discounted cash flow analysis. | Taxes described in detail; revenues are estimated based on at least a final market study or possible letters of intent to purchase; economic viability assessed by detailed discounted cash flow analysis. |

[1] When applied in an initial assessment, these factors pertain to the relevant technical and economic factors likely to influence the prospect of economic extraction. When applied in a preliminary or final feasibility study, these factors pertain to the modifying factors, as defined in this subpart.

[2] The relevant technical and economic factors to be applied in an initial assessment, and the modifying factors to be applied in a pre-feasibility or final feasibility study, include, but are not limited to, the factors listed in this table. The number, type, and specific characteristics of the applicable factors will be a function of and depend upon the particular mineral, mine, property, or project.

[3] Initial assessment, as defined in this subpart, does not require a cash flow analysis or operating and capital cost estimates. The qualified person may include a cash flow analysis at his or her discretion.

[4] An initial assessment does not require capital and operating cost estimates or economic analysis, although it requires unit cost assumptions based on an assumption that the resource will be exploited with surface or underground mining methods. An economic analysis, if included, may be based only on measured and indicated mineral resources, or also may include inferred resources if additional conditions are met.

(e)(1) A registrant's disclosure of mineral reserves under this subpart must be based upon a qualified person's preliminary feasibility (pre-feasibility) study or feasibility study, each as defined in § 229.1300, which includes and supports the qualified person's determination of mineral reserves. The pre-feasibility or feasibility study must include the qualified person's detailed evaluation of all applicable modifying factors to demonstrate the economic viability of the mining property or project. For a material property, the technical report summary submitted by the qualified person to support a determination of mineral reserves must describe the procedures, findings and conclusions reached for the pre-feasibility or feasibility study, as required by § 229.601(b)(96).

(2) When determining mineral reserves, a qualified person must subdivide mineral reserves, in order of increasing confidence, into probable mineral reserves and proven mineral reserves, as defined in § 229.1300. The determination of probable or proven mineral reserves must be based on a qualified person's application of the modifying factors to indicated or measured mineral resources, which results in the qualified person's determination that part of the indicated or measured mineral resource is economically mineable.

(i) For a probable mineral reserve, the qualified person's confidence in the results obtained from the application of the modifying factors and in the estimates of tonnage and grade or quality is lower than what is sufficient for a classification as a proven mineral reserve, but is still sufficient to demonstrate that, at the time of reporting, extraction of the mineral reserve is economically viable under reasonable investment and market assumptions. The lower level of confidence is due to higher geologic uncertainty when the qualified person converts an indicated mineral resource to a probable reserve or higher risk in the results of the application of modifying factors at the time when the qualified person converts a measured mineral resource to a probable mineral reserve. A qualified person must classify a measured mineral resource as a probable mineral reserve when his or her confidence in the results obtained from the application of the modifying factors to the measured mineral resource is lower than what is sufficient for a proven mineral reserve.

(ii) For a proven mineral reserve, the qualified person must have a high degree of confidence in the results obtained from the application of the modifying factors and in the estimates of tonnage and grade or quality.

(3) The pre-feasibility study or feasibility study, which supports the qualified person's determination of mineral reserves, must demonstrate that, at the time of reporting, extraction of the mineral reserve is economically viable under reasonable investment and market assumptions. The study must establish a life of mine plan that is technically achievable and economically viable, which will be the basis of determining the mineral reserve.

(i) The term *mineral reserves* does not necessarily require that extraction facilities are in place or operational, that the company has obtained all necessary permits or that the company has entered into sales contracts for the sale of mined products. It does require, however, that the qualified person has, after reasonable investigation, not identified any obstacles to obtaining permits and entering into the necessary sales contracts, and reasonably believes that the chances of obtaining such approvals and contracts in a timely manner are highly likely.

(ii) In certain circumstances, the determination of mineral reserves may require the completion of at least a preliminary market study, as defined in § 229.1300, in the context of a pre-feasibility study, or a final market study, as defined in § 229.1300, in the context of a feasibility study, to support the qualified person's conclusions about the chances of obtaining revenues from sales. For example, a preliminary or final market study would be required where the mine's product cannot be traded on an exchange, there is no other established market for the product, and no sales contract exists. When assessing mineral reserves, the qualified person must take into account the potential adverse impacts, if any, from any unresolved material matter on which extraction is contingent and which is dependent on a third party.

(4) For both a pre-feasibility and feasibility study, a qualified person must use a price for each commodity that provides a reasonable basis for establishing that the project is economically viable. The qualified person must disclose the price used and explain, with particularity, his or her reasons for using the selected price, including the material assumptions underlying the selection. This explanation must include disclosure of the time frame used to estimate the price and costs and the reasons justifying the selection of that time frame. The qualified person may use a price set by contractual arrangement, provided that such price is reasonable, and the qualified person discloses that he or she is using a contractual price when disclosing the price used. The selected price required by this section and all material assumptions underlying it must be current as of the end of the registrant's most recently completed fiscal year.

(5) A pre-feasibility study must include an economic analysis that supports the property's economic viability as assessed by a detailed discounted cash flow analysis or other similar financial analysis. The economic analysis must describe in detail applicable taxes and provide an estimate of revenues. The qualified person must use a price for each commodity in the economic analysis that meets the requirements of paragraph (e)(4) of this section. As discussed in paragraph (e)(3) of this section, in certain situations, estimates of revenues must be based on at least a preliminary market study.

(6) The qualified person must exclude inferred mineral resources from the pre-feasibility study's demonstration of economic viability in support of a disclosure of a mineral reserve.

(7) Factors to be considered in a pre-feasibility study are typically the same as those required for a final feasibility study, but considered at a lower level of detail or at an earlier stage of development. The list of factors is not exclusive. For example, as provided in Table 1 to paragraph (d) of this section, a pre-feasibility study must define, analyze or otherwise address in detail, to the extent material:

(i) The required access roads, infrastructure location and plant area, and the source of all utilities (*e.g.,* power and water) required for development and production;

(ii) The preferred underground mining method or surface mine pit configuration, with detailed mine layouts drawn for each alternative;

(iii) The bench lab tests that have been conducted, the process flow sheet, equipment sizes, and general arrangement that have been completed, and the plant throughput;

(iv) The environmental compliance and permitting requirements, the baseline studies, and the plans for tailings disposal, reclamation, and mitigation, together with an analysis establishing that permitting is possible; and

(v) Any other reasonable assumptions, based on appropriate testing, on the modifying factors sufficient to demonstrate that extraction is economically viable.

(8) A pre-feasibility study must also identify sources of uncertainty that require further refinement in a final feasibility study.

(9) Operating and capital cost estimates in a pre-feasibility study must, at a minimum, have an accuracy level of approximately ±25% and a contingency range not exceeding 15%, as provided in Table 1 of this section. The qualified person must state the accuracy level and contingency range in the pre-feasibility study.

(10) A feasibility study must contain the application and description of all relevant modifying factors in a more detailed form and with more certainty than a pre-feasibility study. The list of factors is not exclusive. For example, as provided in Table 1 to paragraph (d) of this section, a feasibility study must define, analyze, or otherwise address in detail, to the extent material:

(i) Final requirements for site infrastructure, including well-defined access roads, finalized plans for infrastructure location, plant area, and camp or town site, and the established source of all required utilities (*e.g.,* power and water) for development and production;

(ii) Finalized mining method, including detailed mine layouts and final development and production plan for the preferred alternative with the required equipment fleet specified. The feasibility study must address detailed mining schedules, construction and production ramp up, and project execution plans;

(iii) Completed detailed bench lab tests and a pilot plant test, if required, based on risk. The feasibility study must further address final requirements for process flow sheet, equipment sizes, and general arrangement and specify the final plant throughput;

(iv) The final identification and detailed analysis of environmental compliance and permitting requirements, and the completion of baseline studies and finalized plans for tailings disposal, reclamation, and mitigation; and

(v) The final assessments of other modifying factors necessary to demonstrate that extraction is economically viable.

(11) A feasibility study must also include an economic analysis that describes taxes in detail, estimates revenues, and assesses economic viability by a detailed discounted cash flow analysis. The qualified person must use a price for each commodity in the economic analysis that meets the requirements of paragraph (e)(4) of this section. As discussed in paragraph (e)(3) of this section, in certain situations, estimates of revenues must be based on

a final market study or letters of intent to purchase.

(12) Operating and capital cost estimates in a feasibility study must, at a minimum, have an accuracy level of approximately ±15% and a contingency range not exceeding 10%, as provided by Table 1 of this section. The qualified person must state the accuracy level and contingency range in the feasibility study.

(13) If the uncertainties in the results obtained from the application of the modifying factors that prevented a measured mineral resource from being converted to a proven mineral reserve no longer exist, then the qualified person may convert the measured mineral resource to a proven mineral reserve.

(14) The qualified person cannot convert an indicated mineral resource to a proven mineral reserve unless new evidence first justifies conversion to a measured mineral resource.

(15) The qualified person cannot convert an inferred mineral resource to a mineral reserve without first obtaining new evidence that justifies converting it to an indicated or measured mineral resource.

(f)(1) The qualified person may indicate in the technical report summary that the qualified person has relied on information provided by the registrant in preparing its findings and conclusions regarding the following aspects of modifying factors:

(i) Macroeconomic trends, data, and assumptions, and interest rates;

(ii) Marketing information and plans within the control of the registrant;

(iii) Legal matters outside the expertise of the qualified person, such as statutory and regulatory interpretations affecting the mine plan;

(iv) Environmental matters outside the expertise of the qualified person;

(v) Accommodations the registrant commits or plans to provide to local individuals or groups in connection with its mine plans; and

(vi) Governmental factors outside the expertise of the qualified person.

(2) In a separately captioned section of the technical report summary entitled ''Reliance on Information Provided by the Registrant,'' the qualified person must:

(i) Identify the categories of information provided by the registrant;

(ii) Identify the particular portions of the technical report summary that were prepared in reliance on information provided by the registrant pursuant to paragraph (f)(1) of this section, and the extent of that reliance; and

(iii) Disclose why the qualified person considers it reasonable to rely upon the registrant for any of the information specified in paragraph (f)(1) of this section.

(3) Notwithstanding the provisions of § 230.436(a) and (b) of this chapter, any description in the technical report summary or other part of the registration statement of the procedures, findings, and conclusions reached about matters identified by the qualified person as having been based on information provided by the registrant pursuant to this section shall not be considered a part of the registration statement prepared or certified by the qualified person within the meaning of Sections 7 and 11 of the Securities Act.

**§ 229.1303 (Item 1303) Summary disclosure.**

(a)(1) A registrant that has material mining operations, as determined pursuant to § 229.1301, and two or more mining properties, must provide the information specified in paragraph (b) of this section for all properties that the registrant:

(i) Owns or in which it has, or it is probable that it will have, a direct or indirect economic interest;

(ii) Operates, or it is probable that it will operate, under a lease or other legal agreement that grants the registrant ownership or similar rights that authorize it, as principal, to sell or otherwise dispose of the mineral; or

(iii) Has, or it is probable that it will have, an associated royalty or similar right.

(2) A registrant that has material mining operations but only one mining property is not required to provide the information specified in paragraph (b) of this section. That registrant need only provide the disclosure required by § 229.1304 for the mining property that is material to its business.

(3) A registrant that has a royalty, streaming or other similar right, but which lacks access to any of the information specified in paragraph (b) of this section about the underlying properties, may omit such information, provided that the registrant:

(i) Specifies the information to which it lacks access;

(ii) Explains that it does not have access to the required information because:

(A) Obtaining the information would result in an unreasonable burden or expense; or

(B) It requested the information from a person possessing knowledge of the information, who is not affiliated with the royalty company or similar registrant, and who denied the request; and

(iii) Provides all required information that it does possess or which it can acquire without incurring an unreasonable burden or expense.

(b) Disclose the following information for all properties specified in paragraph (a) of this section:

(1) A map or maps, of appropriate scale, showing the locations of all properties. Such maps should be legible on the page when printed.

(2) An overview of the registrant's mining properties and operations. This overview may be presented in narrative or tabular format.

(i) The overview must include aggregate annual production for the properties during each of the three most recently completed fiscal years preceding the filing.

(ii) The overview should include, as relevant, the following items of information for the mining properties considered in the aggregate:

(A) The location of the properties;

(B) The type and amount of ownership interests;

(C) The identity of the operator or operators;

(D) Titles, mineral rights, leases or options and acreage involved;

(E) The stages of the properties (exploration, development or production);

(F) Key permit conditions;

(G) Mine types and mineralization styles; and

(H) Processing plants and other available facilities.

(iii) When presenting the overview, the registrant should include the amount and type of disclosure concerning its mining properties that is material to an investor's understanding of the registrant's properties and mining operations in the aggregate. This disclosure will depend upon a registrant's specific facts and circumstances and may vary from registrant to registrant. A registrant should refer to, rather than duplicate, any disclosure concerning individually material properties provided in response to § 229.1304.

(iv) A registrant with only a royalty or similar economic interest should provide only the portion of the production that led to royalty or other incomes for each of the three most recently completed fiscal years.

(3) A summary of all mineral resources and mineral reserves, as determined by the qualified person, at the end of the most recently completed fiscal year by commodity and geographic area and for each property containing 10% or more of the registrant's combined measured and indicated mineral resources or containing 10% or more of the registrant's mineral reserves. This

summary must be provided for each class of mineral resources (inferred, indicated, and measured), together with total measured and indicated mineral resources, and each class of mineral reserves (probable and proven), together with total mineral reserves, using the format in Table 1 to paragraph (b) of this section for mineral resources, and the format in Table 2 to paragraph (b) of this section for mineral reserves.

(i) The term *by geographic area* means by individual country, regions of a country, state, groups of states, mining district, or other political units, to the extent material to and necessary for an investor's understanding of a registrant's mining operations.

(ii) All disclosure of mineral resources by the registrant must be exclusive of mineral reserves.

(iii) All disclosure of mineral resources and reserves must be only for the portion of the resources or reserves attributable to the registrant's interest in the property.

(iv) Each mineral resource and reserve estimate must be based on a reasonable and justifiable price selected by a qualified person pursuant to § 229.1302(d) or (e), which provides a reasonable basis for establishing the prospects of economic extraction for mineral resources, and is the expected price for mineral reserves.

(v) Each mineral resource and reserve estimate called for in Tables 1 and 2 to paragraph (b) of this section must be based on a specific point of reference selected by a qualified person. The registrant must disclose the selected point of reference for each of Tables 1 and 2 to paragraph (b) of this section.

(vi) The registrant may modify the tabular formats in Tables 1 and 2 to paragraph (b) of this section for ease of presentation or to add information.

(vii) All material assumptions and information pertaining to the summary disclosure of a registrant's mineral resources and mineral reserves required by this section, including material assumptions related to price estimates, must be current as of the end of the registrant's most recently completed fiscal year.

TABLE 1 TO PARAGRAPH (b)—SUMMARY MINERAL RESOURCES AT END OF THE FISCAL YEAR ENDED [DATE] BASED ON [PRICE] [1]

| | Measured mineral resources | | Indicated mineral resources | | Measured + indicated mineral resources | | Inferred mineral resources | |
|---|---|---|---|---|---|---|---|---|
| | Amount | Grades/ qualities | Amount | Grades/ qualities | Amount | Grades/ qualities | Amount | Grades/ qualities |
| Commodity A: | | | | | | | | |
| Geographic area A | | | | | | | | |
| Geographic area B | | | | | | | | |
| Mine/Property A | | | | | | | | |
| Mine/Property B | | | | | | | | |
| Other mines/properties | | | | | | | | |
| Other geographic areas | | | | | | | | |
| Total | | | | | | | | |
| Commodity B: | | | | | | | | |
| Geographic area A | | | | | | | | |
| Geographic area B | | | | | | | | |
| Mine/Property A | | | | | | | | |
| Mine/Property B | | | | | | | | |
| Other mines/properties | | | | | | | | |
| Other geographic areas | | | | | | | | |
| Total | | | | | | | | |

[1]The registrant must use a reasonable and justifiable price for each commodity, which it must disclose, together with the time frame and point of reference used, when estimating mineral resources for this Table 1.

TABLE 2 TO PARAGRAPH (b)—SUMMARY MINERAL RESERVES AT END OF THE FISCAL YEAR ENDED [DATE] BASED ON [PRICE] [1]

| | Proven mineral reserves | | Probable mineral reserves | | Total mineral reserves | |
|---|---|---|---|---|---|---|
| | Amount | Grades/ qualities | Amount | Grades/ qualities | Amount | Grades/ qualities |
| Commodity A: | | | | | | |

TABLE 2 TO PARAGRAPH (b)—SUMMARY MINERAL RESERVES AT END OF THE FISCAL YEAR ENDED [DATE] BASED ON [PRICE] [1]—Continued

| | Proven mineral reserves | | Probable mineral reserves | | Total mineral reserves | |
|---|---|---|---|---|---|---|
| | Amount | Grades/ qualities | Amount | Grades/ qualities | Amount | Grades/ qualities |
| Geographic area A | | | | | | |
| Geographic area B | | | | | | |
| Mine/Property A | | | | | | |
| Mine/Property B | | | | | | |
| Other mines/properties | | | | | | |
| Other geographic areas | | | | | | |
| Total | | | | | | |
| Commodity B: | | | | | | |
| Geographic area A | | | | | | |
| Geographic area B | | | | | | |
| Mine/Property A | | | | | | |
| Mine/Property B | | | | | | |
| Other mines/properties | | | | | | |
| Other geographic areas | | | | | | |
| Total | | | | | | |

[1] The registrant must use a reasonable and justifiable price for each commodity, which it must disclose, together with the time frame and point of reference used, when estimating mineral reserves for this Table 2.

**§ 229.1304 (Item 1304) Individual property disclosure.**

(a)(1) A registrant must disclose the information specified in this section for each property that is material to its business or financial condition. When determining the materiality of a property relative to its business or financial condition, a registrant must apply the standards and other considerations specified in § 229.1301(c) to each individual property that it:

(i) Owns or in which it has, or it is probable that it will have, a direct or indirect economic interest;

(ii) Operates, or it is probable that it will operate, under a lease or other legal agreement that grants the registrant ownership or similar rights that authorize it, as principal, to sell or otherwise dispose of the mineral; or

(iii) Has, or it is probable that it will have, an associated royalty or similar right.

(2) A registrant that has a royalty, streaming or other similar right, but which lacks access to any of the information specified in this section about the underlying property or properties, may omit such information, provided that the registrant:

(i) Specifies the information to which it lacks access;

(ii) Explains that it does not have access to the required information because:

(A) Obtaining the information would result in an unreasonable burden or expense; or

(B) It requested the information from a person possessing knowledge of the information, who is not affiliated with the with the royalty company or similar registrant, and who denied the request; and

(iii) Provides all required information that it does possess or which it can acquire without incurring an unreasonable burden or expense.

(b) Disclose the following information for each material property specified in paragraph (a) of this section:

(1) A brief description of the property including:

(i) The location, accurate to within one mile, using an easily recognizable coordinate system. The registrant must provide appropriate maps, with proper engineering detail (such as scale, orientation, and titles). Such maps must be legible on the page when printed;

(ii) Existing infrastructure including roads, railroads, airports, towns, ports, sources of water, electricity, and personnel; and

(iii) A brief description, including the name or number and size (acreage), of the titles, claims, concessions, mineral rights, leases or options under which the registrant and its subsidiaries have or will have the right to hold or operate the property, and how such rights are obtained at this location, indicating any conditions that the registrant must meet in order to obtain or retain the property. If held by leases or options or if the mineral rights otherwise have termination provisions, the registrant must provide the expiration dates of such leases, options or mineral rights and associated payments.

(iv) Except as provided in paragraph (a)(2) of this section, if the registrant holds a royalty or similar interest or will have an associated royalty or similar right, the disclosure must describe all of the information in paragraph (b)(1) of this section, including, for example, the documents under which the owner or operator holds or operates the property,

the mineral rights held by the owner or operator, conditions required to be met by the owner or operator, and the expiration dates of leases, options and mineral rights. The registrant must also briefly describe the agreement under which the registrant and its subsidiaries have or will have the right to a royalty or similar interest in the property, indicating any conditions that the registrant must meet in order to obtain or retain the royalty or similar interest, and indicating the expiration date.

(2) The following information, as relevant to the particular property:

(i) A brief description of the present condition of the property, the work completed by the registrant on the property, the registrant's proposed program of exploration or development, the current stage of the property as exploration, development or production, the current state of exploration or development of the property, and the current production activities. Mines should be identified as either surface or underground, with a brief description of the mining method and processing operations. If the property is without known reserves and the proposed program is exploratory in nature or the registrant has started extraction without determining mineral reserves, the registrant must provide a statement to that effect;

(ii) The age, details as to modernization and physical condition of the equipment, facilities, infrastructure, and underground development;

(iii) The total cost for or book value of the property and its associated plant and equipment;

(iv) A brief history of previous operations, including the names of previous operators, insofar as known; and

(v) A brief description of any significant encumbrances to the property, including current and future permitting requirements and associated timelines, permit conditions, and violations and fines.

(c) When providing the disclosure required by paragraph (b) of this section:

(1) A registrant must identify an individual property with no mineral reserves as an exploration stage property, even if it has other properties in development or production. Similarly, a registrant that does not have reserves on any of its properties cannot characterize itself as a development or production stage company, even if it has mineral resources or exploration results, or even if it is engaged in extraction without first disclosing mineral reserves.

(2) A registrant should not include extensive description of regional geology. Rather, it should include geological information that is brief and relevant to property disclosure.

(d)(1) If mineral resources or reserves have been determined, the registrant must provide a summary of all mineral resources or reserves as of the end of the most recently completed fiscal year, which, for each property, discloses in tabular form, as provided in Table 1 to paragraph (d)(1) of this section for each class of mineral resources (measured, indicated, and inferred), together with total measured and indicated mineral resources, the estimated tonnages and grades (or quality, where appropriate), and as provided in Table 2 to paragraph (d)(1) of this section for each class of mineral reserves (proven and probable), together with total mineral reserves, the estimated tonnages, grades (or quality, where appropriate), cut-off grades, and metallurgical recovery, based on a specific point of reference selected by a qualified person pursuant to § 229.601(b)(96). The registrant must disclose the selected point of reference for each of Tables 1 and 2 to paragraph (d)(1) of this section.

TABLE 1 TO PARAGRAPH (D)(1)—[INDIVIDUAL PROPERTY NAME]—SUMMARY OF [COMMODITY/COMMODITIES] MINERAL RESOURCES AT THE END OF THE FISCAL YEAR ENDED [DATE] BASED ON [PRICE] [1]

| | Resources | | Cut-off grades | Metallurgical recovery |
|---|---|---|---|---|
| | Amount | Grades/ qualities | | |
| Measured mineral resources | | | | |
| Indicated mineral resources | | | | |
| Measured + Indicated mineral resources | | | | |
| Inferred mineral resources | | | | |

[1] The registrant must use a reasonable and justifiable price, which it must disclose, together with the time frame and point of reference used, when estimating mineral resources for this Table 1.

TABLE 2 TO PARAGRAPH (D)(1)—[INDIVIDUAL PROPERTY NAME]—SUMMARY OF [COMMODITY/COMMODITIES] MINERAL RESERVES AT THE END OF THE FISCAL YEAR ENDED [DATE] BASED ON [PRICE] [1]

| | Amount | Grades/ qualities | Cut-off grades | Metallurgical recovery |
|---|---|---|---|---|
| Proven mineral reserves | | | | |
| Probable mineral reserves | | | | |
| Total mineral reserves | | | | |

[1] The registrant must use a reasonable and justifiable price for each commodity, which it must disclose, together with the time frame and point of reference used, when estimating mineral reserves for this Table 2.

*Instruction 1 to paragraph (d)(1):* The registrant may modify the tabular formats in Tables 1 and 2 to paragraph (d)(1) of this section for ease of presentation, to add information, or to combine two or more required tables. When combining tables, the registrant should not report mineral resources and reserves in the same table.

(2) All disclosure of mineral resources by the registrant must be exclusive of mineral reserves.

(3) A registrant with only a royalty or similar interest should provide only the portion of the resources or reserves that are subject to the royalty or similar agreement.

(e) Compare the property's mineral resources and reserves as of the end of the last fiscal year with the mineral resources and reserves as of the end of

the preceding fiscal year, and explain any material change between the two. The comparison, which may be in either narrative or tabular format, must disclose information concerning:

(1) The mineral resources or reserves at the end of the last two fiscal years;

(2) The net difference between the mineral resources or reserves at the end of the last completed fiscal year and the preceding fiscal year, as a percentage of the resources or reserves at the end of the fiscal year preceding the last completed one;

(3) An explanation of the causes of any discrepancy in mineral resources including depletion or production, changes in commodity prices, additional resources discovered through exploration, and changes due to the methods employed; and

(4) An explanation of the causes of any discrepancy in mineral reserves including depletion or production, changes in the resource model, changes in commodity prices and operating costs, changes due to the methods employed, and changes due to acquisition or disposal of properties.

(f)(1) If the registrant has not previously disclosed mineral reserve or resource estimates in a filing with the Commission or is disclosing material changes to its previously disclosed mineral reserve or resource estimates, provide a brief discussion of the material assumptions and criteria in the disclosure and cite corresponding sections of the technical report summary, which must be filed as an exhibit pursuant to § 229.1302(b).

(2) All material assumptions and information pertaining to the disclosure of a registrant's mineral resources and mineral reserves required by paragraphs (d), (e), and (f) of this section, including material assumptions relating to all modifying factors, price estimates, and scientific and technical information (*e.g.,* sampling data, estimation assumptions and methods), must be current as of the end of the registrant's most recently completed fiscal year. To the extent that the registrant is not filing a technical report summary but instead is basing the required disclosure upon a previously filed report, that report must also be current in these material respects. If the previously filed report is not current in these material respects, the registrant must file a revised or new technical report summary from a qualified person, in compliance with § 229.601(b)(96) (Item 601(b)(96) of Regulation S–K), that supports the registrant's mining property disclosures.

(3) Regarding the disclosure required by paragraphs (e) and (f) of this section, whether a change in mineral resources or mineral reserves is material is based on all facts and circumstances, both quantitative and qualitative.

(g)(1) If disclosing exploration activity for any material property specified in paragraph (a) of this section for the most recently completed fiscal year, provide a summary that describes the sampling methods used, and, for each sampling method used, disclose the number of samples, the total size or length of the samples, and the total number of assays.

(2) If disclosing exploration results for any material property specified in paragraph (a) of this section for the most recently completed fiscal year, provide a summary that, for each property, identifies the hole, trench or other sample that generated the exploration results, describes the length, lithology, and key geologic properties of the exploration results, and includes a brief discussion of the exploration results' context and relevance. If the summary only includes results from selected samples and intersections, it should be accompanied with a discussion of the context and justification for excluding other results.

(3) The information disclosed under this paragraph (g) may be presented in either narrative or tabular format.

(4) A registrant must disclose exploration results and related exploration activity for a material property under this section if they are material to investors. When determining whether exploration results and related exploration activity are material, the registrant should consider all relevant facts and circumstances, such as the importance of the exploration results in assessing the value of a material property or in deciding whether to develop the property, and the particular stage of the property.

(5) A registrant may disclose an exploration target when discussing exploration results or exploration activity related to a material property as long as the disclosure is in compliance with the requirements of § 229.1302(c).

(6)(i) If the registrant is disclosing exploration results, but has not previously disclosed such results in a filing with the Commission, or is disclosing material changes to its previously disclosed exploration results, it must provide sufficient information to allow for an accurate understanding of the significance of the exploration results. The registrant must include information such as exploration context, type and method of sampling, sampling intervals and methods, relevant sample locations, distribution, dimensions, and relative location of all relevant assay and physical data, data aggregation methods, land tenure status, and any additional material information that may be necessary to make the required disclosure concerning the registrant's exploration results not misleading. If electing to file a technical report summary, the registrant must cite corresponding sections of the technical report summary, which must be filed as an exhibit pursuant to § 229.1302(b).

(ii) Whether a change in exploration results is material is based on all facts and circumstances, both quantitative and qualitative.

(iii) A change in exploration results that significantly alters the potential of the subject deposit is considered material.

(h) A report containing one or more estimates of the quantity, grade, or metal or mineral content of a deposit or exploration results that a registrant has not verified as a current estimate of mineral resources, mineral reserves, or exploration results, and which was prepared before the registrant acquired, or entered into an agreement to acquire, an interest in the property that contains the deposit, is not considered current and cannot be filed in support of disclosure. Notwithstanding this prohibition, a registrant may include such an estimate in a Commission filing that pertains to a merger, acquisition, or business combination if the registrant is unable to update the estimate prior to the completion of the relevant transaction. In that event, when referring to the estimate, the registrant must disclose the source and date of the estimate, and state that a qualified person has not done sufficient work to classify the estimate as a current estimate of mineral resources, mineral reserves, or exploration results and that the registrant is not treating the estimate as a current estimate of mineral resources, mineral reserves, or exploration results.

**§ 229.1305 (Item 1305) Internal controls disclosure.**

(a) Describe the internal controls that the registrant uses in its exploration and mineral resource and reserve estimation efforts. This disclosure should include quality control and quality assurance (QC/QA) programs, verification of analytical procedures, and a discussion of comprehensive risk inherent in the estimation.

(b) A registrant must provide the internal controls disclosure required by this section whether it is providing the disclosure under § 229.1303, § 229.1304, or under both sections.

## PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 7. The general authority citation for part 230 continues to read in part as follows:

**Authority:** 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78*o,* 78*o*–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Public Law 112–106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

■ 8. Amend § 230.436 by adding paragraph (h) to read as follows:

**§ 230.436 Consents required in special cases.**

* * * * *

(h) Notwithstanding the provisions of paragraphs (a) and (b) of this section, any description about matters identified by a qualified person pursuant to § 229.1302(f) of this chapter shall not be considered a part of the registration statement prepared or certified by the qualified person within the meaning of Sections 7 and 11 of the Securities Act.

## PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 9. The general authority citation for part 239 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l,* 78m, 78n, 78*o*(d), 78*o*–7 note, 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37; and sec. 107, Public Law 112–106, 126 Stat. 312, unless otherwise noted.

* * * * *

■ 10. Amend Form 1–A (referenced in § 239.90) by:

■ a. Designating the introductory text of Item 8 under Part II as paragraph (a);

■ b. Adding paragraph (b) to Item 8 under Part II;

■ c. Revising the Instruction to Item 8 under Part II;

■ d. Redesignating paragraph (15) as paragraph (16) of Item 17 (Description of Exhibits) under Part III; and

■ e. Adding new paragraph (15) of Item 17 (Description of Exhibits) under Part III.

The additions and revision read as follows:

**Note:** The text of Form 1–A does not, and these amendments will not, appear in the Code of Federal Regulations.

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM 1–A**

**REGULATION A OFFERING STATEMENT UNDER THE SECURITIES ACT OF 1933**

* * * * *

**PART II—INFORMATION REQUIRED IN OFFERING CIRCULAR**

* * * * *

**OFFERING CIRCULAR**

* * * * *

**Item 8. Description of Property**

(a) State briefly the location and general character of any principal plants or other material physical properties of the issuer and its subsidiaries. If any such property is not held in fee or is held subject to any major encumbrance, so state and briefly describe how held. Include information regarding the suitability, adequacy, productive capacity and extent of utilization of the properties and facilities used in the issuer's business.

(b) Issuers engaged in mining operations must refer to and, if required, provide the disclosure under subpart 1300 of Regulation S–K (§§ 229.1300 through 1305), in addition to any disclosure required by this Item.

*Instruction to Item 8:*

*Except as required by paragraph (b) of this Item, detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required and should not be given.*

* * * * *

**PART III—EXHIBITS**

* * * * *

**Item 17. Description of Exhibits**

* * * * *

15. *The technical report summary under Item 601(b)(96) of Regulation S–K*—An issuer that is required to file a technical report summary pursuant to Item 1302(b)(2) of Regulation S–K must provide the information specified in Item 601(b)(96) of Regulation S–K as an exhibit to Form 1–A.

* * * * *

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 11. The authority citation for part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b), Public Law 111–203, 124 Stat. 1904; Sec. 102(a)(3), Public Law 112–106, 126 Stat. 309 (2012); Sec. 107, Public Law 112–106, 126 Stat. 313 (2012), and Sec. 72001, Public Law 114–94, 129 Stat. 1312 (2015), unless otherwise noted.

Section 249.220f is also issued under secs. 3(a), 202, 208, 302, 306(a), 401(a), 401(b), 406 and 407, Public Law 107–204, 116 Stat. 745.

* * * * *

■ 12. Amend Form 20–F (referenced in § 249.220f) by:

■ a. Revising the heading ''Instruction to Item 4:'';

■ b. Adding Instruction 3 to Item 4;

■ c. Removing the Instructions to Item 4.D;

■ d. Adding Instruction 17 to the Instructions as to Exhibits; and

■ e. Reserving paragraphs 18 through 99 under Instructions as to Exhibits.

The revision and additions read as follows:

**Note:** The text of Form 20–F does not, and these amendments will not, appear in the Code of Federal Regulations.

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM 20–F**

* * * * *

**PART I**

* * * * *

**Instructions to Item 4:**

* * * * *

3. Issuers engaged in mining operations must refer to and, if required, provide the disclosure under subpart 1300 of Regulation S–K (§§ 229.1300 through 1305 of this chapter).

* * * * *

**INSTRUCTIONS AS TO EXHIBITS**

* * * * *

17. The technical report summary under Item 601(b)(96) of Regulation S–K (§ 229.601 of this chapter).

A registrant that is required to file a technical report summary pursuant to Item 1302(b)(2) of Regulation S–K (§ 229.1302(b)(2) of this chapter) must provide the information specified in Item 601(b)(96) of Regulation S–K as an exhibit to its registration statement or annual report on Form 20–F.

18 through 99 [Reserved]

* * * * *

By the Commission.

Dated: October 31, 2018.

**Brent J. Fields,**

*Secretary.*

[FR Doc. 2018–26337 Filed 12–21–18; 8:45 am]

BILLING CODE 8011–01–P

# FEDERAL REGISTER

Vol. 83 Wednesday,

No. 246 December 26, 2018


Part III

## Securities and Exchange Commission

Joint Industry Plan; Notice of Filing of the Eighteenth Amendment to the National Market System Plan To Address Extraordinary Market Volatility by Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, NASDAQ BX, Inc., NASDAQ PHLX LLC, The Nasdaq Stock Market LLC, NYSE National, Inc., New York Stock Exchange LLC, NYSE American LLC, and NYSE Arca, Inc.; Notice

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–84843; File No. 4–631]**

# Joint Industry Plan; Notice of Filing of the Eighteenth Amendment to the National Market System Plan To Address Extraordinary Market Volatility by Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, NASDAQ BX, Inc., NASDAQ PHLX LLC, The Nasdaq Stock Market LLC, NYSE National, Inc., New York Stock Exchange LLC, NYSE American LLC, and NYSE Arca, Inc.

December 18, 2018.

## I. Introduction

On November 5, 2018, NYSE Group, Inc., on behalf of the following parties to the National Market System Plan to Address Extraordinary Market Volatility (''the Plan''): [1] Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Chicago Stock Exchange, Inc., the Financial Industry Regulatory Authority, Inc. (''FINRA''), Investors Exchange LLC, NASDAQ BX, Inc., NASDAQ PHLX LLC, The NASDAQ Stock Market LLC (''Nasdaq''), New York Stock Exchange LLC (''NYSE''), NYSE Arca, Inc., NYSE National Inc., and NYSE American LLC (collectively, the ''Participants'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (''Exchange Act'') [2] and Rule 608 thereunder,[3] a proposal to amend the Plan (''Eighteenth Amendment'').[4] The proposal reflects changes unanimously approved by the Participants. The Eighteenth Amendment proposes to: (i) Amend Section VIII of the Plan to transition the Plan from operating on a pilot to a permanent basis; (ii) adopt a mechanism for periodic review and assessment of the Plan; (iii) eliminate the doubling of the Percentage Parameters [5] between 9:30 a.m. and 9:45 a.m.; [6] and (iv) eliminate the doubling of the Percentage Parameters between 3:35 p.m. and 4:00 p.m., or in the case of an early scheduled close, during the last 25 minutes of trading before the early scheduled close, for Tier 2 NMS Stocks with a Reference Price above $3.00., as discussed below. A copy of the Plan, as proposed to be amended is attached as Exhibit A hereto. The Commission is publishing this notice to solicit comments from interested persons on the Eighteenth Amendment.[7]

## II. Description of the Plan

Set forth in this Section II is the statement of the purpose and summary of the Eighteenth Amendment, along with the information required by Rule 608(a)(4) and (5) under the Exchange Act,[8] substantially prepared and submitted by the Participants to the Commission.[9]

### *A. Statement of Purpose and Summary of the Plan Amendment*

The Participants filed the Plan with the Commission on April 5, 2011 to create a market-wide limit up-limit down mechanism intended to address extraordinary market volatility in NMS Stocks, as defined in Rule 600(b)(47) of Regulation NMS under the Exchange Act.[10] The Plan sets forth procedures that provide for market-wide limit up-limit down requirements to prevent trades in individual NMS Stocks from occurring outside of the specified Price Bands. These limit up-limit down requirements are coupled with Trading Pauses, as defined in Section I(Y) of the Plan, to accommodate more fundamental price moves. In particular, the Participants adopted this Plan to address extraordinary volatility in the securities markets, *i.e.,* significant fluctuations in individual securities' prices over a short period of time, such as those experienced during the ''Flash Crash'' on the afternoon of May 6, 2010.

As set forth in more detail in the Plan, all Trading Centers in NMS Stocks, including both those operated by Participants and those operated by members of Participants, shall establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the limit up-limit down requirements specified in the Plan. More specifically, the single plan processor (''Processors'') responsible for consolidation of information for an NMS Stock pursuant to Rule 603(b) of Regulation NMS under the Exchange Act is responsible for calculating and disseminating a lower Price Band and upper Price Band, as provided for in Section V of the Plan. Section VI of the Plan sets forth the limit up-limit down requirements of the Plan, and in particular, that all Trading Centers in NMS Stocks, including both those operated by Participants and those operated by members of Participants, shall establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trades at prices that are below the lower Price Band or above the upper Price Band for an NMS Stock, consistent with the Plan.

[1] On May 31, 2012, the Commission approved the Plan, as modified by Amendment No. 1. *See* Securities Exchange Act Release No. 67091, 77 FR 33498 (June 6, 2012) (File No. 4–631) (''Approval Order''). On February 20, 2013, the Commission noticed for immediate effectiveness the Second Amendment to the Plan. *See* Securities Exchange Act Release No. 68953, 78 FR 13113 (February 26, 2013). On April 3, 2013, the Commission approved the Third Amendment to the Plan. *See* Securities Exchange Act Release No. 69287, 78 FR 21483 (April 10, 2013). On August 27, 2013, the Commission noticed for immediate effectiveness the Fourth Amendment to the Plan. *See* Securities Exchange Act Release No. 70273, 78 FR 54321 (September 3, 2013). On September 26, 2013, the Commission approved the Fifth Amendment to the Plan. *See* Securities Exchange Act Release No. 70530, 78 FR 60937 (October 2, 2013). On January 7, 2014, the Commission noticed for immediate effectiveness the Sixth Amendment to the Plan. *See* Securities Exchange Act Release No. 71247, 79 FR 2204 (January 13, 2014). On April 3, 2014, the Commission approved the Seventh Amendment to the Plan. *See* Securities Exchange Act Release No. 71851, 79 FR 19687 (April 9, 2014). On February 19, 2015, the Commission approved the Eight Amendment to the Plan. *See* Securities Exchange Act Release No. 74323, 80 FR 10169 (February 25, 2015). On October 22, 2015, the Commission approved the Ninth Amendment to the Plan. *See* Securities Exchange Act Release No. 76244, 80 FR 66099 (October 28, 2015). On April 21, 2016, the Commission approved the Tenth Amendment to the Plan. *See* Securities Exchange Act Release No. 77679, 81 FR 24908 (April 27, 2016). On August 26, 2016, the Commission noticed for immediate effectiveness the Eleventh Amendment to the Plan. *See* Securities Exchange Act Release No. 78703, 81 FR 60397 (September 1, 2016). On January 19, 2017, the Commission approved the Twelfth Amendment to the Plan. *See* Securities Exchange Act Release No. 79845, 82 FR 8551 (January 26, 2017). On April 13, 2017, the Commission approved the Thirteenth Amendment to the Plan. *See* Securities Exchange Act Release No. 80455, 82 FR 18519 (April 19, 2017). On April 28, 2017, the Commission noticed for immediate effectiveness the Fourteenth Amendment to the Plan. *See* Securities Exchange Act Release No. 80549, 82 FR 20928 (May 4, 2017). On September 26, 2017, the Commission noticed for immediate effectiveness the Fifteenth Amendment to Plan. *See* Securities Exchange Act Release No. 81720, 82 FR 45922 (October 2, 2017). On March 15, 2018, the Commission noticed for immediate effectiveness the Sixteenth Amendment to the Plan. *See* Securities Exchange Act Release No. 82887, 83 FR 12414 (March 21, 2018) (File No. 4–631). On April 12, 2018, the Commission approved the Seventeenth Amendment to the Plan. *See* Securities Exchange Act Release No. 83044, 83 FR 17205 (April 18, 2018).

[2] 15 U.S.C. 78k–1(a)(3).

[3] 17 CFR 242.608.

[4] *See* Letter from Elizabeth King, General Counsel and Corporate Secretary, NYSE, to Brent Fields, Secretary, Commission, dated November 2, 2018 (''Transmittal Letter'').

[5] Unless otherwise specified, the terms used herein have the same meaning as set forth in the Plan.

[6] All times are Eastern Standard or ET.

[7] 17 CFR 242.608.

[8] *See* 17 CFR 242.608(a)(4) and (a)(5).

[9] *See* Transmittal Letter, *supra* note 4. The statement of the purpose and summary of the amendment and the information required by Rule 608(a)(4) and (5) is reproduced verbatim from the Transmittal Letter unless otherwise noted; cross-references have been revised to conform with the footnote sequencing of this notice.

[10] 17 CFR 242.600(b)(47).

As set forth in Section V of the Plan, the Price Bands consist of a Lower Price Band and an Upper Price Band for each NMS Stock. The Price Bands are calculated by the Processor responsible for consolidation of information for an NMS Stock pursuant to Rule 603(b) of Regulation NMS under the Act.[11] Those Price Bands are based on a Reference Price for each NMS Stock that equals the arithmetic mean price of Eligible Reported Transactions for the NMS Stock over the immediately preceding five-minute period. The Price Bands for an NMS Stock are calculated by applying the Percentage Parameter for such NMS Stock to the Reference Price, with the Lower Price Band being a Percentage Parameter below the Reference Price, and the Upper Price Band being a Percentage Parameter above the Reference Price. Between 9:30 a.m. and 9:45 a.m. and 3:35 p.m. and 4:00 p.m., or in the case of an early scheduled close, during the last 25 minutes of trading before the early scheduled close, the Price Bands are calculated by applying double the Percentage Parameters.

The Processors also calculate a Pro-Forma Reference Price for each NMS Stock on a continuous basis during Regular Trading Hours. If a Pro-Forma Reference Price does not move by one percent or more from the Reference Price in effect, no new Price Bands are disseminated, and the current Reference Price remains the effective Reference Price. If the Pro-Forma Reference Price moves by one percent or more from the Reference Price in effect, the Pro-Forma Reference Price becomes the Reference Price, and the Processors disseminates new Price Bands based on the new Reference Price. Each new Reference Price remains in effect for at least 30 seconds. When the other side of the market reaches the applicable Price Band, the market for an individual security enters a Limit State, and the Processors are required to disseminate such National Best Offer or National Best Bid with an appropriate flag identifying it as a Limit State Quotation. All trading immediately enters a Limit State if the National Best Offer equals the lower Price Band and does not cross the National Best Bid, or the National Best Bid equals the upper Price Band and does not cross the National Best Offer. Trading for an NMS Stock exits a Limit State if, within 15 seconds of entering the Limit State, all Limit State Quotations were executed or canceled in their entirety.

[11] 17 CFR 242.603(b). The Plan refers to this entity as the Processor.

With respect to Trading Pauses, Section VII(A)(1) of the Plan provides that if trading for an NMS Stock does not exit a Limit State within 15 seconds of entry during Regular Trading Hours, the Primary Listing Exchange declares a Trading Pause for such NMS Stock and shall notify the Processor. Section VII(B)(1) of the Plan further provides that five minutes after declaring a Trading Pause for an NMS Stock, and if the Primary Listing Exchange has not declared a Regulatory Halt, the Primary Listing Exchange shall attempt to reopen trading using its established procedures and the Trading Pause shall end when the Primary Listing Exchange reports a Reopening Price. Section VII(B)(3) of the Plan provides that Trading Centers may not resume trading in an NMS Stock following a Trading Pause without Price Bands in such NMS Stock.

The Plan was initially approved for a one-year pilot period, which began on April 8, 2013.[12] Accordingly, the pilot period was scheduled to end on April 8, 2014. As initially contemplated, the Plan would have been fully implemented across all NMS Stocks within six months of initial Plan operations, which meant there would have been full implementation of the Plan for six months before the end of the pilot period. However, pursuant to the fourth amendment to the Plan,[13] the Participants modified the implementation schedule of Phase II of the Plan to extend the time period as to when the Plan would fully apply to all NMS Stocks. Accordingly, the Plan was not implemented across all NMS Stocks until December 8, 2013. Pursuant to the sixth amendment to the Plan,[14] which further modified the implementation schedule of Phase II of the Plan, the date for full implementation of the Plan was moved to February 24, 2014. Pursuant to the seventh, ninth, tenth, and thirteenth amendments to the Plan,[15] the pilot period was extended from April 8, 2014 to February 20, 2015, from February 20, 2015 to April 22, 2016, from April 22, 2016 to April 17, 2017, from April 17, 2017 to April 16, 2018, and from April 16, 2018 to April 15, 2019.

The Participants now propose to: (i) Amend Section VIII of the Plan to transition the Plan from operating on a pilot to a permanent basis; (ii) adopt a mechanism for periodic review and assessment of the Plan; (iii) eliminate the doubling of the Percentage Parameters between 9:30 a.m. and 9:45 a.m.; and (iv) eliminate the doubling of the Percentage Parameters between 3:35 p.m. and 4:00 p.m., or in the case of an early scheduled close, during the last 25 minutes of trading before the early scheduled close, for Tier 2 NMS Stocks with a Reference Price above $3.00.

[12] *See* Section VIII of the Plan.

[13] *See supra* note 1.

[14] *See id.*

[15] *See id.*

The Plan Should Operate on a Permanent Basis

As mentioned above, the Plan was designed to prevent potentially harmful price volatility in NMS Stocks, including the kind of volatility experienced during the market disruption that occurred on May 6, 2010, often referred to as the ''Flash Crash''. Among other things, the prices of a large number of individual securities suddenly declined by significant amounts in a very short time period, before suddenly reversing to prices consistent with their pre-decline levels. This severe price volatility led to a large number of trades being executed at temporarily depressed prices, including many that were more than 60% away from pre-decline prices and were broken by the exchanges and FINRA. Occasionally a sudden and unanticipated price movement, unrelated to a security's fundamental and/or fair value, can be so drastic that market orders and stop loss orders face an increased risk of being executed at prices far away from their fundamental and/or fair values. Such extreme volatility causing significant fluctuations in an individual security's price over short periods of time can undermine the integrity of the securities market. Key features of the Plan—Price Bands, Trading Pauses, and Limit States—are intended to reduce the frequency of these large, transitory price movements.

The Plan was implemented in phases beginning on April 8, 2013.[16] Prior to the operation of the Plan, each Participant adopted uniform rules on a pilot basis in response to the market events of May 6, 2010 that paused

[16] The implementation of Phase I of the Plan began on April 8, 2013 and ended on May 31, 2013. Phase I applied to securities included in the S&P 500 and Russell 1000 and some high volume ETPs from 9:45 a.m. to 3:30 p.m. During Phase I, the Plan did not operate during the market open and close. The implementation of the first part of Phase II began on August 5, 2013 and ended on September 3, 2013. The first part of Phase II applied to all NMS securities beginning at 9:30 a.m. and ending at 3:45 p.m. Price Bands were calculated by applying double the Percentage Parameters during 9:30 to 9:45 a.m. and during 3:35 to 3:45 p.m. The implementation of the second part of Phase II began on February 24, 2014. The second part of Phase II added Price Bands for the last 15 minutes of trading from 3:45 to 4:00 p.m. and applied to all exchange-listed securities except for Nasdaq. On May 12, 2104, the second part of Phase 2 was implemented for Nasdaq-listed securities.

trading in individual securities during times of price volatility (''Single-Stock Circuit Breaker'' or ''SSCB'').[17] The SSCB rules were an earlier attempt to address extraordinary market volatility under which a Participant paused an individual security for five minutes across all exchanges if the security experienced a 10% change in price over the preceding five minutes.[18] The SSCB pilot mechanism was later replaced by the Plan, which is a more finely calibrated mechanism to address extraordinary price volatility.[19] Specifically and unlike SSCB wherein a security was halted only after three trades at an extreme price, the Plan's mechanism suspends trading before such execution occurs.

The Plan was approved on a pilot basis to allow the Participants and the public to gain valuable practical experience with the Plan's operations during the pilot period. This experience has proven instructive to the Participants and the public in assessing whether further modifications to the Plan were necessary and whether the Plan should operate on a permanent basis. During the pilot period, the Participants provided the Commission and the public [20] with a significant amount of data bearing on the Plan's performance to aid in an assessment of its operations. Based on the Plan's performance, the Participants now propose to implement the Plan on a permanent basis. The Participants believe that the Plan has been beneficial to the national market system by serving to dampen price volatility and prevent unwarranted Trading Pauses that are unrelated to volatility, as intended. Therefore, the Participants believe that the Plan should be approved to operate on a permanent basis.

The data collected during the pilot period and numerous studies conducted by the Participants and the Commission's Department of Economic and Risk Analysis (''DERA'') have shown that the Plan has been beneficial to the markets by serving to dampen price volatility. For instance, DERA issued a number of papers studying the operation of the Plan. In one paper, DERA described their study of the Plan's effect on extraordinary transitory volatility and found evidence that the Plan's mechanism reduced extraordinary transitory volatility relative to the prior SSCB mechanism depending on which methodology was employed.[21] In particular, DERA found evidence that the magnitude of the largest price reversals that occurred each day for both Tier 1 and Tier 2 NMS Stocks were smaller during the Plan time period than during the SSCB Pilot time period or the time period before the SSCB Pilot went into effect. DERA also found evidence that the frequency of moderate price reversal decreased during the eight week phase-in implementation during which Tier 1 NMS Stocks were subject to the Plan and Tier 2 NMS Stocks were subject to the SSCB mechanism.

Moreover, pursuant to the Plan's requirements,[22] the Participants provided the Commission with an assessment relating to the impact of the Plan and calibration of the Percentage Parameters on May 28, 2015.[23] In performing the Joint Assessment, the Participants, in conjunction with a third party consultant, studied data from each exchange and FINRA for the time period from the implementation of the Plan on April 2012 through December 2014. The Participants studied the impact of approaching Price Bands on limit order books, the Plan's impact on erroneous executions, appropriateness of Percentage Parameters, length of Limit States, concerns by options market participants regarding limit states, the process for entering Limit States and the impact of Straddle States, exiting Limit States, as well as the length of Trading Pauses and the reopening process.

Based on the data analyzed, the Supplemental Joint Assessment found that the Plan has been largely effective at reducing the negative impacts of sudden, unanticipated price movements in NMS Stocks, thereby protecting investors and promoting a fair and orderly market. In particular, the data in the Supplemental Joint Assessment had shown that the Price Bands dampened price volatility by keeping prices within the Price Bands. For instance, the data in the Supplemental Joint Assessment showed that even in the cases where a Limit State is reached, a majority (63.3%) of those Limit States naturally resolved themselves within one second without triggering a Trading Pause.[24] Only 4.08% of Limit States resulted in a Trading Pause.[25] The data in the Supplemental Joint Assessment further showed that the Percentage Parameters used to determine the width of the Price Bands were reasonably designed to ensure that they were not too wide as to permit trades to occur at prices that do not properly reflect supply and demand, and not too narrow as to cause excessive disruptions, inhibiting the price discovery process.[26] In reaching this conclusion, the Supplemental Joint Assessment examined, among other things, the frequency distribution of intraday stock returns to gain insight on reasonable price moves that could take place within a day as well as frequency of Reference Price changes. Based on this study, the Supplemental Joint Assessment stated that the ''relative rarity of large price updates of comparable magnitude to the wider Price Bands indicate that the Price Bands could be narrowed substantially without causing undue restrictions on trading.'' [27] The Supplemental Joint Assessment also examined minute by minute changes in stock prices to examine short-term price reversals for the month of October 2014, the most volatile month in the sample period. It further found the five minute time period within which Reference Prices are calculated provided a representative measure of price trends on which to base such calculation.[28]

The data in the Supplemental Joint Assessment also showed that the length of Limit States is clearly adequate for the markets in individual stocks to revert to normal market condition. The

[17] *See* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (SR–BATS–2010–014; SR–EDGA–2010–01; SR–EDGX2010–01; SR–BX–2010–037; SR–ISE–2010–48; SR–NYSE–2010–39; SR–NYSEAmex–2010–46; SR–NYSEArca–2010–41; SR–NASDAQ–2010–061; SR–CHX–2010–10; SR–NSX–2010–05; SR–CBOE–2010–047) (Order Granting Accelerated Approval to Proposed Rule Changes Relating to Trading Pauses Due to Extraordinary Market Volatility).

[18] The 10% threshold is for securities in the S&P 500. A 30% price movement is required for all other listed securities priced above $1.00 and a 50% price movement is for all listed securities priced below $1.00. Calculation of whether a securities price meets the required threshold is based on the price of executed trades.

[19] For example, the number of multiple cancellation events decreased after the implementation of the Plan. *See* page 34, Table 15 of the Limit Up—Limit Down; National Market System Plan Assessment to Address Extraordinary Market Volatility (the ''Supplemental Joint Assessment'' or ''Assessment''), *available athttps://www.sec.gov/comments/4-631/4631-39.pdf* (indicating a decrease from an average of 35.63 to 13.45 multiple cancelation events per month from the time during the SSCB Pilot Mechanism was in effect to after the Plan was fully implemented). For purposes of the Joint Assessment, a multiple cancellation event is an event in which there were six or more cancelled trade reports for a single stock during the day.

[20] *See* Supplemental Joint Assessment, *id.*

[21] *See* '' 'Limit Up-Limit Down'' Pilot Plan and Extraordinary Transitory Volatility'', by Paul Hughes, John Ritter, and Hao Zhang, DERA, dated December 2017, *available at https://www.sec.gov/comments/4-631/4631-2830173-161647.pdf.*

[22] *See* Appendix B, Section III of the Plan.

[23] *See* the Supplemental Joint Assessment, *supra* note 19.

[24] *Id.* at page 19.

[25] *Id.*

[26] *Id.* at page 35.

[27] *Id.* at page 39.

[28] *See* the Supplemental Joint Assessment, *supra* note 19, at page 39.

Supplemental Joint Assessment observed that over 99% of the Limit States in stocks with a market capitalization of over $1 billion resolved themselves without a Trading Pause, and the vast majority of them were resolved in one second.[29] The same general pattern was also true for small capitalization NMS Stocks.

In its conclusion, the Supplemental Joint Assessment found that cancellation events decreased significantly under the Plan and that the Plan's parameters are successful in preventing trades from occurring outside of the Price Bands, avoiding the types of mispriced trades that resulted in the Flash Crash.[30] However, the Supplemental Joint Assessment expressed concern regarding potential disruption in the price discovery process around the opening of trading due to the possible calculation of an inaccurate Reference Price, which may trigger Limit States or Trading Pauses for reasons unrelated to the market for the security. Therefore, the Supplemental Joint Assessment recommended that the previous day's closing price be used as the Reference Price where there are no trades in the opening auction. Based on these findings, the Supplemental Joint Assessment recommended that the Plan be made permanent with the one modification to the Reference Price calculation,[31] which the Participants later adopted in Amendment No. 10 discussed below.

Notwithstanding the Plan's positive impact on the markets, the Participants continued to monitor the scope and operation of the Plan during the pilot period. As a result, the Participants identified two areas of the Plan that needed improvement; namely, the calculation of Reference Prices during the opening of trading and the performance of the reopening process following a Trading Pause. As a result, the Participants filed Amendments Nos. 10 and 12 to the Plan proposing modifications that the Participants deemed necessary and appropriate to improve the Plan's performance in these two areas.

*Amendment No. 10.* First, in Amendment No. 10, the Participants amended the Plan to modify the definition of Opening Price, which is used to determine the first Reference Price of the day.[32] Prior to Amendment No. 10, the Opening Price was defined as the first trade or the midpoint of the Primary Listing Exchange's best bid and offer where the Primary Listing Exchange opened with a quotation, if such Opening Price occurred within the first five minutes of the start of Regular Trading Hours. Amendment No. 10 changed the definition of Opening Price where the Primary Listing Exchange opens with a quotation from the midpoint of that quotation to the previous day's official closing price. In proposing Amendment No. 10, the Participants noted that the midpoint of the bid and offer often resulted in an unrealistic Reference Price[33] where a security opens on quotes that are extremely wide or improperly skewed. The Participants noted that this could, in turn, trigger Limit States and Trading Pauses at inaccurate price levels.[34]

The revised definition of Opening Price in Amendment No. 10 altered the determination of a security's first Reference Price when that security does not trade in an opening auction in an effort to reduce the incidence of unnecessary price moves and reduce the number of unwarranted[35] Trading Pauses and Limit States during the commencement of Regular Trading Hours.

Amendment No. 10 improved the operation of the Plan. Since its implementation on July 18, 2016, Amendment No. 10 reduced the number of unwarranted Trading Pauses and Limit States during the commencement of Regular Trading Hours as intended. Chart A sets forth the number of Trading Pauses in all NMS Stocks across all Primary Listing Exchanges from January 4, 2016 through August 30, 2018. The data in Chart A illustrates the decrease in Trading Pauses for all NMS Stocks in the time since Amendment No. 10 was implemented in July 2016. Trading Pauses dropped from an average of 64.4 per day to an average of 9.2 per after Amendment No. 10 was implemented.

[29] *Id.*

[30] *Id.* at page 54.

[31] *Id.*

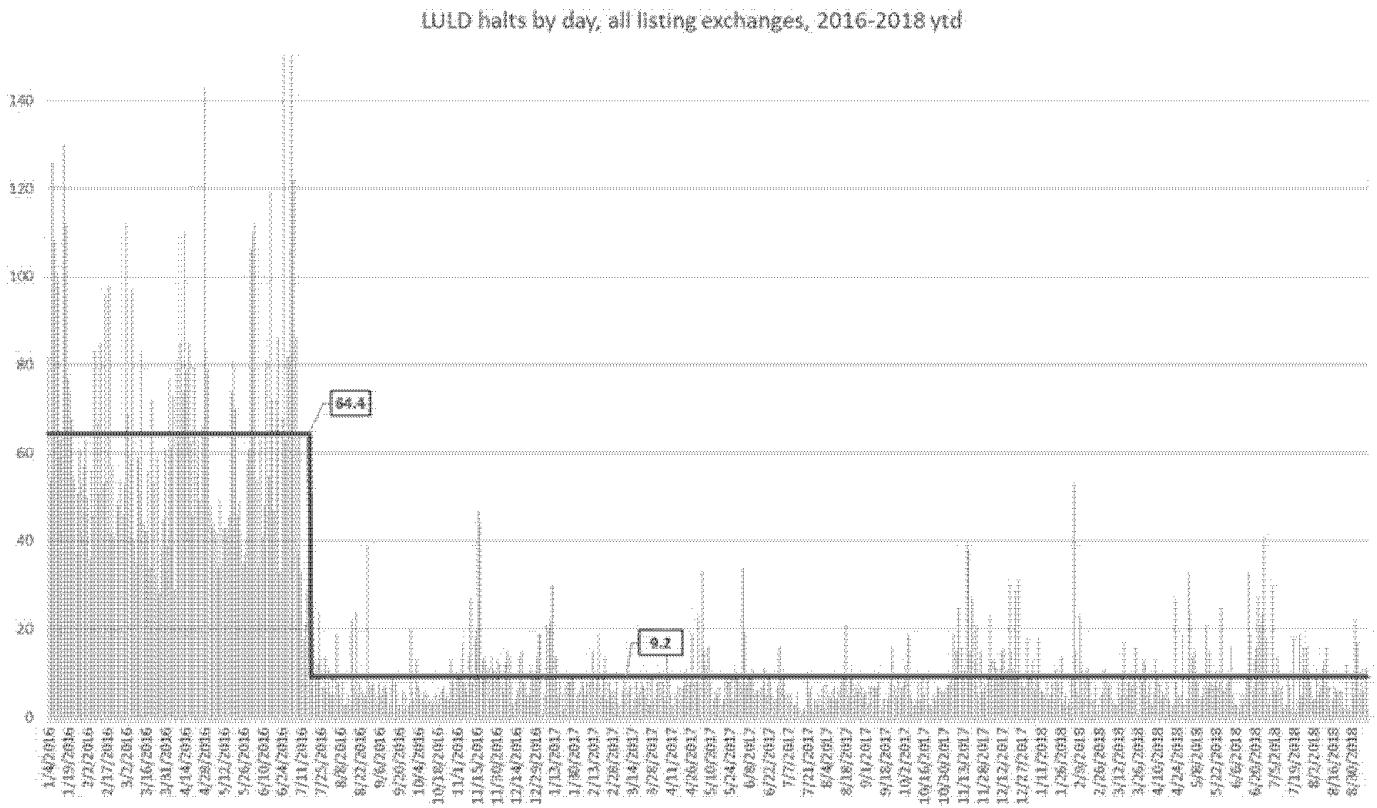
[32] Section V(B)(1) of the Plan provides that the first Reference Price for a Trading Day shall be the Opening Price on the Primary Listing Exchange in an NMS Stock if such Opening Price occurs less than five minutes after the start of Regular Trading Hours.

[33] *See* Securities Exchange Act Release No. 77205 (February 22, 2016), 81 FR 10315 (February 29, 2016) (''Amendment No. 10 Notice'').

[34] *Id.*

[35] An ''unwarranted Trading Pause'' is one that occurs because of factors unrelated to trading volatility. For example, if the Price Bands based on poor Reference Prices result in a Trading Pause, such Trading Pause would be considered unwarranted. Unwarranted Trading Pauses in illiquid stocks are typically characterized by wide or skewed spreads between buy and sell orders and no trading activity leading into the Trading Pause. Another example of an unwarranted Trading Pause is discussed below under the section entitled Proposal to Amend Calculation of Percentage Parameters beginning on page 21.

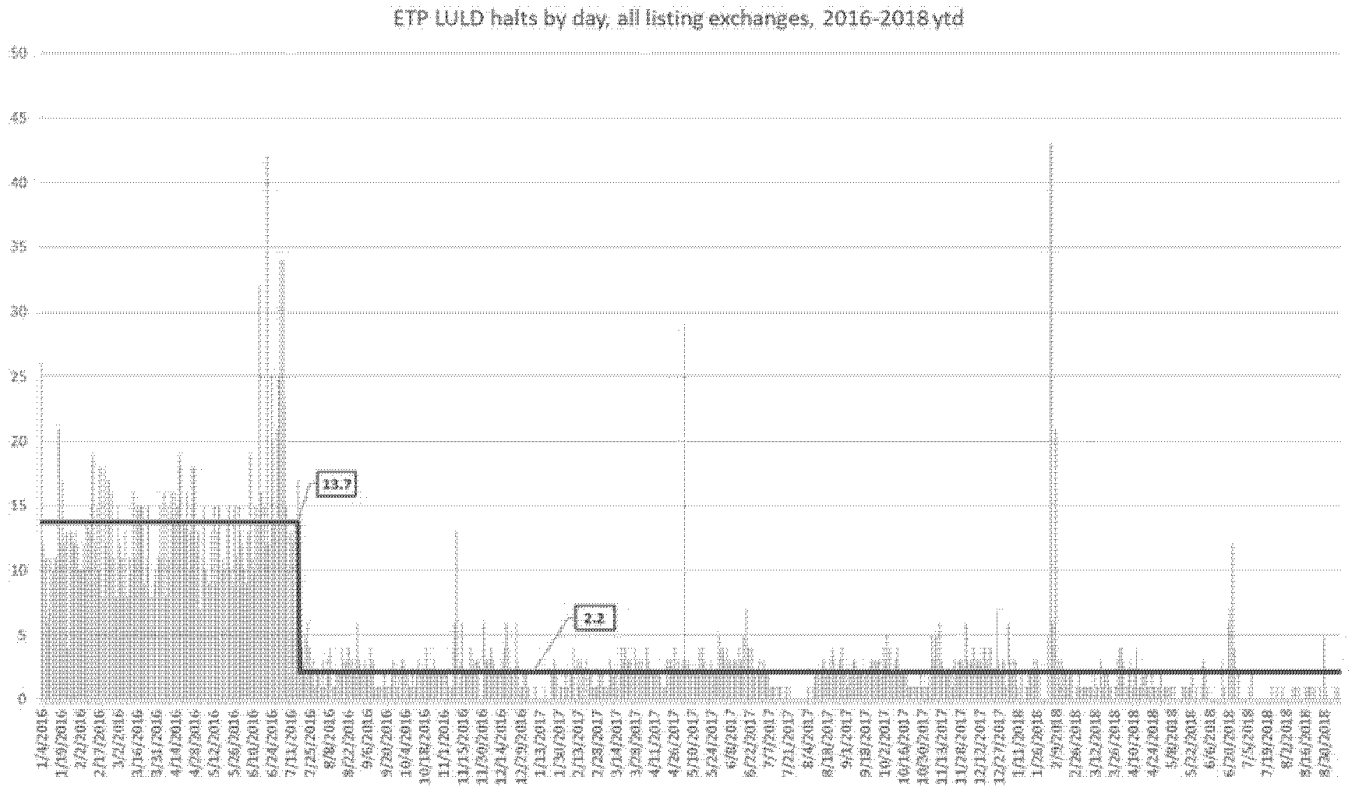
**Chart A**




* Source. Participant data.

Further, as evidenced by the data in Chart B, Trading Pauses in ETPs declined from 13.7 per day to 2.2 per day since Amendment No. 10 was implemented.

**Chart B**




* Source. Participant data.

In addition, DERA issued a white paper studying the impact of Amendment No. 10 and found that Trading Pauses for both Tier 1 and Tier 2 NMS Stocks were less frequent following the implementation of the amendment.[36] DERA found that the ''decrease in the frequency of Trading Pauses was largest for Tier 2 securities, relative to Tier 1, and also larger in the first 30 minutes after the opening of the trading day.'' [37] In particular, from May 12, 2014 (the day Phase 2 of the Plan was implemented) to December 31, 2016, DERA found that the number of Trading Pauses decreased by nearly 80%.[38] Since the implementation of Amendment No. 10, DERA found a further decrease in Trading Pauses, with the largest decrease occurring prior to 10:00 a.m. As evidenced by the above data and DERA's study, Amendment No. 10 improved the performance of the Plan during the commencement of trading by refining the selection method of an NMS Stock's Reference Price, resulting in a decrease in the number of Trading Pauses at the open.

*Amendments Nos. 12 and 13.* On August 24, 2015, the U.S. markets experienced extraordinary equities market volatility in which 257 securities triggered more than one halt, and those multi-halt securities accounted for 1,064 of the 1,278 total halts.[39] Following this event, the Participants focused on a method to improve the accuracy of the reopening price so as to avoid triggering repeated Trading Pauses and adopted a set of common elements across all Primary Listing Exchanges for automated reopenings. The overarching objective was to ensure consistent and standardized behavior across markets, while carefully balancing Halt Auction price quality and the speed with which continuous trading can be resumed.

The process of reopening a security after a Trading Pause prior to Amendment No. 12, provided that the Primary Listing Exchange would attempt to open the paused symbol five minutes after the commencement of the pause and, if unsuccessful, again 10 minutes later. If the Primary Listing Market was unable to reopen 10 minutes after the commencement of the pause, other markets were permitted to resume trading that symbol. Amendment No. 12 improved and standardized the automated reopening process following a Trading Pause. The Primary Listing Exchanges also adopted rules revising their automated reopening processes following a Trading Pause consistent with Amendment No. 12.[40]

Under the original reopening process after a Trading Pause, the Primary Listing Exchange would attempt to open the paused symbol at five minutes and then again at 10 minutes after the initial

[36] *See* ''The Effects of Amendment No. 10 of the 'Limit Up-Limit Down'' Pilot Plan'', by Paul Hughes, DERA, dated December 2017, *available at https://www.sec.gov/comments/4-631/4631-2830189-161648.pdf.*

[37] *Id.* at 2.

[38] *Id.* at page 4.

[39] *See Research Note: Equity Market Volatility on August 24, 2015,* by Commission Staff of the Office of Analytics and Research, Division of Trading and Markets, dated December 2015, *available at https://www.sec.gov/marketstructure/research/equity_market_volatility.pdf.*

[40] *See* Securities Exchange Act Release Nos. 79846 (January 19, 2017), 82 FR 8548 (January 26, 2017) (SR–NYSEArca–2016–130) (Approval Order); 79884 (January 26, 2017), 82 FR 8968 (February 1, 2017) (SR–BatsBZX–2016–61) (Approval Order); 79876 (January 25, 2017), 82 FR 8888 (January 31, 2017) (SR–Nasdaq–2016–131) (Approval Order). The Primary Listing Exchanges implemented these changes to their automated reopenings on November 20, 2017.

pause. If the Primary Listing Market was unable to reopen at 10 minutes under its own auction rules (*e.g.,* a market order imbalance was remaining or the auction clearing price is outside of the auction collar bands), other markets were permitted to resume trading that symbol. Amendment No. 12 changed this reopening process by generally requiring a Primary Listing Exchange to conduct a reopening auction prior to trade resumption by other Trading Centers. Specifically, Amendment No. 12 provided that, if the Primary Listing Exchange is unable to reopen after 10 minutes following a Trading Pause, non-primary markets would no longer be allowed to resume trading. Instead, Amendment No. 12 required that the Trading Pause continue until the Primary Listing Exchange reopens and non-primary exchanges have received Price Bands from the Processor.

In tandem with Amendment No. 12, the Primary Listing Exchanges amended their rules to harmonize certain aspects of their automated re-opening procedures following a Trading Pause. The amended rules require that the Primary Listing Exchange publish auction price collars, which use a Reference Price based on the upper or lower Price Band that triggered the Trading Pause.[41] The initial Trading Pause remains in effect for a full five minute period. If the Primary Listing Exchange is unable to reopen, a second full five minute Trading Pause begins and the auction price collar will be widened by another 5% (based on the last Reference Price. Price collars will be widened with each extension. Subsequent Trading Pause time periods also have a five minute duration, however re-openings after the initial 10 minutes can occur whenever the re-opening criteria have been met, without waiting for a full five minutes. In the event a Trading Pause is in effect and trading has not resumed by 3:50 p.m., trading in the NMS Stock will be deferred until 4:00 p.m. and combined with the closing auction process at each exchange.

To preclude potential scenarios when trading may resume without Price Bands, Amendment No. 12 also prohibits a Trading Center from resuming trading in an NMS Stock following a Trading Pause in the absence of Price Bands. In addition, to address potential scenarios in which there is no Reopening Price from the Primary Listing Exchange to use to calculate Price Bands, Amendment No. 12 also addressed when trading may resume if the Primary Listing Exchange is unable to reopen due to a systems or technology issue. Lastly, Amendment No. 12 also addressed how an NMS Stock's Reference Price would be determined in such a scenario as well as where the Primary Listing Exchange reopens trading on a zero bid or zero offer, or both. The Participants subsequently submitted Amendment No. 13 to build upon Amendment No. 12 by providing that the Processor will publish the following information provided by a Primary Listing Exchange in connection with the reopening of trading following a Trading Pause: Auction reference price; upper auction collar; lower auction collar; and number of extensions to the reopening auction. This information provides greater transparency regarding the price range in which an NMS Stock can reopen and the elapsed time duration of the reopening process.

The Commission-empaneled Equity Structure Advisory Committee (''EMSAC'') tasked its Market Quality Subcommittee to examine the events of August 24, 2015 and to recommend changes as needed. Like the Participants, the Market Quality Subcommittee (''Subcommittee'') studied mechanisms and functions that ''could fix the auction process so that it would more successfully re-price securities to its new fair range.''[42] The Subcommittee recommended that, instead of halting trading when a stock hits a Price Band as provided in the Plan, trading should continue within the current Price Bands for four minutes and then new Price Bands should be reset using the limit Price Band as the Reference Price for those Price Bands. Several members of the Subcommittee were also members of the Plan's Advisory Committee and the Subcommittee recommendations were discussed over a number of Operating Committee meetings on fixing the auction process. The Participants raised concerns that continued trading at the Price Bands would expose retail investors to disadvantageous pricing and determined to address the reopening auction process as described in Amendment No. 12.[43]

The changes adopted by the Primary Listing Exchanges to extend the Trading Pause and widen the Reopening Auction Collar on the side of the Impermissible Price set forth a measured approach to provide additional time to attract offsetting interest, to help to address an imbalance that may not be resolved within the prior Halt Auction Collars, and to reduce the potential for triggering another Trading Pause.

*Conclusion.* As supported by the above data and the Plan's overall performance, the Plan has proved to be a valuable tool in dampening and preventing extreme price volatility. Therefore, the Participants believe that the above data justifies the Plan being approved to operate on a permanent, rather than pilot, basis. Operation of the Plan on a permanent basis would provide market participants with greater assurance regarding the ongoing operation of the Plan and application of controls reasonably designed to stifle extraordinary price volatility.

The Plan has been in effect for over five years since it commenced operation on April 18, 2013. The improvements made to the Plan in Amendments Nos. 10, 12, and 13 have been in place in since July 18, 2016 (for Amendment No. 10) and November 20, 2017 (for Amendments Nos. 12 and 13). In Amendment No. 17 to the Plan, the Participants extended the pilot period until April 15, 2019 to provide additional time for the public, the Participants, and the Commission to assess the operation of Amendment No. 12. The extension of the pilot period was also intended to provide additional time for the Participants, the Commission, and the public to consider other potential modifications to the Plan, including changes to how NMS Stocks are tiered under the Plan, and the applicable Percentage Parameters associated with such tiers, as well as the EMSAC recommendations.

Since the implementation of Amendment Nos. 10, 12, and 13, the U.S. equity markets have not experienced a disruption similar to what had occurred on August 24, 2015, with stable price continuity occurring at the open and following reopenings after a Trading Pause. Nonetheless, the amended Plan has worked well during normal market conditions as well as the volatile market activity that occurred in February 2018. The Plan met the expectations of the Pilot by preventing unwarranted Trading Pauses that are unrelated to volatility while also

[41] For example, if there is selling pressure, the auction reference price will be the lower Price Band. The lower Auction Collars would be 5% below that auction reference price (or $0.15 for stocks with a reference price below $3.00). To address mean price reversion, the upper Auction Collar will be the upper Price Band.

[42] *See* U.S. Securities and Exchange Commission Equity Market Structure Advisory Committee, *Recommendations for Rulemaking on Issues of Market Quality,* dated November 29, 2016, *available at https://www.sec.gov/spotlight/emsac/emsac-recommendations-rulemaking-market-quality.pdf.*

[43] The Participants will address the EMSAC recommendations in their first annual report regarding the Plan's operation, proposed herein and discussed below.

reducing the negative impacts of sudden, unanticipated price movements in NMS Stocks, as evidenced by the above data. Amendment No. 10 has served to greatly reduce the potential for a Reference Price to invoke an unwarranted Trading Pause. The Participants also believe that Amendment No. 12 will continue to perform as expected and will do so during times of potential future market volatility. In addition, the Participants propose to adopt a mechanism for the periodic review and assessment of the Plan's performance discussed below. That assessment would encompass an ongoing review of the Plan's operation generally, including the effectiveness of Amendments Nos. 12 and 13.

The Participants believe that the five year pilot period has provided a robust sample size for ''the public, the Participants, and the Commission to assess the operation of the Plan and whether the Plan should be modified prior to approval on a permanent basis.'' [44] In particular, this time has also allowed the public, the Participants, and the Commission time to assess the operation of the Plan as amended by Amendment Nos. 10 and 12. The Participants believe that the amended Plan has positively impacted the markets by meeting its intended goal, to dampen and prevent extreme price volatility, and should therefore be approved to operate on a permanent basis.

Proposed Mechanism for Periodic Review and Assessment

As part of its proposal to operate the Plan on a permanent basis, the Participants propose a periodic reporting mechanism by which they, along with the Commission and other market participants may continue to monitor the Plan's ongoing operation. The proposed structure would allow for the continued evaluation of the Plan's performance while accounting for an evolving market structure. The proposed mechanism would also ensure that the Plan continues to be monitored in a data-driven manner by requiring data, analyses and reporting on a periodic basis. The proposed mechanism would provide transparency into the effectiveness of the Plan and allow the public and the Commission to examine its ongoing performance.

Appendix B of the Plan currently requires that the Participants collect and transmit to the Commission certain information on a monthly basis, to be provided 30 calendar days following month end. Unless otherwise specified in Appendix B, the Primary Listing Exchanges are responsible for collecting and transmitting the data to the SEC. In sum, Sections I and II of Appendix B of the Plan require the Participants to produce the following data to the Commission as set forth in the Plan:

- Summary statistics concerning the frequency with which NMS Stocks enter a Limit State and when a Trading Pause has been declared for an NMS Stock;
- Raw Data concerning a record of every Straddle State, Price Band, Limit State, Trading Pause or halt;
- Data set of orders entered into reopening auctions during halts or Trading Pauses;
- Data set of order events received during Limit States; and,
- Summary data on order flow of arrivals and cancellations for each 15-second period for discrete time periods and sample stocks to be determined by the SEC in subsequent data requests.

The Plan also includes a provision under Appendix B, Section III that required the Participants to produce a one-time report to the Commission relating to the impact of the Plan and calibration of the Percentage Parameters, as discussed above. The Participants produced that report to the Commission on May 25, 2015.[45] As part of its proposal to operate the Plan on a permanent basis, the Participants propose to replace the current reporting provision under Appendix B, Section III with a reporting mechanism by which the performance of the Plan would be reviewed and assessed on an ongoing basis.

As described earlier, Appendix B, Section III of the Plan required the Participants to provide the Commission at least two months prior to the end of the initial pilot period with an assessment relating to the impact of the Plan and calibration of the Percentage Parameters.[46] The Participants submitted their Supplemental Joint Assessment on May 28, 2015.[47]

As part of its proposal to implement the Plan on a permanent basis, the Participants propose to replace these data reporting requirements with a mechanism by which the Participants would periodically review and assess the performance of the Plan.

*Data Provision.* The Participants believe that regular, ongoing provision of data to the Commission is no longer necessary as public information provided in standard data products provides much of the information currently required by Appendix B.I and B.II.A through B.II.D. With respect to the data that is not publicly available, the Participants propose that the Plan would require the Participants to provide certain data listed below to the Commission upon request.

As proposed, the Commission may request from the Primary Listing Exchanges the following data elements:

A. Data set of all orders entered during halts or Trading Pauses
  1. Normal or Auction Only orders, Arrivals, Changes, Cancels, # shares, limit/market, side, Limit State side
  2. Pipe delimited with field name as first record
B. Data set of order events received during Limit States
C. Summary data on order flow of arrivals and cancellations for each 15-second period for discrete time periods and sample stocks to be determined by the SEC in subsequent data requests. Must indicate side(s) of Limit State
  1. Market/marketable sell orders arrivals and executions
  a. Count
  b. Shares
  c. Shares executed
  2. Market/marketable buy orders arrivals and executions
  a. Count
  b. Shares
  c. Shares executed
  3. Count arriving, volume arriving and shares executing in limit sell orders above NBBO mid-point
  4. Count arriving, volume arriving and shares executing in limit sell orders at or below NBBO mid-point (non-marketable)
  5. Count arriving, volume arriving and shares executing in limit buy orders at or above NBBO mid-point (non-marketable)
  6. Count arriving, volume arriving and shares executing in limit buy orders below NBBO mid-point
  7. Count and volume arriving of limit sell orders priced at or above NBBO mid-point plus $0.05
  8. Count and volume arriving of limit buy orders priced at or below NBBO mid-point minus $0.05
  9. Count and volume of (3–8) for cancels
  10. Include: Ticker, date, time at start, time of Limit State, all data item fields in 1, last sale prior to 15-second period (null if no trades today), range during 15-second period, last trade during 15-second period.

These data elements are substantially similar to that currently required to be

[44] *See supra* note 1, 77 FR 33498 at 33508.

[45] *See* Supplemental Joint Assessment, *supra* note 19.

[46] *See* Appendix B, Section III of the Plan.

[47] *See* Supplemental Joint Assessment, *supra* note 19.

produced monthly under Appendix B.II.E through G. The only difference is that amended Appendix B.I.A would require data for all orders entered during a halt or Trading Pause as well as identifying whether an order was an auction-eligible order. The requested data would be collected and transmitted to the Commission in an agreed-upon format, and would be provided 30 calendar days following the date of the request, or such other date as agreed upon by the Commission and Primary Listing Exchange(s). As is the case today, the proposed data collected and provided to the Commission under the Plan would be transmitted to the Commission with a request for confidential treatment under the Freedom of Information Act. 5 U.S.C. 552, and the Commission's rules and regulations thereunder.[48] The proposed data collection requirements under Appendix B.I would expire at the time the above data becomes available via the National Market System Plan Governing the Consolidated Audit Trail or becomes publicly available.

*Reporting.* The Participants propose to provide the Commission, and make publicly available, three categories of reports concerning the Plan's ongoing operation on either a periodic or *ad hoc* basis, as described below. Specifically, the Participants propose to submit to the Commission an annual report assessing the Plan's performance, quarterly reports providing basic statistics, as well as an *ad hoc* report on the effectiveness of LULD following a significant market event if requested by the Commission. The Participants would perform the proposed ongoing assessment and reporting concerning the Plan's performance based on an empirical analysis of relevant data. Each report proposed herein and provided to the Commission would be made publicly available and published on the Plan's website.

*Annual Report.* As amended, Appendix B, Section III of the Plan would require that by no later than March 31, 2020 and annually thereafter, the Operating Committee would provide the Commission and make publicly available a report containing key information concerning the Plan's performance during the preceding calendar year (''Annual Report''). The proposed Annual Report would be produced in consultation with the Advisory Committee and include the following items: (i) An update on the Plan's operations; (ii) an analysis of any amendments to the Plan implemented during the period covered by the report; and (iii) an analysis of potential material emerging issues that may directly impact the operation of the Plan.

- *Update on the Plan's Operations.* This section of the Annual Report would analyze the Plan's operation during the covered period, including a discussion of any areas of the Plan's operation that require additional analysis. In particular, this section of the Annual Report would examine the calibration of the parameters set forth in the Plan (*e.g.,* Price Bands, duration of Limit States, impact of Straddle States, duration of Trading Pauses, and the performance of reopening procedures following a Trading Pause). This section of the Annual Report also would consider stock characteristics and variations in market conditions over time, and will include tests that differentiate results for different characteristics, both in isolation and in combination.
- *Analysis of Amendments Implemented.* This section of the Annual Report would provide an analysis of any amendments implemented during the covered period. The analysis would include a discussion of the amendment's operation and its impact on the overall operation of the Plan. For example, this section of the Annual Report would include an analysis of the amendments proposed herein to Section V.A. I of the Plan concerning the calculation of the Percentage Parameters should those changes be approved by the Commission and implemented by the Participants during the period covered by that Annual Report.
- *Analysis of Emerging Issues.* This section of the Annual Report should vary from year-to-year and would include a discussion and analysis of the Plan's operation during a significant market event that may have occurred during the covered period. This section shall also include any additional analyses performed during the covered period on issues that were raised in previous Annual Reports. In this section of the first Annual Report to be produced by March 31, 2020, the Participants intend to discuss the November 29, 2016 recommendations made by EMSAC's Market Quality Subcommittee.[49]

The Participants would perform the proposed ongoing assessment and reporting concerning the Plan's performance based on an empirical analysis of relevant data. Any analysis conducted by the Participants and included in the Annual Report would be based on aggregated data from all relevant exchanges and FINRA, depending on the issue that is being analyzed. The Annual Report would be published on the Plan's website.[50]

*Quarterly Data.* 30 days following the end of each calendar quarter, the Participants would provide the Commission and make publicly available a report including basic statistics regarding the Plan's operation (''Monitoring Report'') during the preceding calendar quarter as well as aggregated data from the previous 12 quarters beginning with the calendar quarter covered by the first Monitoring Report. The data included in the Monitoring Report would be collected and transmitted to the Commission in an agreed-upon format that would allow for the download and analysis by the Commission and the public. The purpose of the Monitoring Report is to identify trends in the performance and impact of the Plan on market activity. The Monitoring Report would include data, for example, of the number and rate of recurrence of Limit States, Straddle States and Trading Pauses for each month during the calendar quarter. The Monitoring Report would also examine the number of Clearly Erroneous Executions that occur during the operation of the Plan and the performance of reopening procedures following a Trading Pause. Appendix B.II.B would require the quarterly data production to include the following data for each month during the preceding calendar quarter:

A. Events Data.

[48] The Participants understand the data requested pursuant to proposed Appendix B.I may be used by the Commission for analysis and assessment of the Plan and that any portion of the data utilized as part of a public report produced by the Commission would be included on an anonymous and aggregated basis.

[49] *See* U.S. Securities and Exchange Commission Equity Market Structure Advisory Committee, *Recommendations for Rulemaking on Issues of Market Quality,* dated November 29, 2016, *available at https://www.sec.gov/spotlight/emsac/emsac-recommendations-rulemaking-market-quality.pdf.*

[50] As is the case today with proposed amendments to National Market System Plan submitted pursuant to Rule 608 of Regulation NMS, 17 CFR 242.608, and published by the Commission for public comment, the Participants would consult with Commission staff when evaluating comments submitted by the public on the Annual Report and whether a response is necessary. The Participants note that a similar process is also currently in place when evaluating public comments submitted on proposed rule changes submitted by self-regulatory organizations under Section 19(b) of the Exchange Act. Neither Rule 608 nor Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b), require that the Participants respond to each comment submitted on a proposed amendment to a National Market System Plan or rule change proposed to an individual exchange rule. Nonetheless, as with current practice, potential public comments on the reports proposed herein that raise material issues relevant to the Plan's operation would likely warrant a response from the Participants.

1. Number of Limit States, Trading Pauses, and Straddle States per day, including distribution statics such as the mean, median, minimum and maximum percentiles
2. Number of NMS Stocks that experience more than one Limit State, Trading Pause, or Straddle State in a single day including the length of each Limit State, Trading Pause, and Straddle State per day

B. The number of Clearly Erroneous Events per day for all NMS Stocks that occurred during the time when Price Bands are disseminated by the Processor

C. Reopening Data
1. Number of times an automated reopening process is extended for and the length of the Trading Pause
2. Whether the reopening process ended in a trade
3. The price calculated by an automated reopening process for an NMS Stock exiting a Trading Pause
4. For the five minutes following the conclusion of a Trading Pause, the highest price of all last sale eligible trades, the lowest price of all last sale eligible trades, and the average price of all last sale eligible trades

Appendix B.II.B would also require that the data production partition stocks by the following categories, which are identical to that currently required for the monthly data productions under the existing text to Appendix B.I.A.1.

A. Tier 1 non-ETP issues >$3.00
B. Tier 1 non-ETP issues >=$0.75 and =$3.00
C. Tier 1 non-ETP issues <$0.75
D. Tier 1 non-leveraged ETPs in each of above categories
E. Tier 1 leveraged ETPs in each of above categories
F. Tier 2 non-ETPs in each of above categories
G. Tier 2 non-leveraged ETPs in each of above categories
H. Tier 2 leveraged ETPs in each of above categories

Appendix B.II.B would also require that the above data be partitioned by time of day into the following categories, which are identical to that currently required for the monthly data productions under the existing text to Appendix B.I.A.2.

A. Opening (prior to 9:45 a.m. ET)
B. Regular (between 9:45 a.m. ET and 3:35 p.m. ET)
C. Closing (after 3:35 p.m. ET)
D. Within five minutes of a Trading Pause re-open or IPO open

*Reports on Market Events.* As proposed, the Plan would include a provision that would describe when the Operating Committee would be required to produce a report at the Commission's request. Specifically, upon Commission request, the Operating Committee would provide the Commission and make publicly available a report analyzing the Plan's operation during a significant market event that (1) materially impacted the trading of more than one security across multiple Trading Centers; (2) and is directly related to or implicating the performance of the Plan. For example, this report will evaluate the performance of Market-Wide Circuit Breakers during the covered period and their relationship to and interaction with the operation of the Plan during times when the Market Wide Circuit Breakers have been triggered. The Participants note that a discussion of the Plan's operation during a significant market event is also proposed to be included in the proposed Annual Report. Depending on the timing of the *ad hoc* report requested by the Commission, the Participants anticipate that the report requested by the Commission may be satisfied by inclusion of an analysis of the Plan's operation during a significant market event in the proposed Annual Report.

Proposal To Amend Calculation of Percentage Parameters

The Price Bands for an NMS Stock are calculated by applying the Percentage Parameter for such NMS Stock to the Reference Price, with the Lower Price Band being a Percentage Parameter below the Reference Price, and the Upper Price Band being a Percentage Parameter above the Reference Price. The Price Bands are calculated during Regular Trading Hours. The Price Bands are calculated by applying double the Percentage Parameters between 9:30 a.m. and 9:45 a.m., and 3:35 p.m. and 4:00 p.m., or in the case of an early scheduled close, during the last 25 minutes of trading before the early scheduled close.[51] Doubling of Percentage Parameters results in Price Bands for Tier 1 and Tier 2 NMS Stocks priced above $3.00 of 10% and 20%, respectively.

As part of their ongoing obligation to study and make recommendations for improvement and in consultation with the Advisory Committee, the Participants propose to amend the Plan to change the calculation of Price Bands between 9:30 a.m. and 9:45 a.m. by eliminating the requirement to double the applicable Percentage Parameters under Section V.A.1. The Participants also propose to amend Section V.A.1 of the Plan to double the Percentage Parameters between 3:35 p.m. and 4:00 p.m., or in the case of an early scheduled close, during the last 25 minutes of trading before the early scheduled close, for only Tier 1 NMS Stocks and Tier 2 NMS Stocks with a Reference Price equal to or below $3.00. This change would result in no longer doubling the Percentage Parameters of Tier 2 NMS Stocks with a Reference Price above $3.00 near the close.[52]

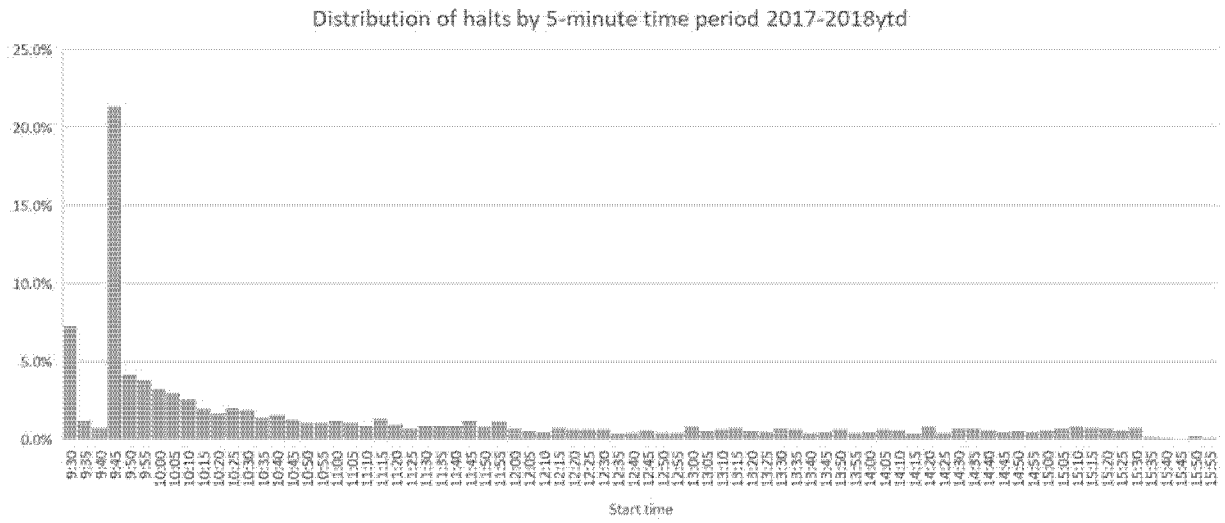
Chart C illustrates the disproportionate number of Limit States and Trading Pauses that occur at or shortly after 9:45 a.m., the only time Price Bands contract intraday. Wider Price Bands could cause displayed quotations that are within the Price Bands prior to 9:45 a.m. to then be outside of the Price Bands once they contract. This, in turn, results in an increased number of Limit States and Trading Pauses starting at 9:45 a.m. when quotations may not be updated quickly enough. (The chart also shows that the number of Limit States and Trading Pauses then decreases as trading adjusts to the tighter Price Bands.)

As illustrated in Chart C, over 21% of all Trading Pauses occur in the five minutes following the contraction of the Price Bands between 9:45 a.m. and 9:50 a.m. Chart D shows that the increase in Trading Pauses at 9:45 a.m. is not due to an increase in volatility at or around 9:45 a.m., but is primarily driven by the sudden contraction of Price Bands as currently required by the Plan.

[51] If the Processor has not yet disseminated Price Bands, but a Reference Price is available, a Trading Center may calculate and apply Price Bands based on the same Reference Price that the Processor would use for calculating such Price Bands until such trading center receives Price Bands from the Processor.

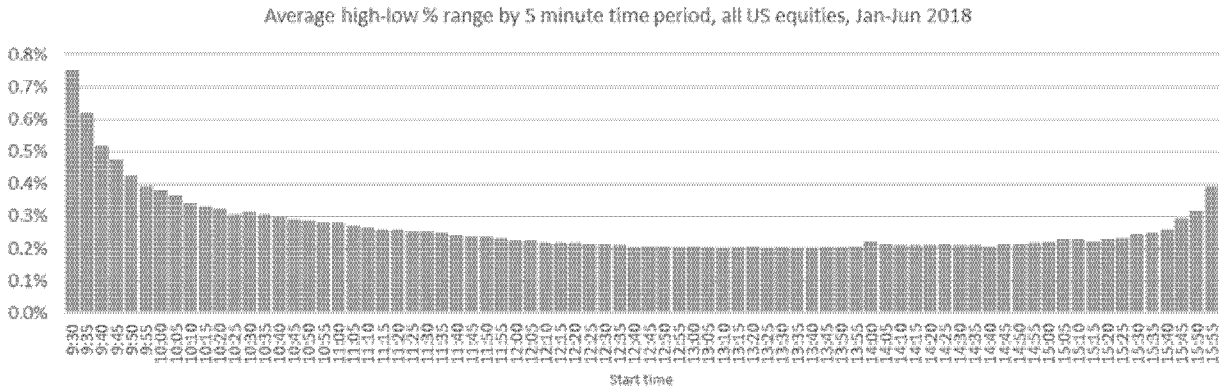
[52] The Participants would include in an Annual Report an analysis of the amendments proposed herein to Section V.A.I of the Plan concerning the calculation of the Percentage Parameters if implemented by the Participants during the period covered by that Annual Report.

**Chart C**



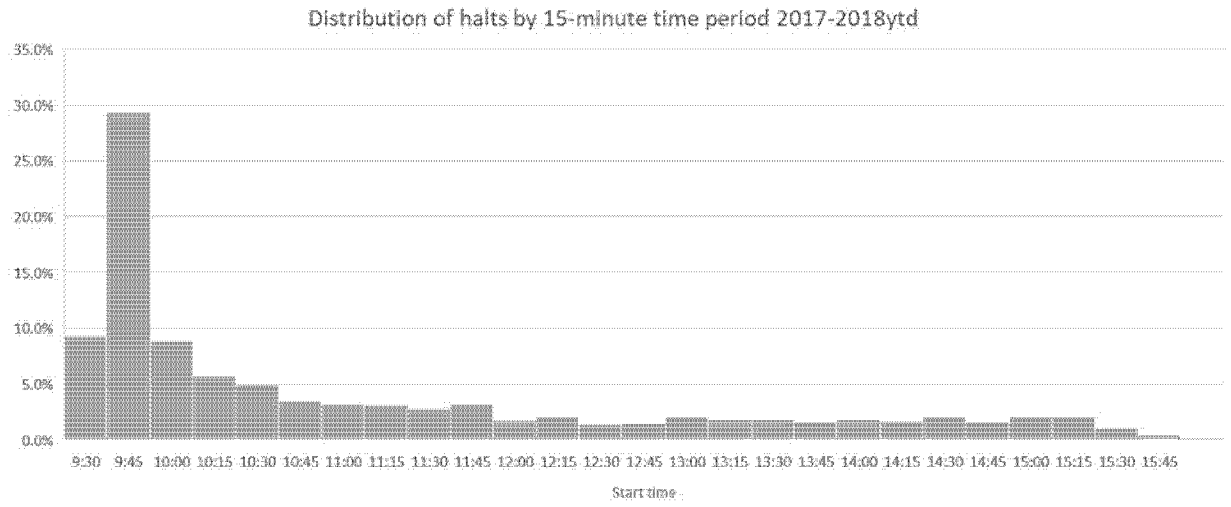

* Source. Participant data.

**Chart D**




* Source. Participant data.

**Chart E**




* Source. Participant data.

Chart E and F below review the same data as Chart C over 15-minute periods, rather than 5-minutes, and show that the first 15 minutes of the trading day from 9:30 a.m. to 9:45 a.m. account for less than 10% of all Trading Pauses. Meanwhile, the subsequent 15 minutes following the contraction of Price Bands at 9:45 a.m. account for nearly 30% of all Trading Pauses despite no evidence of abnormal volatility.

To further illustrate distortions caused by double wide Price Bands from 9:30–9:45 a.m., the Participants studied the distribution of clearly erroneous executions during the trading day. Chart F shows that 44% of all clearly erroneous executions occur between 9:30 a.m. and 9:45 a.m. since the implementation of Amendment No. 10 on July 18, 2016. With regard to ETPs, 64% of all clearly erroneous executions occur between 9:30 a.m. and 9:45 a.m. during that same period. The Participants and Advisors [53] believe that narrower Price Bands during this 15 minute period would have prevented some of these clearly erroneous executions by pausing trading at the Price Bands.

The Participants analyzed the potential impact of eliminating double wide Price Bands on the number of Limit States and Trading Pauses. As expected, using trading data from January 2, 2018 to June 30, 2018, our model predicts a hypothetical increase in the number of Limit States and Trading Pauses. Under existing procedures for calculating Price Bands, the Participants observed that an average of 1.3 NMS Stocks per day experienced one or more Limit States between 9:30 a.m. and 9:45 a.m. Those Limit States resulted in an average of 0.85 NMS Stocks experiencing a Trading Pause each day. Based on historical data, the Participants estimated that eliminating the doubling of Percentage Parameters between 9:30 a.m. and 9:45 a.m. would increase the number of NMS Stocks that experience a Limit State from 1.3 to 5.5 per day, leading to an estimated average of 3.60 NMS Stocks experiencing a Trading Pause, an increase of 2.75 per day.

**Chart F**

All

CE events since reference price fix

| Time of day | Count | Percent |
|---|---|---|
| 9:30-9:45 | 16 | 44% |
| 9:45-10:00 | 2 | 6% |
| 10:00-15:40 | 16 | 44% |
| 15:40-16:00 | 2 | 6% |
| Total | 36 | |

ETPs

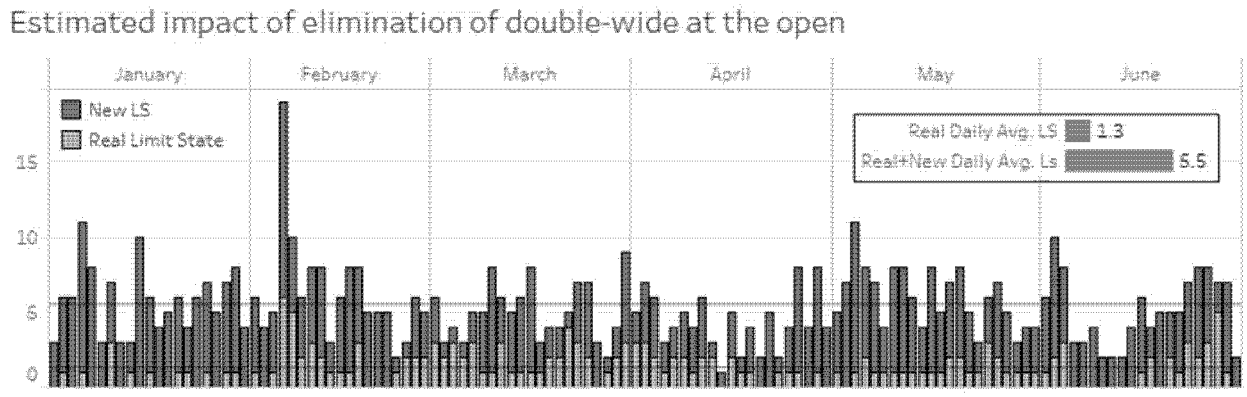
ETP CE events since reference price fix

| Time of day | Count | Percent |
|---|---|---|
| 9:30-9:45 | 7 | 64% |
| 9:45-10:00 | 0 | 0% |
| 10:00-15:40 | 3 | 27% |
| 15:40-16:00 | 1 | 9% |
| Total | 11 | |

* Source. Participant data.

[53] The Commission understands that this reference to ''Advisors'' is related to Section II(D) of the plan, which discusses the Advisory Committee.

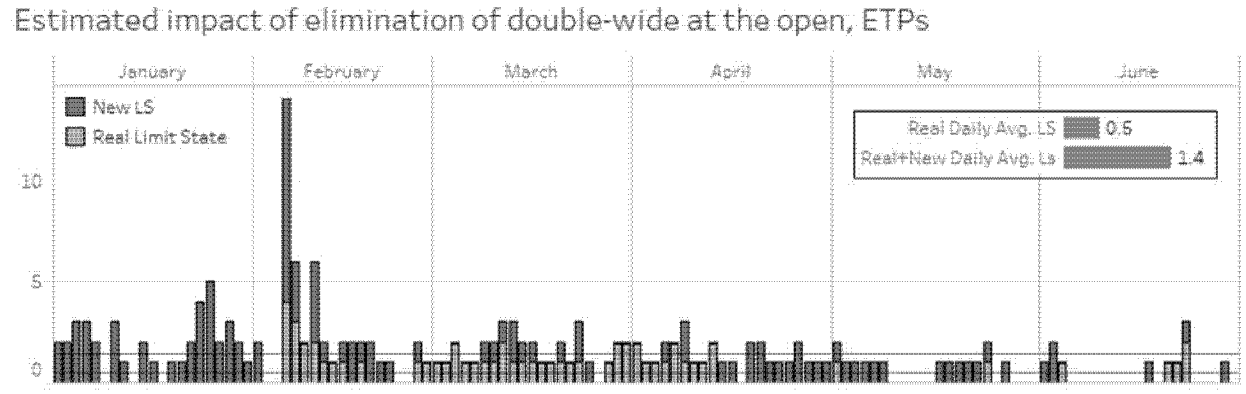
**Chart G**




* Source. Participant data.

With regard to ETPs, the Participants observed that an average of 0.5 ETPs per day experienced one or more Limit States between 9:30 a.m. and 9:45 a.m. from January 2, 2018 to June 30, 2018. Those Limit States resulted in an average of 0.34 symbols experiencing a Trading Pause each day. Based on historical data, the Participants anticipate that no longer doubling the Percentage Parameters between 9:30 a.m. and 9:45 a.m. would increase the number of ETP symbols with limit states from 0.5 per day to 1.4 per day, with an average of 0.94 symbols experiencing a Trading Pause, and increase of 0.6 per day.

**Chart H**




* Source. Participant data

Despite this theoretical increase in Limit States and Trading Pauses, the Participants and Advisors believe that eliminating double wide Price Bands would not result in an actual increase. Instead, the Participants and Advisors, in particular, believe that market participants will quickly adapt their systems to quote and trade within the new, tighter Price Bands. Furthermore, market participants will no longer need to adjust their quotes in response to a sudden narrowing of Price Bands at 9:45. It is anticipated that market makers would quote within the proposed tighter Price Bands and their quotes would remain within the Price Bands as they adjust due to market conditions, rather than at a set time where they drastically contract. The expectation is that market makers would continue to provide liquidity within the Price Bands, even if the Price Bands are tighter than the current levels. As a result of the proposal, the Participants and Advisors anticipate that overall the average number of Limit States and Trading Pauses will decrease.

Currently, Percentage Parameters are also doubled at the close of trading—*i.e.,* the period between 3:35 p.m. and 4:00 p.m., or in the case of an early scheduled close, during the last 25 minutes of trading before the early scheduled close. The Participants propose to amend Section V.A.1 of the Plan to double the Percentage Parameters at the close for only Tier 1 NMS Stocks and Tier 2 NMS Stocks with a Reference Price equal to or below $3.00. Tier 2 NMS Stocks priced above $3.00, which are already subject to a wide Percentage Parameter of 10% during the rest of the trading day, would not be doubled. This proposed change is intended to dampen extreme price movements that may occur inside of the

expanded Price Bands near the close of trading.

The Participants originally designed the Plan to include doubled Percentage Parameters around the opening and close of trading to ensure that the new Limit Up-Limit Down mechanism would perform as intended in periods of higher volatility. Although there was no available data on which to base this decision, at the time the Participants believed that this exception to the regular Percentage Parameters was an appropriate cautionary measure while the Participants and the industry gained experience with this new mechanism. Specifically, as stated in the Participants' response to comments on the proposed Plan, the Participants stated that, ''[t]he Participants believe that the proposed doubling of the Percentage Parameters is appropriate in light of the volatility profiles around the opening and closing periods, and that no adjustment to the timing or levels of the Price Bands should be made to the Plan *until experience is gained* from both Phases I and II'' (*emphasis added*). In approving this aspect of the Plan, the Commission relied on the expertise of the Participants but further provided that the pilot period would provide additional time to gain experience with the operation of the Plan that would inform any permanent approval.

Based on the Participants' collective experience in operating the Plan over the past five years, as well as advice from market participants including the Advisory Committee, the Participants believe that the original concerns about volatility around the close were unfounded with respect to Tier 2 NMS Stocks where the applicable Percentage Parameters are already 10% during the remainder of the trading day. Specifically, the Participants found that only a *de minimis* number of trades actually occur outside of the regular 10% Percentage Parameter, and that therefore the doubling of the Percentage Parameters for Tier 2 NMS Stocks at the close is unwarranted.

Furthermore, the Participants believe that the currently doubled Percentage Parameters for Tier 2 NMS Stocks—which would accommodate price swings of as much as 40% when trading from the upper Price Band to the lower Price Band—are inconsistent with the stated goal of the Plan, which is to address extraordinary volatility in NMS Stocks, and thereby protect investors and promote fair and orderly markets. While data collected by the Participants shows that such extreme price moves are rare today, the Participants believe that waiting for a major event to occur before closing this gap would weaken investor confidence in the markets, and is inconsistent with principles of investor protection.

As shown by Chart I, extreme price changes remain rare and are readily accommodated within the normal, non-doubled, Percentage Parameter for Tier 2 NMS Stocks. To illustrate, the Participants reviewed how far every NMS Stock's price moved (high to low) during every 30-second period from January 2018 to March 2018, a period that included relatively higher volatility in February 2018. As described by the below data, over that period, 99.9% of 30-second high-low price changes were less than 3%. Less than .02% of 30-second periods (22,347 out of 117 million measured) included a price change greater than 5%. Only 126 30-second periods included price change of more than 20%.

BILLING CODE 8011–01–P

## Chart I

Distribution of 30-second price changes, all US stocks, Jan-Mar 2018

| Stock price range | 0-3% | 3-5% | 5-10% | 10-20% | 20-30% | 30-40% | 40-50% | >50% | Total |
|---|---|---|---|---|---|---|---|---|---|
| 1. Less than $1 | 1,402,543 | 25,320 | 4,859 | 379 | 21 | 4 | 1 | 1 | 1,433,128 |
| 2. $1-$3 | 4,905,040 | 31,467 | 7,224 | 783 | 47 | 9 | 2 | 1 | 4,944,573 |
| 3. $3-$5 | 4,349,881 | 11,615 | 3,301 | 278 | 6 | - | - | - | 4,365,081 |
| 4. $5-$10 | 9,987,661 | 7,685 | 1,868 | 152 | 7 | 1 | - | - | 9,997,374 |
| 5. $10-$20 | 20,211,549 | 6,556 | 1,733 | 140 | 11 | - | - | - | 20,219,989 |
| 6. $20-$50 | 38,482,239 | 4,535 | 1,104 | 119 | 11 | - | - | - | 38,488,008 |
| 7. $50-$100 | 23,733,919 | 711 | 168 | 24 | 2 | - | - | - | 23,734,824 |
| 8. >$100 | 13,838,764 | 247 | 68 | 21 | 2 | - | - | - | 13,839,102 |
| Total | 116,911,596 | 88,136 | 20,325 | 1,896 | 107 | 14 | 3 | 2 | 117,022,079 |

* Source. Participant data.

Distribution of 30-second price changes, all US stocks, Jan-Mar 2018

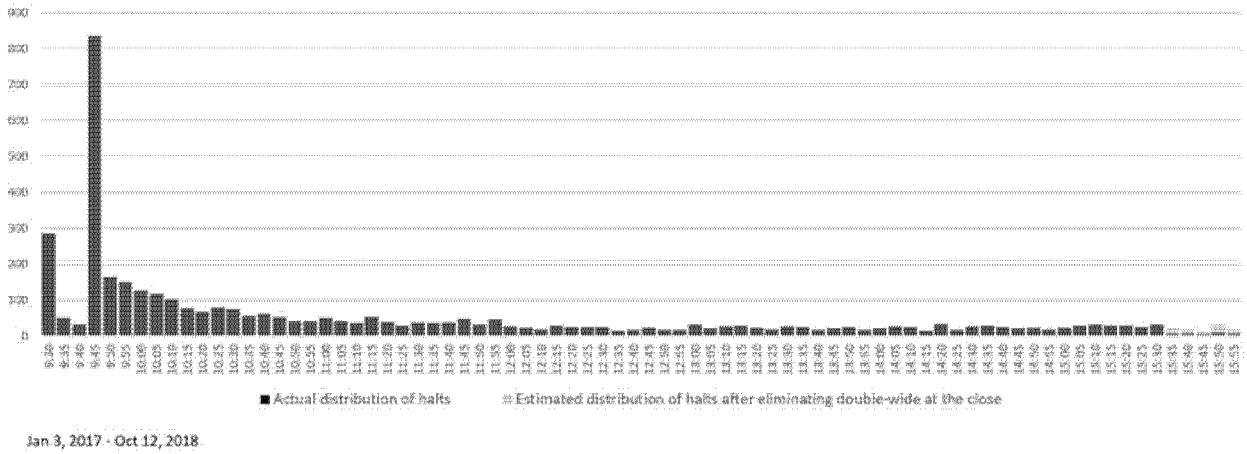
| Stock price range | 0-3% | 3-5% | 5-10% | 10-20% | 20-30% | 30-40% | 40-50% | >50% | Total |
|---|---|---|---|---|---|---|---|---|---|
| 1. Less than $1 | 97.8659% | 1.7668% | 0.3390% | 0.0264% | 0.0015% | 0.0003% | 0.0001% | 0.0001% | 100% |
| 2. $1-$3 | 99.2005% | 0.6364% | 0.1461% | 0.0158% | 0.0010% | 0.0002% | 0.0000% | 0.0000% | 100% |
| 3. $3-$5 | 99.6518% | 0.2661% | 0.0756% | 0.0064% | 0.0001% | 0.0000% | 0.0000% | 0.0000% | 100% |
| 4. $5-$10 | 99.9028% | 0.0769% | 0.0187% | 0.0015% | 0.0001% | 0.0000% | 0.0000% | 0.0000% | 100% |
| 5. $10-$20 | 99.9583% | 0.0324% | 0.0086% | 0.0007% | 0.0001% | 0.0000% | 0.0000% | 0.0000% | 100% |
| 6. $20-$50 | 99.9850% | 0.0118% | 0.0029% | 0.0003% | 0.0000% | 0.0000% | 0.0000% | 0.0000% | 100% |
| 7. $50-$100 | 99.9962% | 0.0030% | 0.0007% | 0.0001% | 0.0000% | 0.0000% | 0.0000% | 0.0000% | 100% |
| 8. >$100 | 99.9976% | 0.0018% | 0.0005% | 0.0002% | 0.0000% | 0.0000% | 0.0000% | 0.0000% | 100% |
| Total | 99.9056% | 0.0753% | 0.0174% | 0.0016% | 0.0001% | 0.0000% | 0.0000% | 0.0000% | 100% |

* Source. Participant data.

As illustrated in Charts J and K below, Trading Pauses are significantly underrepresented during the last 25 minutes of the trading day where the Percentage Parameters are doubled. Based on data compiled by the Participants, during 2017 and 2018 through October 12, an average of 0.06 Trading Pauses occurred each day at the close (about one pause every 17 trading days). By comparison, the average for any 25 minute period across the entire trading day is 0.57 Trading Pauses per day (about one pause every 2 trading days). Even with the proposed change to only double Percentage Parameters for Tier 2 NMS Stocks with a Reference Price below $3.00, the Participants expect that the total number of Trading Pauses experienced during this period would be *de minimis.* The Participants estimate that eliminating double wide at the close will results in about 0.2 new Trading Pauses per day (out of a total of 9 per day during 2017 and 2018 through October 12, 2018) would result from the proposed change, without accounting for a reduction attributable to behavioral changes. Trading Pauses would therefore continue to be underrepresented at the close notwithstanding any minimal increase.

**Chart J**

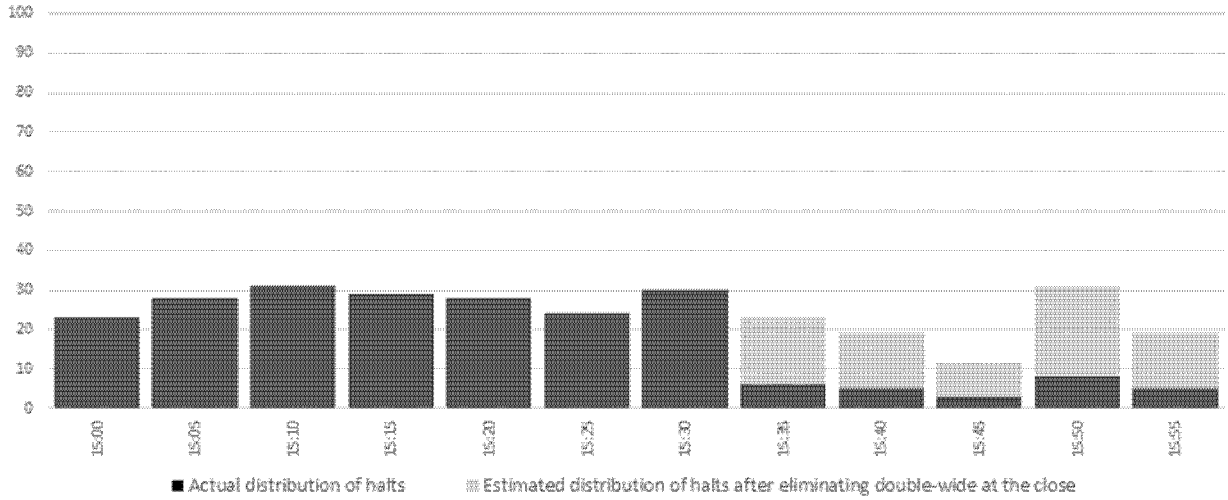
**Distribution of Trading Pauses by 5-minute time period 2017 through Oct 2018**




* Source. Participant data.

**Chart K**

**Distribution of Trading Pauses by 5-minute time period 2017 through Oct 2018, 3-4p.m.**




* Source. Participant data.

BILLING CODE 8011–01–C

Furthermore as discussed above, the Participants believe that the real number of new Trading Pauses under the proposed modified percentage parameters would be significantly lower than suggested by historical data because that data does not take into account changes in behavior by market participants. Specifically, the Participants believe, based on experience operating the Plan and the advice of the Advisory Committee, that market participants would adjust their quoting behavior in response to these changes, resulting in a much lower number of Trading Pauses than suggested by the historical data.

Eliminating the doubling of the Percentage Parameters at the close for Tier 2 NMS Stocks priced above $3.00 would therefore come with almost no cost in terms of additional Trading Pauses and would remove the possibility of extreme price movements within the Price Bands. While volatility near the close has been rare, continuing to double Percentage Parameters leaves investors at risk of extreme price changes of up to 40% from the Upper Price Band to the Lower Price Band. At the same time, there is no evidence that eliminating the doubling of Percentage

Parameters at the close for Tier 2 NMS Stocks priced above $3.00 would be disruptive to the market. The Participants therefore believe that it is consistent with the protection of investors and the public interest to no longer double the Percentage Parameters at the close for these securities. In addition, the Participants believe that this change is consistent with the goals of the Plan itself as Price Bands that are 40% wide from the Upper Band to the Lower Band at the close leave open the potential for the extraordinary price movements that resulted in the Plan being adopted in the first place. In fact, Participants believe that these double wide Price Bands leave open the potential for future mini-Flash Crashes that can and should be prevented.

In addition, there have been discussions around eliminating clearly erroneous rules when the Limit Up-Limit Down mechanism is in effect. Broadly, the Limit Up-Limit Down mechanism prevents trades from happening at prices where one party to the trade would be considered ''aggrieved,'' and thus could be viewed as an appropriate mechanism to supplant clearly erroneous rules. The Participants believe, however, that without the backstop of clearly erroneous rules, it is vital that the Price Bands are appropriately tailored to prevent trades that are so far from current market prices that they would be viewed as having been executed in error. Continuing to permit trading to occur within Price Bands that are as much as 20% above or below the Reference Price without the protections provided by the clearly erroneous rules does not satisfy this requirement, and would be detrimental to investors and the public interest.

*B. Governing or Constituent Documents*

The governing documents of the Processor, as defined in Section I(P) of the Plan, will not be affected by the Plan, but once the Plan is implemented, the Processor's obligations will change, as set forth in detail in the Plan.

*C. Implementation of Plan*

The Plan was initially implemented as a one-year pilot program in two phases, consistent with Section VIII of the Plan: Phase I of Plan implementation began on April 8, 2013 and was completed on May 3, 2013. Implementation of Phase II of the Plan began on August 5, 2013 and was completed on February 24, 2014.

The Participants propose to implement the proposal to operate the Plan on a permanent basis upon Commission approval of this amendment.

The Participants propose to implement the proposed changes to Section V.A.1 of the Plan no later than 12 months after approval of this amendment. The implementation of these changes is contingent upon the Processors' ability to implement this amendment on the proposed timeline. The Participants will provide six month advance public notice to market participants of the implementation date of the proposed changes to Section V.A.1 of the Plan.

Quarterly Monitoring Reports required under Appendix B.II.B would be submitted no later than 30 days after the end of the covered calendar quarter. The Participants propose that the first quarterly Monitoring Report would cover the second full calendar quarter following the approval of this amendment. For example, if this amendment is approved during Q1 2019 then the first quarterly Monitoring Report would cover Q3 2019 and would be submitted no later than October 30, 2019. The Participants would continue to submit monthly data required by current Appendix B.I and B.II for months that would not be included in a quarterly Monitoring Report. The Participants would cease producing monthly data required by current Appendix B.I and B.II at the beginning of the calendar quarter covered by the first quarterly Monitoring Report.

The Participants propose to submit the first Annual Report required under Appendix B.II.A no later than March 31, 2020.

*D. Development and Implementation Phases*

The Plan was initially implemented as a one-year pilot program in two Phases, consistent with Section VIII of the Plan: Phase I of Plan implementation began on April 8, 2013 and was completed on May 3, 2013. Implementation of Phase II of the Plan began on August 5, 2013 and was completed on February 24, 2014. The tenth amendment to the Plan was implemented on July 18, 2016 and the twelfth and thirteenth amendments to the Plan were implemented on November 20, 2017.[54] Pursuant to this proposed amendment, the Participants propose to make the Plan permanent upon approval of this amendment.

*E. Analysis of Impact on Competition*

The proposed amendments to the Plan would apply to all market participants equally and would not impose a competitive burden on one category of market participant in favor of another category of market participant. The proposed amendment would apply to trading on all Trading Centers and all NMS Stocks would be subject to the amended Plan's requirements. Therefore, the proposed Plan does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Participants do not believe that the proposed Plan introduces terms that are unreasonably discriminatory for the purposes of Section 11A(c)(1)(D) of the Exchange Act because it would apply to all market participants equally.

*F. Written Understanding or Agreements Relating to Interpretation of, or Participation in, Plan*

The Participants have no written understandings or agreements relating to interpretation of the Plan. Section II(C) of the Plan sets forth how any entity registered as a national securities exchange or national securities association may become a Participant.

*G. Approval of Amendment of the Plan*

On October 31, 2018, the Operating Committee, duly constituted and chaired by Mr. Robert Books of Cboe Global Markets, Inc., voted unanimously to amend the Plan as set forth herein in accordance with Section III(C) of the Plan. The Plan Advisory Committee was notified in connection with the Eighteenth Amendment and was in favor. Each of the Plan's Participants has executed a written amended Plan.

*H. Terms and Conditions of Access*

Section II(C) of the Plan provides that any entity registered as a national securities exchange or national securities association under the Exchange Act may become a Participant by: (1) Becoming a participant in the applicable Market Data Plans, as defined in Section I(F) of the Plan; (2) executing a copy of the Plan, as then in effect; (3) providing each then-current Participant with a copy of such executed Plan; and (4) effecting an amendment to the Plan as specified in Section III(B) of the Plan.

*I. Method of Determination and Imposition, and Amount of, Fees and Charges*

This section is not applicable as the proposed amendment to the Plan does not involve fees or charges.

[54] *See* text accompanying 82 FR 45922, note 1, *supra.*

*J. Method and Frequency of Processor Evaluation*

This section is not applicable as the operation of the Plan is conducted by the Primary Listing Exchange.

*K. Dispute Resolution*

Section III(C) of the Plan provides that each Participant shall designate an individual to represent the Participant as a member of an Operating Committee. No later than the initial date of the Plan, the Operating Committee shall designate one member of the Operating Committee to act as the Chair of the Operating Committee. Any recommendation for an amendment to the Plan from the Operating Committee that receives an affirmative vote of at least two-thirds of the Participants, but is less than unanimous, shall be submitted to the Commission as a request for an amendment to the Plan initiated by the Commission under Rule 608.

**III. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amendment is consistent with the Exchange Act and the rules thereunder.

*Proposal To Narrow Bands Between 9:30 and 9:45*

1. Is the proposal to amend the Plan by eliminating the requirement to double the applicable Percentage Parameters between 9:30 a.m. and 9:45 a.m. under Section V.A.1 appropriate?

2. Alternatively, would it be preferable and appropriate to maintain the current provision that doubles the Percentage Parameters between 9:30 a.m. and 9:45 a.m.? Please support any response with data, if possible.

3. The requirement to double the Percentage Parameters between 9:30 a.m. and 9:45 a.m. for purposes of calculating the Price Bands was established in light of the higher volatility at the beginning of the trading day. Chart D in the Transmittal Letter accompanying the Eighteenth Amendment shows that the most volatile period of the trading day is between 9:30 a.m. and 9:45 a.m. Would the proposed narrower Price Bands increase the occurrence of Limit States and Trading Pauses that occur between 9:30 a.m. and 9:45 a.m.? Are there any concerns that narrowing the Price Bands between 9:30 a.m. and 9:45 a.m. as proposed in the Eighteenth Amendment would impede an orderly trading environment during this more volatile period of the trading day? Please support any response with data, if possible.

4. The Transmittal Letter provides historical analysis in Charts G and H estimating the impact of eliminating double-wide Price Bands between 9:30 a.m. and 9:45 a.m. This analysis estimates an increase in both limit states and trading pauses were the double-wide bands eliminated during the time period analyzed. The Participants state, however, that this estimated impact is theoretical in nature and that market participant behavior would adjust to narrower Price Bands at the open, ultimately resulting in fewer limit states and trading pauses than reflected in Charts G and H. Do commenters agree with the Participants that market participant behavior would change such that eliminating double-wide bands at the open would not result in an increase in limit states and trading pauses similar to what the Participants project based on Charts G and H? If the double-wide bands did in fact result in a higher incidence of trading pauses and limit states as estimated based on Charts G and H, would market participants be concerned about impacts of the Plan on trading and market quality between 9:30 a.m. and 9:45 a.m. and beyond? [55] Please support any response with data, if possible.

5. Charts G and H demonstrate a spike in actual and projected limit states and trading pauses during February 2018. This spike appears to have occurred during the volatile trading day of February 5, 2018. Are commenters concerned about the impact of narrowing double-wide bands between 9:30 a.m. and 9:45 a.m. on volatile trading days? Please support any response with data, if possible.

6. Is there a disproportionate number of Limit States and Trading Pauses that occur at or shortly after 9:45 a.m.? [56] Are these Limit States and Trading Pauses caused by the contraction of the Price Bands rather than an increase in volatility of the type the Plan is designed to prevent? Would the proposed narrower Price Bands reduce the occurrence of Limit States and Trading Pauses that presently occur at or shortly after the Price Bands contract at 9:45 a.m.?

7. Would the proposed narrower Price Bands reduce the number of clearly erroneous executions that occur between 9:30 a.m. and 9:45 a.m.?

*Proposal to Narrow Bands Between 3:35 and 4:00*

8. Is the proposal to amend the Plan to eliminate the doubling of Percentage Parameters of Tier 2 NMS Stocks with a Reference Price above $3.00 between 3:35 p.m. and 4:00 p.m. appropriate?

9. Alternatively, would it be preferable and appropriate to maintain the current provision that doubles the Percentage Parameters of Tier 2 NMS Stocks with a Reference Price above $3.00 between 3:45 p.m. and 4:00 p.m.? Please support any response with data, if possible.

10. The requirement to double the Percentage Parameters of Tier 2 NMS Stocks with a Reference Price above $3.00 between 3:35 p.m. and 4:00 p.m. for purposes of calculating the Price Bands was established in light of the higher volatility at the end of the trading day. Chart D shows that the volatility gradually increases as the trading day progresses towards the close of trading. Would the proposed narrower Price Bands between 3:35 p.m. and 4:00 p.m. increase the occurrence of Limit States and Trading Pauses that occur during that time period? Are there any concerns that narrowing the Price Bands between 3:35 p.m. and 4:00 p.m. as proposed would impede an orderly trading environment during this more volatile period of the trading day? Would an increase in Limit States and Trading Pauses between 3:35 p.m. and 4:00 p.m. impact negatively the primary listing exchange closing auction processes? Please support any response with data, if possible.

11. Do commenters agree with the Participants that market participant behavior would change such that eliminating double-wide bands at the close would not result in an increase in limit states and trading pauses similar to what the Participants project based on Chart K? If the double-wide bands did in fact result in a higher incidence of trading pauses and limit states as estimated based on Chart K, would market participants be concerned about impacts of the Plan on trading between 3:35 p.m. and 4:00 p.m. or the primary listing exchange closing auction processes? Please support any response with data, if possible.

12. Are commenters concerned about the impact of narrowing double-wide

[55] One academic study examined trading pauses during the SSCB Pilot and LULD Pilot and found that, on average, trading pauses increase volatility and widen bid-ask spreads. Hautsch, Nikolaus and Akos Horvath, 2018. ''How Effective Are Trading Pauses?'', *Journal of Financial Economics,* forthcoming, available at *https://www.sciencedirect.com/science/article/pii/S0304405X18302356.*

[56] Another DERA study looked at the frequency of Trading Pauses around the introduction of Limit up Limit Down and found that a disproportionate number of trading pauses occurred during the five minutes after the opening bands contracted, *i.e.* 9:45–9:50 a.m. *See* Moise, C. and P. Flaherty, 2017. ''Limit Up-Limit Down Pilot Plan and Associated Events'', SEC White Paper, available at *https://www.sec.gov/dera/staff-papers/whitepapers/10mar17moiseflahertyluld.*

bands between 3:35 p.m. and 4:00 p.m. on volatile trading days? Please support any response with data, if possible.

13. Would the proposed narrower Price Bands increase the occurrence of Limit States and Trading Pauses near the close? Is the current doubling of Percentage Parameters for such stocks near the close unwarranted? Are potential price swings of as much as 40% for such stocks inconsistent with the Plan's goal of addressing extraordinary market volatility in NMS Stocks?

*Proposal To Provide Data to the Commission That Would Not Be Made Public*

14. The Participants propose to provide certain data to the Commission upon request that would not be made publicly available. Should any data that is provided to the Commission also be made publicly available? Please describe any concerns with respect to making public, or not making public, the data that will be provided to the Commission.

*Participant Statement Regarding Competition*

15. The Participants state that Plan does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. Do commenters believe that the Plan imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act?

16. Further, would the proposal have a positive, negative, or neutral impact on competition? Please explain. How would any impact on competition from the proposal benefit or harm the national market system or the various market participants? Please describe and explain how, if at all, aspects of the national market system or different market participants would be affected. Please support any response with data, if possible.

17. More generally, to the extent possible please provide specific data, analyses, or studies for support regarding any impacts of the proposal on competition.

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 4–631 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 4–631.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 plan amendment that are filed with the Commission, and all written communications relating to the amendment 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 Participants' offices. 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 4–631 and should be submitted on or before January 16, 2019.

By the Commission.

**Eduardo A. Aleman,**

*Deputy Secretary.*

**Exhibit A**

Proposed new language is underlined; proposed deletions are in [brackets]

**PLAN TO ADDRESS EXTRAORDINARY MARKET VOLATILITY**

**SUBMITTED TO**

**THE SECURITIES AND EXCHANGE COMMISSION**

**PURSUANT TO RULE 608 OF REGULATION NMS**

**UNDER THE**

**SECURITIES EXCHANGE ACT OF 1934**

Table of Contents


| Section | Page |
|---|---|
| Preamble | 1 |
| I. Definitions | 2 |
| II. Parties | 4 |
| III. Amendments to Plan | 7 |
| IV. Trading Center Policies and Procedures | 8 |
| V. Price Bands | 8 |
| VI. Limit Up-Limit Down Requirements | 11 |
| VII. Trading Pauses | 13 |
| VIII. Implementation | 15 |
| IX. Withdrawal from Plan | 15 |
| X. Counterparts and Signatures | 15 |
| Appendix A – Percentage Parameters | 17 |
| Appendix A – Schedule 1 | 19 |
| Appendix B – Data and Reporting | [35]37 |

**Preamble**

The Participants submit to the SEC this Plan establishing procedures to address extraordinary volatility in NMS Stocks. The procedures provide for market-wide limit up-limit down requirements that prevent trades in individual NMS Stocks from occurring outside of the specified Price Bands. These limit up-limit down requirements are coupled with Trading Pauses to accommodate more fundamental price moves. The Plan procedures are designed, among other things, to protect investors and promote fair and orderly markets. The Participants developed this Plan pursuant to Rule 608(a)(3) of Regulation NMS under the Exchange Act, which authorizes the Participants to act jointly in preparing, filing, and implementing national market system plans.

**I. Definitions**

(A) ''Eligible Reported Transactions'' shall have the meaning prescribed by the Operating Committee and shall generally mean transactions that are eligible to update the last sale price of an NMS Stock.

(B) ''Exchange Act'' means the Securities Exchange Act of 1934, as amended.

(C) ''Limit State'' shall have the meaning provided in Section VI of the Plan.

(D) ''Limit State Quotation'' shall have the meaning provided in Section VI of the Plan.

(E) ''Lower Price Band'' shall have the meaning provided in Section V of the Plan.

(F) ''Market Data Plans'' shall mean the effective national market system plans through which the Participants act jointly to disseminate consolidated information in compliance with Rule 603(b) of Regulation NMS under the Exchange Act.

(G) ''National Best Bid'' and ''National Best Offer'' shall have the meaning provided in Rule 600(b)(42) of Regulation NMS under the Exchange Act.

(H) ''NMS Stock'' shall have the meaning provided in Rule 600(b)(47) of Regulation NMS under the Exchange Act.

(I) ''Opening Price'' shall mean the price of a transaction that opens trading on the Primary Listing Exchange. If the Primary Listing Exchange opens with quotations, the ''Opening Price'' shall mean the closing price of the NMS Stock on the Primary Listing Exchange on the previous trading day, or if no such closing price exists, the last sale on the Primary Listing Exchange.

(J) ''Operating Committee'' shall have the meaning provided in Section III(C) of the Plan.

(K) ''Participant'' means a party to the Plan.

(L) ''Plan'' means the plan set forth in this instrument, as amended from time to time in accordance with its provisions.

(M) ''Percentage Parameter'' shall mean the percentages for each tier of NMS Stocks set forth in Appendix A of the Plan.

(N) ''Price Bands'' shall have the meaning provided in Section V of the Plan.

(O) ''Primary Listing Exchange'' shall mean the Participant on which an NMS Stock is listed. If an NMS Stock is listed on more than one Participant, the Participant on which the NMS Stock has been listed the longest shall be the Primary Listing Exchange.

(P) ''Processor'' shall mean the single plan processor responsible for the consolidation of information for an NMS Stock pursuant to Rule 603(b) of Regulation NMS under the Exchange Act.

(Q) ''Pro-Forma Reference Price'' shall have the meaning provided in Section V(A)(2) of the Plan.

(R) ''Reference Price'' shall have the meaning provided in Section V of the Plan.

(S) ''Regular Trading Hours'' shall have the meaning provided in Rule 600(b)(64) of Regulation NMS under the Exchange Act. For purposes of the Plan, Regular Trading Hours can end earlier than 4:00 p.m. ET in the case of an early scheduled close.

(T) ''Regulatory Halt'' shall have the meaning specified in the Market Data Plans.

(U) ''Reopening Price'' shall mean the price of a transaction that reopens trading on the Primary Listing Exchange following a Trading Pause or a Regulatory Halt, or, if the Primary Listing Exchange reopens with quotations, the midpoint of those quotations.

(V) ''SEC'' shall mean the United States Securities and Exchange Commission.

(W) ''Straddle State'' shall have the meaning provided in Section VII(A)(2) of the Plan.

(X) ''Trading center'' shall have the meaning provided in Rule 600(b)(78) of Regulation NMS under the Exchange Act.

(Y) ''Trading Pause'' shall have the meaning provided in Section VII of the Plan.

(Z) ''Upper Price Band'' shall have the meaning provided in Section V of the Plan.

**II. Parties**

*(A) List of Parties*

The parties to the Plan are as follows:

(1) Cboe BZX Exchange, Inc., 400 South LaSalle Street, Chicago, Illinois 60605
(2) Cboe BYX Exchange, Inc., 400 South LaSalle Street, Chicago, Illinois 60605
(3) Cboe EDGA Exchange, Inc., 400 South LaSalle Street, Chicago, Illinois 60605
(4) Cboe EDGX Exchange, Inc., 400 South LaSalle Street, Chicago, Illinois 60605
(5) Chicago Stock Exchange, Inc., 440 South LaSalle Street, Chicago, Illinois 60605
(6) Financial Industry Regulatory Authority, Inc., 1735 K Street NW, Washington, DC 20006
(7) Investors Exchange LLC, 4 World Trade Center, 44th Floor, New York, New York 10007
(8) NASDAQ BX, Inc., One Liberty Plaza, New York, New York 10006
(9) NASDAQ PHLX LLC, 1900 Market Street, Philadelphia, Pennsylvania 19103
(10) The Nasdaq Stock Market LLC, 1 Liberty Plaza, 165 Broadway, New York, NY 10006
(11) NYSE National, Inc., 11 Wall Street, New York, NY 10005
(12) New York Stock Exchange LLC, 11 Wall Street, New York, New York 10005
(13) NYSE American LLC, 11 Wall Street, New York, New York 10005
(14) NYSE Arca, Inc., 11 Wall Street, New York, New York 10005

*(B) Compliance Undertaking*

By subscribing to and submitting the Plan for approval by the SEC, each Participant agrees to comply with and to enforce compliance, as required by Rule 608(c) of Regulation NMS under the Exchange Act, by its members with the provisions of the Plan. To this end, each Participant shall adopt a rule requiring compliance by its members with the provisions of the Plan, and each Participant shall take such actions as are necessary and appropriate as a participant of the Market Data Plans to cause and enable the Processor for each NMS Stock to fulfill the functions set forth in this Plan.

*(C) New Participants*

The Participants agree that any entity registered as a national securities exchange or national securities association under the Exchange Act may become a Participant by: (1) Becoming a participant in the applicable Market Data Plans; (2) executing a copy of the

Plan, as then in effect; (3) providing each then-current Participant with a copy of such executed Plan; and (4) effecting an amendment to the Plan as specified in Section III (B) of the Plan.

*(D) Advisory Committee*

(1) *Formation.* Notwithstanding other provisions of this Plan, an Advisory Committee to the Plan shall be formed and shall function in accordance with the provisions set forth in this section.

(2) *Composition.* Members of the Advisory Committee shall be selected for two-year terms as follows:

(A) *Advisory Committee Selections.* By affirmative vote of a majority of the Participants, the Participants shall select at least one representatives from each of the following categories to be members of the Advisory Committee: (1) A broker-dealer with a substantial retail investor customer base; (2) a broker-dealer with a substantial institutional investor customer base; (3) an alternative trading system; (4) a broker-dealer that primarily engages in trading for its own account; and (5) an investor.

(3) *Function.* Members of the Advisory Committee shall have the right to submit their views to the Operating Committee on Plan matters, prior to a decision by the Operating Committee on such matters. Such matters shall include, but not be limited to, proposed material amendments to the Plan.

(4) *Meetings and Information.* Members of the Advisory Committee shall have the right to attend meetings of the Operating Committee and to receive any information concerning Plan matters; provided, however, that the Operating Committee may meet in executive session if, by affirmative vote of a majority of the Participants, the Operating Committee determines that an item of Plan business requires confidential treatment.

**III. Amendments to Plan**

*(A) General Amendments*

Except with respect to the addition of new Participants to the Plan, any proposed change in, addition to, or deletion from the Plan shall be effected by means of a written amendment to the Plan that: (1) Sets forth the change, addition, or deletion; (2) is executed on behalf of each Participant; and, (3) is approved by the SEC pursuant to Rule 608 of Regulation NMS under the Exchange Act, or otherwise becomes effective under Rule 608 of Regulation NMS under the Exchange Act.

*(B) New Participants*

With respect to new Participants, an amendment to the Plan may be effected by the new national securities exchange or national securities association executing a copy of the Plan, as then in effect (with the only changes being the addition of the new Participant's name in Section II(A) of the Plan) and submitting such executed Plan to the SEC for approval. The amendment shall be effective when it is approved by the SEC in accordance with Rule 608 of Regulation NMS under the Exchange Act or otherwise becomes effective pursuant to Rule 608 of Regulation NMS under the Exchange Act.

*(C) Operating Committee*

(1) Each Participant shall select from its staff one individual to represent the Participant as a member of an Operating Committee, together with a substitute for such individual. The substitute may participate in deliberations of the Operating Committee and shall be considered a voting member thereof only in the absence of the primary representative. Each Participant shall have one vote on all matters considered by the Operating Committee. No later than the initial date of Plan operations, the Operating Committee shall designate one member of the Operating Committee to act as the Chair of the Operating Committee.

(2) The Operating Committee shall monitor the procedures established pursuant to this Plan and advise the Participants with respect to any deficiencies, problems, or recommendations as the Operating Committee may deem appropriate. The Operating Committee shall establish specifications and procedures for the implementation and operation of the Plan that are consistent with the provisions of this Plan and the Appendixes thereto. With respect to matters in this paragraph, Operating Committee decisions shall be approved by a simple majority vote.

(3) Any recommendation for an amendment to the Plan from the Operating Committee that receives an affirmative vote of at least two-thirds of the Participants, but is less than unanimous, shall be submitted to the SEC as a request for an amendment to the Plan initiated by the Commission under Rule 608 of Regulation NMS.

**IV. Trading Center Policies and Procedures**

All trading centers in NMS Stocks, including both those operated by Participants and those operated by members of Participants, shall establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the limit up—limit down requirements specified in Sections VI of the Plan, and to comply with the Trading Pauses specified in Section VII of the Plan.

**V. Price Bands**

*(A) Calculation and Dissemination of Price Bands*

(1) The Processor for each NMS stock shall calculate and disseminate to the public a Lower Price Band and an Upper Price Band during Regular Trading Hours for such NMS Stock. The Price Bands shall be based on a Reference Price for each NMS Stock that equals the arithmetic mean price of Eligible Reported Transactions for the NMS stock over the immediately preceding five-minute period (except for periods following openings and reopenings, which are addressed below). If no Eligible Reported Transactions for the NMS Stock have occurred over the immediately preceding five-minute period, the previous Reference Price shall remain in effect. The Price Bands for an NMS Stock shall be calculated by applying the Percentage Parameter for such NMS Stock to the Reference Price, with the Lower Price Band being a Percentage Parameter below the Reference Price, and the Upper Price Band being a Percentage Parameter above the Reference Price. The Price Bands shall be calculated during Regular Trading Hours. Between [9:30 a.m. and 9:45 a.m. ET, and ]3:35 p.m. and 4:00 p.m. ET, or in the case of an early scheduled close, during the last 25 minutes of trading before the early scheduled close, the Price Bands shall be calculated by applying double the Percentage Parameters set forth in Appendix A <u>for (i) all Tier 1 NMS Stocks and (ii) Tier 2 NMS Stocks priced equal to or below $3.00</u>. If the Processor has not yet disseminated Price Bands, but a Reference Price is available, a trading center may calculate and apply Price Bands based on the same Reference Price that the Processor would use for calculating such Price Bands until such trading center receives Price Bands from the Processor. If, under Section VII(B)(2), the Primary Listing Exchange notifies the Processor that it is unable to reopen an NMS Stock due to a systems or technology issue and it has not declared a Regulatory Halt, the Processor will calculate and disseminate Price Bands by applying triple the Percentage Parameters set forth in Appendix A for the first 30 seconds such Price Bands are disseminated.

**(2)** The Processor shall calculate a Pro-Forma Reference Price on a continuous basis during Regular Trading Hours, as specified in Section V(A)(1) of the Plan. If a Pro-Forma Reference Price has not moved by 1% or more from the Reference Price currently in effect, no new Price Bands shall be disseminated, and the current Reference Price shall remain the effective Reference Price. When the Pro-Forma Reference Price has moved by 1% or more from the Reference Price currently in effect, the Pro-Forma Reference Price shall become the Reference Price, and the Processor shall disseminate new Price Bands based on the new Reference Price; provided, however, that each new Reference Price shall remain in effect for at least 30 seconds.

*(B) Openings*

(1) Except when a Regulatory Halt is in effect at the start of Regular Trading Hours, the first Reference Price for a trading day shall be the Opening Price on the Primary Listing Exchange in an NMS Stock if such Opening Price occurs less than five minutes after the start of Regular Trading Hours. During the period less than five minutes after the Opening Price, a Pro-Forma Reference Price shall be updated on a continuous basis to be the arithmetic mean price of Eligible Reported Transactions for the NMS Stock during the period following the Opening Price (including the Opening Price), and if it differs from the current Reference Price by 1% or more shall become the new Reference Price, except that a new Reference Price shall remain in effect for at least 30 seconds. Subsequent Reference Prices shall be calculated as specified in Section V(A) of the Plan.

(2) If the Opening Price on the Primary Listing Exchange in an NMS Stock does not occur within five minutes after the start of Regular Trading Hours, the first Reference Price for a trading day shall be the arithmetic mean price of Eligible Reported Transactions for the NMS Stock over the preceding five minute time period, and subsequent Reference Prices shall be calculated as specified in Section V(A) of the Plan.

*(C) Reopenings*

(1) Following a Trading Pause in an NMS Stock, and if the Primary Listing Exchange has not declared a Regulatory Halt, if the Primary Listing Exchange reopens trading with a transaction or quotation that does not include a zero bid or zero offer, the next Reference Price shall be the Reopening Price on the Primary Listing Exchange. Subsequent Reference Prices shall be determined in the manner prescribed for normal openings, as specified in Section V(B)(1) of the Plan. If the Primary Listing Exchange notifies the Processor that it is unable to reopen an NMS Stock due to a systems or technology issue, or if the Primary Listing Exchange reopens trading with a quotation that has a zero bid or zero offer, or both, the next Reference Price shall be the last effective Price Band that was in a Limit State before the Trading Pause. Subsequent Reference Prices shall be calculated as specified in Section V(A) of the Plan.

(2) Following a Regulatory Halt, the next Reference Price shall be the Opening or Reopening Price on the Primary Listing Exchange if such Opening or Reopening Price occurs within five minutes after the end of the Regulatory Halt, and subsequent Reference Prices shall be determined in the manner prescribed for normal openings, as specified in Section V(B)(1) of the Plan. If such Opening or Reopening Price has not occurred within five minutes after the end of the Regulatory Halt, the Reference Price shall be equal to the arithmetic mean price of Eligible Reported Transactions for the NMS Stock over the preceding five minute time period, and subsequent Reference Prices shall be calculated as specified in Section V(A) of the Plan.

**VI. Limit Up-Limit Down Requirements**

*(A) Limitations on Trades and Quotations Outside of Price Bands*

(1) All trading centers in NMS Stocks, including both those operated by Participants and those operated by members of Participants, shall establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trades at prices that are below the Lower Price Band or above the Upper Price Band for an NMS Stock. Single-priced opening, reopening, and closing transactions on the Primary Listing Exchange, however, shall be excluded from this limitation. In addition, any transaction that both (i) does not update the last sale price (except if solely because the transaction was reported late or because the transaction was an odd-lot sized transaction), and (ii) is excepted or exempt from Rule 611 under Regulation NMS shall be excluded from this limitation.

(2) When a National Best Bid is below the Lower Price Band or a National Best Offer is above the Upper Price Band for an NMS Stock, the Processor shall disseminate such National Best Bid or National Best Offer with an appropriate flag identifying it as non-executable.

When a National Best Offer is equal to the Lower Price Band or a National Best Bid is equal to the Upper Price Band for an NMS Stock, the Processor shall distribute such National Best Bid or National Best Offer with an appropriate flag identifying it as a ''Limit State Quotation''.

(3) All trading centers in NMS Stocks, including both those operated by Participants and those operated by members of Participants, shall establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent the display of offers below the Lower Price Band and bids above the Upper Price Band for an NMS Stock. The Processor shall disseminate an offer below the Lower Price Band or bid above the Upper Price Band that may be submitted despite such reasonable policies and procedures, but with an appropriate flag identifying it as non-executable; provided, however, that any such bid or offer shall not be included in National Best Bid or National Best Offer calculations.

*(B) Entering and Exiting a Limit State*

(1) All trading for an NMS Stock shall immediately enter a Limit State if the National Best Offer equals the Lower Price Band and does not cross the National Best Bid, or the National Best Bid equals the Upper Price Band and does not cross the National Best Offer.

(2) When trading for an NMS Stock enters a Limit State, the Processor shall disseminate this information by identifying the relevant quotation (*i.e.,* a National Best Offer that equals the Lower Price Band or a National Best Bid that equals the Upper Price Band) as a Limit State Quotation. At this point, the Processor shall cease calculating and disseminating updated Reference Prices and Price Bands for the NMS Stock until either trading exits the Limit State or trading resumes with an opening or re-opening as provided in Section V.

(3) Trading for an NMS Stock shall exit a Limit State if, within 15 seconds of entering the Limit State, the entire size of all Limit State Quotations are executed or cancelled.

(4) If trading for an NMS Stock exits a Limit State within 15 seconds of entry, the Processor shall immediately calculate and disseminate updated Price Bands based on a Reference Price that equals the arithmetic mean price of Eligible Reported Transactions for the NMS Stock over the immediately preceding five-minute period (including the period of the Limit State).

(5) If trading for an NMS Stock does not exit a Limit State within 15 seconds of entry, the Limit State will terminate when the Primary Listing Exchange declares a Trading Pause pursuant to Section VII of the Plan or at the end of Regular Trading Hours.

**VII. Trading Pauses**

*(A) Declaration of Trading Pauses*

(1) If trading for an NMS Stock does not exit a Limit State within 15 seconds of entry during Regular Trading Hours, then the Primary Listing Exchange shall declare a Trading Pause for such NMS Stock and shall notify the Processor.

(2) The Primary Listing Exchange may also declare a Trading Pause for an NMS Stock when an NMS Stock is in a Straddle State, which is when National Best Bid (Offer) is below (above) the Lower (Upper) Price Band and the NMS Stock is not in a Limit State, and trading in that NMS Stock deviates from normal trading characteristics such that declaring a Trading Pause would support the Plan's goal to address extraordinary market volatility. The Primary Listing Exchange shall develop policies and procedures for determining when it would declare a Trading Pause in such circumstances. If a Trading Pause is declared for an NMS Stock under this provision, the Primary Listing Exchange shall notify the Processor.

(3) The Processor shall disseminate Trading Pause information to the public. No trades in an NMS Stock shall occur during a Trading Pause, but all bids and offers may be displayed.

*(B) Reopening of Trading During Regular Trading Hours*

(1) Five minutes after declaring a Trading Pause for an NMS Stock, and if the Primary Listing Exchange has not declared a Regulatory Halt, the Primary Listing Exchange shall attempt to reopen trading using its established reopening procedures. The Processor will publish the following information that the Primary Listing Exchange provides to the Processor in connection with such reopening: Auction reference price; auction collars; and number of extensions to the reopening auction. The Trading Pause shall end when the Primary Listing Exchange reports a Reopening Price.

(2) The Primary Listing Exchange shall notify the Processor if it is unable to reopen trading in an NMS Stock due to a systems or technology issue and if it has not declared a Regulatory Halt. The Processor shall disseminate this information to the public.

(3) Trading centers may not resume trading in an NMS Stock following a Trading Pause without Price Bands in such NMS Stock.

(4) The Processor shall update the Price Bands as set forth in Section V(C)(1)–(2) of the Plan after receiving notification from the Primary Listing Exchange of a Reopening Price following a Trading Pause (or a resume message in the case of a reopening quote that has a zero bid or zero offer, or both) or that it is unable to reopen trading following a Trading Pause due to a systems or technology issue, provided that if the Primary Listing Exchange is unable to reopen due to a systems or technology issue, the update to the Price Bands will be no earlier than ten minutes after the beginning of the Trading Pause.

*(C) Trading Pauses Within Ten Minutes of the End of Regular Trading Hours*

(1) If an NMS Stock is in a Trading Pause during the last ten minutes of trading before the end of Regular Trading Hours, the Primary Listing Exchange shall not reopen trading and shall attempt to execute a closing transaction using its established closing procedures. All trading centers may begin trading the NMS Stock when the Primary Listing Exchange executes a closing transaction.

(2) If the Primary Listing Exchange does not execute a closing transaction within five minutes after the end of Regular Trading Hours, all trading centers may begin trading the NMS Stock.

**VIII. Implementation**

**IX. Withdrawal From Plan**

If a Participant obtains SEC approval to withdraw from the Plan, such Participant may withdraw from the Plan at any time on not less than 30 days' prior written notice to each of the other Participants. At such time, the withdrawing Participant shall have no further rights or obligations under the Plan.

**X. Counterparts and Signatures**

The Plan may be executed in any number of counterparts, no one of which need contain all signatures of all Participants, and as many of such counterparts as shall together contain all such signatures shall constitute one and the same instrument.

The initial date of Plan operations shall be April 8, 2013.

**[The Plan shall be implemented on a pilot basis set to end on April 15, 2019.]**

IN WITNESS THEREOF, this Plan has been executed as of the __ day of [July]November 2018 by each of the parties hereto.

Cboe BZX EXCHANGE, INC.

BY:_____

Cboe BYX EXCHANGE, INC.

BY:_____

Cboe EDGA EXCHANGE, INC.

BY:_____

Cboe EDGX EXCHANGE, INC.

BY:_____

CHICAGO STOCK EXCHANGE, INC.

BY:_____

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.

BY:_____

INVESTORS EXCHANGE LLC

BY:_____

NASDAQ BX, Inc.

BY:_____

NASDAQ PHLX LLC

BY:_____

THE NASDAQ STOCK MARKET LLC

BY:_____

NYSE NATIONAL, INC.

BY:_____

NEW YORK STOCK EXCHANGE LLC

BY:_____

NYSE American LLC

BY:_____

NYSE ARCA, INC.

BY:_____

**Appendix A—Percentage Parameters**

**I. Tier 1 NMS Stocks**

(2) The Percentage Parameters for Tier 1 NMS Stocks with a Reference Price more than $3.00 shall be 5%.

(3) The Percentage Parameters for Tier 1 NMS Stocks with a Reference Price equal to $0.75 and up to and including $3.00 shall be 20%.

(4) The Percentage Parameters for Tier 1 NMS Stocks with a Reference Price less than $0.75 shall be the lesser of (a) $0.15 or (b) 75%.

(5) The Reference Price used for determining which Percentage Parameter shall be applicable during a trading day shall be based on the closing price of the NMS Stock on the Primary Listing Exchange on the previous trading day, or if no closing price exists, the last sale on the Primary Listing Exchange reported by the Processor.

(1) Tier 1 NMS Stocks shall include all NMS Stocks included in the S&P 500 Index[,] and the Russell 1000 Index, and the exchange-traded products ("ETP") identified as Schedule 1 to this Appendix. Schedule 1 to the Appendix will be reviewed and updated semi-annually based on the fiscal year by the Primary Listing Exchange to add ETPs that meet the criteria, or delete ETPs that are no longer eligible. To determine eligibility for an ETP to be included as a Tier 1 NMS Stock, all ETPs across multiple asset classes and issuers, including domestic equity, international equity, fixed income, currency, and commodities and futures will be identified. Leveraged ETPs will be excluded and the list will be sorted by notional consolidated average daily volume ("CADV"). The period used to measure CADV will be from the first day of the previous fiscal half year up until one week before the beginning of the next fiscal half year. Daily volumes will be multiplied by closing prices and then averaged over the period. ETPs, including inverse ETPs, that trade over $2,000,000 CADV will be eligible to be included as a Tier 1 NMS Stock. The semi-annual updates to Schedule 1 do not require an amendment to the Plan. The Primary Listing Exchanges will maintain the updated Schedule 1 on their respective websites.

**II. Tier 2 NMS Stocks**

(1) Tier 2 NMS Stocks shall include all NMS Stocks other than those in Tier 1, provided, however, that all rights and warrants are excluded from the Plan.

(2) The Percentage Parameters for Tier 2 NMS Stocks with a Reference Price more than $3.00 shall be **10**%.

(3) The Percentage Parameters for Tier 2 NMS Stocks with a Reference Price equal to $0.75 and up to and including $3.00 shall be 20%.

(4) The Percentage Parameters for Tier 2 NMS Stocks with a Reference Price less than $0.75 shall be the lesser of (a) $0.15 or (b) 75%.

(5) Notwithstanding the foregoing, the Percentage Parameters for a Tier 2 NMS Stock that is a leveraged ETP shall be the applicable Percentage Parameter set forth in clauses (2), (3), or (4) above, multiplied by the leverage ratio of such product.

(6) The Reference Price used for determining which Percentage Parameter shall be applicable during a trading day shall be based on the closing price of the NMS Stock on the Primary Listing Exchange on the previous trading day, or if no closing price exists, the last sale on the Primary Listing Exchange reported by the Processor.

**Appendix A—Schedule 1**
**(as of July 2, 2018)**

| Ticker | ETP name | Exchange |
|---|---|---|
| SPY | SPDR S&P 500 ETF Trust | NYSE Arca. |
| QQQ | Invesco QQQ Trust | NASDAQ. |
| IWM | iShares Russell 2000 ETF | NYSE Arca. |
| EEM | iShares MSCI Emerging Markets ETF | NYSE Arca. |
| EFA | iShares MSCI EAFE ETF | NYSE Arca. |
| XLF | Financial Select Sector SPDR Fund | NYSE Arca. |
| VXX | iPath S&P 500 VIX Short-Term Futures ETN Class A | NYSE Arca. |
| DIA | SPDR Dow Jones Industrial Average ETF Trust | NYSE Arca. |
| HYG | iShares iBoxx $ High Yield Corporate Bond ETF | NYSE Arca. |
| IVV | iShares Core S&P 500 ETF | NYSE Arca. |
| XLE | Energy Select Sector SPDR Fund | NYSE Arca. |
| FXI | iShares China Large-Cap ETF | NYSE Arca. |
| TLT | iShares 20+ Year Treasury Bond ETF | NASDAQ. |
| XLI | Industrial Select Sector SPDR Fund | NYSE Arca. |
| XLK | Technology Select Sector SPDR Fund | NYSE Arca. |
| GLD | SPDR Gold Trust | NYSE Arca. |
| EWZ | iShares MSCI Brazil ETF | NYSE Arca. |
| XLU | Utilities Select Sector SPDR Fund | NYSE Arca. |
| GDX | VanEck Vectors Gold Miners ETF | NYSE Arca. |
| XLP | Consumer Staples Select Sector SPDR Fund | NYSE Arca. |
| XLV | Health Care Select Sector SPDR Fund | NYSE Arca. |
| VOO | Vanguard S&P 500 ETF | NYSE Arca. |
| LQD | iShares iBoxx $ Investment Grade Corporate Bond ETF | NYSE Arca. |
| XOP | SPDR S&P Oil & Gas Exploration & Production ETF | NYSE Arca. |

| Ticker | ETP name | Exchange |
|---|---|---|
| IEMG | iShares Core MSCI Emerging Markets ETF | NYSE Arca. |
| IYR | iShares U.S. Real Estate ETF | NYSE Arca. |
| VWO | Vanguard FTSE Emerging Markets ETF | NYSE Arca. |
| XLY | Consumer Discretionary Select Sector SPDR Fund | NYSE Arca. |
| SMH | VanEck Vectors Semiconductor ETF | NYSE Arca. |
| EWJ | iShares MSCI Japan ETF | NYSE Arca. |
| IEFA | iShares Core MSCI EAFE ETF | Cboe BZX. |
| JNK | SPDR Bloomberg Barclays High Yield Bond ETF | NYSE Arca. |
| VNQ | Vanguard Real Estate ETF | NYSE Arca. |
| XBI | SPDR S&P BIOTECH ETF | NYSE Arca. |
| VEA | Vanguard FTSE Developed Markets ETF | NYSE Arca. |
| AGG | iShares Core U.S. Aggregate Bond ETF | NYSE Arca. |
| MDY | SPDR S&P Midcap 400 ETF Trust | NYSE Arca. |
| XLB | Materials Select Sector SPDR Fund | NYSE Arca. |
| GDXJ | VanEck Vectors Junior Gold Miners ETF | NYSE Arca. |
| KRE | SPDR S&P Regional Banking ETF | NYSE Arca. |
| VTI | Vanguard Total Stock Market ETF | NYSE Arca. |
| SVXY | ProShares Short VIX Short-Term Futures ETF | NYSE Arca. |
| EMB | iShares JP Morgan USD Emerging Markets Bond ETF | NASDAQ. |
| EZU | iShares MSCI Eurozone ETF | Cboe BZX. |
| IEF | iShares 7–10 Year Treasury Bond ETF | NASDAQ. |
| IBB | iShares NASDAQ. Biotechnology ETF | NASDAQ. |
| VGK | Vanguard FTSE Europe ETF | NYSE Arca. |
| IJR | iShares Core S&P Small Cap ETF | NYSE Arca. |
| IWF | iShares Russell 1000 Growth ETF | NYSE Arca. |
| USO | United States Oil Fund LP | NYSE Arca. |
| IWD | iShares Russell 1000 Value ETF | NYSE Arca. |
| IJH | iShares Core S&P Mid-Cap ETF | NYSE Arca. |
| XRT | SPDR S&P Retail ETF | NYSE Arca. |
| EWY | iShares MSCI South Korea ETF | NYSE Arca. |
| MCHI | iShares MSCI China ETF | NASDAQ. |
| OIH | VanEck Vectors Oil Services ETF | NYSE Arca. |
| RSX | VanEck Vectors Russia ETF | NYSE Arca. |
| EWT | iShares MSCI Taiwan ETF | NYSE Arca. |
| EWW | iShares MSCI Mexico ETF | NYSE Arca. |
| BND | Vanguard Total Bond Market ETF | NYSE Arca. |
| IWB | iShares Russell 1000 ETF | NYSE Arca. |
| VTV | Vanguard Value ETF | NYSE Arca. |
| ACWI | iShares MSCI ACWI ETF | NASDAQ. |
| AMLP | Alerian MLP ETF | NYSE Arca. |
| DXJ | WisdomTree Japan Hedged Equity Fund | NYSE Arca. |
| IAU | iShares Gold Trust | NYSE Arca. |
| TIP | iShares TIPS Bond ETF | NYSE Arca. |
| FEZ | SPDR EURO STOXX 50 ETF | NYSE Arca. |
| SHV | iShares Short Treasury Bond ETF | NASDAQ. |
| SHY | iShares 1–3 Year Treasury Bond ETF | NASDAQ. |
| EWG | iShares MSCI Germany ETF | NYSE Arca. |
| BSV | Vanguard Short-Term Bond ETF | NYSE Arca. |
| VEU | Vanguard FTSE All-World ex-US Index Fund | NYSE Arca. |
| VUG | Vanguard Growth ETF | NYSE Arca. |
| IVE | iShares S&P 500 Value ETF | NYSE Arca. |
| INDA | iShares MSCI India ETF | Cboe BZX. |
| SH | ProShares Short S&P 500 | NYSE Arca. |
| EWH | iShares MSCI Hong Kong ETF | NYSE Arca. |
| SLV | iShares Silver Trust | NYSE Arca. |
| IVW | iShares S&P 500 Growth ETF | NYSE Arca. |
| VCSH | Vanguard Short-Term Corporate Bond ETF | NASDAQ. |
| ITB | iShares U.S. Home Construction ETF | Cboe BZX. |
| IWN | iShares Russell 2000 Value ETF | NYSE Arca. |
| SOXX | iShares PHLX Semiconductor ETF | NASDAQ. |
| KBE | SPDR S&P Bank ETF | NYSE Arca. |
| VGT | Vanguard Information Technology ETF | NYSE Arca. |
| IWO | iShares Russell 2000 Growth ETF | NYSE Arca. |
| MTUM | iShares Edge MSCI USA Momentum Factor ETF | Cboe BZX. |
| XHB | SPDR S&P Homebuilders ETF | NYSE Arca. |
| XME | SPDR S&P Metals & Mining ETF | NYSE Arca. |
| XLRE | Real Estate Select Sector SPDR Fund | NYSE Arca. |
| VCIT | Vanguard Intermediate-Term Corporate Bond ETF | NASDAQ. |
| VT | Vanguard Total World Stock ETF | NYSE Arca. |
| USMV | iShares Edge MSCI Min Vol USA ETF | Cboe BZX. |
| BKLN | Invesco Senior Loan ETF | NYSE Arca. |
| EWC | iShares MSCI Canada ETF | NYSE Arca. |
| PFF | iShares U.S. Preferred Stock ETF | NASDAQ. |
| FLOT | iShares Floating Rate Bond ETF | Cboe BZX. |

| Ticker | ETP name | Exchange |
|---|---|---|
| BIL | SPDR Bloomberg Barclays 1–3 Month T-Bill ETF | NYSE Arca. |
| OEF | iShares S&P 100 ETF | NYSE Arca. |
| UNG | United States Natural Gas Fund LP | NYSE Arca. |
| VB | Vanguard Small-Cap ETF | NYSE Arca. |
| MINT | PIMCO Enhanced Short Maturity Active ETF | NYSE Arca. |
| SPLV | Invesco S&P 500 Low Volatility ETF | NYSE Arca. |
| VIG | Vanguard Dividend Appreciation ETF | NYSE Arca. |
| HEDJ | WisdomTree Europe Hedged Equity Fund | NYSE Arca. |
| SCZ | iShares MSCI EAFE Small-Cap ETF | NASDAQ. |
| EWU | iShares MSCI United Kingdom ETF | NYSE Arca. |
| VYM | Vanguard High Dividend Yield Yield Index Fund | NYSE Arca. |
| SCHF | Schwab International Equity ETF | NYSE Arca. |
| AAXJ | iShares MSCI All Country Asia ex Japan ETF | NASDAQ. |
| FDN | First Trust Dow Jones Internet Index Fund | NYSE Arca. |
| EMLC | VanEck Vectors J.P. Morgan EM Local Currency Bond ETF | NYSE Arca. |
| VIXY | ProShares VIX Short-Term Futures ETF | NYSE Arca. |
| BNDX | Vanguard Total International Bond ETF | NASDAQ. |
| MUB | iShares National Muni Bond ETF | NYSE Arca. |
| DVY | iShares Select Dividend ETF | NASDAQ. |
| ITA | iShares U.S. Aerospace & Defense ETF | Cboe BZX. |
| AMJ | J.P. Morgan Alerian MLP Index ETN | NYSE Arca. |
| MBB | iShares MBS ETF | NASDAQ. |
| RSP | Invesco S&P 500 Equal Weight ETF | NYSE Arca. |
| ITOT | iShares Core S&P Total U.S. Stock Market ETF | NYSE Arca. |
| SJNK | SPDR Bloomberg Barclays Short Term High Yield Bond ETF | NYSE Arca. |
| BIV | Vanguard Intermediate-Term Bond ETF | NYSE Arca. |
| ILF | iShares Latin America 40 ETF | NYSE Arca. |
| CWB | SPDR Bloomberg Barclays Convertible Securities ETF | NYSE Arca. |
| VO | Vanguard Mid-Cap ETF | NYSE Arca. |
| IWV | iShares Russell 3000 ETF | NYSE Arca. |
| CSJ | iShares 1–3 Year Credit Bond ETF | NASDAQ. |
| SCHX | Schwab U.S. Large-Cap ETF | NYSE Arca. |
| IEI | iShares 3–7 Year Treasury Bond ETF | NASDAQ. |
| SCHB | Schwab U.S. Broad Market ETF | NYSE Arca. |
| PCY | Invesco Emerging Markets Sovereign Debt ETF | NYSE Arca. |
| DBC | Invesco DB Commodity Index Tracking Fund | NYSE Arca. |
| EPI | WisdomTree India Earnings Fund | NYSE Arca. |
| SDY | SPDR S&P Dividend ETF | NYSE Arca. |
| VFH | Vanguard Financials ETF | NYSE Arca. |
| SCHD | Schwab US Dividend Equity ETF | NYSE Arca. |
| PSQ | ProShares Short QQQ | NYSE Arca. |
| HYS | PIMCO 0–5 Year High Yield Corporate Bond Index ETF | NYSE Arca. |
| VXUS | Vanguard Total International Stock ETF | NASDAQ. |
| EWA | iShares MSCI Australia ETF | NYSE Arca. |
| VV | Vanguard Large-Cap ETF | NYSE Arca. |
| IYT | iShares Transportation Average ETF | Cboe BZX. |
| EUFN | iShares MSCI Europe Financials ETF | NASDAQ. |
| IYW | iShares U.S. Technology ETF | NYSE Arca. |
| EWI | iShares MSCI Italy ETF | NYSE Arca. |
| FXE | Invesco CurrencyShares Euro Trust | NYSE Arca. |
| IWS | iShares Russell Mid-Cap Value ETF | NYSE Arca. |
| IYF | iShares U.S. Financials ETF | NYSE Arca. |
| DBEF | Xtrackers MSCI EAFE Hedged Equity ETF | NYSE Arca. |
| EFV | iShares MSCI EAFE Value ETF | Cboe BZX. |
| IWR | iShares Russell Midcap ETF | NYSE Arca. |
| BOTZ | Global X Robotics & Artificial Intelligence ETF | NASDAQ. |
| IGV | iShares North American Tech-Software ETF | Cboe BZX. |
| VBR | Vanguard Small Cap Value ETF | NYSE Arca. |
| KWEB | KraneShares CSI China Internet ETF | NYSE Arca. |
| NEAR | iShares Short Maturity Bond ETF | Cboe BZX. |
| IXUS | iShares Core MSCI Total International Stock ETF | NASDAQ. |
| IWP | iShares Russell Mid-Cap Growth ETF | NYSE Arca. |
| GOVT | iShares U.S. Treasury Bond ETF | Cboe BZX. |
| CIU | iShares Intermediate Credit Bond ETF | NASDAQ. |
| EWM | iShares MSCI Malaysia ETF | NYSE Arca. |
| EFAV | iShares Edge MSCI Min Vol EAFE ETF | Cboe BZX. |
| EWP | iShares MSCI Spain ETF | NYSE Arca. |
| HDV | iShares Core High Dividend ETF | NYSE Arca. |
| SCHP | Schwab US TIPS ETF | NYSE Arca. |
| SHYG | iShares 0–5 Year High Yield Corporate Bond ETF | NYSE Arca. |
| EZA | iShares MSCI South Africa ETF | NYSE Arca. |
| IEV | iShares Europe ETF | NYSE Arca. |
| EWQ | iShares MSCI France ETF | NYSE Arca. |
| EWL | iShares MSCI Switzerland ETF | NYSE Arca. |

| Ticker | ETP name | Exchange |
|---|---|---|
| ASHR | Xtrackers Harvest CSI 300 China A-Shares ETF | NYSE Arca. |
| SCHE | Schwab Emerging Markets Equity ETF | NYSE Arca. |
| VTIP | Vanguard Short-Term Inflation-Protected Securities ETF | NASDAQ. |
| VMBS | Vanguard Mortgage-Backed Securities ETF | NASDAQ. |
| VOE | Vanguard Mid-Cap Value ETF | NYSE Arca. |
| ACWX | iShares MSCI ACWI ex U.S. ETF | NASDAQ. |
| QUAL | iShares Edge MSCI USA Quality Factor ETF | Cboe BZX. |
| HEWJ | iShares Currency Hedged MSCI Japan ETF | NYSE Arca. |
| VDE | Vanguard Energy ETF | NYSE Arca. |
| EIDO | iShares MSCI Indonesia ETF | NYSE Arca. |
| IJK | iShares S&P Mid-Cap 400 Growth ETF | NYSE Arca. |
| KBWB | Invesco KBW Bank ETF | NASDAQ. |
| HEZU | iShares Currency Hedged MSCI Eurozone ETF | NYSE Arca. |
| VHT | Vanguard Health Care ETF | NYSE Arca. |
| VXF | Vanguard Extended Market ETF | NYSE Arca. |
| VLUE | iShares Edge MSCI USA Value Factor ETF | Cboe BZX. |
| HEFA | iShares Currency Hedged MSCI EAFE ETF | Cboe BZX. |
| SPIB | SPDR Portfolio Intermediate Term Corporate Bond ETF | NYSE Arca. |
| UUP | Invesco DB US Dollar Index Bullish Fund | NYSE Arca. |
| SRLN | SPDR Blackstone/GSO Senior Loan ETF | NYSE Arca. |
| VNQI | Vanguard Global ex-U.S. Real Estate ETF | NASDAQ. |
| SCHA | Schwab U.S. Small-Cap ETF | NYSE Arca. |
| SPYG | SPDR Portfolio S&P 500 Growth ETF | NYSE Arca. |
| SCHH | Schwab U.S. REIT ETF | NYSE Arca. |
| SCHG | Schwab U.S. Large-Cap Growth ETF | NYSE Arca. |
| PGX | Invesco Preferred ETF | NYSE Arca. |
| FLRN | SPDR Bloomberg Barclays Investment Grade Floating Rate ETF | NYSE Arca. |
| VPL | Vanguard FTSE Pacific ETF | NYSE Arca. |
| VTEB | Vanguard Tax-Exempt Bond ETF | NYSE Arca. |
| FTSM | First Trust Enhanced Short Maturity ETF | NASDAQ. |
| FTEC | Fidelity MSCI Information Technology Index ETF | NYSE Arca. |
| SPSB | SPDR Portfolio Short Term Corporate Bond ETF | NYSE Arca. |
| EPP | iShares MSCI Pacific ex-Japan ETF | NYSE Arca. |
| DOG | ProShares Short Dow30 | NYSE Arca. |
| EEMV | iShares Edge MSCI Min Vol Emerging Markets ETF | Cboe BZX. |
| IUSG | iShares Core S&P U.S. Growth ETF | NASDAQ. |
| VSS | Vanguard FTSE All-World ex-US Small-Cap ETF | NYSE Arca. |
| BWX | SPDR Bloomberg Barclays International Treasury Bond ETF | NYSE Arca. |
| TFI | SPDR Nuveen Bloomberg Barclays Municipal Bond ETF | NYSE Arca. |
| SHM | SPDR Nuveen Bloomberg Barclays Short Term Municipal Bond ETF | NYSE Arca. |
| IJS | iShares S&P Small-Cap 600 Value ETF | NYSE Arca. |
| ROBO | ROBO Global Robotics and Automation Index ETF | NYSE Arca. |
| EWS | iShares MSCI Singapore ETF | NYSE Arca. |
| VBK | Vanguard Small-Cap Growth ETF | NYSE Arca. |
| RWX | SPDR Dow Jones International Real Estate ETF | NYSE Arca. |
| DGRO | iShares Core Dividend Growth ETF | NYSE Arca. |
| IYE | iShares U.S. Energy ETF | NYSE Arca. |
| IJT | iShares S&P Small-Cap 600 Growth ETF | NASDAQ. |
| IDV | iShares International Select Dividend ETF | Cboe BZX. |
| HYLB | Xtrackers USD High Yield Corporate Bond ETF | NYSE Arca. |
| JUST | Goldman Sachs JUST U.S. Large Cap Equity ETF | NYSE Arca. |
| EFG | iShares MSCI EAFE Growth ETF | Cboe BZX. |
| MJ | ETFMG Alternative Harvest ETF | NYSE Arca. |
| SPHD | Invesco S&P 500 High Dividend Low Volatility ETF | NYSE Arca. |
| THD | iShares MSCI Thailand ETF | NYSE Arca. |
| IHI | iShares U.S. Medical Devices ETF | NYSE Arca. |
| SCHZ | Schwab US Aggregate Bond ETF | NYSE Arca. |
| VPU | Vanguard Utilities ETF | NYSE Arca. |
| SPAB | SPDR Portfolio Aggregate Bond ETF | NYSE Arca. |
| HYD | VanEck Vectors High-Yield Municipal Index ETF | NYSE Arca. |
| SPTM | SPDR Portfolio Total Stock Market ETF | NYSE Arca. |
| NOBL | ProShares S&P 500 Dividend Aristocrats ETF | Cboe BZX. |
| MGK | Vanguard Mega Cap Growth ETF | NYSE Arca. |
| ECH | iShares MSCI Chile ETF | Cboe BZX. |
| SCHO | Schwab Short-Term US Treasury ETF | NYSE Arca. |
| VCLT | Vanguard Long-Term Corporate Bond ETF | NASDAQ. |
| RWR | SPDR Dow Jones REIT ETF | NYSE Arca. |
| VIS | Vanguard Industrials ETF | NYSE Arca. |
| DBEU | Xtrackers MSCI Europe Hedged Equity ETF | NYSE Arca. |
| IUSV | iShares Core S&P US Value ETF | NASDAQ. |
| VAW | Vanguard Materials ETF | NYSE Arca. |
| VGSH | Vanguard Short-Term Treasury ETF | NASDAQ. |
| DBJP | Xtrackers MSCI Japan Hedged Equity ETF | NYSE Arca. |
| VDC | Vanguard Consumer Staples ETF | NYSE Arca. |

| Ticker | ETP name | Exchange |
|---|---|---|
| BLV | Vanguard Long-Term Bond ETF | NYSE Arca. |
| SPYV | SPDR Portfolio S&P 500 Value ETF | NYSE Arca. |
| SPDW | SPDR Portfolio Developed World ex-US ETF | NYSE Arca. |
| VOT | Vanguard Mid-Cap Growth ETF | NYSE Arca. |
| PDBC | Invesco Optimum Yield Diversified Commodity Strategy K–1 ETF | NASDAQ. |
| SCHR | Schwab Intermediate-Term US Treasury ETF | NYSE Arca. |
| FPE | First Trust Preferred Securities & Income ETF | NYSE Arca. |
| ERUS | iShares MSCI Russia ETF | NYSE Arca. |
| IYG | iShares US Financial Services ETF | NYSE Arca. |
| LIT | Global X Lithium & Battery Tech ETF | NYSE Arca. |
| IEUR | iShares Core MSCI Europe ETF | NYSE Arca. |
| SCHM | Schwab U.S. Mid-Cap ETF | NYSE Arca. |
| PRF | Invesco FTSE RAFI US 1000 ETF | NYSE Arca. |
| SPEM | SPDR Portfolio Emerging Markets ETF | NYSE Arca. |
| SCHV | Schwab U.S. Large-Cap Value ETF | NYSE Arca. |
| QTEC | First Trust NASDAQ–100 Technology Sector Index Fund | NASDAQ. |
| VCR | Vanguard Consumer Discretionary ETF | NYSE Arca. |
| TOTL | SPDR DoubleLine Total Return Tactical ETF | NYSE Arca. |
| FXY | Invesco CurrencyShares Japanese Yen Trust | NYSE Arca. |
| FVD | First Trust Value Line Dividend Index Fund | NYSE Arca. |
| TUR | iShares MSCI Turkey ETF | NASDAQ. |
| GSY | Invesco Ultra Short Duration ETF | NYSE Arca. |
| ARKK | ARK Innovation ETF | NYSE Arca. |
| RPG | Invesco S&P 500 Pure Growth ETF | NYSE Arca. |
| IYM | iShares U.S. Basic Materials ETF | NYSE Arca. |
| PHB | Invesco Fundamental High Yield Corporate Bond ETF | NYSE Arca. |
| ISTB | iShares Core 1–5 Year USD Bond ETF | NASDAQ. |
| EMLP | First Trust North American Energy Infrastructure Fund | NYSE Arca. |
| ACWV | iShares Edge MSCI Min Vol Global ETF | Cboe BZX. |
| SPLG | SPDR Portfolio Large Cap ETF | NYSE Arca. |
| RWO | SPDR Dow Jones Global Real Estate ETF | NYSE Arca. |
| SKYY | First Trust Cloud Computing ETF | NASDAQ. |
| ICF | iShares Cohen & Steers REIT ETF | Cboe BZX. |
| IYH | iShares U.S. Healthcare ETF | NYSE Arca. |
| IXC | iShares Global Energy ETF | NYSE Arca. |
| ANGL | VanEck Vectors Fallen Angel High Yield Bond ETF | NYSE Arca. |
| XES | SPDR S&P Oil & Gas Equipment & Services ETF | NYSE Arca. |
| RWM | ProShares Short Russell2000 | NYSE Arca. |
| DBO | Invesco DB Oil Fund | NYSE Arca. |
| IJJ | iShares S&P Mid-Cap 400 Value ETF | NYSE Arca. |
| DBA | Invesco DB Agriculture Fund | NYSE Arca. |
| TBF | Proshares Short 20+ Year Treasury | NYSE Arca. |
| GSLC | Goldman Sachs ActiveBeta U.S. Large Cap Equity ETF | NYSE Arca. |
| FNCL | Fidelity MSCI Financials Index ETF | NYSE Arca. |
| IGF | iShares Global Infrastructure ETF | NASDAQ. |
| FNDX | Schwab Fundamental US Large Co. Index ETF | NYSE Arca. |
| REM | iShares Mortgage Real Estate ETF | Cboe BZX. |
| KIE | SPDR S&P Insurance ETF | NYSE Arca. |
| ONEQ | Fidelity NASDAQ Composite Index Tracking Stock | NASDAQ. |
| LMBS | First Trust Low Duration Opportunities ETF | NASDAQ. |
| GUNR | FlexShares Morningstar Global Upstream Natural Resources Index Fund | NYSE Arca. |
| HACK | ETFMG Prime Cyber Security ETF | NYSE Arca. |
| EWD | iShares MSCI Sweden ETF | NYSE Arca. |
| AIA | iShares Asia 50 ETF | NASDAQ. |
| IGOV | iShares International Treasury Bond ETF | NASDAQ. |
| ARKW | ARK Web x.0 ETF | NYSE Arca. |
| IXN | iShares Global Tech ETF | NYSE Arca. |
| STIP | iShares 0–5 Year TIPS Bond ETF | NYSE Arca. |
| VOOG | Vanguard S&P 500 Growth ETF | NYSE Arca. |
| XAR | SPDR S&P Aerospace & Defense ETF | NYSE Arca. |
| RYT | Invesco S&P 500 Equal Weight Technology ETF | NYSE Arca. |
| INDY | iShares India 50 ETF | NASDAQ. |
| SCJ | iShares MSCI Japan Small-Cap ETF | NYSE Arca. |
| DEM | WisdomTree Emerging Markets High Dividend Fund | NYSE Arca. |
| IYJ | iShares U.S. Industrials ETF | Cboe BZX. |
| XT | iShares Exponential Technologies ETF | NASDAQ. |
| FNDF | Schwab Fundamental International Large Co. Index ETF | NYSE Arca. |
| MLPI | ETRACS Alerian MLP Infrastructure Index ETN | NYSE Arca. |
| VGIT | Vanguard Intermediate-Term Treasury ETF | NASDAQ. |
| JPST | JPMorgan Ultra-Short Income ETF | Cboe BZX. |
| GVI | iShares Intermediate Government/Credit Bond ETF | Cboe BZX. |
| BOND | PIMCO Active Bond ETF | NYSE Arca. |
| SLYV | SPDR S&P 600 Small Cap Value ETF | NYSE Arca. |
| ZIV | VelocityShares Daily Inverse VIX Medium-Term ETN | NASDAQ. |

| Ticker | ETP name | Exchange |
|---|---|---|
| SPHB | Invesco S&P 500 High Beta ETF | NYSE Arca. |
| HEWG | iShares Currency Hedged MSCI Germany ETF | NASDAQ. |
| AMZA | InfraCap MLP ETF | NYSE Arca. |
| FNDA | Schwab Fundamental US Small Co. Index ETF | NYSE Arca. |
| XLC | Communication Services Select Sector SPDR Fund | NYSE Arca. |
| BBRE | JPMorgan BetaBuilders MSCI U.S. REIT ETF | Cboe BZX. |
| XSD | SPDR S&P Semiconductor ETF | NYSE Arca. |
| EUM | ProShares Short MSCI Emerging Markets | NYSE Arca. |
| EPOL | iShares MSCI Poland ETF | NYSE Arca. |
| SLYG | SPDR S&P 600 Small Cap Growth ETF | NYSE Arca. |
| DJP | iPath Bloomberg Commodity Index Total Return ETN | NYSE Arca. |
| GSG | iShares S&P GSCI Commodity Indexed Trust | NYSE Arca. |
| FDT | First Trust Developed Markets ex-US AlphaDEX Fund | NASDAQ. |
| VOX | Vanguard Communication Services ETF | NYSE Arca. |
| VRP | Invesco Variable Rate Preferred ETF | NYSE Arca. |
| FFTY | Innovator IBD 50 ETF | NYSE Arca. |
| IAT | iShares U.S. Regional Banks ETF | NYSE Arca. |
| EBND | SPDR Bloomberg Barclays Emerging Markets Local Bond ETF | NYSE Arca. |
| DGRW | WisdomTree US Quality Dividend Growth Fund | NASDAQ. |
| ITM | VanEck Vectors AMT-Free Intermediate Municipal Index ETF | NYSE Arca. |
| SGOL | ETFS Physical Swiss Shares | NYSE Arca. |
| FBT | First Trust NYSE Arca Biotechnology Index Fund | NYSE Arca. |
| VONG | Vanguard Russell 1000 Growth ETF | NASDAQ. |
| FXL | First Trust Technology AlphaDEX Fund | NYSE Arca. |
| FTSL | First Trust Senior Loan Fund | NASDAQ. |
| DON | WisdomTree U.S. MidCap Dividend Fund | NYSE Arca. |
| SPSM | SPDR Portfolio Small Cap ETF | NYSE Arca. |
| GXC | SPDR S&P China ETF | NYSE Arca. |
| FV | First Trust Dorsey Wright Focus 5 ETF | NASDAQ. |
| CEF | Sprott Physical Gold and Silver Trust Units | NYSE Arca. |
| SPMD | SPDR Portfolio Mid Cap ETF | NYSE Arca. |
| IDU | iShares U.S. Utilities ETF | NYSE Arca. |
| MDYG | SPDR S&P 400 Mid Cap Growth ETF | NYSE Arca. |
| IYZ | iShares U.S. Telecommunications ETF | Cboe BZX. |
| FNDE | Schwab Fundamental Emerging Markets Large Co. Index ETF | NYSE Arca. |
| CQQQ | Invesco China Technology ETF | NYSE Arca. |
| IGM | iShares North American Tech ETF | NYSE Arca. |
| GBIL | Goldman Sachs TreasuryAccess 0–1 Year ETF | NYSE Arca. |
| VGLT | Vanguard Long-Term Treasury ETF | NASDAQ. |
| EPHE | iShares MSCI Philippines ETF | NYSE Arca. |
| MLPA | Global X MLP ETF | NYSE Arca. |
| EWN | iShares MSCI Netherlands ETF | NYSE Arca. |
| FM | iShares MSCI Frontier 100 ETF | NYSE Arca. |
| IVOG | Vanguard S&P Mid-Cap 400 Growth ETF | NYSE Arca. |
| LRGF | iShares Edge MSCI Multifactor USA ETF | NYSE Arca. |
| DFJ | WisdomTree Japan SmallCap Dividend Fund | NYSE Arca. |
| KBA | KraneShares Bosera MSCI China A Share ETF | NYSE Arca. |
| CWI | SPDR MSCI ACWI ex-US ETF | NYSE Arca. |
| SPTL | SPDR Portfolio Long Term Treasury ETF | NYSE Arca. |
| SUB | iShares Short-Term National Muni Bond ETF | NYSE Arca. |
| FHLC | Fidelity MSCI Health Care Index ETF | NYSE Arca. |
| GNR | SPDR S&P Global Natural Resources ETF | NYSE Arca. |
| IUSB | iShares Core Total USD Bond Market ETF | NASDAQ. |
| USMC | Principal U.S. Mega-Cap Multi-Factor Index ETF | NASDAQ. |
| SPYD | SPDR Portfolio S&P 500 High Dividend ETF | NYSE Arca. |
| GREK | Global X MSCI Greece ETF | NYSE Arca. |
| EDV | Vanguard Extended Duration Treasury ETF | NYSE Arca. |
| VWOB | Vanguard Emerging Markets Government Bond ETF | NASDAQ. |
| CLY | iShares 10+ Year Credit Bond ETF | NYSE Arca. |
| JPIN | J.P. Morgan Diversified Return International Equity ETF | NYSE Arca. |
| SCHC | Schwab International Small-Cap Equity ETF | NYSE Arca. |
| SDOG | ALPS Sector Dividend Dogs ETF | NYSE Arca. |
| FEP | First Trust Europe AlphaDEX Fund | NASDAQ. |
| VNM | VanEck Vectors Vietnam ETF | NYSE Arca. |
| INTF | iShares Edge MSCI Multifactor Intl ETF | NYSE Arca. |
| VTWO | Vanguard Russell 2000 ETF | NASDAQ. |
| PICK | iShares MSCI Global Metals & Mining Producers ETF | Cboe BZX. |
| XMLV | Invesco S&P MidCap Low Volatility ETF | NYSE Arca. |
| VYMI | Vanguard International High Dividend Yield ETF | NASDAQ. |
| PXH | Invesco FTSE RAFI Emerging Markets ETF | NYSE Arca. |
| XSLV | Invesco S&P SmallCap Low Volatility ETF | NYSE Arca. |
| CRED | iShares U.S. Credit Bond ETF | NASDAQ. |
| FENY | Fidelity MSCI Energy Index ETF | NYSE Arca. |
| PZA | Invesco National AMT-Free Municipal Bond ETF | NYSE Arca. |

| Ticker | ETP name | Exchange |
|---|---|---|
| EMQQ | Emerging Markets Internet & Ecommerce ETF | NYSE Arca. |
| PPA | Invesco Aerospace & Defense ETF | NYSE Arca. |
| HYLS | First Trust Tactical High Yield ETF | NASDAQ. |
| VONV | Vanguard Russell 1000 Value ETF | NASDAQ. |
| DGS | WisdomTree Emerging Markets SmallCap Dividend Fund | NYSE Arca. |
| PSCH | Invesco S&P SmallCap Health Care ETF | NASDAQ. |
| FIDU | Fidelity MSCI Industrials Index ETF | NYSE Arca. |
| FEM | First Trust Emerging Markets AlphaDEX Fund | NASDAQ. |
| FXO | First Trust Financials AlphaDEX Fund | NYSE Arca. |
| SPLB | SPDR Portfolio Long Term Corporate Bond ETF | NYSE Arca. |
| IXG | iShares Global Financials ETF | NYSE Arca. |
| IPE | SPDR Bloomberg Barclays TIPS ETF | NYSE Arca. |
| CORP | PIMCO Investment Grade Corporate Bond Index ETF | NYSE Arca. |
| WIP | SPDR FTSE International Government Inflation-Protected Bond ETF | NYSE Arca. |
| RPV | Invesco S&P 500 Pure Value ETF | NYSE Arca. |
| BSJI | Invesco BulletShares 2018 High Yield Corporate Bond ETF | NYSE Arca. |
| IEO | iShares U.S. Oil & Gas Exploration & Production ETF | Cboe BZX. |
| PRFZ | Invesco FTSE RAFI US 1500 Small-Mid ETF | NASDAQ. |
| FXR | First Trust Industrials/Producer Durables AlphaDEX Fund | NYSE Arca. |
| FEX | First Trust Large Cap Core AlphaDEX Fund | NASDAQ. |
| DLS | WisdomTree International SmallCap Dividend Fund | NYSE Arca. |
| DFE | WisdomTree Europe SmallCap Dividend Fund | NYSE Arca. |
| FTCS | First Trust Capital Strength ETF | NASDAQ. |
| BSJJ | Invesco BulletShares 2019 High Yield Corporate Bond ETF | NYSE Arca. |
| PNQI | Invesco NASDAQ Internet ETF | NASDAQ. |
| TLH | iShares 10–20 Year Treasury Bond ETF | NYSE Arca. |
| SLQD | iShares 0–5 Year Investment Grade Corporate Bond ETF | NASDAQ. |
| EXI | iShares Global Industrials ETF | NYSE Arca. |
| PGF | Invesco Financial Preferred ETF | NYSE Arca. |
| GEM | Goldman Sachs ActiveBeta Emerging Markets Equity ETF | NYSE Arca. |
| PPH | VanEck Vectors Pharmaceutical ETF | NASDAQ. |
| PDP | Invesco DWA Momentum ETF | NASDAQ. |
| FDIS | Fidelity MSCI Consumer Discretionary Index ETF | NYSE Arca. |
| FXB | Invesco CurrencyShares British Pound Sterling Trust | NYSE Arca. |
| PHYS | Sprott Physical Gold Trust Units | NYSE Arca. |
| IAI | iShares U.S. Broker-Dealers & Securities Exchanges ETF | NYSE Arca. |
| LEMB | iShares J.P. Morgan EM Local Currency Bond ETF | NYSE Arca. |
| BLOK | Amplify Transformational Data Sharing ETF | NYSE Arca. |
| USRT | iShares Core U.S. REIT ETF | NYSE Arca. |
| SPTS | SPDR Portfolio Short Term Treasury ETF | NYSE Arca. |
| IYC | iShares U.S. Consumer Services ETF | NYSE Arca. |
| CMF | iShares California Muni Bond ETF | NYSE Arca. |
| FXH | First Trust Health Care AlphaDEX Fund | NYSE Arca. |
| FNDC | Schwab Fundamental International Small Co. Index ETF | NYSE Arca. |
| OGIG | O'Shares Global Internet Giants ETF | NYSE Arca. |
| IGHG | ProShares Investment Grade-Interest Rate Hedged | Cboe BZX. |
| MGC | Vanguard Mega Cap ETF | NYSE Arca. |
| DES | WisdomTree U.S. SmallCap Dividend Fund | NYSE Arca. |
| DWX | SPDR S&P International Dividend ETF | NYSE Arca. |
| PTLC | Pacer Trendpilot US Large Cap ETF | Cboe BZX. |
| MGV | Vanguard Mega Cap Value ETF | NYSE Arca. |
| BSJK | Invesco BulletShares 2020 High Yield Corporate Bond ETF | NYSE Arca. |
| MOAT | VanEck Vectors Morningstar Wide Moat ETF | NYSE Arca. |
| EELV | Invesco S&P Emerging Markets Low Volatility ETF | NYSE Arca. |
| SDIV | Global X Superdividend ETF | NYSE Arca. |
| DSI | iShares MSCI KLD 400 Social ETF | NYSE Arca. |
| VIGI | Vanguard International Dividend Appreciation ETF | NASDAQ. |
| MDYV | SPDR S&P 400 Mid Cap Value ETF | NYSE Arca. |
| REET | iShares Global REIT ETF | NYSE Arca. |
| ITE | SPDR Bloomberg Barclays Intermediate Term Treasury ETF | NYSE Arca. |
| IWY | iShares Russell Top 200 Growth ETF | NYSE Arca. |
| QDF | FlexShares Quality Dividend Index Fund | NYSE Arca. |
| FDL | First Trust Morningstar Dividend Leaders Index Fund | NYSE Arca. |
| SPHQ | Invesco S&P 500 Quality ETF | NYSE Arca. |
| AOR | iShares Core Growth Allocation ETF | NYSE Arca. |
| AOM | iShares Core Moderate Allocation ETF | NYSE Arca. |
| COMT | iShares Commodities Select Strategy ETF | NASDAQ. |
| IBND | SPDR Bloomberg Barclays International Corporate Bond ETF | NYSE Arca. |
| EMHY | iShares Emerging Markets High Yield Bond ETF | Cboe BZX. |
| WPS | iShares International Developed Property ETF | NYSE Arca. |
| FXZ | First Trust Materials AlphaDEX Fund | NYSE Arca. |
| ECON | Columbia Emerging Markets Consumer ETF | NYSE Arca. |
| DLN | WisdomTree U.S. LargeCap Dividend Fund | NYSE Arca. |
| MOO | VanEck Vectors Agribusiness ETF | NYSE Arca. |

| Ticker | ETP name | Exchange |
|---|---|---|
| IBUY | Amplify Online Retail ETF | NASDAQ. |
| BSCJ | Invesco BulletShares 2019 Corporate Bond ETF | NYSE Arca. |
| GSIE | Goldman Sachs ActiveBeta International Equity ETF | NYSE Arca. |
| TAN | Invesco Solar ETF | NYSE Arca. |
| RING | iShares MSCI Global Gold Miners ETF | NASDAQ. |
| VNLA | Janus Henderson Short Duration Income ETF | NYSE Arca. |
| FXN | First Trust Energy AlphaDEX Fund | NYSE Arca. |
| PPLT | ETFS Physical Platinum Shares | NYSE Arca. |
| EEMO | Invesco S&P Emerging Markets Momentum ETF | NYSE Arca. |
| VXZ | iPath S&P 500 VIX Mid-Term Futures ETN Class A | NYSE Arca. |
| RODM | Hartford Multifactor Developed Markets (ex-US) ETF | NYSE Arca. |
| VIOO | Vanguard S&P Small-Cap 600 ETF | NYSE Arca. |
| EEMA | iShares MSCI Emerging Markets Asia ETF | NASDAQ. |
| URA | Global X Uranium ETF | NYSE Arca. |
| BSCK | Invesco BulletShares 2020 Corporate Bond ETF | NYSE Arca. |
| QAI | IQ Hedge Multi-Strategy Tracker ETF | NYSE Arca. |
| REMX | VanEck Vectors Rare Earth/Strategic Metals ETF | NYSE Arca. |
| STPZ | PIMCO 1–5 Year US TIPS Index ETF | NYSE Arca. |
| FPX | First Trust US Equity Opportunities ETF | NYSE Arca. |
| FXC | Invesco CurrencyShares Canadian Dollar Trust | NYSE Arca. |
| IAGG | iShares Core International Aggregate Bond ETF | Cboe BZX. |
| PXF | Invesco FTSE RAFI Developed Markets ex-U.S. ETF | NYSE Arca. |
| BBH | VanEck Vectors Biotech ETF | NASDAQ. |
| BSCI | Invesco BulletShares 2018 Corporate Bond ETF | NYSE Arca. |
| VONE | Vanguard Russell 1000 ETF | NASDAQ. |
| PWV | Invesco Dynamic Large Cap Value ETF | NYSE Arca. |
| CIBR | First Trust NASDAQ. Cybersecurity ETF | NASDAQ. |
| TOK | iShares MSCI Kokusai ETF | NYSE Arca. |
| ARGT | Global X MSCI Argentina ETF | NYSE Arca. |
| IYK | iShares U.S. Consumer Goods ETF | NYSE Arca. |
| IYY | iShares Dow Jones U.S. ETF | NYSE Arca. |
| IHF | iShares U.S. Healthcare Providers ETF | NYSE Arca. |
| TDTT | FlexShares iBoxx 3 Year Target Duration TIPS Index Fund | NYSE Arca. |
| CFO | VictoryShares US 500 Enhanced Volatility Wtd ETF | NASDAQ. |
| CLRG | IQ Chaikin U.S. Large Cap ETF | NASDAQ. |
| RTM | Invesco S&P 500 Equal Weight Materials ETF | NYSE Arca. |
| SMIN | iShares MSCI India Small Cap ETF | Cboe BZX. |
| RWL | Oppenheimer S&P 500 Revenue ETF | NYSE Arca. |
| SCHK | Schwab 1000 Index ETF | NYSE Arca. |
| PSI | Invesco Dynamic Semiconductors ETF | NYSE Arca. |
| RHS | Invesco S&P 500 Equal Weight Consumer Staples ETF | NYSE Arca. |
| FTA | First Trust Large Cap Value AlphaDEX Fund | NASDAQ. |
| FCG | First Trust Natural Gas ETF | NYSE Arca. |
| DDWM | WisdomTree Dynamic Currency Hedged International Equity Fund | Cboe BZX. |
| DBB | Invesco DB Base Metals Fund | NYSE Arca. |
| MNA | IQ Merger Arbitrage ETF | NYSE Arca. |
| PKW | Invesco Buyback Achievers ETF | NASDAQ. |
| EWO | iShares MSCI Austria ETF | NYSE Arca. |
| NANR | SPDR S&P North American Natural Resources ETF | NYSE Arca. |
| HYMB | SPDR Nuveen S&P High Yield Municipal Bond ETF | NYSE Arca. |
| IWC | iShares Micro-Cap ETF | NYSE Arca. |
| XLG | Invesco S&P 500 Top 50 ETF | NYSE Arca. |
| SIL | Global X Silver Miners ETF | NYSE Arca. |
| FXD | First Trust Consumer Discretionary AlphaDEX Fund | NYSE Arca. |
| BSCL | Invesco BulletShares 2021 Corporate Bond ETF | NYSE Arca. |
| ICVT | iShares Convertible Bond ETF | Cboe BZX. |
| BAB | Invesco Taxable Municipal Bond ETF | NYSE Arca. |
| FLTR | VanEck Vectors Investment Grade Floating Rate ETF | NYSE Arca. |
| PSK | SPDR Wells Fargo Preferred Stock ETF | NYSE Arca. |
| IXJ | iShares Global Healthcare ETF | NYSE Arca. |
| EEMS | iShares MSCI Emerging Markets Small Cap ETF | NYSE Arca. |
| AOA | iShares Core Aggressive Allocation ETF | NYSE Arca. |
| GWX | SPDR S&P International Small Cap ETF | NYSE Arca. |
| FREL | Fidelity MSCI Real Estate Index ETF | NYSE Arca. |
| RFDI | First Trust Riverfront Dynamic Developed International ETF | NASDAQ. |
| FMAT | Fidelity MSCI Materials Index ETF | NYSE Arca. |
| SLX | VanEck Vectors Steel ETF | NYSE Arca. |
| WOOD | iShares Global Timber & Forestry ETF | NASDAQ. |
| IEZ | iShares U.S. Oil Equipment & Services ETF | NYSE Arca. |
| FEMS | First Trust Emerging Markets Small Cap AlphaDEX Fund | NASDAQ. |
| CHIQ | Global X China Consumer ETF | NYSE Arca. |
| JKD | iShares Morningstar Large-Cap ETF | NYSE Arca. |
| IFV | First Trust Dorsey Wright International Focus 5 ETF | NASDAQ. |
| BSCM | Invesco BulletShares 2022 Corporate Bond ETF | NYSE Arca. |

| Ticker | ETP name | Exchange |
|---|---|---|
| FTXO | First Trust NASDAQ. Bank ETF | NASDAQ. |
| SCIF | VanEck Vectors India Small-Cap Index ETF | NYSE Arca. |
| IPAC | iShares Core MSCI Pacific ETF | NYSE Arca. |
| FTC | First Trust Large Cap Growth AlphaDEX Fund | NASDAQ. |
| PALL | ETFS Physical Palladium Shares | NYSE Arca. |
| RDVY | First Trust Rising Dividend Achievers ETF | NASDAQ. |
| XPH | SPDR S&P Pharmaceuticals ETF | NYSE Arca. |
| HYEM | VanEck Vectors Emerging Markets High Yield Bond ETF | NYSE Arca. |
| ICSH | iShares Ultra Short-Term Bond ETF | Cboe BZX. |
| URTH | iShares MSCI World ETF | NYSE Arca. |
| BAR | GraniteShares Gold Shares | NYSE Arca. |
| BNO | United States Brent Oil Fund LP | NYSE Arca. |
| RYH | Invesco S&P 500 Equal Weight Health Care ETF | NYSE Arca. |
| BSJL | Invesco Bulletshares 2021 High Yield Corporate Bond ETF | NYSE Arca. |
| USCI | United States Commodity Index Fund | NYSE Arca. |
| RYF | Invesco S&P 500 Equal Weight Financials ETF | NYSE Arca. |
| IVOO | Vanguard S&P Mid-Cap 400 ETF | NYSE Arca. |
| SLY | SPDR S&P 600 Small Cap ETF | NYSE Arca. |
| XHE | SPDR S&P Health Care Equipment ETF | NYSE Arca. |
| IBDL | iShares iBonds Dec 2020 Term Corporate ETF | NYSE Arca. |
| AGGY | WisdomTree Barclays Yield Enhanced U.S. Aggregate Bond Fund | NYSE Arca. |
| FMB | First Trust Managed Municipal ETF | NASDAQ. |
| IFGL | iShares International Developed Real Estate ETF | NASDAQ. |
| IBDK | iShares iBonds Dec 2019 Term Corporate ETF | NYSE Arca. |
| IBDM | iShares iBonds Dec 2021 Term Corporate ETF | NYSE Arca. |
| IQDF | FlexShares International Quality Dividend Index Fund | NYSE Arca. |
| FLTB | Fidelity Limited Term Bond ETF | NYSE Arca. |
| KSA | iShares MSCI Saudi Arabia ETF | NYSE Arca. |
| BLCN | Reality Shares Nasdaq NextGen Economy ETF | NASDAQ. |
| IOO | iShares Global 100 ETF | NYSE Arca. |
| VOOV | Vanguard S&P 500 Value ETF | NYSE Arca. |
| EWX | SPDR S&P Emerging Markets Small Cap ETF | NYSE Arca. |
| OUSA | O'Shares FTSE US Quality Dividend ETF | NYSE Arca. |
| FNX | First Trust Mid Cap Core AlphaDEX Fund | NASDAQ. |
| FUTY | Fidelity MSCI Utilities Index ETF | NYSE Arca. |
| DHS | WisdomTree U.S. High Dividend Fund | NYSE Arca. |
| DVYE | iShares Emerging Markets Dividend ETF | NYSE Arca. |
| HYGH | iShares Interest Rate Hedged High Yield Bond ETF | NYSE Arca. |
| MLPX | Global X MLP & Energy Infrastructure ETF | NYSE Arca. |
| AGZ | iShares Agency Bond ETF | NYSE Arca. |
| FDD | First Trust Stoxx European Select Dividend Index Fund | NYSE Arca. |
| RGI | Invesco S&P 500 Equal Weight Industrials ETF | NYSE Arca. |
| SOCL | Global X Social Media ETF | NASDAQ. |
| IGE | iShares North American Natural Resources ETF | Cboe BZX. |
| TDTF | FlexShares iBoxx 5 Year Target Duration TIPS Index Fund | NYSE Arca. |
| IPAY | ETFMG Prime Mobile Payments ETF | NYSE Arca. |
| TDIV | First Trust NASDAQ Technology Dividend Index Fund | NASDAQ. |
| JKE | iShares Morningstar Large-Cap Growth ETF | NYSE Arca. |
| RYE | Invesco S&P 500 Equal Weight Energy ETF | NYSE Arca. |
| IHE | iShares U.S. Pharmaceuticals ETF | NYSE Arca. |
| PJP | Invesco Dynamic Pharmaceuticals ETF | NYSE Arca. |
| PID | Invesco International Dividend Achievers ETF | NASDAQ. |
| PEY | Invesco High Yield Equity Dividend Achievers ETF | NASDAQ. |
| ILTB | iShares Core 10+ Year USD Bond ETF | NYSE Arca. |
| RDIV | Oppenheimer S&P Ultra Dividend Revenue ETF | NYSE Arca. |
| LVHD | Legg Mason Low Volatility High Dividend ETF | NASDAQ. |
| EZM | WisdomTree U.S. MidCap Earnings Fund | NYSE Arca. |
| ARKG | ARK Genomic Revolution Multi-Sector ETF | NYSE Arca. |
| HFXI | IQ 50 Percent Hedged FTSE International ETF | NYSE Arca. |
| SNLN | Highland iBoxx Senior Loan ETF | NASDAQ. |
| CSML | IQ Chaikin U.S. Small Cap ETF | NASDAQ. |
| FXU | First Trust Utilities AlphaDEX Fund | NYSE Arca. |
| PSLV | Sprott Physical Silver Trust | NYSE Arca. |
| QQEW | First Trust Nasdaq-100 Equal Weighted Index Fund | NASDAQ. |
| EMGF | iShares Edge MSCI Multifactor Emerging Markets ETF | Cboe BZX. |
| FXF | Invesco CurrencyShares Swiss Franc Trust | NYSE Arca. |
| HYZD | WisdomTree Interest Rate Hedged High Yield Bond Fund | NASDAQ. |
| AGGP | IQ Enhanced Core Plus Bond U.S. ETF | NYSE Arca. |
| AIEQ | AI Powered Equity ETF | NYSE Arca. |
| PCEF | Invesco CEF Income Composite ETF | NYSE Arca. |
| KBWY | Invesco KBW Premium Yield Equity REIT ETF | NASDAQ. |
| IBDN | iShares iBonds Dec 2022 Term Corporate ETF | NYSE Arca. |
| PBP | Invesco S&P 500 BuyWrite ETF | NYSE Arca. |
| CFA | VictoryShares US 500 Volatility Wtd ETF | NASDAQ. |

| Ticker | ETP name | Exchange |
|---|---|---|
| BWZ | SPDR Bloomberg Barclays Short Term International Treasury Bond ETF | NYSE Arca. |
| VIIX | VelocityShares VIX Short-Term ETN | NASDAQ. |
| SJB | ProShares Short High Yield | NYSE Arca. |
| FSTA | Fidelity MSCI Consumer Staples Index ETF | NYSE Arca. |
| DWM | WisdomTree International Equity Fund | NYSE Arca. |
| ESGE | iShares MSCI EM ESG Optimized ETF | NASDAQ. |
| FXG | First Trust Consumer Staples AlphaDEX Fund | NYSE Arca. |
| CXSE | WisdomTree China ex-State-Owned Enterprises Fund | NASDAQ. |
| EQAL | Invesco Russell 1000 Equal Weight ETF | NYSE Arca. |
| SMDV | ProShares Russell 2000 Dividend Growers ETF | Cboe BZX. |
| MXI | iShares Global Materials ETF | NYSE Arca. |
| IHDG | WisdomTree International Hedged Quality Dividend Growth Fund | NYSE Arca. |
| FYX | First Trust Small Cap Core AlphaDEX Fund | NASDAQ. |
| JPUS | JPMorgan Diversified Return U.S. Equity ETF | NYSE Arca. |
| CGW | Invesco S&P Global Water Index ETF | NYSE Arca. |
| SIZE | iShares Edge MSCI USA Size Factor ETF | NYSE Arca. |
| XNTK | SPDR NYSE Technology ETF | NYSE Arca. |
| CDC | VictoryShares US EQ Income Enhanced Volatility Wtd ETF | NASDAQ. |
| SIVR | ETFS Physical Silver Shares | NYSE Arca. |
| IDLV | Invesco S&P International Developed Low Volatility ETF | NYSE Arca. |
| FBND | Fidelity Total Bond ETF | NYSE Arca. |
| VRIG | Invesco Variable Rate Investment Grade ETF | NASDAQ. |
| XMX | WisdomTree Global ex-Mexico Equity Fund | NYSE Arca. |
| QABA | First Trust NASDAQ ABA Community Bank Index Fund | NASDAQ. |
| RIGS | RiverFront Strategic Income Fund | NYSE Arca. |
| FDRR | Fidelity Dividend ETF for Rising Rates | NYSE Arca. |
| EPU | iShares MSCI Peru ETF | NYSE Arca. |
| QYLD | Recon Capital NASDAQ 100 Covered Call ETF | NASDAQ. |
| CSM | ProShares Large Cap Core Plus | Cboe BZX. |
| FINX | Global X FinTech ETF | NASDAQ. |
| GLTR | ETFS Physical Precious Metals Basket Shares | NYSE Arca. |
| MDIV | First Trust Multi-Asset Diversified Income Index Fund | NASDAQ. |
| AADR | AdvisorShares Dorsey Wright ADR ETF | NYSE Arca. |
| PFXF | VanEck Vectors Preferred Securities ex Financials ETF | NYSE Arca. |
| PGHY | Invesco Global Short Term High Yield Bond ETF | NYSE Arca. |
| BKF | iShares MSCI BRIC ETF | NYSE Arca. |
| PSCT | Invesco S&P SmallCap Information Technology ETF | NASDAQ. |
| JPN | Xtrackers Japan JPX-Nikkei 400 Equity ETF | NYSE Arca. |
| ULVM | USAA MSCI USA Value Momentum Blend Index ETF | NYSE Arca. |
| AMU | ETRACS Alerian MLP Index ETN | NYSE Arca. |
| TFLO | iShares Treasury Floating Rate Bond ETF | NYSE Arca. |
| FIXD | First Trust TCW Opportunistic Fixed Income ETF | NASDAQ. |
| EES | WisdomTree U.S. SmallCap Earnings Fund | NYSE Arca. |
| FVC | First Trust Dorsey Wright Dynamic Focus 5 ETF | NASDAQ. |
| EDIV | SPDR S&P Emerging Markets Dividend ETF | NYSE Arca. |
| FCVT | First Trust SSI Strategic Convertible Securities ETF | NASDAQ. |
| HDGE | AdvisorShares Ranger Equity Bear ETF | NYSE Arca. |
| IBDO | iShares iBonds Dec 2023 Term Corporate ETF | NYSE Arca. |
| TMFC | Motley Fool 100 Index ETF | Cboe BZX. |
| FEU | SPDR STOXX Europe 50 ETF | NYSE Arca. |
| PKB | Invesco Dynamic Building & Construction ETF | NYSE Arca. |
| PTMC | Pacer Trendpilot US Mid Cap ETF | Cboe BZX. |
| FTGC | First Trust Global Tactical Commodity Strategy Fund | NASDAQ. |
| ESGD | iShares MSCI EAFE ESG Optimized ETF | NASDAQ. |
| KXI | iShares Global Consumer Staples ETF | NYSE Arca. |
| PWB | Invesco Dynamic Large Cap Growth ETF | NYSE Arca. |
| FXA | Invesco CurrencyShares Australian Dollar Trust | NYSE Arca. |
| REGL | ProShares S&P MidCap 400 Dividend Aristocrats ETF | Cboe BZX. |
| JPGE | J.P. Morgan Diversified Return Global Equity ETF | NYSE Arca. |
| BSCN | Invesco Bulletshares 2023 Corporate Bond ETF | NYSE Arca. |
| JKG | iShares Morningstar Mid-Cap ETF | NYSE Arca. |
| GMF | SPDR S&P Emerging Asia Pacific ETF | NYSE Arca. |
| NUAG | NuShares Enhanced Yield U.S. Aggregate Bond ETF | NYSE Arca. |
| NIB | iPath Bloomberg Cocoa Subindex Total Return ETN | NYSE Arca. |
| PIE | Invesco DWA Emerging Markets Momentum ETF | NASDAQ. |
| PUTW | WisdomTree CBOE S&P 500 PutWrite Strategy Fund | NYSE Arca. |
| FYC | First Trust Small Cap Growth AlphaDEX Fund | NASDAQ. |
| SUSA | iShares MSCI USA ESG Select ETF | NYSE Arca. |
| RXI | iShares Global Consumer Discretionary ETF | NYSE Arca. |
| IPKW | Invesco International BuyBack Achievers ETF | NASDAQ. |
| TLTE | FlexShares Morningstar Emerging Markets Factor Tilt Index | NYSE Arca. |
| UDN | Invesco DB US Dollar Index Bearish Fund | NYSE Arca. |
| HDEF | Xtrackers MSCI EAFE High Dividend Yield Equity ETF | NYSE Arca. |
| ELD | WisdomTree Emerging Markets Local Debt Fund | NYSE Arca. |

| Ticker | ETP name | Exchange |
|---|---|---|
| XTL | SPDR S&P Telecom ETF | NYSE Arca. |
| ZROZ | PIMCO 25+ Year Zero Coupon US Treasury Index ETF | NYSE Arca. |
| ATMP | Barclays ETN+ Select MLP ETN | NYSE Arca. |

**BILLING CODE 8011–01–P**

## Appendix B – Data and Reporting

[Unless otherwise specified, the following data shall be collected and transmitted to the SEC in an agreed-upon format on a monthly basis, to be provided 30 calendar days following month end. Unless otherwise specified, the Primary Listing Exchanges shall be responsible for collecting and transmitting the data to the SEC. Data collected in connection with Sections II(E) – (G) below shall be transmitted to the SEC with a request for confidential treatment under the Freedom of Information Act. 5 U.S.C. § 552, and the SEC's rules and regulations thereunder.

I. **Summary Statistics**

A. Frequency with which NMS Stocks enter a Limit State. Such summary data shall be broken down as follows:

1. Partition stocks by category

a. Tier 1 non-ETP issues > $3.00

b. Tier 1 non-ETP issues >= $0.75 and <= $3.00

c. Tier 1 non-ETP issues < $0.75

d. Tier 1 non-leveraged ETPs in each of above categories

e. Tier 1 leveraged ETPs in each of above categories

f. Tier 2 non-ETPs in each of above categories

g. Tier 2 non-leveraged ETPs in each of above categories

h. Tier 2 leveraged ETPs in each of above categories

2. Partition by time of day

a. Opening (prior to 9:45 am ET)

b. Regular (between 9:45 am ET and 3:35 pm ET)

c. Closing (after 3:35 pm ET)

d. Within five minutes of a Trading Pause re-open or IPO open

3. Track reasons for entering a Limit State, such as:

a. Liquidity gap –price reverts from a Limit State Quotation and returns to trading within the Price Bands

b. Broken trades

c. Primary Listing Exchange manually declares a Trading Pause pursuant to Section (VII)(2) of the Plan

d. Other

B. Determine (1), (2) and (3) for when a Trading Pause has been declared for an NMS Stock pursuant to the Plan.

II. **Raw Data** *(all Participants, except A-E, which are for the Primary Listing Exchanges only)*

A. Record of every Straddle State.

1. Ticker, date, time entered, time exited, flag for ending with Limit State, flag for ending with manual override.

2. Pipe delimited with field names as first record.

B. Record of every Price Band

1. Ticker, date, time at beginning of Price Band, Upper Price Band, Lower Price Band

2. Pipe delimited with field names as first record

C. Record of every Limit State

1. Ticker, date, time entered, time exited, flag for halt

2. Pipe delimited with field names as first record

D. Record of every Trading Pause or halt

1. Ticker, date, time entered, time exited, type of halt (i.e., regulatory halt, non-regulatory halt, Trading Pause pursuant to the Plan, other)

2. Pipe delimited with field names as first record

E. Data set or orders entered into reopening auctions during halts or Trading Pauses

1. Arrivals, Changes, Cancels, # shares, limit/market, side, Limit State side

2. Pipe delimited with field name as first record

F. Data set of order events received during Limit States

G. Summary data on order flow of arrivals and cancellations for each 15-second period for discrete time periods and sample stocks to be determined by the SEC in subsequent data requests. Must indicate side(s) of Limit State.

1. Market/marketable sell orders arrivals and executions

   a. Count

   b. Shares

   c. Shares executed

2. Market/marketable buy orders arrivals and executions

   a. Count

   b. Shares

   c. Shares executed

3. Count arriving, volume arriving and shares executing in limit sell orders above NBBO mid-point

4. Count arriving, volume arriving and shares executing in limit sell orders at or below NBBO mid-point (non-marketable)

5. Count arriving, volume arriving and shares executing in limit buy orders at or above NBBO mid-point (non-marketable)

6. Count arriving, volume arriving and shares executing in limit buy orders below NBBO mid-point

7. Count and volume arriving of limit sell orders priced at or above NBBO mid-point plus $0.05

8. Count and volume arriving of limit buy orders priced at or below NBBO mid-point minus $0.05

9. Count and volume of (3-8) for cancels

10. Include: ticker, date, time at start, time of Limit State, all data item fields in 1, last sale prior to 15-second period (null if no trades today), range during 15-second period, last trade during 15-second period

III. **On May 28, 2015, Participants provided to the SEC a supplemental joint assessment relating to the impact of the Plan and calibration of the Percentage Parameters as follows:**

A. Assess the statistical and economic impact on liquidity of approaching Price Bands.

B. Assess the statistical and economic impact of the Price Bands on erroneous trades.

C. Assess the statistical and economic impact of the appropriateness of the Percentage Parameters used for the Price Bands.

D. Assess whether the Limit State is the appropriate length to allow for liquidity replenishment when a Limit State is reached because of a temporary liquidity gap.

E. Evaluate concerns from the options markets regarding the statistical and economic impact of Limit States on liquidity and market quality in the options markets. (Participants that operate options exchange should also prepare such assessment reports.)

F. Assess whether the process for entering a Limit State should be adjusted and whether Straddle States are problematic.

G. Assess whether the process for exiting a Limit State should be adjusted.

H. Assess whether the Trading Pauses are too long or short and whether the reopening procedures should be adjusted.]

**I. Data Provision.** The Commission may request from the Primary Listing Exchanges the below data that is not otherwise publicly available. The requested data shall be collected and transmitted to the Commission in an agreed-upon format, to be provided 30 calendar days following the date of the request, or such other date as agreed upon by the Commission and Primary Listing Exchange. Data collected in connection with a Commission request shall be transmitted to the Commission with a request for confidential treatment under the Freedom of Information Act. 5 U.S.C. § 552, and the Commission's rules and regulations thereunder. This section shall expire at the time the below data becomes available via the National Market System Plan Governing the Consolidated Audit Trail or becomes publicly available.

A. Data set of all orders entered during halts or Trading Pauses

1. Normal or Auction Only orders, Arrivals, Changes, Cancels, # shares, limit/market, side, Limit State side

2. Pipe delimited with field name as first record

B. Data set of order events received during Limit States

C. Summary data on order flow of arrivals and cancellations for each 15-second period for discrete time periods and sample stocks to be determined by the SEC in subsequent data requests. Must indicate side(s) of Limit State.

1. Market/marketable sell orders arrivals and executions

a. Count

b. Shares

c. Shares executed

2. Market/marketable buy orders arrivals and executions

a. Count

b. Shares

c. Shares executed

3. Count arriving, volume arriving and shares executing in limit sell orders above NBBO mid-point

4. Count arriving, volume arriving and shares executing in limit sell orders at or below NBBO mid-point (non-marketable)

5. Count arriving, volume arriving and shares executing in limit buy orders at or above NBBO mid-point (non-marketable)

6. Count arriving, volume arriving and shares executing in limit buy orders below NBBO mid-point

7. Count and volume arriving of limit sell orders priced at or above NBBO mid-point plus $0.05

8. Count and volume arriving of limit buy orders priced at or below NBBO mid-point minus $0.05

9. Count and volume of (3-8) for cancels

10. Include: ticker, date, time at start, time of Limit State, all data item fields in 1, last sale prior to 15-second period (null if no trades today), range during 15-second period, last trade during 15-second period

## II. Reporting

**A. Annual Report.** No later than March 31, 2020 and annually thereafter, the Operating Committee, in consultation with the Advisory Committee, will provide the Commission and make

publicly available a report containing key information concerning the Plan's performance during the preceding calendar year which shall include the following items: (1) an update on the Plan's operations; (2) an analysis of any amendments to the Plan implemented during the period covered by the report; and (3) an analysis of potential material emerging issues that may directly impact the operation of the Plan.

1. Update on the Plan's Operations. This section of the Annual Report shall analyze the Plan's operation during the covered period, including a discussion of any areas of the Plan's operation that require additional analysis. In particular, this section of the Annual Report shall examine the calibration of the parameters set forth in the Plan (e.g., Price Bands, duration of Limit States, impact of Straddle States, duration of Trading Pauses, and the performance of reopening procedures following a Trading Pause). The section of the Annual Report also shall consider stock characteristics and variations in market conditions over time, and may include tests that differentiate results for different characteristics, both in isolation and in combination.

2. Analysis of Amendments Implemented. This section of the Annual Report shall provide an analysis of any amendments implemented during the covered period. The analysis shall include a discussion of any such amendment's operation and its impact on the overall operation of the Plan.

3. Analysis of Emerging Issues. This section of the Annual Report should vary from year-to-year and will include a discussion and analysis of the Plan's operation during a significant market event that may have occurred during the covered period. This section shall also include any additional analyses performed during the covered period on issues that were raised in previous Annual Reports.

**B. Quarterly Data**. 30 days following the end of each calendar quarter, the Operating Committee shall provide the Commission and make publicly available a report including basic statistics regarding the Plan's operation ("Monitoring Report") during the preceding calendar quarter as well as aggregated data from the previous 12 quarters beginning with the calendar quarter covered by the first Monitoring Report. The purpose of the Monitoring Report is to identify trends in the performance and impact of the Plan on market activity.

1. The quarterly production shall include the following data for each month during the preceding calendar quarter:

a. Events Data.

i. Number of Limit States, Trading Pauses, and Straddle States per day, including distribution statics such as the mean, median, minimum and maximum percentiles

ii. Number of NMS Stocks that experience more than one Limit State Trading Pause, or Straddle State in a single day including the length of each Limit State, Trading Pause, and Straddle State per day

b. The number of Clearly Erroneous Events per day for all NMS Stocks that occurred during the time when Price Bands are disseminated by the Processor

c. Reopening Data

i. Number of times an automated reopening process is extended for and the length of the Trading Pause

ii. Whether the reopening process ended in a trade

iii. The price calculated by an automated reopening process for an NMS Stock exiting a Trading Pause

iv. For the five minutes following the conclusion of a Trading Pause, the highest price of all last sale eligible trades, the lowest price of all last sale eligible trades, and the average price of all last sale eligible trades

2. Partition stocks by category

a. Tier 1 non-ETP issues > $3.00

b. Tier 1 non-ETP issues >= $0.75 and <= $3.00

c. Tier 1 non-ETP issues < $0.75

d. Tier 1 non-leveraged ETPs in each of above categories

e. Tier 1 leveraged ETPs in each of above categories

f. Tier 2 non-ETPs in each of above categories

g. Tier 2 non-leveraged ETPs in each of above categories

h. Tier 2 leveraged ETPs in each of above categories

3. Partition by time of day

a. Opening (prior to 9:45 am ET)

b. Regular (between 9:45 am ET and 3:35 pm ET)

c. Closing (after 3:35 pm ET)

d. Within five minutes of a Trading Pause re-open or IPO open

**C. Reports on Market Events**. At the Commission's request, the Operating Committee shall provide the Commission and make publicly available a report analyzing the Plan's operation during a significant market event that (1) materially impacted the trading of more than one security across multiple Trading Centers; and (2) is directly related to or implicating the performance of the

Plan. Such report shall be provided to the Commission no later than 30 days following the Commission's request, or at a later date as agreed upon between the Commission and the Operating Committee. The requirement to submit a report under this section may be satisfied by including the required analysis within an Annual Report.

[FR Doc. 2018–27819 Filed 12–21–18 8:45 am]
BILLING CODE 8011–01–C

# FEDERAL REGISTER

Vol. 83 Wednesday,

No. 246 December 26, 2018


Part IV

## Department of Justice

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Parts 447, 478, and 479

Bump-Stock-Type Devices; Rule

**DEPARTMENT OF JUSTICE**

**Bureau of Alcohol, Tobacco, Firearms, and Explosives**

**27 CFR Parts 447, 478, and 479**

**[Docket No. 2018R–22F; AG Order No. 4367–2018]**

**RIN 1140–AA52**

# Bump-Stock-Type Devices

**AGENCY:** Bureau of Alcohol, Tobacco, Firearms, and Explosives; Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** The Department of Justice is amending the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to clarify that bump-stock-type devices—meaning ''bump fire'' stocks, slide-fire devices, and devices with certain similar characteristics—are ''machineguns'' as defined by the National Firearms Act of 1934 and the Gun Control Act of 1968 because such devices allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger. Specifically, these devices convert an otherwise semiautomatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that harnesses the recoil energy of the semiautomatic firearm in a manner that allows the trigger to reset and continue firing without additional physical manipulation of the trigger by the shooter. Hence, a semiautomatic firearm to which a bump-stock-type device is attached is able to produce automatic fire with a single pull of the trigger. With limited exceptions, the Gun Control Act, as amended, makes it unlawful for any person to transfer or possess a machinegun unless it was lawfully possessed prior to the effective date of the statute. The bump-stock-type devices covered by this final rule were not in existence prior to the effective date of the statute, and therefore will be prohibited when this rule becomes effective. Consequently, under the final rule, current possessors of these devices will be required to destroy the devices or abandon them at an ATF office prior to the effective date of the rule.

**DATES:** This rule is effective March 26, 2019.

**FOR FURTHER INFORMATION CONTACT:** Vivian Chu, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648–7070.

**SUPPLEMENTARY INFORMATION:**

I. Executive Summary
A. Summary of the Regulatory Action
B. Summary of Costs and Benefits
II. Background
A. Regulatory Context
B. Las Vegas Shooting
C. Advance Notice of Proposed Rulemaking
III. Notice of Proposed Rulemaking
A. Prior Interpretations of ''Single Function of the Trigger'' and ''Automatically''
B. Re-Evaluation of Bump-Stock-Type Devices
C. Proposed Definition of ''Single Function of the Trigger''
D. Proposed Definition of ''Automatically''
E. Proposed Clarification That the Definition of ''Machinegun'' Includes Bump-Stock-Type Devices
F. Amendment of 27 CFR 479.11
G. Amendment of 27 CFR 478.11
H. Amendment of 27 CFR 447.11
IV. Analysis of Comments and Department Responses for Proposed Rule
A. Comments Generally Supporting the Rule
B. Particular Reasons Raised in Support of the Rule
C. Comments Generally Opposing the Rule
D. Specific Issues Raised in Opposition to the Rule
E. ATF Suggested Alternatives
F. Other Alternatives
G. Proposed Rule's Statutory and Executive Order Review
H. Affected Population
I. Costs and Benefits
J. Regulatory Flexibility Act
K. Miscellaneous Comments
L. Comments on the Rulemaking Process
V. Final Rule
VI. Statutory and Executive Order Review
A. Executive Orders 12866, 13563, and 13771
B. Executive Order 13132
C. Executive Order 12988
D. Regulatory Flexibility Act
E. Small Business Regulatory Enforcement Fairness Act of 1996
F. Congressional Review Act
G. Unfunded Mandates Reform Act of 1995
H. Paperwork Reduction Act of 1995

## I. Executive Summary

### *A. Summary of the Regulatory Action*

The current regulations at §§ 447.11, 478.11, and 479.11 of title 27, Code of Federal Regulations (CFR), contain definitions for the term ''machinegun.'' [1] The definitions used in 27 CFR 478.11 and 479.11 match the statutory definition of ''machinegun'' in the National Firearms Act of 1934 (NFA), as amended, and the Gun Control Act of 1968 (GCA), as amended. Under the NFA, the term ''machinegun'' means ''any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.'' 26 U.S.C. 5845(b). The term ''machinegun'' also includes ''the frame or receiver of any such weapon'' or any part or combination of parts designed and intended ''for use in converting a weapon into a machinegun,'' and ''any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.'' *Id.* This definition uses the key terms ''single function of the trigger'' and ''automatically,'' but these terms are not defined in the statutory text.

The definition of ''machinegun'' in 27 CFR 447.11, promulgated pursuant to the portion of section 38 of the Arms Export Control Act (AECA) (22 U.S.C. 2778) delegated to the Attorney General by section 1(n)(ii) of Executive Order 13637 (78 FR 16129), is similar. Currently, the definition of ''machinegun'' in § 447.11 provides that a '''machinegun', 'machine pistol', 'submachinegun', or 'automatic rifle' is a firearm originally designed to fire, or capable of being fired fully automatically by a single pull of the trigger.''

In 2006, ATF concluded that certain bump-stock-type devices qualified as machineguns under the NFA and GCA. Specifically, ATF concluded that a device attached to a semiautomatic firearm that uses an internal spring to harness the force of a firearm's recoil so that the firearm shoots more than one shot with a single pull of the trigger is a machinegun. Between 2008 and 2017, however, ATF also issued classification decisions concluding that other bump-stock-type devices were not machineguns, primarily because the devices did not rely on internal springs or similar mechanical parts to channel recoil energy. Decisions issued during that time did not include extensive legal analysis relating to the definition of ''machinegun.'' ATF undertook a review of its past classifications and determined that those conclusions did not reflect the best interpretation of ''machinegun'' under the NFA and GCA.

ATF decided to promulgate a rule that would bring clarity to the definition of ''machinegun''—specifically with respect to the terms ''automatically'' and ''single function of the trigger,'' as those terms are used to define ''machinegun.'' As an initial step in the process of promulgating a rule, on December 26, 2017, the Department of Justice (Department) published in the **Federal**

[1] Regulations implementing the relevant statutes spell the term ''machine gun'' rather than ''machinegun.'' *E.g.*, 27 CFR 478.11, 479.11. For convenience, this notice uses ''machinegun'' except when quoting a source to the contrary.

**Register** an advance notice of proposed rulemaking titled ''Application of the Definition of Machinegun to 'Bump Fire' Stocks and Other Similar Devices.'' 82 FR 60929. Subsequently, on March 29, 2018, the Department published in the **Federal Register** a notice of proposed rulemaking (NPRM) titled ''Bump-Stock-Type Devices.'' 83 FR 13442.

The NPRM proposed to amend the regulations at 27 CFR 447.11, 478.11, and 479.11 to clarify that bump-stock-type devices are ''machineguns'' as defined by the NFA and GCA because such devices allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger. Specifically, these devices convert an otherwise semiautomatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that harnesses the recoil energy of the semiautomatic firearm in a manner that allows the trigger to reset and continue firing without additional physical manipulation of the trigger by the shooter. Hence, a semiautomatic firearm to which a bump-stock-type device is attached is able to produce automatic fire with a single pull of the trigger. 83 FR at 13447–48.

The NPRM proposed regulatory definitions for the statutory terms ''single function of the trigger'' and ''automatically,'' and amendments of the regulatory definition of ''machinegun'' for purposes of clarity. Specifically, the NPRM proposed to amend the definitions of ''machinegun'' in §§ 478.11 and 479.11, define the term ''single function of the trigger'' to mean ''single pull of the trigger,'' and define the term ''automatically'' to mean ''as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger.'' 83 FR at 13447–48. The NPRM also proposed to clarify that the definition of ''machinegun'' includes a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter (commonly known as bump-stock-type devices). *Id.* at 13447. Finally, the NPRM proposed to harmonize the definition of ''machinegun'' in § 447.11 with the definitions in 27 CFR parts 478 and 479, as those definitions would be amended. *Id.* at 13448.

The goal of this final rule is to amend the relevant regulatory definitions as described above. The Department, however, has revised the definition of ''single function of the trigger'' to mean ''single pull of the trigger'' and analogous motions, taking into account that there are other methods of initiating an automatic firing sequence that do not require a pull. This final rule also informs current possessors of bump-stock-type devices of the proper methods of disposal, including destruction by the owner or abandonment to ATF.

*B. Summary of Costs and Benefits*

ATF estimates the total undiscounted cost of this rule at $312.1 million over 10 years. The total 7% discount cost is estimated at $245.5 million, and the discounted costs would be $32.8 million and $35.0 million, annualized at 3% and 7% respectively. The estimate includes costs to the public for loss of property ($102.5 million); costs of forgone future production and sales ($198.9 million); costs of disposal ($9.4 million); and government costs ($1.3 million). Unquantified costs include potential loss of wages for employees of bump-stock-type device manufacturers, notification to bump-stock-type device owners of the need to destroy the devices, and loss of future usage by the owners of bump-stock-type devices. ATF did not calculate any cost savings for this final rule.

This final rule clarifies that bump-stock-type devices are machineguns that are subject to the NFA and GCA. The provisions of those statutes addressing machineguns are designed to increase public safety by, among other things, limiting legal access to them. Consistent with the NFA and GCA, therefore, a desired outcome of this final rule is increased public safety.

## II. Background

*A. Regulatory Context*

The Attorney General is responsible for enforcing the NFA, as amended, and the GCA, as amended.[2] This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the NFA and GCA. *See* 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A), 7805(a). The Attorney General has delegated the responsibility for administering and enforcing the NFA and GCA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 CFR 0.130(a)(1)–(2). Accordingly, the Department and ATF have promulgated regulations implementing both the NFA and the GCA. *See* 27 CFR parts 478, 479. In particular, ATF for decades promulgated rules governing ''the procedural and substantive requirements relative to the importation, manufacture, making, exportation, identification and registration of, and the dealing in, machine guns.'' 27 CFR 479.1; *see, e.g., United States* v. *Dodson,* 519 F. App'x 344, 348–49 & n.4 (6th Cir. 2013) (acknowledging ATF's role in interpreting the NFA's definition of ''machinegun''); *F.J. Vollmer Co.* v. *Higgins,* 23 F.3d 448, 449–51 (D.C. Cir. 1994) (upholding an ATF determination regarding machinegun receivers). Courts have recognized ATF's leading regulatory role with respect to firearms, including in the specific context of classifying devices as machineguns under the NFA. *See, e.g., York* v. *Sec'y of Treasury,* 774 F.2d 417, 419–20 (10th Cir. 1985).

The GCA defines ''machinegun'' by referring to the NFA definition,[3] which includes ''any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.'' 26 U.S.C. 5845(b). The term ''machinegun'' also includes ''the frame or receiver of any such weapon'' or any part, or combination of parts, designed and intended ''for use in converting a weapon into a machinegun,'' and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. *Id.* With limited exceptions, the GCA prohibits the transfer or possession of machineguns under 18 U.S.C. 922(o).

In 1986, Congress passed the Firearms Owners' Protection Act (FOPA), Public Law 99–308, 100 Stat. 449, which included a provision that effectively froze the number of legally transferrable machineguns to those that were registered before the effective date of the statute. 18 U.S.C. 922(o). Due to the fixed universe of ''pre-1986'' machineguns that may be lawfully transferred by nongovernmental entities, the value of those machineguns has steadily increased over time. This price premium on automatic weapons has spurred inventors and manufacturers to develop firearms, triggers, and other devices that permit shooters to use semiautomatic rifles to replicate

[2] NFA provisions still refer to the ''Secretary of the Treasury.'' 26 U.S.C. ch. 53. However, the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, transferred the functions of ATF from the Department of the Treasury to the Department of Justice, under the general authority of the Attorney General. 26 U.S.C. 7801(a)(2); 28 U.S.C. 599A(c)(1). Thus, for ease of reference, this notice refers to the Attorney General.

[3] 18 U.S.C. 921(a)(23).

automatic fire without converting these rifles into ''machineguns'' under the NFA and GCA. ATF began receiving classification requests for such firearms, triggers, and other devices that replicate automatic fire beginning in 1988. ATF has noted a significant increase in such requests since 2004, often in connection with rifle models that were, until 2004, defined as ''semiautomatic assault weapons'' and prohibited under the Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. 921(a)(30) (sunset effective Sept. 13, 2004).

ATF received classification requests pertaining to bump-stock-type devices. Shooters use bump-stock-type devices with semiautomatic firearms to accelerate the firearms' cyclic firing rate to mimic automatic fire. These devices replace a rifle's standard stock and free the weapon to slide back and forth rapidly, harnessing the energy from the firearm's recoil either through a mechanism like an internal spring or in conjunction with the shooter's maintenance of pressure (typically constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and constant rearward pressure on the device's extension ledge with the shooter's trigger finger).

In 2006, ATF concluded that certain bump-stock-type devices qualified as machineguns under the NFA and GCA. Specifically, ATF concluded that devices attached to semiautomatic firearms that use an internal spring to harness the force of the recoil so that the firearm shoots more than one shot with a single pull of the trigger are machineguns. Between 2008 and 2017, however, ATF also issued classification decisions concluding that other bump-stock-type devices were not machineguns, including a device submitted by the manufacturer of the bump-stock-type devices used in the 2017 Las Vegas shooting discussed below. Those decisions indicated that semiautomatic firearms modified with these bump-stock-type devices did not fire ''automatically,'' and thus were not ''machineguns,'' because the devices did not rely on internal springs or similar mechanical parts to channel recoil energy. (For further discussion of ATF's prior interpretations, see Part III.A.) Because ATF has not regulated these certain types of bump-stock-type devices as machineguns under the NFA or GCA, they have not been marked with a serial number or other identification markings. Individuals, therefore, have been able to legally purchase these devices without undergoing background checks or complying with any other Federal regulations applicable to firearms.

*B. Las Vegas Shooting*

On October 1, 2017, a shooter attacked a large crowd attending an outdoor concert in Las Vegas, Nevada. By using several AR-type rifles with attached bump-stock-type devices, the shooter was able to fire several hundred rounds of ammunition in a short period of time, killing 58 people and wounding approximately 500. The bump-stock-type devices recovered from the scene included two distinct, but functionally equivalent, model variations from the same manufacturer. These types of devices were readily available in the commercial marketplace through online sales directly from the manufacturer, and through multiple retailers.

The Las Vegas bump-stock-type devices, as well as other bump-stock-type devices available on the market, all utilize essentially the same functional design. They are designed to be affixed to a semiautomatic long gun (most commonly an AR-type rifle or an AK-type rifle) in place of a standard, stationary rifle stock, for the express purpose of allowing ''rapid fire'' operation of the semiautomatic firearm to which they are affixed. They are configured with a sliding shoulder stock molded (or otherwise attached) to a pistol-grip/handle (or ''chassis'') that includes an extension ledge (or ''finger rest'') on which the shooter places the trigger finger while shooting the firearm. The devices also generally include a detachable rectangular receiver module (or ''bearing interface'') that is placed in the receiver well of the device's pistol-grip/handle to assist in guiding and regulating the recoil of the firearm when fired. Bump-stock-type devices, including those with the aforementioned characteristics, are generally designed to channel recoil energy to increase the rate of fire of a semiautomatic firearm from a single trigger pull. Accordingly, when a bump-stock-type device is affixed to a semiautomatic firearm, the device harnesses and directs the firearm's recoil energy to slide the firearm back and forth so that the trigger automatically re-engages by ''bumping'' the shooter's stationary finger without additional physical manipulation of the trigger by the shooter.

Following the mass shooting in Las Vegas, ATF received correspondence from members of the United States Congress, as well as nongovernmental organizations, requesting that ATF examine its past classifications and determine whether bump-stock-type devices available on the market constitute machineguns under the statutory definition. Consistent with its authority to ''reconsider and rectify'' potential classification errors, *Akins* v. *United States,* 312 F. App'x 197, 200 (11th Cir. 2009) (per curiam), ATF reviewed its earlier determinations for bump-stock-type devices issued between 2008 and 2017 and concluded that those determinations did not include extensive legal analysis of the statutory terms ''automatically'' or ''single function of the trigger.'' The Department decided to move forward with the rulemaking process to clarify the meaning of these terms, which are used in the NFA's statutory definition of ''machinegun.''

*C. Advance Notice of Proposed Rulemaking*

On December 26, 2017, the Department, as an initial step in the process of promulgating a Federal regulation interpreting the definition of ''machinegun'' with respect to bump-stock-type devices, published an advance notice of proposed rulemaking (ANPRM) in the **Federal Register**. Application of the Definition of Machinegun to ''Bump Fire'' Stocks and Other Similar Devices, 82 FR 60929. The ANPRM solicited comments concerning the market for bump-stock-type devices and manufacturer and retailer data. Specifically, the Department asked a series of questions of consumers, retailers, and manufacturers of bump-stock-type devices regarding the cost of bump-stock-type devices, average gross receipts of sales, and the volume and cost of manufacturing, as well as input on the potential effect of a rulemaking affecting bump-stock-type devices, including viable markets or the cost of disposing of inventory. Public comment on the ANPRM concluded on January 25, 2018. While ATF received over 115,000 comments, the vast majority of these comments were not responsive to the ANPRM.

On February 20, 2018, the President issued a memorandum to the Attorney General concerning ''bump fire'' stocks and similar devices. Application of the Definition of Machinegun to ''Bump Fire'' Stocks and Other Similar Devices, 83 FR 7949. The memorandum noted that the Department of Justice had already ''started the process of promulgating a Federal regulation interpreting the definition of 'machinegun' under Federal law to clarify whether certain bump stock type devices should be illegal.'' *Id.* The President then directed the Department of Justice, working within established legal protocols, ''to dedicate all

available resources to complete the review of the comments received [in response to the ANPRM], and, as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns.'' *Id.*

**III. Notice of Proposed Rulemaking**

On March 29, 2018, the Department published in the **Federal Register** a notice of proposed rulemaking (NPRM) titled ''Bump-Stock-Type Devices,'' 83 FR 13442 (ATF Docket No. 2017R–22), proposing changes to the regulations in 27 CFR 447.11, 478.11, and 479.11. The comment period for the proposed rule concluded on June 27, 2018.

*A. Prior Interpretations of ''Single Function of the Trigger'' and ''Automatically''*

In the NPRM, the Department reviewed ATF's history of classifying bump-stock-type devices through agency rulings and relevant litigation. In particular, it described how ATF published ATF Ruling 2006–2, ''Classification of Devices Exclusively Designed to Increase the Rate of Fire of a Semiautomatic Firearm.'' The ruling explained that ATF had received requests from ''several members of the firearms industry to classify devices that are exclusively designed to increase the rate of fire of a semiautomatic firearm.'' ATF Ruling 2006–2, at 1. Prior to issuing ATF Ruling 2006–2, ATF had examined a device called the ''Akins Accelerator.'' To operate the device, the shooter initiated an automatic firing sequence by pulling the trigger one time, which in turn caused the rifle to recoil within the stock, permitting the trigger to lose contact with the finger and manually reset. Springs in the Akins Accelerator then forced the rifle forward, forcing the trigger against the finger, which caused the weapon to discharge the ammunition. The recoil and the spring-powered device thus caused the firearm to cycle back and forth, impacting the trigger finger without further input by the shooter while the firearm discharged multiple shots. The device was advertised as able to fire approximately 650 rounds per minute. *See id.* at 2.

ATF initially reviewed the Akins Accelerator in 2002 and determined it not to be a machinegun because ATF interpreted the statutory term ''single function of the trigger'' to refer to a single movement of the trigger. But ATF undertook further review of the device based on how it actually functioned when sold and later determined that the Akins Accelerator should be classified as a machinegun. ATF reached that conclusion because the best interpretation of the phrase ''single function of the trigger'' includes a ''single pull of the trigger.'' The Akins Accelerator qualified as a machinegun because ATF determined through testing that when the device was installed on a semiautomatic rifle (specifically a Ruger Model 10–22), it resulted in a weapon that ''[with] a single pull of the trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is exhausted.'' *Akins* v. *United States,* No. 8:08–cv–988, slip op. at 5 (M.D. Fla. Sept. 23, 2008) (internal quotation marks omitted).

When issuing ATF Ruling 2006–2, ATF set forth a detailed description of the components and functionality of the Akins Accelerator and devices with similar designs. The ruling determined that the phrase ''single function of the trigger'' in the statutory definition of ''machinegun'' was best interpreted to mean a ''single pull of the trigger.'' ATF Ruling 2006–2, at 2 (citing *National Firearms Act: Hearings Before the Comm. on Ways and Means, House of Representatives, Second Session on H.R. 9066,* 73rd Cong., at 40 (1934)). ATF further indicated that this interpretation would apply when the agency classified devices designed to increase the rate of fire of semiautomatic firearms. Thus, ATF concluded in ATF Ruling 2006–2 that devices exclusively designed to increase the rate of fire of semiautomatic firearms were machineguns if, ''when activated by a single pull of the trigger, [such devices] initiate[ ] an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted.'' *Id.* at 3. Finally, because the ''single pull of the trigger'' interpretation constituted a change from ATF's prior interpretations of the phrase ''single function of the trigger,'' ATF Ruling 2006–2 concluded that ''[t]o the extent previous ATF rulings are inconsistent with this determination, they are hereby overruled.'' *Id.*

Following its reclassification of the Akins Accelerator as a machinegun, ATF determined and advised owners of Akins Accelerator devices that removal and disposal of the internal spring—the component that caused the rifle to slide forward in the stock—would render the device a non-machinegun under the statutory definition. Thus, a possessor could retain the device by removing and disposing of the spring, in lieu of destroying or surrendering the device.

In May 2008, the inventor of the Akins Accelerator filed a lawsuit challenging ATF's classification of his device as a machinegun, claiming the agency's decision was arbitrary and capricious under the Administrative Procedure Act (APA). *Akins* v. *United States,* No. 8:08–cv–988, slip op. at 7–8 (M.D. Fla. Sept. 23, 2008). The United States District Court for the Middle District of Florida rejected the plaintiff's challenge, holding that ATF was within its authority to reconsider and change its interpretation of the phrase ''single function of the trigger'' in the NFA's statutory definition of ''machinegun.'' *Id.* at 14. The court further held that the language of the statute and the legislative history supported ATF's interpretation of the statutory phrase ''single function of the trigger'' as synonymous with ''single pull of the trigger.'' *Id.* at 11–12. The court concluded that in ATF Ruling 2006–2, ATF had set forth a ''reasoned analysis'' for the application of that new interpretation to the Akins Accelerator and similar devices, including the need to ''protect the public from dangerous firearms.'' *Id.* at 12.

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision, holding that ''[t]he interpretation by the Bureau that the phrase 'single function of the trigger' means a 'single pull of the trigger' is consonant with the statute and its legislative history.'' *Akins,* 312 F. App'x at 200. The Eleventh Circuit further concluded that ''[b]ased on the operation of the Accelerator, the Bureau had the authority to 'reconsider and rectify' what it considered to be a classification error.'' *Id.*

In ten letter rulings between 2008 and 2017, ATF applied the ''single pull of the trigger'' interpretation to other bump-stock-type devices. Like the Akins Accelerator, these other bump-stock-type devices allowed the shooter to fire more than one shot with a single pull of the trigger. However, ATF ultimately concluded that these devices did not qualify as machineguns because, in ATF's view, they did not ''automatically'' shoot more than one shot with a single pull of the trigger. ATF also applied its ''single pull of the trigger'' interpretation to other trigger actuators, two-stage triggers, and other devices submitted to ATF for classification. Depending on the method of operation, some such devices were classified to be machineguns that were required to be registered in the National Firearms Registration and Transfer Record (NFRTR) and could not be transferred or possessed, except in

limited circumstances, under 18 U.S.C. 922(o).[4]

In the NPRM, the Department also noted that prior ATF rulings concerning bump-stock-type devices did not provide substantial or consistent legal analysis regarding the meaning of the term ''automatically,'' as it is used in the NFA and GCA. For example, ATF Ruling 2006–2 concluded that devices like the Akins Accelerator initiated an ''automatic'' firing cycle because, once initiated by a single pull of the trigger, ''the automatic firing cycle continues until the finger is released or the ammunition supply is exhausted.'' ATF Ruling 2006–2, at 1. In contrast, other ATF letter rulings between 2008 and 2017 concluded that bump-stock-type devices that enable a semiautomatic firearm to shoot more than one shot with a single function of the trigger by harnessing a combination of the recoil and the maintenance of pressure by the shooter do not fire ''automatically.'' Of the rulings issued between 2008 and 2017, ATF provided different explanations for why certain bump-stock-type devices were not machineguns, but none of them extensively examined the meaning of ''automatically.'' For instance, some letter rulings concluded that certain devices were not machineguns because they did not ''initiate[ ] an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted,'' without further defining the term ''automatically.'' *E.g.,* Letter for Michael Smith from ATF's Firearm Technology Branch Chief (April 2, 2012). Other letter rulings concluded that certain bump-stock-type devices were not machineguns because they lacked any ''automatically functioning mechanical parts or springs and perform[ed] no mechanical function[s] when installed,'' again without further defining the term ''automatically'' in this context. *E.g.,* Letter for David Compton from ATF's Firearm Technology Branch Chief (June 7, 2010).

*B. Re-Evaluation of Bump-Stock-Type Devices*

In the NPRM, the Department reviewed the functioning of semiautomatic firearms, describing that ordinarily, to operate a semiautomatic firearm, the shooter must repeatedly pull and release the trigger to allow it to reset, so that only one shot is fired with each pull of the trigger. 83 FR at 13443. It then explained that bump-stock-type devices, like the ones used in Las Vegas, are designed to channel recoil energy to increase the rate of fire of semiautomatic firearms from a single trigger pull. *Id.* Shooters can maintain a continuous firing cycle after a single pull of the trigger by directing the recoil energy of the discharged rounds into the space created by the sliding stock (approximately 1.5 inches) in constrained linear rearward and forward paths. *Id.* These bump-stock-type devices are generally designed to operate with the shooter shouldering the stock of the device (in essentially the same manner a shooter would use an unmodified semiautomatic shoulder stock), maintaining constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and maintaining the trigger finger on the device's ledge with constant rearward pressure. *Id.* The device itself then harnesses the recoil energy of the firearm, providing the primary impetus for automatic fire. *Id.*

In light of its reassessment of the relevant statutory terms ''single function of the trigger'' and ''automatically,'' the NPRM stated ATF's conclusion that bump-stock-type devices are ''machineguns'' as defined in the NFA because they convert an otherwise semiautomatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that, after a single pull of the trigger, harnesses the recoil energy of the semiautomatic firearm in a manner that allows the trigger to reset and continue firing without additional physical manipulation of the trigger by the shooter. Hence, a semiautomatic firearm to which a bump-stock-type device is attached is able to produce automatic fire with a single pull of the trigger.

*C. Proposed Definition of ''Single Function of the Trigger''*

The Department proposed to interpret the phrase ''single function of the trigger'' to mean ''a single pull of the trigger,'' as it considered it the best interpretation of the statute and because it reflected ATF's position since 2006. The Supreme Court in *Staples* v. *United States,* 511 U.S. 600, 602 n.1 (1994), indicated that a machinegun within the NFA ''fires repeatedly with a single pull of the trigger.'' This interpretation is also consistent with how the phrase ''single function of the trigger'' was understood at the time of the NFA's enactment in 1934. For instance, in a congressional hearing leading up to the NFA's enactment, the National Rifle Association's then-president testified that a gun ''which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun.'' *National Firearms Act: Hearings Before the Committee on Ways and Means, H.R. 9066,* 73rd Cong., 2nd Sess., at 40 (1934). Furthermore, and as noted above, the Eleventh Circuit in *Akins* concluded that ATF's interpretation of ''single function of the trigger'' to mean a ''single pull of the trigger'' ''is consonant with the statute and its legislative history.'' 312 F. App'x at 200. No other court has held otherwise.[5]

[4] Examples of recent ATF classification letters relying on the ''single pull of the trigger'' interpretation to classify submitted devices as machineguns include the following:

• On April 13, 2015, ATF issued a classification letter regarding a device characterized as a ''positive reset trigger,'' designed to be used on a semiautomatic AR-style rifle. The device consisted of a support/stock, secondary trigger, secondary trigger link, pivot toggle, shuttle link, and shuttle. ATF determined that, after a single pull of the trigger, the device utilized recoil energy generated from firing a projectile to fire a subsequent projectile. ATF noted that ''a 'single function of the trigger' is a single pull,'' and that the device utilized a ''single function of the trigger'' because the shooter need not release the trigger to fire a subsequent projectile, and instead ''can maintain constant pressure through a single function of the trigger.''

• On October 7, 2016, ATF issued a classification letter regarding two devices described as ''LV–15 Trigger Reset Devices.'' The devices, which were designed to be used on an AR-type rifle, were essentially identical in design and function and were submitted by the same requester (per the requester, the second device included ''small improvements that have come as the result of further development since the original submission''). The devices were each powered by a rechargeable battery and included the following components: A self-contained trigger mechanism with an electrical connection, a modified two-position semiautomatic AR–15 type selector lever, a rechargeable battery pack, a grip assembly/trigger guard with electrical connections, and a piston that projected forward through the lower rear portion of the trigger guard and pushed the trigger forward as the firearm cycled. ATF held that ''to initiate the firing . . . a shooter must simply pull the trigger.'' It explained that although the mechanism pushed the trigger forward, ''the shooter never releases the trigger. Consistent with [the requester's] explanation, ATF demonstrated that the device fired multiple projectiles with a ''single function of the trigger'' because a single pull was all that was required to initiate and maintain a firing sequence.

[5] The NPRM also explained that the term ''pull'' can be analogized to ''push'' and other terms that describe activation of a trigger. For instance, ATF used the term ''pull'' in classifying the Akins Accelerator because that was the manner in which the firearm's trigger was activated with the device. But the courts have made clear that whether a trigger is operated through a ''pull,'' ''push,'' or some other action such as a flipping a switch, does not change the analysis of the functionality of a firearm. For example, in *United States* v. *Fleischli,* 305 F.3d 643, 655–56 (7th Cir. 2002), the Seventh Circuit rejected the argument that a switch did not constitute a trigger for purposes of assessing whether a firearm was a machinegun under the NFA, because such an interpretation of the statute would lead to ''the absurd result of enabling persons to avoid the NFA simply by using weapons that employ a button or switch mechanism for firing.'' *See also United States* v. *Camp,* 343 F.3d 743, 745 (5th Cir. 2003) (''To construe ''trigger'' to mean only a small lever moved by a finger would be to impute to Congress the intent to restrict the term to apply only to one kind of trigger, albeit a

*D. Proposed Definition of ''Automatically''*

The Department also proposed to interpret the term ''automatically'' to mean ''as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger.'' That interpretation reflects the ordinary meaning of that term at the time of the NFA's enactment in 1934. The word ''automatically'' is the adverbial form of ''automatic,'' meaning ''[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation[.]'' *Webster's New International Dictionary* 187 (2d ed. 1934); *see also* 1 *Oxford English Dictionary* 574 (1933) (defining ''Automatic'' as ''[s]elf-acting under conditions fixed for it, going of itself.'').

Relying on these definitions, the United States Court of Appeals for the Seventh Circuit interpreted the term ''automatically'' as used in the NFA as ''delineat[ing] how the discharge of multiple rounds from a weapon occurs: As the result of a self-acting mechanism . . . set in motion by a single function of the trigger and . . . accomplished without manual reloading.'' *United States* v. *Olofson,* 563 F.3d 652, 658 (7th Cir. 2009). So long as the firearm is capable of producing multiple rounds with a single pull of the trigger until the trigger finger is removed, the ammunition supply is exhausted, or the firearm malfunctions, the firearm shoots ''automatically'' irrespective of why the firing sequence ultimately ends. *Id.* (''[T]he reason a weapon ceased firing is not a matter with which § 5845(b) is concerned.''). *Olofson* thus requires only that the weapon shoot multiple rounds with a single function of the trigger ''as the result of a self-acting mechanism,'' not that the self-acting mechanism produces the firing sequence without any additional action by the shooter. This definition accordingly requires that the self-acting or self-regulating mechanism allows the firing of multiple rounds through a single function of the trigger.

*E. Proposed Clarification That the Definition of ''Machinegun'' Includes Bump-Stock-Type Devices*

The Department also proposed, based on the interpretations discussed above, to clarify that the term ''machinegun'' includes a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter. The Department explained that when a shooter who has affixed a bump-stock-type device to a semiautomatic firearm pulls the trigger, that movement initiates a firing sequence that produces more than one shot. And that firing sequence is ''automatic'' because the device harnesses the firearm's recoil energy in a continuous back-and-forth cycle that allows the shooter to attain continuous firing after a single pull of the trigger, so long as the trigger finger remains stationary on the device's ledge (as designed). Accordingly, these devices are included under the definition of ''machinegun'' and, therefore, come within the purview of the NFA.

*F. Amendment of 27 CFR 479.11*

The regulatory definition of ''machine gun'' in 27 CFR 479.11 matches the statutory definition of ''machinegun'' in the NFA. The definition includes the terms ''single function of the trigger'' and ''automatically,'' but those terms are not defined in the statutory text. The NPRM proposed to define these terms in order to clarify the meaning of ''machinegun.'' Specifically, the Department proposed to amend the definition of ''machine gun'' in 27 CFR 479.11 by:

1. Defining the term ''single function of the trigger'' to mean ''single pull of the trigger'';

2. defining the term ''automatically'' to mean ''as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger''; and

3. adding a sentence to clarify that a ''machine gun'' includes a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter (commonly known as a bump-stock-type device).

*G. Amendment of 27 CFR 478.11*

The GCA and its implementing regulations in 27 CFR part 478 reference the NFA's definition of machinegun. Accordingly, the NPRM proposed to make the same amendments in 27 CFR 478.11 that were proposed for § 479.11.

*H. Amendment of 27 CFR 447.11*

The Arms Export Control Act (AECA), as amended, does not define the term ''machinegun'' in its key provision, 22 U.S.C. 2778.[6] However, regulations in 27 CFR part 447 that implement the AECA include a similar definition of ''machinegun,'' and explain that machineguns, submachineguns, machine pistols, and fully automatic rifles fall within Category I(b) of the U.S. Munitions Import List when those defense articles are permanently imported. *See* 27 CFR 447.11, 447.21. Currently, the definition of ''machinegun'' in § 447.11 provides that ''[a] 'machinegun', 'machine pistol', 'submachinegun', or 'automatic rifle' is a firearm originally designed to fire, or capable of being fired fully automatically by a single pull of the trigger.'' The NPRM proposed to harmonize the AECA's regulatory definition of machinegun with the definitions in 27 CFR parts 478 and 479, as those definitions would be amended by the proposed rule.

## IV. Analysis of Comments and Department Responses for Proposed Rule

In response to the NPRM, ATF received over 186,000 comments. Submissions came from individuals, including foreign nationals, lawyers, and government officials, as well as various interest groups. Overall, 119,264 comments expressed support for the proposed rule, 66,182 comments expressed opposition, and for 657 comments, the commenter's position could not be determined. The commenters' grounds for support and opposition, along with specific concerns and suggestions, are discussed below.

*A. Comments Generally Supporting the Rule*

Comments Received

Of the 119,264 comments received in support of the rule, 14,618 used one form letter in support of the proposed rule; 51,454 were petitions or petition signatures compiled by an organization and individuals; and 53,192 were unique comments. Many of the 53,192 unique comments used repetitious declarations of support or a single sentence or phrase, declaring, in essence, (1) ban bump stocks now or I

very common kind. The language [in 18 U.S.C. 922(o)] implies no intent to so restrict the meaning[.]' '' (quoting *United States* v. *Jokel,* 969 F.2d 132, 135 (5th Cir. 1992) (emphasis removed))). Examples of machineguns that operate through a trigger activated by a push include the Browning design, M2 .50 caliber, the Vickers, the Maxim, and the M134 hand-fired Minigun.

[6] Under the AECA, the President has the authority to designate which items are controlled as defense articles for purposes of importation and exportation. 22 U.S.C. 2778(a)(1). The President has, in turn, delegated to the Attorney General the authority to promulgate regulations designating the defense articles controlled for permanent importation, including machineguns.

support a ban; (2) common sense gun reform or gun control now; (3) bump stocks should be outlawed; or (4) I fully support this proposed rule. Others supporting the rule expressed disbelief as to how such devices were legal and that it seemed to be a ''no brainer,'' especially after Las Vegas, to prevent anyone from possessing an item that allows the shooter to inflict mass carnage. Several commenters stated that they were present at or knew people who were directly affected by the Las Vegas shooting and urged finalization of the proposed rule on bump-stock-type devices. Some commenters identified as active or former military, while other individuals noted their support for a prohibition on bump-stock-type devices while identifying as gun owners and gun enthusiasts, strong supporters of the Second Amendment, or members of a particular pro-gun interest group. For instance, one commenter wrote, ''As an FFL [Federal firearms license] dealer, gun owner and collector, I am writing to support the ban on the sale of bump stocks.'' Another explained that he has been a member of the National Rifle Association (NRA) for over 30 years and loves hunting and shooting but believes ''there is zero justification for bump stocks,'' because the ''only thing bump stocks are good for is creating a kill zone.''

Department Response

The Department acknowledges the commenters' support for the proposed rule. The rule clarifies the regulatory definition of ''machinegun'' to include bump-stock-type devices, and, therefore, subjects them to the restrictions imposed by the NFA and GCA. As 18 U.S.C. 922(o), with limited exceptions, prohibits the possession of machineguns that were not lawfully possessed before the effective date of the statute, current possessors of bump-stock-type devices will be obligated to cease possessing these devices.

*B. Particular Reasons Raised in Support of the Rule*

1. Threat to Public Safety

Comments Received

Over 36,000 of the supporting comments expressly cited public safety, saving lives (or specifically children's lives), reducing gun deaths and future mass shootings, or protecting law enforcement as the reason for supporting a rule that would restrict possession of bump-stock-type devices. A majority of these comments, including submissions from professional medical associations, declared that allowing persons to modify semiautomatic rifles with bump-stock-type devices so that they operate with a similar rate of fire as fully automatic rifles poses a substantial risk to public safety and that the continued presence of these devices puts all communities at risk. Some commenters said that research shows that nations that have reasonable gun restrictions experience fewer mass shootings. Additionally, many students and numerous individuals identified as former or current teachers expressed support for the rule, with some citing fear that their school could be the next site of a mass shooting or stating that they do not want to continue seeing their students in constant fear of the next active shooter.

Several commenters also noted that bump-stock-type devices are a danger to police forces, with one commenter, a retired law enforcement officer, declaring that regulating bump-stock-type devices is an issue of public safety and will save the lives of those who are in law enforcement. Similarly, other commenters, including a former military physician, stated that the rapid fire enabled by bump-stock-type devices significantly increases the casualties in an attack and puts police officers who respond at greater risk. In light of the Las Vegas shooting, many commenters argued that, given that bump-stock-type devices are easily attainable and inexpensive items, prohibiting these devices is a needed step to reduce gun deaths or prevent future mass shootings. Many individuals, including several State and local government officials and gun safety or public health groups, expressed the urgent need for ATF to finalize the proposed rule in order to protect the public and children, especially given the frequency of mass shootings in recent months and the likelihood that a potential perpetrator will seek out these devices.

Department Response

The Department acknowledges that a bump-stock-type device combined with a semiautomatic firearm can empower a single individual to take many lives in a single incident. The reason for the Department's classification change is that ATF, upon review (discussed in Part III), believes that bump-stock-type devices must be regulated because they satisfy the statutory definition of ''machinegun'' in the NFA and GCA. By making clear that these devices are subject to the restrictions that the NFA and GCA place on machineguns, this rule reflects the public safety goals of those statutes. Indeed, the NPRM stated that the Las Vegas tragedy made ''individuals aware that these devices exist—potentially including persons with criminal or terrorist intentions—and made their potential to threaten public safety obvious.'' 83 FR at 13447. For further discussion of benefits, see Part VI.A.

2. Unnecessary for Civilians to Own

Comments Received

Of the total supporting comments, at least 25,135 of the commenters opined that bump-stock-type devices have no place in civil society and are unnecessary for ordinary persons to own. One of the primary reasons thousands expressed support for the regulation was their view that bump-stock-type devices have no legitimate uses for hunting or sporting purposes, target shooting, or self-protection. Many of these commenters emphasized that the devices cause a decrease in shooter accuracy, and therefore are not useful for hunting and target shooting, and are inappropriate for use in self or home defense. For example, one commenter rhetorically stated, ''[W]hat law abiding gun owner who is responsible for every bullet they shoot would want to reduce their accuracy?'' Some of these commenters further asserted that because the devices enable rapid but inaccurate fire, they pose a particular risk to large-scale public events, such as the Las Vegas concert. Many commenters, including those identifying as former or active military members, commented that only the military or law enforcement should have access to bump-stock-type devices or that there was no need for civilians to have access to them.

Department Response

The Department acknowledges supporters' comments on limiting the possession of bump-stock-type devices to military or law enforcement. Such a limitation is consistent with the Firearms Owners' Protection Act (FOPA), Public Law 99–308, 100 Stat. 449, which makes it unlawful for any person to transfer or possess a machinegun that was not lawfully possessed before the effective date of the statute. FOPA made an exception for governmental entities, allowing for the ''transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof.'' 18 U.S.C. 922(o)(2)(A). Congress provided this exemption because it recognized the necessity for the military and law enforcement to continue to use and possess these types of weapons. This final rule is consistent with

implementing the requirements of the NFA and GCA provisions that regulate possession of machineguns.

3. Consistent With the Intent of the National Firearms Act

Comments Received

More than 27,000 of the supporting comments urged issuance of the final rule because bump-stock-type devices and other similar conversion devices were meant to circumvent the restrictions of the NFA and GCA, as bump-stock-type devices enable shooters to transform their guns into automatic weapons. Some commenters asserted that it is useless to have a law against automatic weapons yet allow manufacturers to legally produce and sell an item with the sole purpose of turning a firearm into an automatic weapon. Many of these commenters also stated that bump-stock-type devices violate the spirit of the law and that this loophole should be closed by ATF as quickly as possible. Further, at least 1,675 of the supporting comments stated that the proposed rule is consistent with the purposes of the NFA and the intent of Congress. Specifically, these commenters opined that the regulation ''enforces machinegun laws that date back many decades'' and that ''it will have the same dramatic benefit originally intended by those foundational laws.''

Department Response

The Department acknowledges supporters' comments that bump-stock-type devices were meant to circumvent the restrictions of the NFA and GCA. Prior to this rule, ATF issued classification letters that determined that some bump-stock-type devices were not ''machineguns'' as defined by the NFA. Those decisions, however, did not include extensive legal analysis, as described in Part III. Upon reexamining these classifications, this final rule promulgates definitions for the terms ''single function of the trigger'' and ''automatically'' as those terms are used in the statutory definition of ''machinegun.'' ATF believes these definitions represent the best interpretation of the statute. Therefore, recognizing that a bump-stock-type device used with a semiautomatic firearm enables a shooter to shoot automatically more than one shot by a single function of the trigger, the purpose of this rule is to clarify that such devices are machineguns under the NFA.

4. Constitutional Under the Second Amendment

Comments Received

More than 2,100 commenters in support of the rule argued that a rule prohibiting possession of bump-stock-type devices does not conflict with the Second Amendment. Many opined that the Framers of the Constitution did not intend for these types of devices, which can inflict mass carnage, to be protected by the Second Amendment. Commenters expressed the view that because persons living in the 18th century used muskets capable of firing only one shot before requiring a long reloading process, our forefathers would not have wanted bump-stock-type devices to be readily available. Other commenters, including those who declared themselves to be strong supporters of the Second Amendment, stated that prohibiting bump-stock-type devices was consistent with the Second Amendment.

Several commenters noted language from the majority opinion in *District of Columbia* v. *Heller,* 554 U.S. 570 (2008). There, the Supreme Court declared that the Second Amendment protects an individual right to bear arms for traditional lawful purposes such as self-defense and hunting. However, the Court also stated, ''Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'' *Id.* at 626. Commenters further summarized the Court's conclusions that limitations on the right to keep and carry arms are supported by the historical tradition of prohibiting the carrying of ''dangerous and unusual weapons.'' *Id.* at 627. Commenters argued that the Supreme Court's Second Amendment decisions support the proposed rule.

Department Response

The Department acknowledges supporters' concerns and agrees that regulation of bump-stock-type devices is permissible under the Second Amendment. For discussion of the Department's position on the constitutionality of this final rule under the Second Amendment, see Part IV.D.1.a.

5. Absence of Congressional Action

Comments Received

Over 1,500 comments in support urged action on this final rule by invoking popular support for responsible gun limitations. Many of these commenters stated this measure would be a sensible first step for gun safety and that ATF should act where Congress has not acted. One gun safety organization noted that while congressional measures have stalled, ATF is doing what it can to refine rules. At least 1,300 commenters indicated that ATF should choose saving children and the public welfare over the interests of the gun industry and pro-gun organizations, naming in particular the NRA. One commenter wrote, ''It's time we quit cow-towing [sic] to the NRA and considered all the rest of us and our children especially. Being afraid to go to school is unAmerican which is what the insistence by the NRA on no gun control is—unAmerican.'' Many supporting commenters echoed these sentiments.

Department Response

In light of the legal analysis of the term ''machinegun'' set forth above, the Department agrees with commenters that it is necessary to clarify that the term ''machinegun'' includes bump-stock-type devices. Congress granted the Attorney General authority to issue rules to administer the NFA and GCA, and the Attorney General has delegated to ATF the authority to administer and enforce these statutes and to implement the related regulations accordingly. The Department and ATF have initiated this rulemaking to clarify the regulatory interpretation of the NFA and GCA.

*C. Comments Generally Opposing the Rule*

Comments Received

A total of 66,182 comments were received that opposed the rule. Approximately 40,806 of those comments were form submissions by the National Association for Gun Rights (NAGR) on behalf of its members, with 25,874 submitted on paper petitions and 14,932 submitted by facsimile. The remaining 25,376 opposing comments were individually submitted. Many of the commenters identified as lawyers, judges, industry groups, or members of law enforcement or the military. There were several commenters who stated they did not own or had no interest in owning a bump-stock-type device but still objected to the rule on various grounds, including that it is unconstitutional and only punishes law-abiding owners of bump-stock-type devices. Of the 25,376 comments individually submitted, 12,636 used one of three form letters; the remaining 12,740 were unique comments. A majority of these commenters raised

specific, detailed objections to the agency's proposal and the premise upon which the regulation is based, whereas several hundred of the unique comments were limited to a few sentences opposing the regulation without further detail. For example, these types of comments simply declared, in essence, (1) no ban, or a ban is unnecessary; (2) individuals' Second Amendment rights should not be infringed; or (3) I oppose any additional gun regulations.

Department Response

The Department acknowledges the commenters' objections to the proposed rule but disagrees with assertions that the rule infringes on the constitutional right to keep and bear arms and punishes law-abiding gun owners. The Department believes that bump-stock-type devices satisfy the definition of ''machinegun'' under the NFA and GCA and that this final rule reflects the public safety goals of the NFA and GCA. The Department thoroughly considered the various issues raised in opposition to the rule, which are discussed below.

*D. Specific Issues Raised in Opposition to the Rule*

1. Constitutional and Statutory Arguments

a. Violates the Second Amendment

Comments Received

A total of 16,051 of the commenters opposed the rule on the ground that it violates the Second Amendment. Of these, 11,753 used a form letter stating that the ''regulations dismiss Second Amendment protections, by appealing to the *Heller* court decision. But the Constitution trumps the Supreme Court—so when the Second Amendment says the right to keep and bear arms shall not be infringed, any limitation of the right for law-abiding citizens should be treated as unconstitutional[.]'' Many commenters, including those identifying as former or active law enforcement or military members, echoed these sentiments by declaring that the proposed rule infringes on the rights of law-abiding gun owners, and that the phrasing of the Second Amendment—''shall not be infringed''—strictly limits or negates the ability of Government to impose any regulations on firearms. One commenter, for instance, argued that the Second Amendment's reference to a ''well-regulated Militia'' includes unorganized militia, which the commenter interpreted to mean any person who owns a gun. Because the military has automatic weapons, the commenter reasoned that the people—as the unorganized militia—are likewise constitutionally entitled to access such weapons.

Numerous commenters cited the Supreme Court's decision in *Heller,* 554 U.S. 570, which declared that the Second Amendment protects an individual right to bear arms. Commenters also referred to the Supreme Court's decision in *Caetano* v. *Massachusetts,* 136 S. Ct. 1027 (2016) (per curiam), stating that this decision makes clear that weapons in ''common use'' cannot be banned. One commenter pointed out that if bump-stock-type devices are now machineguns, then there are an additional 519,927 machineguns that are currently owned typically by law-abiding citizens for lawful purposes. This amount, the commenter argued, surpasses the 200,000 stun guns found to trigger a ''common use'' analysis in *Caetano,* meaning that such items cannot be banned unless they are both dangerous and unusual. Further, commenters said that *Caetano* stands for the proposition that any advancement in weaponry is still protected under the Second Amendment. They argued that the Court declared ''the Second Amendment extends, *prima facie,* to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding'' and that its protection is not limited to only those weapons useful in warfare. *Id.* at 1027 (internal quotation marks omitted).

Department Response

The Department does not believe that the proposed regulation violates the Second Amendment. The Supreme Court has indicated, and several lower courts have squarely held, that the Second Amendment does not protect a right to possess a machinegun. Because bump-stock-type devices are machinegun conversion devices that qualify as ''machineguns'' under Federal law, *see supra* Part III.E., prohibiting them does not violate the Second Amendment.

''Like most rights, the right secured by the Second Amendment is not unlimited.'' *Heller,* 554 U.S. at 626; *accord McDonald* v. *City of Chi.,* 561 U.S. 742, 786 (2010). In *Heller,* for example, the Supreme Court recognized an ''important limitation on the right to keep and carry arms'': ''the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' '' 554 U.S. at 627. More specifically, and importantly for purposes of this rulemaking, the Court explicitly described machineguns as the kind of dangerous and unusual weapons not protected by the Second Amendment. In the course of explaining the Court's holding in *United States* v. *Miller,* 307 U.S. 174 (1939) (upholding Federal prohibition of short-barreled shotguns), the Court noted that a portion of *Miller* could be ''[r]ead in isolation'' to ''mean that only those weapons useful in warfare are protected'' by the Second Amendment. *Heller,* 554 U.S. at 624. But ''[t]hat would be a startling reading of the opinion,'' the Court continued, ''since it would mean that the National Firearms Act's restrictions on machineguns . . . might be unconstitutional, machineguns being useful in warfare in 1939.'' *Id. Heller* thus made clear that machineguns, like short-barreled shotguns, are ''weapons not typically possessed by law-abiding citizens for lawful purposes,'' and thus fall outside the scope of the Second Amendment as historically understood. *Id.* at 625; *see also id.* at 627 (accepting that M–16 rifles are dangerous and unusual weapons that may be banned).

In the decade since *Heller* was decided, lower courts have consistently upheld prohibitions of machineguns. *Hollis* v. *Lynch,* 827 F.3d 436, 451 (5th Cir. 2016) (upholding Federal statute banning possession of machineguns because they are ''dangerous and unusual and therefore not in common use''); *United States* v. *Henry,* 688 F.3d 637, 640 (9th Cir. 2012); *Hamblen* v. *United States,* 591 F.3d 471, 472, 474 (6th Cir. 2009); *United States* v. *Fincher,* 538 F.3d 868, 874 (8th Cir. 2008); *see also Heller* v. *Dist. of Columbia* (*Heller II*), 670 F.3d 1244, 1270 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (''fully automatic weapons, also known as machine guns, have traditionally been banned and may continue to be banned after *Heller*''); *United States* v. *Marzzarella,* 614 F.3d 85, 94–95 (3d Cir. 2010) (''the Supreme Court has made clear the Second Amendment does not protect'' machineguns and short-barreled shotguns).

This body of precedent, in addition to *Heller,* strongly supports the Department's view that a bump-stock-type device, as a machinegun conversion device qualifying as a ''machinegun'' under Federal law, is not protected by the Second Amendment. What makes a machinegun a ''dangerous and unusual weapon'' unprotected by the Second Amendment is its capacity to fire automatically, *see, e.g., Henry,* 688 F.3d at 640, which ''puts the machine gun on a different plane'' than other firearms, *United States* v. *Kirk,* 105 F.3d 997, 1002 (5th Cir. 1997) (en banc) (opinion of Higginbotham, J.). Bump-stock-type devices qualify as machineguns, as discussed above,

because they enable an otherwise semiautomatic firearm to fire automatically. Since they bear the same key characteristic that makes traditional machineguns ''dangerous and unusual,'' bump-stock-type devices are unprotected by the Second Amendment for the same reason.

This conclusion is fully consistent with *Caetano* v. *Massachusetts,* 136 S. Ct. 1027. In *Caetano,* the Supreme Judicial Court of Massachusetts had upheld a State prohibition of stun guns on the grounds that stun guns were not in common use when the Second Amendment was ratified and are not useful in military operations. *See id.* at 1027–28. The Supreme Court summarily vacated this ruling because neither of the State court's premises was valid: *Heller* made a ''clear statement that the Second Amendment 'extends . . . to . . . arms . . . that were not in existence at the time of the founding,' '' and ''rejected the proposition 'that only those weapons useful in warfare are protected.' '' *Id.* at 1028 (quoting *Heller,* 554 U.S. at 582, 624–25). The Department's conclusion in this rulemaking that the Second Amendment does not protect bump-stock-type devices rests on neither of the propositions rejected by *Caetano.* As discussed above, the Department believes that this rule comports with the Second Amendment because bump-stock-type devices qualify as machineguns, which are not constitutionally protected—not because bump-stock-type devices did not exist in 1791 or are not useful in warfare. Moreover, although the Supreme Judicial Court of Massachusetts ultimately held that stun guns are protected under the Second Amendment in *Ramirez* v. *Commonwealth,* 94 NE3d 809 (2018), the court did not suggest that more dangerous weapons, like machineguns and machinegun conversion devices, are also protected. The court acknowledged that a stun gun is even ''less lethal than a handgun,'' *id.* at 817, the weapon that the Supreme Court expressly held to be protected in *Heller,* 554 U.S. at 635.

b. Violates the Fifth Amendment

i. Violates Due Process Clause—Entrapment

Comments Received

At least one commenter, a gun-rights nonprofit organization, argued that ATF's change of position constitutes unconstitutional entrapment. It maintained that ATF's past classification letters, which informed the public that certain bump-stock-type devices were not subject to the NFA or GCA, invited the public to rely on its consistent decisions and acquire such items. With the sudden change of position, the organization asserted, ATF seeks to entrap citizens who have simply purchased a federally approved firearm accessory. Citing *Sherman* v. *United States,* 356 U.S. 367, 376 (1958), the organization argued that it is ''unconstitutional for the Government to beguile an individual 'into committing crimes which he otherwise would not have attempted.' '' Further, it argued that at least some 520,000 law-abiding citizens could be criminals who could face up to ten years' imprisonment ''without even receiving individual notice of ATF's reversal of position.''

Department Response

The Department disagrees that the final rule amounts to entrapment. Entrapment is a complete defense to a criminal charge on the theory that ''Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.'' *Jacobson* v. *United States,* 503 U.S. 540, 548 (1992). A valid entrapment defense has two related elements: (1) Government inducement of the crime, and (2) the defendant's lack of predisposition to engage in the criminal conduct. *Mathews* v. *United States,* 485 U.S. 58, 63 (1988).

As described above, ATF has now concluded that it misclassified some bump-stock-type devices and therefore initiated this rulemaking pursuant to the requirements of the APA. An agency is entitled to correct its mistakes. *See Williams Gas Processing-Gulf Coast Co.* v. *FERC,* 475 F.3d 319, 326 (D.C. Cir. 2006) (''[I]t is well understood that [a]n agency is free to discard precedents or practices it no longer believes correct. Indeed we expect that an [ ] agency may well change its past practices with advances in knowledge in its given field or as its relevant experience and expertise expands. If an agency decides to change course, however, we require it to supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.''). This rulemaking procedure is specifically designed to notify the public about changes in ATF's interpretation of the NFA and GCA and to help the public avoid the unlawful possession of a machinegun. It is important to note that at no time did ATF induce any member of the public to commit a crime. The ANPRM, NPRM, and this final rule have followed the statutory process for ensuring that the public is aware of the correct classification of bump-stock-type devices under the law, and that continued possession of such devices is prohibited. Anyone currently in possession of a bump-stock-type device is not acting unlawfully unless they fail to relinquish or destroy their device after the effective date of this regulation.

ii. Violates Takings Clause and Due Process Clause

Comments Received

Over 1,200 commenters objected that the rule will violate the Takings Clause of the Fifth Amendment, which provides ''private property [shall not] be taken for public use, without just compensation.'' Some commenters said that the Takings Clause requires the Government to compensate manufacturers for their present and future loss of revenues. Many other commenters further indicated that the Government would owe compensation to owners of bump-stock-type devices because the Government would effectively be taking personal property for public safety, which is a form of public use. They cited *Horne* v. *Department of Agriculture,* 135 S. Ct. 2419, 2428 (2015), for the proposition that mandating relinquishment of property constitutes a physical taking and requires compensation. One commenter contrasted this rule with the regulation at issue in *Andrus* v. *Allard,* 444 U.S. 51 (1979), which prohibited the commercial sale of eagle body parts gathered before 1940. The commenter observed that the Supreme Court held the eagle-part regulation was not a regulatory taking because it did not compel the surrender of the body parts and imposed no physical invasion or restraint upon them. *Id.* at 65–66. By contrast, the commenter noted, owners of bump-stock-type devices under the regulation would be compelled to surrender their devices or face criminal penalties.

Several commenters also stated that ''for this regulation to be Constitutional each and every owner of a bump stock, or other devices captured in this regulation not yet named, must be given their day in court to present evidence and an argument as to why their property shouldn't be taken without compensation at a minimum.''

Many commenters separately opined that the Department did not include the cost of compensation in its cost-benefit analysis and several proposed estimated costs of such compensation. Those comments are addressed in Part IV.I.1.

Department Response

The Department does not agree that classifying bump-stock-type devices as machineguns results in the unlawful taking of property ''for public use, without just compensation.'' U.S. Const. amend. V. It is well established that ''the nature of the [government's] action is critical in takings analysis.'' *Keystone Bituminous Coal Ass'n* v. *DeBenedictis,* 480 U.S. 470, 488 (1987); *accord Penn Cent. Transp. Co.* v. *City of New York,* 438 U.S. 104, 124 (1978) (''character of the government action'' has ''particular significance''). The Department's action here, classifying bump-stock-type devices as machineguns subject to the NFA and GCA, does not have the nature of a taking.

A restriction on ''contraband or noxious goods'' and dangerous articles by the government to protect public safety and welfare ''has not been regarded as a taking for public use for which compensation must be paid.'' *Acadia Tech., Inc.* v. *United States,* 458 F.3d 1327, 1332 (Fed. Cir. 2006); *see also United States* v. *$7,990.00 in U.S. Currency,* 170 F.3d 843, 845 (8th Cir. 1999) (''forfeiture of contraband is an exercise of the government's police power'' and does not qualify as a taking).[7] The Takings Clause was ''not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given.'' *Chi., Burlington & Quincy Ry. Co.* v. *Illinois,* 200 U.S. 561, 594 (1906) (internal quotation marks omitted); *see, e.g., Holliday Amusement Co. of Charleston* v. *South Carolina,* 493 F.3d 404, 409–11 (4th Cir. 2007) (upholding State prohibition of video gaming machines without compensation).

In *Mugler* v. *Kansas,* 123 U.S. 623, 668–69 (1887), for example, the Supreme Court rejected a distiller's argument that a State constitutional amendment prohibiting the manufacture and sale of intoxicating liquors was an unconstitutional taking. The Court explained that the government's power to prohibit the ''use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.'' *Id.* at 669. Similarly, the Supreme Court held in *Miller* v. *Schoene,* 276 U.S. 272, 280 (1928), that Virginia was not required to compensate owners of red cedar trees for the value of trees that the State had ordered destroyed to prevent the spread of a disease that threatened local apple orchards. ''[W]here the public interest is involved,'' the Court observed, ''preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.'' *Id.* at 279–80. Lower courts have likewise deemed the Takings Clause inapplicable to governmental regulation of dangerous personal property for public-safety reasons. *See, e.g., Garcia* v. *Vill. of Tijeras,* 767 P.2d 355 (N.M. Ct. App. 1988) (village ordinance banning possession of pit bulls was ''a proper exercise of the Village's police power'' and not a taking).

Consistent with these cases, courts have rejected arguments that restrictions on the possession of dangerous firearms, like machineguns, are takings requiring just compensation. In *Akins* v. *United States,* 82 Fed. Cl. 619 (2008), for example, the Court of Federal Claims held that ATF's ultimate classification of the Akins Accelerator as a machinegun, *see supra* Part III, was not a taking. The court reasoned that ATF had acted ''pursuant to the police power conferred on it by Congress'' rather than by exercising eminent domain, and that the plaintiff lacked a sufficient property interest because he had ''voluntarily entered an area subject to pervasive federal regulation—the manufacture and sale of firearms.'' *Id.* at 623–24; *see also Bennis* v. *Michigan,* 516 U.S. 442, 452 (1996) (''The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.''). Similar reasoning led the District of Columbia Court of Appeals to hold that a DC law prohibiting machineguns and requiring their disposal or removal was not a taking. *Fesjian* v. *Jefferson,* 399 A.2d 861, 865–66 (1979). These precedents support the Department's conclusion that the prohibition of bump-stock-type devices as machineguns does not have the character of a compensable taking within the meaning of the Fifth Amendment.

The Department acknowledges that a panel of the U.S. Court of Appeals for the Ninth Circuit recently upheld a preliminary injunction against the Attorney General of California that relied in part on the Takings Clause in prohibiting the State from implementing restrictions on firearm magazines that hold more than 10 rounds. *Duncan* v. *Becerra,* No. 17–56081, 2018 WL 3433828 (9th Cir. July 17, 2018). The Ninth Circuit's order essentially adopted the district court's analysis of the Takings Clause question. *See id.* at *3. The district court's reasoning on the takings question was closely intertwined with the Second Amendment inquiry, and rested on the conclusion that it was ''dubious'' for California to deem large-capacity magazines a public nuisance given the Supreme Court's observation that ''[g]uns in general are not deleterious devices or products or obnoxious waste materials.'' *Duncan* v. *Becerra,* 265 F. Supp. 3d 1106, 1137 (S.D. Cal. 2017) (internal quotation marks omitted) (quoting *Staples* v. *United States,* 511 U.S. 600, 610 (1994)). But regulation of bump-stock-type devices is fundamentally distinguishable from California's prohibition on possessing such magazines. As discussed, and as *Heller* indicates, dangerous and unusual weapons are not entitled to Second Amendment protection, and may indeed qualify as deleterious devices or contraband. Other district courts have followed the reasoning of cases like *Akins* and *Fesjian* and rejected takings challenges to California firearm restrictions. *See Rupp* v. *Becerra,* 2018 WL 2138452, at *8–9 (C.D. Cal. May 9, 2018) (restrictions on ''assault weapons''); *Wiese* v. *Becerra,* 263 F. Supp. 3d 986, 995 (E.D. Cal. 2017) (prohibition of large-capacity gun magazines).

Finally, the Department does not agree that each owner of a bump-stock-type device has a due-process right to a hearing in connection with the promulgation of this rule. The rule clarifies the scope of the NFA and GCA, general legislative enactments, with respect to bump-stock-type devices. ''Official action that is legislative in nature is not subject to the notice and hearing requirements of the due process

[7] In the takings context, the use of the term ''police power'' in connection with Federal regulation does not posit the existence of a ''plenary police power'' at the Federal level. *Cf. United States* v. *Lopez,* 514 U.S. 549, 566 (1995). Rather, it refers to ''the power of the federal government to engage,'' pursuant to one or more of its enumerated powers, ''in activities not unlike those engaged in by the states under their inherent sovereign powers'' to protect the public welfare. *Fla. Rock Indus., Inc.* v. *United States,* 18 F.3d 1560, 1568 n.17 (Fed. Cir. 1994).

clause.'' *Interport Pilots Agency, Inc.* v. *Sammis,* 14 F.3d 133, 142 (2d Cir. 1994); *see also, e.g., Bi-Metallic Inv. Co.* v. *State Bd. of Equalization,* 239 U.S. 441, 445 (1915) (''General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard.''). Furthermore, the Department's conclusion that bump-stock-type devices are machineguns under the NFA and GCA means that owners lack a cognizable property interest in these devices for due-process purposes. As the Fifth Circuit held in *Cooper* v. *City of Greenwood,* firearms covered by the NFA are ''contraband *per se,*'' and ''[c]ourts will not entertain a claim contesting the confiscation of contraband *per se* because one cannot have a property right in that which is not subject to legal possession.'' 904 F.2d 302, 305 (1990).

c. Violates Ex Post Facto Clause and Bill of Attainder Clause

Comments Received

Numerous commenters asserted that the proposed rule would violate article I, section 9, clause 3 of the Constitution, which states, ''No Bill of Attainder or ex post facto Law shall be passed.'' One gun-rights nonprofit organization, quoting *United States* v. *O'Neal,* 180 F.3d 115, 122 (4th Cir. 1999), stated that even though this is a regulatory action, the ''sanction or disability it imposes is 'so punitive in fact' that the law 'may not legitimately be viewed as civil in nature.' ''

Another commenter, the Maryland Shall Issue organization, argued that ATF's reliance on 18 U.S.C. 922(o) creates an impermissible ex post facto law because current owners and manufacturers of bump-stock-type devices ''became felons as of the date and time they took possession of a bump stock, even though such possession and manufacture was then expressly permitted by prior ATF interpretations.'' The commenter cited *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386, 390 (1798), and *Peugh* v. *United States,* 569 U.S. 530 (2013), to support its arguments. It argued that the ex post facto issue can be avoided by holding that the exemption in 18 U.S.C. 922(o)(2)(A) applies where bump-stock-type devices are possessed under ''the authority'' of prior ATF rulings. Furthermore, the commenter, citing *Bowen* v. *Georgetown University Hospital,* 488 U.S. 204, 208 (1988), stated that the Supreme Court has held that an agency cannot engage in retroactive rulemaking without specific congressional authorization. Relying on *Fernandez-Vargas* v. *Gonzales,* 548 U.S. 30, 36 (2006), the commenter stated there is no question that the proposed rule has a retroactive effect because the rule would ''affect'' existing rights and impose new liabilities on the past and continued possession of bump-stock-type devices.

At least one commenter argued the rule is an unconstitutional bill of attainder because the rule restricts particular brands of stocks, per the Department's definition, while not at the same time restricting all brands of stocks. Similarly, another commenter stated the regulation appears punitive in nature, and abusively narrow in targeting Slide Fire, a seller of bump-stock-type devices that has already announced the close of its business.

Department Response

The Department disagrees that the proposed rule violates the Ex Post Facto or Bill of Attainder Clauses. The rule would criminalize only future conduct, not past possession of bump-stock-type devices that ceases by the effective date of this rule. In *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386 (1798), the Supreme Court set out four types of laws that violate the Ex Post Facto Clause:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

*Id.* at 390. Citing *Calder,* the Supreme Court has explained that ''[t]o fall within the *ex post facto* prohibition, a law must be retrospective—that is, *it must apply to events occurring before its enactment*—and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime.'' *Lynce* v. *Mathis,* 519 U.S. 433, 441 (1997) (emphasis added; citations and internal quotation marks omitted). The Federal courts have thus been careful to distinguish statutes and regulations that violate the Ex Post Facto Clause from those that criminalize only future conduct and are therefore not ''retrospective,'' including in the firearms possession context. For example, following passage of the Lautenberg Amendment (18 U.S.C. 922(g)(9)), which made it unlawful for persons convicted of a misdemeanor crime of domestic violence to possess a firearm, several defendants argued that the law violated the Ex Post Facto Clause. One defendant argued that he had a prior conviction for a misdemeanor crime of domestic violence, but lawfully possessed a firearm before 18 U.S.C. 922(g)(9) became law. *United States* v. *Mitchell,* 209 F.3d 319 (4th Cir. 2000). The defendant argued that, as applied to him, the statute violated the Ex Post Facto Clause because the new law penalized him for his previous domestic violence conviction. However, the Fourth Circuit disagreed, noting that ''[i]t is immaterial that Mitchell's firearm purchase and domestic violence conviction occurred prior to § 922(g)(9)'s enactment because the conduct prohibited by § 922(g)(9) is the *possession* of a firearm.'' *Id.* at 322; *see also United States* v. *Pfeifer,* 371 F.3d 430, 436–37 (8th Cir. 2004); *United States* v. *Meade,* 986 F. Supp. 66, 69 (D. Mass. 1997), *aff'd,* 175 F.2d 215 (1st Cir. 1999); *United States* v. *Brady,* 26 F.3d 282, 290–91 (2d Cir. 1994); *United States* v. *Gillies,* 851 F.2d 492, 495–96 (1st Cir. 1988) (Breyer, J.); *United States* v. *D'Angelo,* 819 F.2d 1062, 1065–66 (11th Cir. 1987).

This rule brings clarity to the meaning of ''machinegun,'' and makes clear that individuals are subject to criminal liability only for possessing bump-stock-type devices *after* the effective date of regulation, not for possession before that date. No action taken before the effective date of the regulation is affected under the rule. Although regulating past possession of a firearm may implicate the Ex Post Facto Clause, regulating the continued or future possession of a firearm that is already possessed does not. *See Benedetto* v. *Sessions,* No. CCB–17–0058; 2017 WL 4310089, at *5 (D. Md. Sept. 27, 2017) (''Whether a gun was purchased before the challenged law was enacted . . . is immaterial to whether the challenged law regulates conduct that occurred before or after its enactment.''); *see also Samuels* v. *McCurdy,* 267 U.S. 188, 193 (1925) (rejecting Ex Post Facto Clause challenge to statute that prohibited the post-enactment possession of intoxicating liquor, even when the liquor was lawfully acquired before the statute's enactment). For this reason, the Department disagrees with commenters' assertions that the rule violates the Ex Post Facto Clause.

Relatedly, the Department also disagrees with the view that 18 U.S.C. 922(o)(2)(A) provides the authority to permit continued possession of bump-stock-type devices ''under the

authority'' of prior ATF rulings. Section 922(o)(2)(A) is inapplicable because, among other reasons, ATF's letter rulings regarding bump-stock-type devices did not purport to authorize the possession of devices qualifying as machineguns under section 922(o)(1); instead, ATF advised individuals that certain devices did not qualify as machineguns in the first place, a position that ATF has now reconsidered. Furthermore, section 922(o)(2)(A) does not empower ATF to freely grant exemptions from section 922's general prohibition of machineguns.

The Department also disagrees that the proposed rule constitutes a bill of attainder. The Supreme Court has highlighted the fact that the Bill of Attainder Clause applies only to Congress, noting that ''[t]he distinguishing feature of a bill of attainder is the substitution of a *legislative* for a judicial determination of guilt.'' *De Veau* v. *Braisted,* 363 U.S. 144, 160 (1960) (emphasis added). The Court has also described a bill of attainder as ''a law that *legislatively* determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'' *Nixon* v. *Adm'r of Gen. Servs.,* 433 U.S. 425, 468 (1977) (emphasis added). Accordingly, the Bill of Attainder Clause does not apply ''to regulations promulgated by an executive agency.'' *Paradissiotis* v. *Rubin,* 171 F.3d 983, 988–89 (5th Cir. 1999) (citing *Walmer* v. *U.S. Dep't of Defense,* 52 F.3d 851, 855 (10th Cir. 1995) (''The bulk of authority suggests that the constitutional prohibition against bills of attainder applies to legislative acts, not to regulatory actions of administrative agencies.'')); *see also Korte* v. *Office of Personnel Mgmt.,* 797 F.2d 967, 972 (Fed. Cir. 1986); *Marshall* v. *Sawyer,* 365 F.2d 105, 111 (9th Cir. 1966). Even if the proposed rule were subject to the Bill of Attainder Clause, it would pass constitutional muster. The fact that Slide Fire announced the close of its business does not make this rule a bill of attainder; that company is not being singled out, as the proposed rule applies to all similar devices. Further, the regulation of all machineguns of this type is not a ''punishment'' as is required for an enactment to be unlawful bill of attainder. *See Nixon,* 433 U.S. at 473.

d. Violates Fourth Amendment

Comments Received

Many commenters also raised objections on grounds that the proposed rule violates the Fourth Amendment's guarantee against unreasonable searches and seizures. Commenters believed that because bump-stock-type devices essentially would become contraband under the rule, ''mandating [their] surrender to authorities would violate the 4th Amendment protection from seizure without due process.''

Department Response

Although commenters cite the Fourth Amendment, it is unclear how a ''search'' or ''seizure'' would result from this rule. The Department is unaware of any precedent supporting the view that a general regulatory prohibition of possession of certain contraband can violate the Fourth Amendment. A seizure in ''[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control,'' *Brower* v. *Cty. of Inyo,* 489 U.S. 593, 596 (1989), and the final rule makes clear that current possessors of bump-stock-type devices are not required to surrender the devices to the authorities. Instead, current possessors may lawfully dispose of their devices in other ways, as discussed below in Part IV.D.7.

e. Violates Ninth and Tenth Amendments

Comments Received

Various commenters opposed to the rule stated that it would violate the Ninth and Tenth Amendments of the Constitution. The Ninth Amendment provides: ''The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'' The Tenth Amendment provides: ''The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'' One commenter said, ''The BATF is another agency whose existence violates the 10th Amendment.'' Another commenter argued, ''as an accessory, the federal government cannot ban [bump-stock-type devices], because only the states can ban them.'' A handful of other commenters stated that the rule violates States' rights under the Tenth Amendment because it violates the ''right to keep and bear arms'' provisions of 44 State constitutions.

Department Response

The Department disagrees that the proposed rule violates the commenters' rights under the Ninth Amendment. The Ninth Amendment ''does not confer substantive rights in addition to those conferred by other portions of our governing law. The Ninth Amendment 'was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution.' '' *Gibson* v. *Matthews,* 926 F.2d 532, 537 (6th Cir. 1991) (citing *Charles* v. *Brown,* 495 F. Supp. 862, 863–64 (N.D. Ala. 1980)). Federal ''circuit courts across the country have consistently held that the Ninth Amendment does not impinge upon Congress's authority to restrict firearm ownership.'' *United States* v. *Finnell,* 256 F. Supp. 2d 493, 498 (E.D. Va. 2003).

The Department also disagrees that the rule violates the Tenth Amendment. Commenters seemingly argued that the powers exercised by the Department in issuing the rule were ''powers not delegated to the United States by the Constitution, nor prohibited by it to the States.'' However, Federal courts have long held that the NFA, GCA, and implementing regulations do not violate the Tenth Amendment. The NFA does not ''usurp[ ] police power reserved to the States.'' *United States* v. *Miller,* 307 U.S. 174, 176 (1939). Further, ''[b]ecause § 922(o) was a proper exercise of Congress's enumerated authority under the Commerce Clause, and because it does not compel, let alone commandeer, the states to do anything, the statute does not violate the Tenth Amendment.'' *United States* v. *Kenney,* 91 F.3d 884, 891 (7th Cir. 1996).

f. Lack of Statutory Authority

Comments Received

A total of 47,863 commenters, most of whom sent form submissions opposed to the proposed rule, argued that ATF lacks statutory authority to regulate bump-stock-type devices. Many commenters said that ATF, by its own admission, repeatedly stated it could not regulate such devices. Commenters generally expressed the view that because bump-stock-type devices are not firearms, ATF has no authority under the NFA or GCA to regulate them. Some commenters contended that 6 U.S.C. 531 gives ATF only narrow statutory authority and does not provide ATF general authority to regulate the safety of firearms, accessories, or parts.

In addition, numerous commenters argued that, as the term ''machinegun'' is already clearly defined in the NFA, only Congress can make changes to the definition and regulate bump-stock-type devices. Furthermore, commenters stated that the agency's interpretation of the term ''machinegun'' would not be entitled to deference under *Chevron U.S.A.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984).

Department Response

The Attorney General is responsible for enforcing the NFA, as amended, and the GCA, as amended. This includes the authority to promulgate regulations necessary to enforce the provisions of these statutes. *See* 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A), 7805(a). The statutory provision cited by some commenters, 6 U.S.C. 531, is the provision of the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, that transferred the powers the Secretary of the Treasury had with respect to ATF to the Attorney General when ATF was transferred to the Department of Justice. Accordingly, the Attorney General is now responsible for enforcing the NFA and GCA, and he has delegated the responsibility for administering and enforcing the NFA and GCA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 CFR 0.130(a)(1)–(2).

''Because § 926 authorizes the [Attorney General] to promulgate those regulations which are 'necessary,' it almost inevitably confers some measure of discretion to determine what regulations are in fact 'necessary.'" *Nat'l Rifle Ass'n* v. *Brady,* 914 F.2d 475, 479 (4th Cir. 1990). In the original GCA implementing regulations, ATF provided regulatory definitions of the terms that Congress did not define in the statute. 33 FR 18555 (Dec. 14, 1968). Since 1968, ATF has occasionally added definitions to the implementing regulations. *See, e.g.,* 63 FR 35520 (June 30, 1998). Similarly, 26 U.S.C. 7805(a) states that ''the [Attorney General] shall prescribe all needful rules and regulations for the enforcement of this title.'' As is the case with the GCA, ATF has provided regulatory definitions for terms in the NFA that Congress did not define, such as ''frame or receiver'' and ''manual reloading.'' *See, e.g.,* 81 FR 2658 (Jan. 15, 2016). These definitions were necessary to explain and implement the statute, and do not contradict the statute. Federal courts have recognized ATF's authority to classify devices as ''firearms'' under Federal law. *See, e.g., Demko* v. *United States,* 44 Fed. Cl. 83, 93 (1999) (destructive device); *Akins* v. *United States,* 312 F. App'x 197 (11th Cir. 2009) (per curiam) (machinegun).

This rule is based upon this authority. Further, ATF has provided technical and legal reasons why bump-stock-type devices enable automatic fire by a single function of the trigger, and thus qualify as machinegun conversion devices, not mere ''accessories.'' ATF has regularly classified items as machinegun ''conversion devices'' or ''combinations of parts,'' including auto sears (ATF Ruling 81–4) and the Akins Accelerator (ATF Ruling 2006–2).

The Department agrees that regulatory agencies may not promulgate rules that conflict with statutes. However, the Department disagrees that the rule conflicts with the statutes or is in contravention of administrative-law principles. The rule merely defines terms used in the definition of ''machinegun'' that Congress did not—the terms ''automatically'' and ''single function of the trigger''—as part of implementing the provisions of the NFA and GCA.

When a court is called upon to review an agency's construction of the statute it administers, the court looks to the framework set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–43 (1984). The first step of the *Chevron* review is to ask ''whether Congress has directly spoken to the precise question at issue.'' *Id.* at 842. ''If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue . . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.'' *Id.* at 842–43 (footnote omitted).

The Department believes that this rule's interpretations of ''automatically'' and ''single function of the trigger'' in the statutory definition of ''machinegun'' accord with the plain meaning of those terms. Moreover, even if those terms are ambiguous, this rule rests on a reasonable construction of them. Although Congress defined ''machinegun'' in the NFA, 26 U.S.C. 5845(b), it did not further define the components of that definition. *See, e.g., United States* v. *One TRW, Model M14, 7.62 Caliber Rifle,* 441 F.3d 416, 419 (6th Cir. 2006) (noting that the NFA does not define the phrases ''designed to shoot'' or ''can be readily restored'' in the definition of ''machinegun''). Congress thus implicitly left it to the Department to define ''automatically'' and ''single function of the trigger'' in the event those terms are ambiguous. *See Chevron,* 467 U.S. at 844. Courts have appropriately recognized that the Department has the authority to interpret elements of the definition of ''machinegun'' like ''automatically'' and ''single function of the trigger.'' *See York* v. *Sec'y of Treasury,* 774 F.2d 417, 419–20 (10th Cir. 1985); *United States* v. *Dodson,* 519 F. App'x 344, 348–49 & n.4 (6th Cir. 2013); *cf., e.g., Firearms Import/Export Roundtable Trade Grp.* v. *Jones,* 854 F. Supp. 2d 1, 18 (D.D.C. 2012) (upholding ATF's interpretation of 18 U.S.C. 925(d) to ban importation of certain firearm parts under *Chevron* ''step one''); *Modern Muzzleloading, Inc.* v. *Magaw,* 18 F. Supp. 2d 29, 35–36 (D.D.C. 1998) (''since the ATF's classification of [a firearm as not antique] 'amounts to or involves its interpretation' of the GCA, a statute administered by the ATF, we review that interpretation under the deferential standard announced in *Chevron*'').

Second, the Department's construction of those terms is reasonable under *Chevron.* As explained in more detail in Part III, the Department is clarifying its regulatory definition of ''automatically'' to conform to how that word was understood and used when the NFA was enacted in 1934. *See Olofson,* 563 F.3d at 658. And the Department is reaffirming that a single pull of the trigger is a single function of the trigger, consistent with the NFA's legislative history, ATF's previous determinations, and judicial precedent. *See, e.g., Akins,* 312 F. App'x at 200. This rule is therefore lawful under the NFA and GCA even if the operative statutory terms are ambiguous.

g. Violation of the Americans With Disabilities Act

Comments Received

A few commenters indicated that bump-stock-type devices are assistive devices for people with nerve damage or a physical disability. A few commenters further stated that the regulation could be a violation of the Americans with Disabilities Act (ADA), 42 U.S.C. ch. 126. In particular, one commenter claimed that under the ADA, an individual can establish coverage under the law by ''showing that he or she has been subjected to *an action* prohibited under the Act because of an actual or *perceived physical* [condition] that is not transitory and minor.'' The commenter asserted that this regulation constitutes such ''an action'' and would violate the civil rights of a diverse group of persons with disabilities, including homeowners, veterans, target shooters, and hunters.

Department Response

The Department disagrees with commenters that the final rule would violate the ADA. While the ADA applies to State and local governments, it does not apply to the Executive Branch of the Federal Government. *See* 42 U.S.C. 12131(1) (defining ''public entity'' as

any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation, and any commuter authority). Accordingly, because ATF is a Federal agency that is not subject to the ADA, the commenters' assertion that ATF's regulation would violate the ADA is incorrect.

While not mentioned by commenters, ATF is covered by section 504 of the Rehabilitation Act of 1973, which prohibits discrimination, solely by reason of disability, in Federally conducted programs and activities. 29 U.S.C. 794(a) (stating that ''[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under . . . any program or activity conducted by any Executive agency''). As detailed above, the sole purpose of this rulemaking is to clarify that bump-stock-type devices satisfy the statutory definition of ''machinegun,'' as defined by Congress in the NFA and GCA. While a few commenters made general assertions that bump-stock-type devices can be used as assistive devices for people with disabilities, none submitted any specific information to suggest that this rule would cause qualified individuals with disabilities, solely by reason of their disability, to be excluded from the participation in, subjected to discrimination under, or denied the benefits of any program or activity of ATF. Accordingly, there is nothing in the record to suggest that this rule would raise concerns under the Rehabilitation Act.

2. Politically Motivated and Emotional Response

Comments Received

At least 41,954 commenters opposed to the rule, including the 40,806 comments submitted through the NAGR petition, asserted that the proposed rule is a political or knee-jerk response to a tragic incident. Many commenters suggested that the proposed rule reflected political pressure and would be a hasty response that would not achieve real benefits and could lead to confiscating all guns. A handful of commenters even asserted they would support the elimination of ATF. Petitions submitted through NAGR portray the rule as a response to ''the anti-gun left . . . so they can turn millions of commonly owned firearms into 'illegal guns' with the stroke of a pen.'' They cautioned that this rule unfairly capitalizes on the misfortunes of others to push political agendas and that facts should not be thrown aside. Another commenter said that this rule will be tainted because from the beginning the President made clear he had no intention of instructing the Department to abide by the public comments, having declared that bump-stock-type devices ''will soon be out'' after the ''mandated comment period'' notwithstanding possible congressional action.

Department Response

While the Las Vegas tragedy brought attention to bump-stock-type devices and requests from Congress and nongovernmental organizations prompted ATF to review its classification of bump-stock-type devices, the Department disagrees that this rulemaking is an unreasoned reaction to recent events. As discussed in the NPRM, see *Part III* above, ATF recognized that its prior classifications determining only some bump-stock-type devices to be machineguns did not include extensive legal analysis of certain terms that are significant to defining ''machinegun'' under the NFA and were not always consistent. This final rule defines the terms ''automatically'' and ''single function of the trigger'' to clarify the meaning of machinegun and to make clear that bump-stock-type devices are machineguns under the meaning of the statute. The Department further notes that the President specifically directed it to clarify the legal status of bump-stock-type devices through the administrative ''procedures the law prescribes,'' including notice and comment. 83 FR 7949 (Feb. 23, 2018).

3. Not Used in Criminal Activity

Comments Received

Numerous commenters expressed that besides the shooting in Las Vegas, there is no evidence that bump-stock-type devices have been used in the commission of crimes. Several commenters stated that, pursuant to a Freedom of Information Act request, they asked ATF and the Federal Bureau of Investigation (FBI) for any records on whether bump-stock-type devices have been used in crimes and that they received no confirmation affirming the existence of any such records. Moreover, some commenters stated that ATF provided no evidence or justification that bump-stock-type devices will be used more frequently in future crimes. They argued that if the agency cannot show what materials it relied on to regulate bump-stock-type devices for purposes of public safety, then the rulemaking is arbitrary and capricious under the APA. Commenters cited judicial decisions such as *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 52 (1983), in which the Supreme Court held that when an agency rescinds or changes its stance on a regulation, it must explain the evidence underlying its decision and offer a rational connection between the facts found and the choice made.

Many commenters also noted that there is still no confirmation or documentation, despite requests, from Federal agencies confirming that bump-stock-type devices were actually used in the Las Vegas incident, and that ATF has not issued a ''Report of Technical Examination'' (ATF Form 3311.2) for any of the firearms used in the incident. With questions remaining about the Las Vegas criminal investigation and doubts as to whether bump-stock-type devices were actually used, commenters argued that ATF has no basis to promulgate a regulation that, as ATF declared in the NPRM, ''would affect the criminal use of bump-stock-type devices in mass shootings, such as the Las Vegas shooting incident.'' 83 FR at 13454.

These arguments were frequently raised alongside concerns that the cost-benefit analysis did not address the fact that there would be few benefits to the rule given that bump-stock-type devices have supposedly been used in only one crime. These concerns are addressed in Part IV.I.5.

Department Response

The Department disagrees that ATF seeks to regulate bump-stock-type devices merely because they were, or have the potential to be, used in crime. The NPRM stated that the Las Vegas shooting made ''individuals aware that these devices exist—potentially including persons with criminal or terrorist intentions—and made their potential to threaten public safety obvious.'' 83 FR at 13447. But the NRPM also provided a detailed analysis explaining that bump-stock-type devices must be regulated because they satisfy the statutory definition of ''machinegun'' as it is defined in the NFA and GCA. *Id.* at 13447–48.

Commenters conflate the legal basis for ATF's regulation of bump-stock-type devices with the background information that was provided as context for the reason ATF revisited its previous classifications. In the NPRM, ATF explained that the tragedy in Las Vegas gave rise to requests from Congress and nongovernmental organizations that ATF examine its past

classifications and determine whether bump-stock-type devices currently on the market constitute machineguns under the statutory definition. *Id.* at 13446. While part of the Department's mission is to enhance public safety, the impetus for the change in classification was not, as commenters argued, that the device may potentially pose a public safety threat but because, upon review, ATF believes that it satisfies the statutory definition of ''machinegun.'' This rule reflects the public safety objectives of the NFA and GCA, but the materials and evidence of public safety implications that commenters seek have no bearing on whether these devices are appropriately considered machineguns based on the statutory definition.

In *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29 (1983), the Supreme Court wrote that an ''agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' '' *Id.* at 43 (quoting *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962)). However, that case involved a Federal agency that rescinded a final rule—based on data and policy choices—shortly after publication, arguing that that rule was no longer necessary for a multitude of reasons, including that the costs outweighed the safety benefits. *See id.* at 38–39. The Supreme Court recognized that any change requires a reasoned basis, noting that ''[i]f Congress established a presumption from which judicial review should start, that presumption—contrary to petitioners' views—is not *against* safety regulation, but *against* changes in current policy that are not justified by the rulemaking record.'' *Id.* at 42. However, the revocation in that case involved a discretionary policy decision, and did not depend solely upon statutory construction. The bump-stock-type device rule is not a discretionary policy decision based upon a myriad of factors that the agency must weigh, but is instead based only upon the functioning of the device and the application of the relevant statutory definition. Therefore, the Department does not believe that this rule conflicts with *State Farm.*

4. Will Not Enhance Public Safety

Comments Received

More than 1,100 commenters indicated that a regulation on bump-stock-type devices would have no measurable effect on the current rate of crime or enhance public safety. One commenter argued that the use of bump-stock-type devices by mass shooters might actually save lives based on his experience that using the device can result in a rifle jamming, misfeeding, or misfiring, which would be the best time to disrupt a shooter. Other commenters noted that bump-stock-type devices actually impede a shooter's ability to fire accurately. Commenters stated that there is currently no empirical evidence that further firearms regulations would reduce crime or safeguard people more effectively. One commenter, for example, estimated that out of the tens of thousands of gun deaths per year, most of which he stated are suicides, the proposed rule would only impact a minute percentage, while another commenter opined that crime rate data from the FBI show that areas with more firearms restrictions have more crime. A handful of commenters pointed to Chicago as having some of the most stringent gun restrictions yet continuing to have high rates of homicide and gun-related deaths that ''surpass[] war zones.''

Many commenters opposed to the regulation maintained that neither this rule nor any new gun laws will prevent criminals or people with malicious intent from proceeding to commit crimes. Several voiced the opinion that people determined to kill many people will find other means, such as cars, knives, toxic substances, homemade explosives, or any other object. The problem, they argued, is not the object, but the person who controls it—and that criminals will do whatever they can to accomplish unlawful ends. One commenter, identifying as a law enforcement officer, wrote that he frequently encounters prohibited possessors who still somehow obtain a firearm and do not care about the consequences. Another commenter stated that the fact that the shooter in Las Vegas was well aware that murder is unlawful but chose to ignore the law only serves as proof that laws do not stop evildoers.

Additionally, several hundred commenters stated that ATF should focus its time and energy on enforcing existing gun laws and regulations rather than issuing a new one. One commenter, a former corrections officer from Baltimore, suggested that time would be better spent prosecuting criminals for crimes on the books. Similarly, another commenter noted that ''[w]hen the courtrooms are revolving doors that push gang members right back out,'' the problem is not the lack of laws but rather a lack of tools and resources devoted to enforcing the existing laws. Some commenters remarked that had there been better policing, certain mass shootings could have been avoided.

Department Response

The Department agrees with the commenters that the existing laws should be enforced, and the Department is committed to addressing significant violent crime problems facing our communities. No law or regulation entirely prevents particular crimes, but the Las Vegas shooting illustrated the particularly destructive capacity of bump-stock-type devices when used in mass shooting incidents. In any event, the impetus for this rule is the Department's belief, after a detailed review, that bump-stock-type devices satisfy the statutory definition of ''machinegun.'' Through the NFA and GCA, Congress took steps to regulate machineguns because it determined that machineguns were a public safety threat. ATF must therefore classify devices that satisfy the statutory definition of ''machinegun'' as machineguns. The proposed rule is thus lawful and necessary to provide public guidance on the law.

5. Punishes Law-Abiding Citizens

Comments Received

At least 2,103 commenters opposed the rule on the ground that it would punish law-abiding citizens and would turn them instantly into potential felons. They asserted that hundreds of thousands of law-abiding citizens are being punished for the acts of one evil person and that the overwhelming majority use bump-stock-type devices lawfully and for fun. Many commenters, some of whom do not own a bump-stock-type device, objected that owners of these devices would become felons overnight just for owning a piece of plastic that is not needed to achieve bump firing. They further pointed out that because there is no grandfathering provision, law-abiding gun owners would have to surrender any bump-stock-type devices after having spent money to buy them. Many raised these objections in connection with concerns that the rule is unconstitutional under the Ex Post Facto Clause and the Takings Clause of the Constitution, as already discussed in this preamble. Moreover, some commenters, concerned that the rule's proposed language could later apply to other trigger assemblies, stated that thousands of law-abiding citizens may eventually become criminals overnight for simply owning a non-factory trigger.

Department Response

The Department disagrees that law-abiding citizens would instantly become felons under this rule. This final rule provides specific information about acceptable methods of disposal, as well as the timeframe under which disposal must be accomplished to avoid violating 18 U.S.C. 922(o). Current possessors of bump-stock-type devices who properly destroy or abandon their devices will avoid criminal liability. As described in Part IV.D.1.b, this is not a compensable ''taking'' of property under the Constitution.

6. Other Priorities and Efficiencies

Comments Received

Hundreds of commenters who oppose the rule suggested that the focus should not be on any new gun regulation but rather on an array of other issues, including addressing mental health, drug addiction, education, civility, and the decline of parenting and morals. Many argued that more resources should be devoted to treating the mentally ill or to the opioid epidemic, including ensuring that law enforcement and mental health agencies have the power to incarcerate and institutionalize people who are a danger to themselves or others. Several others suggested that resources should be devoted to securing public spaces, observing that the U.S. Capitol and all Federal buildings have armed security but many schools and workplaces do not. Numerous commenters noted that other improvements are needed before any new gun restriction is pursued, such as improving records in the National Instant Criminal Background Check System (NICS), properly charging persons with crimes that would bar them from owning firearms, or addressing bullying and teaching morals and the Bible in schools. One commenter suggested the Government investigate the social changes that are turning men into killers, while another said that to make a difference, one needs to go after the videogame industry and Hollywood movies that glorify carnage, body counts, murder, and violence. Commenters argued that only once these issues are tackled can discussion of new gun regulations begin.

Department Response

The Department acknowledges comments regarding treatment of mental health and drug addiction, securing schools and workplaces, improving records in the NICS system, and various social issues. The Department agrees that these are important issues, but they are outside the scope of this rulemaking. Several of these matters were raised as alternatives for the Department to consider. See Part IV.F for further discussion of alternatives.

7. Enforcement and Compliance

Comments Received

Some commenters questioned how ATF will enforce this regulation, and a few stated that they or people they know of will not comply with this rule should it go into effect. Several questioned whether the agency would send armed agents to visit homes and confiscate bump-stock-type devices, while others pointed out that because bump-stock-type devices have not been tracked in any way, confiscation will depend on volunteers. Commenters highlighted the lack of success that certain States, such as Massachusetts, have had in collecting bump-stock-type devices after passing laws restricting their possession. Many commenters suggested it would be a waste of ATF employees' time and public funds for ATF to implement the rule. Several others remarked that confiscation or enforcement would be easily circumvented because new technology like 3D printing and CNC (Computer Numeric Control) equipment (computerized milling machines), or even traditional manufacturing methods, will facilitate a black market in homemade bump-stock-type devices. One commenter submitted to ATF ''a fully functional'' bump-stock equivalent that was created ''using super glue, 2-part epoxy, an AR–15 A2 pistol grip, threaded steel rods, and small ABS plastic bricks [*i.e.,* Legos].''

Department Response

The Department acknowledges comments on enforcement of and compliance with the rule. As stated in the NPRM, current possessors of bump-stock-type devices will be obligated to dispose of these devices. Acceptable methods of destruction include completely melting, shredding, or crushing the device. If the device is made of metal, an alternative acceptable method of destruction is using an oxy/acetylene torch to make three angled cuts that completely severs design features critical to the functionality of the bump-stock-type device. Each cut should remove at least ¼ inch of metal per cut. Any method of destruction must render the device so that it is not readily restorable to a firing condition or is otherwise reduced to scrap. However, as the majority of bump-stock-type devices are made of plastic material, individuals may use a hammer to break them apart so that the device is not readily restorable to a firing condition or is otherwise reduced to scrap, and throw the pieces away.

Current possessors are encouraged to undertake destruction of the devices. However, current possessors also have the option to abandon bump-stock-type devices at the nearest ATF office.

Current possessors of bump-stock-type devices will have until the effective date of the rule (90 days from the date of publication in the **Federal Register**) to comply. Additional information on the destruction of bump-stock-type devices will be available at *www.atf.gov.*

8. Lack of Consistency

Comments Received

Hundreds of commenters indicated that ATF's reversal of position from its earlier determinations and insistence that a bump-stock-type device now qualifies as a machinegun under the NFA ''hurts [the agency's] credibility.'' As one commenter remarked, the perpetual state of inconsistencies, whereby products are approved and then later ruled to be illegal by ATF, ''creates an air of fear and distrust in the gunowning public,'' and moreover, ''calls into question the validity and competence of the very agency charged with making these determinations.'' Several commenters argued that ATF's lack of consistency only serves to increase distrust of the agency, the Government, and the legal process.

Department Response

The Department acknowledges comments regarding the inconsistency in ATF's previous classifications of some bump-stock-type devices as machineguns and others as non-machineguns. As described in Part III, upon review, ATF recognized that the decisions issued between 2008 and 2017 did not provide consistent or extensive legal analysis regarding the term ''automatically'' as that term applies to bump-stock-type devices. Consistent with its authority to reconsider and rectify its past classifications, the Department accordingly clarifies that the definition of ''machinegun'' in the NFA and GCA includes bump-stock-type devices because they convert an otherwise semiautomatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that harnesses the recoil energy of the semiautomatic firearm in a manner that allows the trigger to reset and continue firing without additional physical manipulation of the trigger by the shooter. The Supreme Court has made clear that this sort of regulatory correction is permissible. An agency

may change its course as long as it ''suppl[ies] a reasoned analysis for the change,'' which the Department has done at length in the NPRM and this final rule. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983). And the agency bears no heightened burden in prescribing regulations that displace inconsistent previous regulatory actions. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514–15 (2009).

9. Earlier Determinations Correct

Comments Received

Over 1,500 commenters opposed to the rule maintained that ATF's earlier classifications determining certain bump-stock-type devices not to be subject to the NFA or GCA were correct and should not be reversed. These commenters stated that reversing this position is unnecessary and unlawful. To make the point that ATF is bound by its prior determinations, many commenters submitted ATF's own classification letters and highlighted the Department's arguments made in litigation as evidence that the rule on bump-stock-type devices is an arbitrary decision. In particular, commenters cited the Department's arguments made in litigation with Freedom Ordnance Manufacturing, Inc. (''Freedom Ordnance''), No. 3:16–cv–243 (S.D. Ind. filed Dec. 13, 2016). There, the Department defended its decision to classify Freedom Ordnance's Electronic Reset Assistant Device (ERAD) as a machinegun. In responding to Freedom Ordnance's argument that the ERAD was a bump-stock-type device and not subject to regulation, the Department stated such stocks were not machineguns because ''[b]ump firing requires the shooter to manually and simultaneously pull and push the firearm in order for it to continue firing.'' Brief for ATF in Support of Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, ECF No. 28, at 21 (July 27, 2017). These prior decisions and admissions, commenters argued, preclude the Department from suddenly reversing its decision.

Department Response

The Department acknowledges that ATF previously determined that certain bump-stock-type devices were not ''machineguns'' under the law. The Department notes, however, that a great deal of its analysis in the Freedom Ordnance litigation was fully consistent with its position in this rule. For example, the Department adhered to its view that a single pull is a ''single function'' of the trigger, *see id.* at 13–14, and it argued that a device that relieves the shooter from having to ''pull and release the trigger for *each individual, subsequent shot*'' converts the firearm into a machinegun, *id.* at 22. While the Department accepted the previous classification of some bump-stock-type devices as non-machineguns, it relied on the mistaken premise that the need for ''shooter input'' (*i.e.,* maintenance of pressure) for firing with bump-stock-type devices means that such devices do not enable ''automatic'' firing, *see id.* at 21—even though Freedom Ordnance's ERAD also required maintenance of pressure by the shooter, *see id.* at 20.

In any event, as explained in the NPRM, the Department believes that ATF clearly has authority to ''reconsider and rectify'' its classification errors. *Akins,* 312 F. App'x at 200; *see also Fox,* 556 U.S. at 514–15; *Hollis* v. *Lynch,* 121 F. Supp. 3d 617, 642 (N.D. Tex. 2015) (no due process violation in ATF's revocation of mistaken approval to manufacture a machinegun). In the NPRM, the Department noted that ''ATF has reviewed its original classification determinations for bump-stock-type devices from 2008 to 2017 in light of its interpretation of the relevant statutory language, namely the definition of 'machinegun.' '' 83 FR at 13446. The NPRM explained that ''ATF's classifications of bump-stock-type devices between 2008 and 2017 did not include extensive legal analysis of these terms in concluding that the bump-stock-type devices at issue were not 'machineguns.' '' *Id.* Specifically, some of these rulings concluded that such devices were not machineguns because they did not '''initiate [ ] an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted,' '' but did not provide a definition or explanation of the term ''automatically.'' *Id.* at 13445. This is precisely the purpose of this rule. As explained in more detail in Part III, the Department has determined that bump-stock-type devices enable a shooter to initiate an automatic firing sequence with a single pull of the trigger, making the devices machineguns under the NFA and GCA. Consistent with the APA, this rule is the appropriate means for ATF to set forth its analysis for its changed assessment. *See Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 57 (1983).

10. Bump Firing and Bump-Stock-Type Device Operation

a. Bump-Stock-Type Device Operation

Comments Received

More than 17,000 commenters argued that ATF cannot proceed because its description of how bump-stock-type devices operate is inaccurate and that the proposed rule is based on a false premise. Commenters emphatically argued that bump-stock-type devices do not make a semiautomatic firearm shoot automatically by a single function of the trigger. They stated: (1) No part of the bump-stock-type device touches the trigger itself, but rather touches only the shooter's trigger finger, and (2) if bump-stock-type devices made semiautomatic rifles fully automatic, then holding the gun with only the trigger finger hand while depressing the trigger should cause the gun to repeatedly fire, which does not happen when a rifle is affixed with a bump-stock-type device. One commenter said that should ATF be asked to demonstrate the firing of a rifle equipped with a bump-stock-type device with the shooter only using his trigger hand, and no coordinated input from the other hand, it could not be done, as it requires two hands, skill, and coordination. Similarly, another commenter asserted that while various manual bump-firing techniques ''vary in difficulty and are arguably more difficult to master than the use of a bump-stock-type device, the fact is that they use exactly the same principle as a bump-stock-type device *without* the use of such a device, and thus the device itself cannot be the 'primary impetus for a firing sequence' as described.''

Several commenters raised specific objections to ATF's description in the NPRM that a bump-stock-type device ''harnesses the recoil energy [of a firearm] to slide the firearm back and forth so that the trigger automatically re-engages by 'bumping' the shooter's stationary trigger finger without additional physical manipulation of the trigger by the shooter'' and that the device is ''a self-acting and self-regulating force that channels the firearm's recoil energy in a continuous back-and-forth cycle that allows the shooter to attain continuous firing after a single pull of the trigger so long as the trigger finger remains stationary on the device's extension ledge (as designed).'' 83 FR at 13443. These commenters disputed these descriptions, stating that a bump-stock-type device does not harness any recoil energy and there is nothing that makes it an energy sink (such as a spring) that stores recoil

energy to move the firearm forward. Further, they argued that further physical manipulation is required to operate a firearm equipped with a bump-stock-type device—specifically, the shooter must physically manipulate the trigger after every shot fired by pushing the firearm forward to re-engage the trigger.

The bump-stock firing sequence is not automatic, commenters argued, because trigger reset is not caused by a mechanical device, part, or combination of parts associated with pulling the trigger. Reset occurs, they said, only if continuous forward motion and pressure is applied by the non-trigger hand or arm of the shooter, not the device. As described by some commenters, ''[t]he trigger of a semiautomatic firearm in a bump-stock type device is being repeatedly actuated, functioned, pulled (take your pick) by the non trigger hand of the shooter pushing the firearm forward. That actuation, function, [or] pull can and often does occur entirely independent of recoil. Recoil is incidental to the firing sequence of a bump-stock type device equipped semiautomatic firearm, not intrinsic.'' In challenging ATF's proposed rule and description of how these devices operate, one commenter asked ATF to provide the history of the machinegun and semiautomatic firearms, along with a discussion of the differences between the mechanical and legal definitions.

In sum, commenters argued that because ATF's premise of how bump-stock-type devices operate is inaccurate, there is no basis for ATF to regulate them as machineguns.

Department Response

The Department disagrees that ATF's description of how bump-stock-type devices operate is inaccurate. ATF explained that bump-stock-type devices ''are generally designed to operate with the shooter shouldering the stock of the device (in essentially the same manner a shooter would use an unmodified semiautomatic shoulder stock), maintaining constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the rifle, and maintaining the trigger finger on the device's extension ledge with constant rearward pressure.'' 83 FR at 13443. The Department believes that this accurately describes the operation of these devices. Further, ATF explained that bump-stock-type devices ''are designed to allow the shooter to maintain a continuous firing cycle after a single pull of the trigger by directing the recoil energy of the discharged rounds into the space created by the sliding stock (approximately 1.5 inches) in constrained linear rearward and forward paths.'' *Id.* This is a distinctive feature of bump-stock-type devices and enables the unique functioning and operation of these devices. The bump-stock-type device captures and harnesses the firearm's recoil to maintain a continuous firing sequence, and thus is properly described as ''a self-acting or self-regulating mechanism.'' The very purpose of a bump-stock-type device is to eliminate the need for the shooter to manually capture, harness, or otherwise utilize this energy to fire additional rounds, as one would have to do to ''bump fire'' without a bump-stock-type device. Further, this mechanism ''allows the firing of multiple rounds through a single function of the trigger'' because, as explained in the NPRM, ATF's interpretation that the phrase ''single function of the trigger'' includes a ''single pull of the trigger'' ''is consonant with the statute and its legislative history.'' *Akins* v. *United States,* 312 F. App'x 197, 200 (11th Cir. 2009) (per curiam).

The Department agrees with the commenters that ''[n]o part of the bump stock touches the trigger, only the shooter[']s trigger finger.'' However, this is neither legally nor technically determinative. The fact that a bump-stock-type device does not touch the trigger does not mean that the device has not acted automatically (by directing and utilizing recoil energy) or that anything other than a single pull of the trigger occurred. That is, the bump-stock-type device remains ''a self-acting or self-regulating mechanism'' for the reasons described in this section. The fact that bump-stock-type devices do not touch the trigger does not mean that they do not qualify as machineguns within the meaning of the NFA and GCA. ATF has provided a thorough explanation of their functioning, showing that a semiautomatic firearm utilizing a bump-stock-type device ''shoots automatically more than one shot, without manual reloading, by a single function of the trigger.'' 26 U.S.C. 5845(b).

Additionally, the Department disagrees that to be classified as a ''machinegun'' under the NFA, a firearm must fire ''repeatedly'' when a shooter holds and fires the gun with only the trigger-finger hand. Any such argument misconstrues the meaning of ''automatically.'' As explained above, bump-stock-type devices operate automatically because their design eliminates the requirement that a shooter manually capture and direct recoil energy to fire additional rounds. In this way, semiautomatic firearms shoot ''automatically'' when equipped with bump-stock-type devices in that their recoil energy is channeled through these ''self-acting or self-regulating mechanisms.'' The commenters' positions reflect previous analysis that ATF is now correcting. ATF explained above that ''[p]rior ATF rulings concerning bump-stock-type devices have not provided substantial legal analysis regarding the meaning of the term 'automatically' as it is used in the GCA and NFA.'' 83 FR at 13445.

The Department disagrees that a shooter repeatedly actuates, functions, or pulls the trigger of a semiautomatic firearm using a bump-stock-type device with the non-trigger hand by ''pushing the firearm forward.'' In fact, the shooter ''pulls'' the trigger once and allows the firearm and attached bump-stock-type device to operate until the shooter releases the trigger finger or the constant forward pressure with the non-trigger hand. The non-trigger hand never comes in contact with the trigger and does not actuate, function, or pull it. By maintaining constant forward pressure, a shooter relies on the device to capture and direct recoil energy for each subsequent round and requires no further manipulation of the trigger itself.

In this way, the Department also disagrees that ''[r]ecoil is incidental to the firing sequence of a bump-stock type device equipped semiautomatic firearm, not intrinsic.'' Without recoil and the capture and directing of that recoil energy, a bump-stock-type device would be no different from a traditional shoulder stock. As numerous commenters acknowledged, bump-stock-type devices allow shooters to fire semiautomatic firearms at a faster rate and in a different manner than they could with traditional shoulder stocks. Bump-stock-type devices do this by capturing and directing recoil mechanically, enabling continuous fire without repeated manual manipulation of the trigger by a shooter.

b. Bump-Stock-Type Device Firing Technique

Comments Received

Thousands of commenters objected to the proposed rule on grounds that bump-stock-type devices are novelty items that assist with bump firing, which is a technique that any shooter can perform with training or with everyday items such as a rubber band or belt loop. Many commenters stated that all semiautomatic firearms can be bump fired by a shooter simply holding the trigger finger stationary and pushing the weapon forward until the trigger is depressed against it to the point of

firing, and that use of bump-stock-type devices makes using the bump-fire shooting technique safer for the shooter and those around the shooter. Some commenters also gave examples of extremely skilled and fast shooters who do not need any assistive device or item to fire a semiautomatic firearm at a rapid rate. Commenters therefore argued that if the Department proceeds to prohibit possession of bump-stock-type devices they must also ban rubber bands, belt loops, string, or even people's fingers.

Department Response

The Department disagrees with commenters' assessments and believes that bump-stock-type devices are objectively different from items such as belt loops that are designed for a different primary purpose but can serve an incidental function of assisting with bump firing. To bump fire a firearm using a belt loop or a similar method without a bump-stock-type device, a shooter must put his thumb against the trigger and loop that thumb through a belt loop. With the non-trigger hand, the shooter then pushes the firearm forward until the thumb engages the trigger and the firearm fires. The recoil pushes the firearm backwards as the shooter controls the distance of the recoil, and the trigger resets. The constant forward pressure with the non-trigger hand pushes the firearm forward, again pulling the firearm forward, engaging the trigger, and firing a second round.

This rule defines the term ''automatically'' to mean ''functioning as the result of a self-acting or self-regulating mechanism.'' Bump-stock-type devices enable semiautomatic firearms to operate ''automatically'' because they serve as a self-acting or self-regulating mechanism. An item like a belt loop is not a ''self-acting or self-regulating mechanism.'' When such items are used for bump firing, no device is present to capture and direct the recoil energy; rather, the shooter must do so. Conversely, bump-stock-type devices are specifically designed to capture the recoil energy, a force that initiates a firing sequence that ultimately produces more than one shot. That firing sequence is ''automatic'' because the device harnesses the firearm's recoil energy as part of a continuous back-and-forth cycle that allows the shooter to attain continuous firing after a single pull of the trigger.

Bump firing utilizing a belt loop or similar method of maintaining tension on the firearm is thus more difficult than using a bump-stock-type device. In fact, the belt-loop method provides a stabilizing point for the trigger finger but relies on the shooter—not a device—to harness the recoil energy so that the trigger automatically re-engages by ''bumping'' the shooter's stationary trigger finger. Unlike a bump-stock-type device, the belt loop or a similar manual method requires the shooter to control the distance that the firearm recoils and the movement along the plane on which the firearm recoils.

ATF's previous bump-stock-type device classifications determined that these devices enable continuous firing by a single function of the trigger. Other firing techniques may do the same because they rely on a single ''pull.'' However, as ATF has made clear, a determining factor is whether the device operates or functions automatically. The proposed and final rules make clear that if a device incorporates a self-acting or self-regulating component for the firing cycle, the firearm equipped with the device operates automatically. Again, this differs from traditional semiautomatic firearms because the trigger must be repeatedly manipulated by the shooter to fire additional rounds, whereas a bump-stock-type device allows for a single pull, and the self-acting or self-regulating device automatically re-engages the trigger finger.

Further, while skilled shooters may be able to fire more rapidly than a shooter employing a bump-stock-type device on a semiautomatic firearm, they do so by pulling and releasing the trigger for each shot fired. This is a fundamental distinction between skilled shooters and those employing bump-stock-type devices. Bump-stock-type devices require that a shooter pull the trigger to fire the first round and merely maintain the requisite pressure to fire subsequent rounds. This is the purpose of a bump-stock-type device—to make rapid firing easier without the need to pull and release the trigger repeatedly. This shows that skilled shooters would be unaffected by the proposed rule and counters commenters' arguments that the rule is ''arbitrary and capricious'' on these grounds.

11. Proposed Definitions

a. Vagueness—Rate of Fire

Comments Received

Many commenters focused on the increased rate of fire associated with bump-stock-type devices and objected to the proposed regulation being ''based, at least in part, on the idea that bump stocks are machineguns because they 'allow[ ] ''rapid fire'' of the semiautomatic firearm,' 'increase the rate of fire of semiautomatic firearms,' and 'mimic automatic fire' '' (quoting 83 FR at 13443–44). Commenters objected to classifying bump-stock-type devices as machineguns because ''a high rate of fire alone does not transform a semi-automatic into an automatic weapon under the NFA.''

Additionally, other commenters objected to classifying other ''rate-increasing devices'' as machineguns because doing so would require a standard rate of fire to be defined, which some said is impossible, or would capture certain semiautomatic firearms and firearms accessories. A few commenters pointed out that ''[t]rue machine guns do not require freedom to oscillate fore and aft to increase their rate of fire. The rate of fire of a machine gun is intrinsic to the weapon and completely independent of the shooter's manual dexterity, the firing position, the number of hands holding the firearm, and any degree of freedom of motion. . . . Bump stocks do not increase the rate of fire when the semiautomatic firearm is operated with only one hand—even when shouldered. The human element is indispensable to any firing rate increase achieved with a bump stock.''

Department Response

The Department has neither proposed the rate of fire as a factor in classifying machineguns, nor utilized this as the applicable standard in the proposed rule. The Department disagrees with any assertion that the rule is based upon the increased rate of fire. While bump-stock-type devices are intended to increase the rate at which a shooter may fire a semiautomatic firearm, this rule classifies these devices based upon the functioning of these devices under the statutory definition. The Department believes that bump-stock-type devices satisfy the statutory definition of ''machinegun'' because bump-stock-type devices utilize the recoil energy of the firearm to create an automatic firing sequence with a single pull of the trigger. The rate of fire is not relevant to this determination.

The Department also agrees with commenters that the standard rate of fire of a semiautomatic firearm or machinegun is a characteristic that is not dependent upon the individual shooter. Any reference to the ''increased'' rate of fire attributable to bump-stock-type devices refers only to the increased rate of fire that a particular shooter may achieve. Further, the Department agrees that there is no rate of fire that can identify or differentiate a machinegun from a semiautomatic firearm. This is because the statutory definition alone determines whether a firearm is a

machinegun. The Department believes that the final rule makes clear that a bump-stock-device will be classified as a machinegun based only upon whether the device satisfies the statutory definition.

b. Vagueness—Impact on Semiautomatic Firearms and Other Firearm Accessories

Comments Received

More than 56,000 commenters, including those submitting through the three main form letters opposing the rule and the NAGR submission, indicated that the proposed rule would set a dangerous precedent because a future ''anti-gun Administration'' will use it to confiscate millions of legally owned semiautomatic firearms as well as firearm components and accessories.

Commenters opposed to the rule broadly argued that by classifying bump-stock-type devices as machineguns, AR–15s and other semiautomatic firearms also may be classified as machineguns. In particular, commenters stated that under the GCA, rifles and shotguns are defined using a ''single pull of the trigger'' standard, in contrast to machineguns, which are defined by a ''single function of the trigger'' standard under the NFA. Commenters argued that by defining ''single function of the trigger'' to mean ''single pull of the trigger,'' the rule will bring all semiautomatic rifles and shotguns currently regulated under the GCA under the purview of the NFA. Commenters also argued that the proposed regulatory text encompasses a number of commercially available items, such as Gatling guns, competition triggers, binary triggers, Hellfire trigger mechanisms, or even drop-in replacement triggers. One commenter pointed out that the language ''firing without additional physical manipulation of the trigger by shooter'' would apply, for instance, to Model 37 pump shotguns made by Ithaca.

Several commenters said that the proposed rule should be more narrowly tailored so that it applies to bump-stock-type devices only. For instance, one commenter proposed that the following be added to the definition of bump-stock-type device: ''A single accessory capable of performing the roles of both a pistol grip and a shoulder stock.'' Another commenter suggested that, at most, one sentence could be added at the end of the definition of ''machinegun'':

> For purposes of this definition, the term ''automatically'' as it modifies ''shoots, is designed to shoot, or can be readily restored to shoot,'' means a device that—(1) attaches to a semiautomatic rifle (as defined in section 921(a)(28) of title 18, United States Code); (2) is designed and intended to repeatedly activate the trigger without the deliberate and volitional act of the user pulling the trigger each time the firearm is fired; and (3) functions by continuous forward pressure applied to the rifle's fore end in conjunction with a linear forward and backward sliding motion of the mechanism utilizing the recoil energy when the rifle is discharged.

One commenter suggested that, instead of trying to define a bump-stock-type device, it would be better to issue a rule stating that one cannot modify or replace the current style of stock with one that contains other features, with exceptions for adjusting the length of the stock or having a cheek rest.

Department Response

The Department disagrees that other firearms or devices, such as rifles, shotguns, and binary triggers, will be reclassified as machineguns under this rule. Although rifles and shotguns are defined using the term ''single pull of the trigger,'' 18 U.S.C. 921(a)(5), (7), the statutory definition of ''machinegun'' also requires that the firearm ''shoots automatically more than one shot, without manual reloading,'' by a single function of the trigger, 26 U.S.C. 5845(b). While semiautomatic firearms may shoot one round when the trigger is pulled, the shooter must release the trigger before another round is fired. Even if this release results in a second shot being fired, it is as the result of a separate function of the trigger. This is also the reason that binary triggers cannot be classified as ''machineguns'' under the rule—one function of the trigger results in the firing of only one round. By contrast, a bump-stock-type device utilizes the recoil energy of the firearm itself to create an automatic firing sequence with a single pull of the trigger. The Department notes that ATF has already described a ''single pull of the trigger'' as a ''single function of the trigger.'' *See* ATF Ruling 2006–2.

Further, while the phrase ''firing without additional physical manipulation of the trigger by the shooter'' would apply to firearms like the Model 37 pump shotguns made by Ithaca, that firearm could not be classified as a machinegun under the rule. The Model 37 permits a shooter to pull the trigger, hold it back, and pump the fore-end. The pump-action ejects the spent shell and loads a new shell that fires as soon as it is loaded. While this operates by a single function of the trigger, it does not shoot ''automatically,'' and certainly does not shoot ''without manual reloading.'' 26 U.S.C. 5845(b). In fact, the pump-action design requires that the shooter take action to manually load the firearm for each shot fired.

The Department disagrees that ''automatically'' should be defined using the more extensive definition quoted above. Whereas analysis as to what constitutes a ''single function of the trigger'' is separate from whether a firearm shoots automatically, the commenter's proposed definition merges the two issues. The Department believes that this may lead to confusion, further complicate the issue, and result in further questions that require clarification.

c. Concerns Raised by Equating ''Function'' and ''Pull''

Comments Received

One commenter said drafters of the NFA chose the term ''function'' intentionally and that by proposing to equate ''function'' with ''pull,'' a whole new fully automatic non-machinegun market will be opened because ''fire initiated by voice command, electronic switch, swipe on a touchscreen or pad, or any conceivable number of interfaces [does] not requir[e] a pull.'' The commenter suggested that ''single function of a trigger'' be defined to include but not be limited to a pull, as that would include bump-stock-type devices without opening a ''can of worms.''

Department Response

The proposed addition to the regulatory definition of machinegun includes this statement: ''For purposes of this definition, the term 'single function of the trigger' means a 'single pull of the trigger.' '' The Department believes that the commenter is correct—this proposed definition may lead to confusion. The proposed definition suggests that *only* a single *pull* of the trigger will qualify as a single function. However, it is clear that a push or other method of initiating the firing cycle must also be considered a ''single function of the trigger.'' Machineguns such as the M134 Minigun utilize a button or an electric switch as the trigger. *See* 83 FR at 13447 n.8 (explaining that other methods of trigger activation are analogous to pulling a trigger).

Therefore, the Department concurs with the commenters and has modified the proposed definition so that in this final rule the regulatory text will state that ''single function of the trigger'' means a ''single pull of the trigger'' and analogous motions rather than a ''single pull of the trigger.'' Although the case law establishes that a ''single pull'' is a

''single function,'' those cases were addressing devices that relied on a single pull of the trigger, as opposed to some other single motion to activate the trigger. The term ''single function'' is reasonably interpreted to also include other analogous methods of trigger activation.

*E. ATF Suggested Alternatives*

1. General Adequacy of ATF Alternatives

Comments Received

One commenter opposed to the rule suggested that the alternatives discussed in the NPRM were not in compliance with Office of Management and Budget (OMB) Circular A–4 guidance, and that ATF failed to consider available alternatives and the impact on innovation. In addition, the commenter stated that ATF failed to show a need for the rule and argued that ATF did not make a good-faith attempt to meet its statutory mandate to identify, analyze, and rule out feasible alternatives. One commenter suggested that the analysis of alternatives should include alternatives provided under OMB Circular A–4, which include tort liability, criminal statutes, and punishments for violating statutes.

Department Response

OMB Circular A–4 requires the consideration of ''possible alternatives'' to regulation.[8] ATF considered possible alternatives that it could legally employ under the NFA, as many of the suggested alternatives from commenters—*e.g.,* grandfathering and reimbursement policies—are not possible given the legal constraints of existing ATF authority. OMB Circular A–4 stipulates, ''The number and choice of alternatives selected for detailed analysis is a matter of judgment. There must be some balance between thoroughness and the practical limits on [the agency's] analytical capacity.'' [9] Circular A–4 adds that ''analyzing all possible combinations is not practical when there are many options (including possible interaction effects).'' [10] In these cases, the agency is to use its judgment to choose reasonable alternatives for careful consideration. During formulation of the NPRM, ATF considered various alternatives, including examples provided under OMB Circular A–4, and deemed them inappropriate. ATF believes that bump-stock-type devices satisfy the definition of ''machinegun'' under the NFA, so regulatory action is necessary to implement the NFA and GCA.

2. First ATF Alternative—No Regulatory Action

Comments Received

Commenters opposed to the regulation implicitly agreed with the first alternative listed by ATF, which is for the Department not to take any action. They argued that attention should be devoted to improving the background check system, that ATF should concentrate on enforcing the existing gun laws, or that if there is to be change, that change should be made by Congress or the States. One commenter argued ATF failed to properly analyze this alternative.

Department Response

As explained above, Part IV.D.4, the Department has concluded that the NFA and GCA require regulation of bump-stock-type devices as machineguns, and that taking no regulatory action is therefore not a viable alternative to this rule.

3. Second ATF Alternative—Shooting Ranges

Comments Received

Commenters who suggested that bump-stock-type devices be used in a controlled setting, or be available only at shooting ranges, were largely in support of the rule rather than viewing it as a complete alternative to taking no regulatory action.

Department Response

The Department acknowledges comments on the potential use of bump-stock-type devices in a controlled setting, such as a shooting range. As stated above, the Department believes that such items satisfy the statutory definition of ''machinegun,'' and therefore it is promulgating this rule to clarify the definition. ATF has previously held that the on-premises rental of NFA firearms is permitted. However, whereas machineguns that are currently available for rental at shooting ranges are lawfully registered in the NFRTR if they may be lawfully possessed under 18 U.S.C. 922(o)(2)(B), bump-stock-type devices cannot be registered because none were in existence when section 922(o) was enacted in 1986.

4. Third ATF Alternative—Use Other Means

Comments Received

Many commenters opposed to the rulemaking pointed out that bump firing can be accomplished by using other everyday items such as belt loops or rubber bands. *See* Part IV.10.b. No commenter said that solely using rubber bands or other items would be a satisfactory alternative if the proposed rule went into effect. Rather, these commenters made the point that if bump firing is possible with or without bump-stock-type devices, then the Department would be obliged to also prohibit possession of rubber bands and belt loops under the NFA.

Department Response

The Department has detailed in the NPRM and this rule the distinction between bump firing with a bump-stock-type device and using belt loops or rubber bands. *See* Part IV.10.b. Although a shooter using a belt loop, string, or other manual method utilizes recoil energy to bump fire, the shooter is responsible for constraining the firearm, maintaining the correct finger pressure, and regulating the force necessary to fire continuously. This is clearly distinguishable from a bump-stock-type device, as ATF has explained that such a device functions ''as a self-acting and self-regulating force that channels the firearm's recoil energy in a continuous back-and-forth cycle that allows the shooter to attain continuous firing after a single pull of the trigger so long as the trigger finger remains stationary on the device's extension ledge.'' 83 FR at 13443. Based on the clear differences between bump-stock-type devices and manual means of bump firing, the Department disagrees with the commenters that manual means of bump firing are factually or technically equivalent to bump-stock-type devices.

*F. Other Alternatives*

1. Allow Registration or Grandfathering of Bump-Stock-Type Devices Under NFA

Comments Received

Several hundred commenters argued that ATF should announce an amnesty period, allowing time for current owners of bump-stock-type devices to register them as NFA firearms in the NFRTR. These commenters argued that pursuant to section 207(d) of the GCA, the Attorney General has power to establish amnesty periods for up to 90 days. Further, they argued there is precedent for an amnesty period, pointing to the seven-year amnesty/registration period that was allowed for the Striker-12/Streetsweeper and USAS–12 shotguns. *See* ATF Rulings 94–1, 94–2. Doing so, they argued, would save the Government from having to compensate

[8] OMB Circular A–4, *Regulatory Analysis,* at 2 (Sept. 17, 2003), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

[9] *Id.* at 7.

[10] *Id.* at 11.

current owners of bump-stock-type devices and also even generate money for the Government, as individuals would be required to pay a $200 tax on the devices. *See* 26 U.S.C. 5821.

Department Response

The Department disagrees that an amnesty period is possible in this scenario. While in 1968 Congress left open the possibility of future amnesty registration of firearms subject to the NFA, ATF has long held that it eliminated any possible amnesty for machineguns in 1986. Following passage of 18 U.S.C. 922(o), ATF advised the industry and the public that amnesty registration of machineguns was not legally permissible. For example, in 1996 and 1997, ATF advised an industry member that:

> 18 U.S.C. 922(o) would preclude the registration of machineguns during an amnesty period. Section 922(o) prohibits possession of machineguns which were not lawfully possessed prior to its effective date of May 19, 1986 . . . . Since 922(o) [was enacted after the amnesty provision of the NFA], its provisions would prevail over any earlier enactment in conflict. This means that any future amnesty period could not permit the lawful possession and registration of machineguns prohibited by section 922(o).

Letter for C. Michael Shyne from ATF's National Firearms Act Branch Chief (March 10, 1997). Section 922(o) does not ban the private possession and transfer of all machineguns because it specifically excludes ''any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date [section 922(o)] takes effect.'' 18 U.S.C. 922(o)(2)(B). The intent of the statute was to limit transactions in post-1986 machineguns. *See United States* v. *Ferguson,* 788 F. Supp. 580, 581 (D.D.C. 1992) (''Under section 922(o)(2)(B), certain machineguns, namely, those that were lawfully possessed before enactment of the statute in 1986, may be legally possessed and transferred even today.''); *see also United States* v. *O'Mara,* 827 F. Supp. 1468, 1470 n.4 (C.D. Cal. 1993) (citing *Ferguson*). Congress's goal was to ban the transfer and possession of such weapons outright. *United States* v. *Hunter,* 843 F. Supp. 235, 247–48 (E.D. Mich. 1994). The legislative history supports this proposition. When asked whether an amnesty period could ''be administratively declared by the Secretary of the Treasury by the enactment of this bill,'' Senator Kennedy responded that ''[t]here is nothing in the bill that gives such an authority, and there is clearly no valid law enforcement goal to be achieved by such open-ended amnesty.'' *See id.* at 248.

Some commenters pointed to ATF Rulings 94–1 and 94–2 as precedent for an amnesty period; however, section 922(o) applies only to machineguns, and there was no similar restriction on the destructive devices at issue in ATF Rulings 94–1 and 94–2. Therefore, these rulings cannot serve as precedent in the present case.

2. Licensing and Background Checks

Comments Received

Numerous commenters suggested other methods for how bump-stock-type devices should be regulated, including methods involving background checks. Some commenters broadly suggested that these devices should be sold like firearms under the GCA, meaning that the purchaser would undergo a background check when acquiring one from a retailer. One commenter suggested a new ''2.5 firearms class'' that would cover ''grey area'' guns and accessories, like bump-stock-type devices. Possessors of items falling under the ''2.5 firearms class'' would undergo background checks and, as with State-issued concealed-carry permits, local law enforcement would be able to cancel privileges if necessary. Other commenters suggested that bump-stock-type devices should not be available to the public unless the possessor is licensed, passes a background check, or provides a valid reason for needing a bump-stock-type device. Another commenter suggested bump-stock-type devices should be regulated like ''any other weapon'' under the NFA, 26 U.S.C. 5845(e), so that current owners could register them by paying a $5 fee, allowing a waiting period to elapse, and establishing a paper trail of ownership.

Department Response

The Department acknowledges these suggested alternatives but does not have the authority to add a new class of firearms to the statutory scheme or impose licensing requirements to acquire a firearm. Such changes would require legislation. Further, the definition of ''any other weapon'' in the NFA does not apply to bump-stock-type devices. Because bump-stock-type devices are properly classified as ''machineguns'' under the NFA and GCA, the Department believes that ATF must regulate them as such, and that the recommended alternatives are not possible unless Congress amends the NFA and GCA.

3. Remuneration

Comments Received

Over 1,000 commenters opposed to the rule argued that compensation should be provided to owners of bump-stock-type devices. Several supporters of the rule also suggested there should be a buy-back program in order to reduce the number of bump-stock-type devices. One commenter more specifically stated that manufacturers or retailers should be required to buy back all such devices and make full refunds to all purchasers. Another supporter suggested a one-time tax credit to owners who surrender their bump-stock-type devices or provide proof of destruction.

Department Response

The Department acknowledges comments on compensation for current owners of bump-stock-type devices. While ATF has the authority to implement the NFA and GCA, the Department does not have the necessary Federal appropriations to implement a buy-back program or offer monetary compensation. To implement a buy-back program or provide a tax credit would require congressional action.

4. Medical Exemption

Comments Received

Some commenters suggested that Department amend the proposed rule so it would provide an exemption for ''medical necessity,'' thereby allowing certain individuals, such as those with nerve damage or one functional arm, to possess bump-stock-type devices. Similarly, commenters suggested bump-stock-type devices should only be available for people who are physically unable to pull a trigger for hunting or target practice.

Department Response

The Department does not have authority to create a medical exemption for the possession of machineguns. Pursuant to the NFA and GCA, for private possession of machineguns to be lawful, they must have been lawfully possessed before the effective date of 18 U.S.C. 922(o).

5. Allow Removal of Trigger Ledge

Comments Received

One commenter suggested that ''ATF could find that bump-stock-type devices with the ledge/rest removed are *not* affected by any additional regulation.'' The commenter argued that this would make the proposed rule ''logically consistent with the notion that operators may 'bump fire' with or without a

bump-stock-type device, as long as they do not utilize a device allowing a fixed trigger finger.''

Department Response

The Department does not believe that removing the trigger ledge is sufficient to affect a bump-stock-type device's classification as a machinegun. While the trigger ledge makes it easier to utilize the device, removing the ledge does nothing to prevent the directing of the ''recoil energy of the discharged rounds into the space created by the sliding stock (approximately 1.5 inches) in constrained linear rearward and forward paths.'' 83 FR at 13443. Therefore, even without the trigger ledge, the bump-stock-type device will operate as designed if the shooter simply holds his or her finger in place. As such the bump-stock-type device remains a ''machinegun'' under the NFA and GCA.

6. Miscellaneous Alternatives To Regulate Bump-Stock-Type Devices

Comments Received

Other miscellaneous comments included suggesting a ban only on future production and commercial sale of such items; enacting a quota on the number of devices that can be produced or possessed; enacting a Pigouvian tax, which is a tax imposed on a good that is calculated to reduce market quantity (and increase market price) in order to achieve the socially optimal level of the good; deferring action until Congress takes action; leaving the matter for State legislative action; improving security at mass-attended events; and improving law enforcement capabilities.

Department Response

The Department acknowledges comments on alternative suggestions for the regulation of bump-stock-type devices, but it does not have authority to implement many of the suggested alternatives. The Department does not have the authority to restrict only the future manufacture or sale of bump-stock-type devices, nor does it have the authority to remove the general prohibition on the transfer and possession of machineguns that were not lawfully possessed on the effective date of 18 U.S.C. 922(o). In addition, the Department lacks the authority to enact an excise tax on bump-stock-type devices.

As mentioned above, the Department does not agree with commenters that any change needs to be enacted by Congress or should be left to State legislatures. Congress passed both the NFA and GCA, delegating enforcement authority to the Attorney General. Accordingly, the Attorney General has the authority to promulgate regulations necessary to enforce the provisions of the NFA and GCA, and the Department determined that notice-and-comment rulemaking was the appropriate avenue to clarify the definition of ''machinegun.'' In the interest of public safety and in light of the statutory definition of ''machinegun,'' the Department has determined that Federal regulation of bump-stock-type devices is necessary. However, this action does not prevent Congress from taking action on bump-stock-type devices in the future.

The Department acknowledges comments on improving security at mass-attended events and agrees that it is important to improve law enforcement capabilities. The Department actively works with State and local law enforcement agencies to provide security at mass-attended events, as well as training and equipment for their departments.

*G. Proposed Rule's Statutory and Executive Order Review*

Comments Received

A few commenters suggested that ATF failed to comply with Executive Orders 12866, 13563, and 13771, including failing to identify and repeal two regulations for every new regulation issued. Commenters argued that ATF did not quantify the benefits of the rule, and it did not explain why those benefits were unquantifiable as required by OMB Circular A–4. Commenters stated that ATF did not identify the need for the proposed rule, in that ATF cited no evidence to support that the Las Vegas shooter used a bump-stock-type device. One commenter asked that ATF demonstrate how the cost-benefit analysis shows that the proposed rule is in the interests of gun owners, business owners, and the Federal Government. The commenter further suggested that ATF did not provide any citations or peer-reviewed research as evidence of the need for Federal regulatory action. Lastly, some commenters questioned how ATF determined the negative externalities that were presented in the NPRM.

Department Response

Executive Order 12866 and OMB Circular A–4 acknowledge that regulatory agencies should comply with them wherever possible or feasible. The Department interprets and adheres to the existing Executive Orders and OMB Circular A–4 to the extent that it is possible, using the best available information, and to the extent quantified information was available. Alternatively, wherever quantifiable means were not available, the Department considered qualitative costs, benefits, concerns, and justifications.

This rule is a significant regulatory action that clarifies the statutory definition of machinegun. By clarifying that bump-stock-type devices are machineguns subject to the restrictions of the NFA and GCA, the rule in effect removes those devices from the civilian marketplace. This final rule is an Executive Order 13771 regulatory action. *See* OMB, *Guidance Implementing Executive Order 13771, Titled ''Reducing Regulation and Controlling Regulatory Costs''* (Apr. 5, 2017).

As for the need for Federal regulation, agencies are allowed to consider public safety as a compelling need for a Federal rulemaking. Executive Order 12866 expressly recognizes as appropriate exercises of agency rulemaking authority that ''are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.'' 58 FR 51735 (Oct. 4, 1993). As explained in the NPRM, the purpose of this rule is to amend ATF regulations to clarify that bump-stock-type devices are ''machineguns'' as defined by the NFA and GCA, with a desired outcome of increasing public safety. In accordance with OMB Circular A–4, the Department has provided information wherever possible regarding the costs, benefits, and justification of this rule.

As further requested by one commenter, this rule not only considers the implications of this rule on gun owners in the United States, business owners, and the Federal Government, but also considers the risk of criminal use of bump-stock-type devices and the general safety of the public to justify the issuance of this final rule.

*H. Affected Population*

Comments Received

There were a number of commenters who stated this rule will affect between 200,000 and 500,000 owners. Some commenters suggested that the estimated number of bump-stock-type devices should be higher, potentially over a million, than the estimated amount stated in the NPRM. Some commenters indicated that this would incorporate homemade devices, 3D-printed devices, or other devices made by personal means.

Department Response

In the NPRM, ATF did not estimate the number of owners. 83 FR at 13449. The 280,000–520,000 range in the Executive Order 12866 section of the NPRM is the estimated number of bump-stock-type devices in circulation, not the number of owners. While the Department does not know the total number of bump-stock-type devices currently extant, nor the number of owners, the Department's high estimate of 520,000 is still the primary estimate only for devices sold on the market. While it may be possible to make homemade devices, the Department cannot calculate the number of such devices or the likelihood of these devices circulating among the public. The Department is using the best available information, and there is no known information that would allow ATF to estimate such a number, much less achieve the level of accuracy that the public is requesting. Therefore, the estimates provided continue to be based upon the best available information.

*I. Costs and Benefits*

1. Costs to Purchasers

Comments Received

One commenter stated that some models of bump-stock-type devices never sold for less than $425 plus taxes. Another commenter stated that the Department's regulatory analysis did not account for the individual cost in purchasing bump-stock-type devices, only manufacturers' and retailers' expenses. Other commenters suggested that the analysis did not account for taxes. One commenter suggested that the costs should incorporate the cost of purchasing a pre-1986 machinegun. One commenter suggested that many owners have bump-stock-type devices as the only stocks that they own and that purchasing a standard stock will need to be incorporated into the analysis.

Some commenters stated that the cost analysis does not include compensation for bump-stock-type devices and that the cost could be more than $50 trillion. Other commenters indicated that the rule did not account for lost lives, treatment costs, decreased tourism, and costs of criminal investigations. Other commenters argued that ATF failed to consider other costs, such as loss of faith in ATF by the regulated industry and resentment for not being reimbursed for bump-stock-type devices.

Department Response

The Department concurs that certain models sold at the $425.95 rate (a rate also included in ATF's range of costs published in the NPRM), representing the high end of the range of rates. 83 FR at 13451. However, bump-stock-type devices also sold for as low as $100. *Id.* In order to account for the full range of prices, the Department used the average of the full range of prices; therefore, the average price of $301 was used in the NPRM to account for the full range of market prices for these bump-stock-type devices. *Id.* As for the payment of taxes, the Department concurs that an unknown number of bump-stock-type-devices were sold, and individuals paid local taxes on them at time of purchase. For the purposes of this final rule, the Department maintains the average price used in the NPRM but incorporates the average cost of combined State and local taxes. For the purposes of this final rule, the Department estimates that the national average of taxes is 6.47% and attributed this tax rate to the price of all bump-stock-type devices that were sold on the market.[11]

The Department disagrees that the regulatory analysis did not account for the individual cost in purchasing bump-stock-type devices. The market price of bump-stock-type devices sold to the public represents the public price of these devices, which also accounts for the manufacturer and retail prices and does not double-count costs. While it may be possible for the public to purchase a pre-1986 machinegun, these amounts are not used to purchase bump-stock-type devices, so the market prices for these pre-1986 machineguns are not considered for purposes of this rule.

The Department reached out to the commenter who discussed the population of gun owners who will need to replace their bump-stock-type devices with standard stocks. The commenter was unable to provide a source establishing the existence of such gun owners and only speculated that this was a possibility. Having determined that this was speculation, the Department declined to incorporate this information into the analysis.

The Department does not propose compensation for bump-stock-type devices, so these costs were not included in the rule. See *Part* IV.D.1.b for a discussion of the Fifth Amendment's Takings Clause. Further, costs associated with victims, criminal investigations, loss of tourism, loss of faith in ATF by the regulated industry, and resentment for not being reimbursed for bump-stock-type devices are all indirect or unquantifiable costs of the rule and are not considered in the cost-benefit analysis.

2. Costs to Manufacturers, Employees, and Communities

Comments Received

Commenters suggested that this rule will cost manufacturers, employees, and families of manufacturers their livelihood. In particular, one commenter suggested that three additional manufacturers would have entered or re-entered the market after the lapse of the patent for the main manufacturer of bump-stock-type devices. Additionally, public comments suggested that the Department overlooked the capital expenses required to start a company.

Department Response

The Department has considered the effect that this rule will have on these manufacturers, employees, and families and acknowledges that they will no longer be able to manufacture bump-stock-type devices. The Department acknowledges that there will be a potential loss of wages from employees losing jobs from loss of manufacturing; however, the extent to which they are unable to find replacement jobs is speculative. The Department considered the capital expenses for manufacturers, including patents and equipment to start production. However, in light of the Las Vegas shooting and the estimated time it would have taken for the patents to expire, the Department has determined that there could be potential crowding of additional manufacturers and saturation of the market for bump-stock-type devices. Therefore, the viability of these businesses is speculative and the capital expenses that they incurred are a sunk cost for those who put in the expense. While the Department does not include capital expenses for manufacturing in the economic analysis, the Department had already considered the overall potential for return on investment for any manufacturers who would have remained in the market from the existing estimate of foregone production. Accounting for capital expenses would be double counting of expenditures. Therefore, the economic analysis for this portion remains the same.

3. Costs of Litigation

Comments Received

Commenters suggested that the Department did not account for the cost of litigation regarding the rule.

[11] *See* Jared Walczak & Scott Drenkard, *State and Local Tax Rates in 2017,* Tax Found. (Jan. 31, 2017), *https://taxfoundation.org/state-and-local-sales-tax-rates-in-2017/.*

Department Response

Litigation costs are not a direct cost of the rule because such costs do not result from compliance with the rule. Additionally, any estimate of litigation expenses would be highly speculative and would not inform the Department's decision regarding the implementation of this final rule. However, the Department acknowledges that to the extent parties choose to enter into litigation regarding this final rule, there are indirect costs associated with that litigation.

4. Government Costs

Comments Received

Commenters suggested that this rule would cost the Government approximately $297 million, including the disposal cost of the bump-stock-type devices. Other commenters indicated that confiscation costs were not included in the cost of the rule. One commenter provided estimates on the cost to house bump-stock-type device owners in prison as felons, particularly if a large number of owners opt not to destroy such devices. Lastly, one commenter suggested that ATF consider foregone sales taxes associated with ammunition used to fire bump-stock-type devices.

Department Response

In the NPRM, the Department estimated that the total cost of the rule for the general public (*e.g.,* owners and manufacturers of bump-stock-type devices) would be about $326.2 million over a 10-year period, not that the rule would cost the Federal Government that amount. 83 FR at 13454. The Department's estimate that Government costs are de minimis still stands for this final rule because the costs identified by these commenters are not Government expenditures. Further, costs associated with administering the option of current possessors of bump-stock-type devices abandoning their devices at their local ATF offices will be de minimis. The Department also disagrees that this rule will turn owners of bump-stock-type devices into felons. This final rule provides an effective date that allows ample time for current owners to destroy or abandon such devices. To the extent that owners timely destroy or abandon these bump-stock-type devices, they will not be in violation of the law or incarcerated as a result. However, if prohibited bump-stock-type devices are possessed after the effective date of the final rule, the person in possession of the bump-stock-type device will be in violation of Federal law.

While the usage of bump-stock-type devices may boost ammunition sales, the Department did not consider the loss of tax revenue collected from additional ammunition sales because they are speculative and are not a direct cost of the rule. Additionally, any estimate of tax revenue generated would not inform the Department's decision regarding the implementation of this final rule.

5. Benefits

Comments Received

Commenters stated that there are no quantifiable benefits to justify the costs of this rule, nor will it prevent criminal use of firearms. One commenter also stated that ATF did not explain why the benefits were unquantifiable as required by OMB Circular A–4. Some commenters suggested that ATF is required ''by law'' to quantify and monetize benefits. Commenters stated that the benefits do not outweigh the costs and ATF failed to conduct any analysis of the benefits of the rule and did not quantify the benefits. Further, commenters argued that ATF did not substantiate its assertion that bump-stock-type devices will be used more frequently in future crimes if this rule is not promulgated.

One commenter argued that the Department needed to separate the effects of using a bump-stock-type device from other factors that might have incremental effects on criminal activity, such as crowd density and angle of fire. The commenter stated that benefits must be reduced accordingly and must take into account a reduction in violence instead of elimination of the threat of violence from bump-stock-type devices. Many commenters argued that ATF cannot rely on the Las Vegas shooting as the measure of benefits for this rule.

Commenters discussed means of monetizing shooting incidents or comparing the death rates related to other items like motor vehicles, opiates, knives, and rocks. Other commenters in support of the rule suggested that ATF incorporate the financial and societal benefits of this rule.

Department Response

The Department declines to quantify benefits because OMB Circular A–4 requires quantifying and monetizing benefits only ''if possible.'' OMB Circular A–4 at 45. One commenter provided descriptions on how to determine quantitative benefits of this rule and specifics on using a break-even analysis; however, due to limitations on data, the Department has considered the qualitative benefits for this rulemaking.

The Department did not account for the cost of deaths and injuries unrelated to bump-stock-type devices, as these are unrelated to this rule. This rule does not prohibit the use of firearms that could be used in shootings, or other items or devices. Furthermore, it is unclear how risk associated with other devices such as motor vehicles should influence ATF's decision-making. ATF has provided a cost-benefit analysis in both the NPRM and this final rule that fulfills the requirements of Executive Order 12866, OMB Circular A–4, the Regulatory Flexibility Act (RFA), and the Unfunded Mandates Reform Act.

*J. Regulatory Flexibility Act*

Comments Received

Some commenters suggested that the RFA requires examination of the future impact of the rule on innovation and of making a lawful product into an unlawful one.

Department Response

The Department disagrees that the RFA requires an examination of those specific factors. The RFA ''requires agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize small entity impacts, and make their analyses available for public comment.'' [12] The RFA ''does not seek preferential treatment for small entities, nor does it require agencies to adopt regulations that impose the least burden on them, or mandate exemptions for them. Rather, it requires agencies to examine public policy issues using an analytical process that identifies barriers to small business competitiveness and seeks a level playing field for small entities, not an unfair advantage.'' [13]

The Department found that this rule significantly impacts small businesses related to bump-stock-type devices. The Department interprets the RFA to mean that small businesses should not be prevented from using innovations to compete with other businesses, and to account for small businesses when determining alternative approaches with respect to small businesses in the field.[14] At this time, there are only small businesses that manufacture bump-stock-type devices; therefore, no regulatory alternative was considered to

[12] U.S. Small Business Administration, Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,* at 1 (Aug. 2017), *https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf.*

[13] *Id.*

[14] *Id.*

alleviate the regulatory burden on small businesses with respect to competition with businesses that are not small.

*K. Miscellaneous Comments*

Commenters both in support of and in opposition to the proposed rule raised additional miscellaneous issues. These are discussed below.

1. Improve Background Checks

Comments Received

Separate from the suggested alternative, discussed above, that bump-stock-type devices be sold like firearms, many commenters voiced their general support for various enhancements to the existing Federal background check requirement. Commenters said the ''gun show loophole'' should be closed, and many called for universal background checks. At least one commenter suggested there should be psychiatric evaluations for firearms purchasers. Commenters making these points were largely supporters of the proposed rule, but at least a few commenters opposed to the rule also supported background checks. One opposed commenter said better communication between the relevant government agencies and tighter background checks were needed. A few opposed commenters suggested it would be more effective to have a more in-depth background check along with a minimum age of 21 or 25 and a five-day waiting period because they observed that young, alienated people have frequently been the perpetrators of mass shootings.

Department Response

The Department acknowledges comments on enhanced or expanded background checks, an increase in minimum age requirements, and waiting periods. The Department is aware of the importance of having accurate and complete information available to the NICS, which is managed by the FBI; further, the Department works with Federal and State agencies to ensure that necessary information is submitted to the system. The Department does not, however, have the authority to increase the minimum-age requirement or enact a mandatory waiting period to purchase a firearm.

2. Increase Criminal Penalties

Comments Received

Commenters on both sides of the issue suggested that there be more stringent criminal penalties for firearms offenses. Some commenters in support of the rule said there should be severe penalties for possessing a bump-stock-type device, or for manufacturing one through digital printing, or simply for anyone who manufactures or distributes bump-stock-type devices. Another commenter supporting the rule said that bump-stock-type devices should be prohibited from all public spaces where there is the potential for mass murder, but did not object to persons who wanted to use bump-stock-type devices on their own property or on hunting or shooting grounds. Some commenters opined that generally there should be more severe penalties for anyone using guns illegally or irresponsibly. A few commenters opposed to the rule suggested that in lieu of a rule prohibiting possession, a more effective deterrent would be severe penalties for the manufacture and sale of bump-stock-type devices, and that there should instead be swift and severe punishment, such as the death penalty for persons who commit or attempt to commit a mass shooting, or, more generally, that the law should be written to include mandated, nondiscretionary sentences.

Department Response

The Department does not have the authority to increase criminal penalties. Only Congress can increase, amend, or add new criminal penalties for Federal crimes.

3. Repeal the NFA and Hughes Amendment, and Remove Silencers

Comments Received

Numerous commenters opposed to the regulation viewed the proposed rule as an infringement on their rights. As part of their opposition to the proposed rule, some commented that the NFA itself is inherently unconstitutional and declared that it should be repealed. Commenters similarly questioned the constitutionality of the Hughes Amendment (18 U.S.C. 922(o)), which was enacted as a part of the Firearms Owners' Protection Act in 1986 and prohibits possession by individuals of any post-1986 machinegun. These commenters declared it should be repealed. A majority of these commenters simply objected to any further firearms restrictions and insisted these laws be repealed in order to restore freedoms they believe to have been steadily eroded by the Government. Some commenters noted that bump-stock-type devices evolved as a workaround to the NFA and Hughes Amendment restrictions so that shooters could have an affordable alternative to shoot in a manner that is close to a machinegun. Some opined that that a rule prohibiting bump-stock-type devices would be acceptable so long as these other restrictions are lifted to give individuals affordable access to machineguns. A few commenters also added that silencers should be removed from the NFA's coverage or be made available like any other firearm device, with at least one commenter stating that the Hearing Protection Act or Sportsmen's Heritage and Recreational Enhancement (SHARE) Act should be passed.

Department Response

The Department does not have the authority to repeal or amend provisions of the NFA, such as by removing silencers from the NFA. The NFA is a statute, which only Congress may repeal or alter. ATF does not have the authority to remove the general prohibition on the transfer and possession of machineguns that were not lawfully possessed before the date 18 U.S.C. 922(o) became effective, nor does it have the authority to permit nongovernmental entities to possess machineguns or other NFA firearms that are not lawfully registered in the NFRTR. Only Congress can alter these provisions. However, as stated, ATF does have the authority to implement the existing statute and has utilized the rulemaking process to do so.

4. Focus on Mental Health and Other Gun Control Measures

Comments Received

Supporters argued that in addition to finalizing the rule, more attention needs to be paid to improving mental health care. Generally, these commenters suggested there should be more spending on the mental health system so as to increase access.

Numerous commenters in support of the rule also listed several other proposals pertaining to gun safety or gun control measures that should be implemented. Almost 5,000 commenters expressed that ''other conversion devices'' along with bump-stock-type devices should be banned. And more than 1,500 commenters also called for a ban on ''assault weapons'' or firearms altogether, while several others specifically stated that there should be restrictions on high-capacity magazines. Some commenters provided many other suggestions, including a higher age limit to acquire a firearm, written tests for firearm access, mandatory gun safety classes, proper storage inspections, a nationwide gun registry, licensure and gun ownership insurance requirements, ammunition limits, and protocols for removing firearms from domestic abusers and the mentally ill through protective orders.

Department Response

The Department acknowledges the importance of improving mental health care. However, mental health treatment does not fall under the Department's authority.

Although this rulemaking specifically addresses bump-stock-type devices, any item that meets the definition of a ''machinegun'' will be regulated as such and cannot be possessed unless legally registered. But only Congress can add additional requirements that must be met in order to purchase a firearm.

The Department does not have the authority to remove firearms from persons who are not prohibited from receiving or possessing them under Federal law. Only Congress can amend or add new categories of prohibited persons.

*L. Comments on the Rulemaking Process*

1. Availability of Supporting Documentation

Comments Received

A handful of commenters argued that the procedures of the APA were not properly followed, in part because ATF did not include any supporting documentation on how it formulated its decision to regulate bump-stock-type devices. In particular, commenters stated that although they submitted Freedom of Information Act requests, ATF did not make available its own prior letter determinations that classified various bump-stock-type devices as firearm parts not subject to the NFA or GCA, nor did ATF make available any evidence suggesting that there have been other instances of criminal use of a bump-stock-type device. This kind of documentation, they argued, would provide the basis upon which the agency justified its proposed rule and therefore should be made public in order to allow for meaningful comment under the APA.

Department Response

Contrary to the commenters' arguments, the Department believes that it provided all of the background information necessary to allow meaningful public participation. The APA, 5 U.S.C. 553(b), provides that ''[g]eneral notice of proposed rule making shall be published in the **Federal Register**,'' and that this notice shall include, *inter alia,* ''either the terms or substance of the proposed rule or a description of the subjects and issues involved.'' Federal courts have recognized that they must determine whether regulations are consistent with statutes, and ''whether the process used in arriving at those regulations afforded those affected . . . their procedural due. More specifically, in the informal rulemaking context . . . , this inquiry asks whether the agency gave 'interested persons an opportunity to participate in the rule making through submission of written (or other) data' and whether it 'incorporate(d) in the rule adopted a concise general statement of their basis and purpose.' '' *Weyerhaeuser Co.* v. *Costle,* 590 F.2d 1011, 1024 (D.C. Cir. 1978) (quoting 5 U.S.C. 553). A ''notice of proposed rulemaking must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.'' *Honeywell Int'l, Inc.* v. *EPA,* 372 F.3d 441, 445 (D.C. Cir. 2004) (internal quotation marks omitted).

The Department agrees with commenters that interested parties will not be able to make meaningful comments upon an agency's proposed regulation if the notice ''fails to provide an accurate picture'' of the agency's reasoning. *Conn. Light & Power Co.* v. *NRC,* 673 F.2d 525, 528 (D.C. Cir. 1982). Commenters fail, however, to recognize that the text of the NPRM set out the facts necessary to ''provide an accurate picture'' of the Department's reasoning. In the NPRM, the Department articulated the reasons for its proposed change in the classification of bump-stock-type devices, provided detailed descriptions and explanations of its prior classifications, and offered thorough explanations of its past and current analysis. Accordingly, the Department believes that it provided notice to the public, in sufficient factual detail, to permit interested parties to comment meaningfully on the proposed rule.

2. Previous ''Lack of Candor''

Comments Received

One commenter also included an extensive description of ATF's ''prior lack of candor,'' including instances where ATF purportedly (1) committed ''institutional perjury'' before the courts in the context of criminal prosecutions and supporting probable-cause showings for search warrants; (2) committed deception and delayed responding with respect to congressional inquiries regarding NFRTR inaccuracies as well the ''Fast and Furious'' investigation; and (3) misled the public about the accuracy of the NFRTR. According to the commenter, these episodes highlight a pattern of procedural irregularities that should draw further scrutiny of this rulemaking.

Department Response

These comments are beyond the scope of this rulemaking, but the Department notes that ATF has committed available resources to develop the NPRM and respond to comments as part of the rulemaking process. In developing this rulemaking and responding to comments, ATF has followed all established procedures and complied with all relevant policies and requirements.

3. 90-Day Public Comment Period

Comments Received

One commenter asserted that the agency failed to provide the statutorily mandated 90-day public comment period. The commenter relied on an online article that ''detail[ed] the trials and tribulations of trying to find the appropriate docket,'' given that some commenters indicated that they encountered a ''Comment Period Closed'' notification on the *FederalRegister.gov* website when the NPRM was published on March 29, 2018. The author of the online article said that he submitted an inquiry to ATF asking why the comment period appeared closed when it should have been open through June 27, 2018, and why the website, at various times, depicted different numbers for the amount of comments ATF received. The author's description of events concluded by noting that he received a response from ATF with a specified weblink to *Regulations.gov* where he could submit a comment but that none of his comments submitted were visible on the website. Relying primarily on this online account, the commenter asserts that ATF did not disclose this weblink to the public and that numerous people believed that the comment period was closed from the very beginning of the comment period and were therefore precluded from submitting comments. The commenter therefore believes that the comment period should be extended because ATF did not permit the statutorily mandated 90-day comment period.

Department Response

The Department acknowledges that upon publication of the NPRM on March 29, 2018, there was some confusion within the first 24 to 48 hours about submitting comments through the Federal eRulemaking Portal (*www.Regulations.gov*), which is managed and maintained by a third-party host. ATF was in touch with the managers of the Federal eRulemaking portal, and relayed an explanation of these technical issues to the author of

the online article in two subsequent emails dated April 2 and April 3, 2018. However, there is no evidence that the proposed rule was not available for public comment for the 90-day comment period. On the contrary, ATF received numerous comments from the very beginning of the comment period.

ATF explained to the author of the article that on March 29, 2018, when the comment period opened for the NPRM, the link for submitting comments to the NPRM had been inadvertently connected to the *Regulations.gov* Docket ID number 2018–0001–0001, which had been used by the *Regulations.gov* website for the ANPRM comment period, December 26, 2017, through January 25, 2018. On March 29, 2018, the same day the proposed rule was published in the **Federal Register**, individuals were able to and did submit comments for the NPRM even though it was linked to the Docket ID used for the ANPRM. Realizing that the link for the NPRM should not have been listed under the ANPRM Docket ID, a new Docket ID number (2018–0002–0001) was created for the NPRM. These Docket ID numbers are created by the third-party managers of *Regulations.gov* for purposes of the website. ATF uses its own docket number, 2017R–22, as seen in the text of the ANPRM and NPRM.

Once the third-party managers of *Regulations.gov* created a new Docket ID number for the NPRM with a ''Comment Now'' feature, they eliminated the ability to submit NPRM comments under the old ANPRM Docket ID. The Department acknowledges that there was some confusion because there was a brief period on March 29, 2018, during which the ANPRM link (2018–0001–0001) was prominently situated on the homepage of the *Regulations.gov* website even though that link was no longer able to accept comments for the NPRM. Despite the brief prominence of the old ANPRM Docket ID on the *Regulations.gov* website, the public had the ability to submit comments through the Federal eRulemaking Portal for the NPRM at all times, as a simple search for ''bump stock'' in the main search bar on *Regulations.gov* during this time would have displayed the link for the new NPRM Docket ID, which was active and accepting comments. Moreover, some individuals confused about how to comment on *Regulations.gov* called ATF's Office of Regulatory Affairs, which was able to assist them.

ATF also responded to the author's inquiry regarding the discrepancy in the numbers showing the amount of comments received. Over the weekend of March 31, 2018, the third-party managers of *Regulations.gov* transferred all comments submitted for the NPRM through the ANPRM Docket ID to the new NPRM Docket ID. ATF was informed that the number of comments displayed on *Regulations.gov* updated only once a day and therefore would harmonize over the next few days as ongoing system maintenance occurred. Ultimately, the website depicting the amount of comments received reflects all comments received since March 29, 2018, the beginning of the comment period.

To answer the author's inquiry as to why his comments submitted were not visible on *Regulations.gov*, ATF reminded the online author that Part VII.C of the NPRM, which described the three methods for submitting public comments, informed the public that comments submitted through *Regulations.gov* ''will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, . . . comment[s] may not be viewable for up to several weeks.'' Since the beginning of the comment period, ATF received a high volume of comments and, as forewarned, there was a delay between the time comments were submitted and when they became viewable on the website, assuming the comment met the posting guidelines stated in Part VII.A of the NPRM. By April 3, 2018, two of the online author's comments were visible on *Regulations.gov*, and the agency provided him with direct weblinks to his comments.

Accordingly, the Department disagrees that the agency failed to provide the statutorily mandated 90-day public comment period. Moreover, the Department notes that the Federal eRulemaking Portal is one of the three methods available for the public to submit comments during the 90-day comment period. Therefore, the public also had the ability to submit comments via mail or facsimile during the entire 90-day period.

The Department believes the numerous examples provided by the commenter of cases in which Federal agencies extended comment periods are inapplicable to this rulemaking. The specific scenarios the commenter listed were apparently all the result of the lapse in government funding that occurred in October 2013. At that time, agencies were largely unstaffed, and insufficient personnel were available to process the comments. This rulemaking has not involved similar difficulties.

4. Request for Public Hearing

Comments Received

A few commenters requested a hearing pursuant to the NPRM because they want the opportunity to be heard before ATF prescribes any rule. One commenter stated that 18 U.S.C. 926(b) requires ATF to hold a public hearing when such is requested because the statute provides that the Attorney General ''shall afford interested parties opportunity for hearing, before prescribing . . . rules and regulations [under 18 U.S.C. ch. 44].''

Department Response

The Department is not persuaded that a public hearing is necessary or appropriate in connection with this rulemaking. The Department believes that a comprehensive public record has already been established through the comment process, which generated over 186,000 comments, some of which included substantial discussions of the rulemaking. The Department does not believe that a public hearing would meaningfully add data or information germane to the examination of the merits of the proposal or would provide substantive factual information that would assist the Department in improving the rule in material ways. Furthermore, the Department believes that it has made changes to this rule and included clarifications in the preamble that address the important issues raised by parties who requested a hearing. In light of all the circumstances, a public hearing is unnecessary.

The Supreme Court has held that it is not necessary for an agency to hold a public hearing on a rulemaking simply because it receives a request for one. In both *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972), and *United States* v. *Florida East Coast Railway,* 410 U.S. 224 (1973), the Court established the rule that it is necessary to examine the particular statute involved when determining whether notice-and-comment procedures under 5 U.S.C. 553 are available or, alternatively, whether there is a right to a formal hearing. In general, unless a statute specifically provides for rules to be made on the record after a hearing, the Federal courts have held that the informal rulemaking procedure is applicable. Thus, even statutory language such as ''due notice and opportunity for a public hearing,'' and ''opportunity for hearing,'' have been held to mandate only informal procedures under 5 U.S.C. 553. *See* 3 Administrative Law 16.03 (2018).

One Federal court specifically addressed the language in 18 U.S.C.

926(b), on which one commenter relied, and rejected the commenter's position. In that case, the plaintiff contended ''that all of the regulations must be invalidated because the Secretary failed to follow the procedures mandated in FOPA by refusing to afford interested parties an opportunity for an oral hearing.'' However, the court held that the agency provided an ''opportunity'' for a hearing even though it decided against an oral hearing. The court wrote:

> FOPA contains no provision guaranteeing interested parties the right to an oral hearing. . . . It is well-settled that the requirement of a hearing does not necessitate that the hearing be oral. Here, the Secretary, pursuant to regulation, reserved for himself the right to determine whether an oral hearing should be held. He ultimately determined that an oral hearing was unwarranted, but did provide interested parties with the opportunity to submit written comments. This is all the hearing requirement in § 926(b) demands.

*Nat'l Rifle Ass'n* v. *Brady,* 914 F.2d 475, 485 (4th Cir. 1990) (citations omitted). Here, the Department has made the same determination that an oral hearing is unnecessary.

## V. Final Rule

This final rule adopts, with minor changes, the proposed amendments to the definition of ''machine gun'' in 27 CFR 447.11, 478.11, and 479.11, which include clarification of the meaning of ''automatically'' and ''single function of the trigger'' and clarification that bump-stock-type devices are machineguns. The Department accordingly determined that persons in possession of bump-stock-type devices must destroy or abandon the devices.

In response to comments received and discussed in Part IV, the Department added employees of manufacturers and one additional manufacturer to the populations potentially affected by this rule, and incorporated sales tax of $19.00 per bump-stock-type device as part of the economic analysis. Also, the Department considered additional alternatives and inserted an OMB Circular A–4 Accounting Statement for clarity.

## VI. Statutory and Executive Order Review

### *A. Executive Orders 12866, 13563, and 13771*

Executive Orders 13563 (Improving Regulation and Regulatory Review) and 12866 (Regulatory Planning and Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs. This final rule is expected to have an impact of over $100 million in the first year of this regulatory action. Details on the estimated costs of this final rule can be found in the rule's economic analysis below.

The Attorney General has determined this rule is a ''significant regulatory action'' that is economically significant under section 3(f)(1) of Executive Order 12866 because, as discussed, the rule will have an annual effect on the economy of $100 million or more. Accordingly, the rule has been reviewed by the Office of Management and Budget. This rule is a significant regulatory action that clarifies the meaning of the statutory definition of machinegun and reflects the public safety goals of the NFA and GCA. Further, this rule is a regulatory action subject to Executive Order 13771. *See* OMB, *Guidance Implementing Executive Order 13771, Titled* ''*Reducing Regulation and Controlling Regulatory Costs*'' (Apr. 5, 2017).

This final rule is intended to interpret the definition of ''machinegun'' within the NFA and GCA such that it includes a bump-stock-type device, *i.e.,* a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

### Accounting Statement

Table 1 provides the annualized and unquantified costs and benefits to this final rule. These costs are annualized and discounted at 3% and 7%.

TABLE 1—OMB CIRCULAR A–4 ACCOUNTING STATEMENT

| Category | Primary estimate | | Minimum estimate | | Midrange estimate | | Source |
|---|---|---|---|---|---|---|---|
| **Benefits** | | | | | | | |
| Annualized monetized benefits (discount rate in parentheses) | (7%)<br>(3%) | N/A<br>N/A | (7%)<br>(3%) | N/A<br>N/A | (7%)<br>(3%) | N/A<br>N/A. | Final Rule. |
| Unquantified Benefits | • Limit access to bump-stock-type devices<br>• Prevents usage of bump-stock-type devices for criminal purposes.<br>• Intended to reduce casualties in mass shootings.<br>• Intended to help protect first responders when responding to shooting incidents. | | | | | | Final Rule. |
| **Costs** | | | | | | | |
| Annualized monetized costs (discount rate in parentheses) | (7%)<br>(3%) | $35.0 mil<br>$32.8 mil | (7%)<br>(3%) | $28.9 mil<br>$27.6 mil | (7%)<br>(3%) | $32.0 mil<br>$31.2 mil | Final Rule.<br>Final Rule. |
| Qualitative costs (unquantified) | • Potential loss of wages for employees of bump-stock-type device manufacturers<br>• Costs of advertising to inform owners of the need to dispose of their bump-stock-type devices<br>• Lost consumer surplus to users of bump-stock-type devices. | | | | | | Final Rule. |
| **Transfers** | | | | | | | |
| Annualized monetized transfers: ''on budget'' | 0 | | 0 | | 0 | | Final Rule. |
| From whom to whom? | N/A | | N/A | | N/A | | None. |
| Annualized monetized transfers: ''off-budget'' | 0 | | 0 | | 0 | | Final Rule. |
| From whom to whom? | N/A | | N/A | | N/A | | None. |

TABLE 1—OMB CIRCULAR A–4 ACCOUNTING STATEMENT—Continued

| Category | Primary estimate | Minimum estimate | Midrange estimate | Source |
|---|---|---|---|---|
| Miscellaneous analysis/category | Effects | | | Source citation |
| Effects on State, local, and/or tribal governments | None. | | | None. |
| Effects on small businesses | Significant effect on small businesses. Prepared FRFA. | | | RFA. |
| Effects on wages | None. | | | None. |
| Effects on growth | None. | | | None. |

**Need for Federal Regulatory Action**

Agencies take regulatory action for various reasons. One of the reasons is to carry out Congress's policy decisions, as expressed in statutes. Here, this rulemaking aims to apply Congress's policy decision to prohibit machineguns. Another reason underpinning regulatory action is the failure of the market to compensate for negative externalities caused by commercial activity. A negative externality can be the byproduct of a transaction between two parties that is not accounted for in the transaction. This final rule is addressing a negative externality. The negative externality of the commercial sale of bump-stock-type devices is that they could be used for criminal purposes. This poses a public safety issue that the Department is trying to address.

**Summary of Affected Population, Costs, and Benefits**

Table 2 provides a summary of the affected population and anticipated costs and benefits to promulgating this rule.

TABLE 2—SUMMARY OF AFFECTED POPULATION, COSTS, AND BENEFITS

| Category | Affected populations, costs, and benefits |
|---|---|
| Applicability | • Manufacturers of bump-stock-type devices.<br>• Employees of bump-stock-type device manufacturers.<br>• Retail sellers of bump-stock-type devices.<br>• Gun owners who own bump-stock-type devices or would have purchased them in the future. |
| Affected Population | • 1 manufacturer of bump-stock-type devices.<br>• 2,281 retailers of bump-stock-type devices.<br>• Owners and future consumers of bump-stock-type devices. |
| Total Quantified Costs to Industry, Public, and Government (7% Discount Rate). | • $245.5 million present value over 10 years.<br>• $35.0 million annualized. |
| Unquantified Costs | • Potential loss of wages for employees of bump-stock-type device manufacturers.<br>• Costs of advertising to inform owners of the need to dispose of their bump-stock-type devices.<br>• Lost consumer surplus to users of bump-stock-type devices. |
| Unquantified Benefits | • Limits access to bump-stock-type devices.<br>• Prevents usage of bump-stock-type devices for criminal purposes.<br>• Intended to reduce casualties in mass shootings.<br>• Intended to help protect first responders when responding to shooting incidents. |

**Changes from the NPRM to FR**

Table 3 presents a summary of the changes to economic effects from NPRM to final rule.

TABLE 3—CHANGES IN BUMP-STOCK-TYPE DEVICES FROM NPRM TO THE FINAL RULE

| Variables | NPRM | Final Rule | Difference | Description of Changes |
|---|---|---|---|---|
| Applicability | N/A | Employees of bump-stock-type device manufacturers. | Adding employees of bump-stock-type device manufacturers. | Per public comment, ATF included employees of manufacturers qualitatively. |
| | 2 manufacturers | 1 manufacturer | Subtracted 1 | Based on publicly available information. |
| Cost of Bump-Stock-Type Devices. | $301 | $320 | $19 | Per public comment, ATF included State and local taxes. |
| Destruction | $5.4 million | $9.4 million | $3.9 million | Change in policy. |
| Future Sales | $213.0 million | $198.9 million | $14.1 million | Change from 2 large retailers selling bump-stock-type devices to 1. |
| Government Cost | $0 | $1.3 million | $1.3 million | Change in policy. |

TABLE 3—CHANGES IN BUMP-STOCK-TYPE DEVICES FROM NPRM TO THE FINAL RULE—Continued

| Variables | NPRM | Final Rule | Difference | Description of Changes |
|---|---|---|---|---|
| **Alternatives** | | | | |
| Amnesty or "grandfathering". | This alternative was rejected because since the passage of 18 U.S.C. 922(o), amnesty registration of machineguns is not legally permissible | | | Per public comment. |
| Licensing and background checks. | This alternative was rejected because only Congress can add a new class of firearm and impose licensing or acquisition requirements on them. | | | Per public comment. |
| Remuneration | This alternative was rejected because only Congress has the authority to offer monetary compensation. | | | Per public comment. |
| Medical exemption | This alternative was rejected because neither the NFA nor the GCA provides for medical exemptions to acquire a firearm. Only Congress can add medical exemptions | | | Per public comment. |
| Future production and sales. | This alternative was rejected because ATF does not have the authority to restrict only the future manufacture or sale of bump-stock-type devices | | | Per public comment. |
| Quota | This alternative was rejected because ATF lacks authority to implement it, as all devices determined to be machineguns are prohibited across the board | | | Per public comment. |
| Instituting a tax | This alternative was rejected because excise tax is regulated by statute and only Congress can determine the amount of excise tax on an item | | | Per public comment. |
| Improved security at mass events. | This alternative was rejected because improved security must be paired with reasonable regulations to increase public safety and reduce violent crime | | | Per public comment. |
| Congressional legislation | This alternative was rejected because ATF has been delegated authority to issue rules to implement the NFA and GCA. This action will not prevent Congress from taking action on bump-stock-type devices | | | Per public comment. |
| Leave to States to regulate | This alternative was rejected because ATF prioritizes public safety and preventing crime. This action will not prevent States from taking action on bump-stock-type devices | | | Per public comment. |
| Improved law enforcement | This alternative was rejected because training and equipment must be paired with reasonable regulatory efforts to increase public safety and reduce violent crime | | | Per public comment. |

## Affected Population

The populations affected by this rule are manufacturers of bump-stock-type devices, employees of bump-stock-type device manufacturers, retailers who sell them either in brick-and-mortar stores or online, and individuals who have purchased or would have wanted to purchase bump-stock-type devices. The number of entities and individuals affected are as follows:

- 1 manufacturer
- 2,281 retailers
- An uncertain number of individuals who have purchased bump-stock-type devices or would have purchased them in the future [15]
- An estimated 22 employees who were employed by one manufacturer, based on public comments [16]

Because many bump-stock-type devices—including those ATF addressed in classification letters between 2008 and 2017—have not been subject to regulation under the GCA, ATF does not keep track of manufacturers or retailers of bump-stock-type devices, nor does ATF keep track or maintain a database of individuals who have purchased bump-stock-type devices. Therefore, the affected population of manufacturers and retailers is an estimate and based on publicly available information and, with respect to retailers who are also Federal firearms licensees (FFLs), is also based on ATF's records in the Federal Firearms Licensing System.

Based on publicly available information and comments on the NPRM, ATF estimates that since 2010, as many as seven domestic bump-stock-type device manufacturers have been in the marketplace, but due to patent infringement litigation, only three remained in the market. However, it appears two have ceased manufacturing bump-stock-type devices since publication of the NPRM due their inability to obtain liability insurance.

For the estimate of the number of retailers, ATF filtered all FFLs for a list of potential sellers. While there are approximately 80,000 FFLs currently licensed, only certain types of FFLs sell firearms to the public. ATF first removed FFLs that do not sell firearms to the public. Next, since not all FFLs sell firearm accessories, ATF needed to estimate the number that do sell accessories. ATF assumed that FFLs that are likely to sell bump-stock-type devices also have websites. ATF ran a query on the FFL database and found that of those that sell firearms to the public, 2,270 have websites. Because sellers of firearm accessories do not necessarily sell firearms, ATF also performed an online search and found an additional 11 retailers who sell firearm accessories, but not firearms. Adding these two totals together, ATF estimates that there are 2,281 retailers of bump-stock-type devices.

Because there are no records of individuals who have purchased firearm accessories, ATF does not have an estimated number of individuals who will be affected by this final rule. Although ATF lacks data on the number

[15] Note that many commenters assumed that each person who owns a bump-stock-type device owns one device. This overestimates the number of owners because owners of such devices may own more than one, as evidenced by the Las Vegas shooter, who allegedly owned at least 12.

[16] *Regulations.gov, Docket ID: ATF–2018–0002–16668,* available at *https://www.regulations.gov/document?D=ATF-2018-0002-16668* (last visited Nov. 16, 2018).

of individuals who have purchased bump-stock-type devices, ATF has some information from one manufacturer and four retailers on the volume of sales of such devices. Based on these reported amounts, ATF estimates that the number of bump-stock-type devices that were purchased during the 8-year period beginning in 2010 ranges from 35,000 per year as a low estimate to 75,000 per year as the high and primary estimate. ATF used a public commenter's estimate of 400,000 total devices in circulation as a third estimate. For further information on the methodology of these estimates, please review the analysis regarding ''Costs'' below.

**Costs**

There are four primary sources of costs from this rule. First, for owners of bump-stock-type devices, there will be a lost value from no longer being able to possess or use the devices. Second, there will be a lost value from future sales of the devices. Third, there is a disposal cost associated with the need to destroy the devices or abandon them at the nearest ATF office. Finally, there will be a potential loss of wages from employees losing jobs from loss of manufacturing; however, the extent to which they will be unable to find replacement jobs is speculative.

*Manufacturing and Startup Cost*

Commenters suggested that ATF overlooked the capital expenses to start up a company to manufacture bump-stock-type devices. The Department considered the capital expenses for manufacturers. However, in light of the Las Vegas shooting and potential crowding of additional manufacturers, the Department determined that the potential for manufacturers to continue business in a potentially saturated market was doubtful. Furthermore, the Department has already calculated the foregone return on investment when the Department considered foregone production, so accounting for capital expenses would be double counting of expenditures. Therefore, the viability that these businesses will be successful is speculative and the capital expenses that they incurred are a sunk cost for those who put in the expense.

*Cost to the Public for Loss of Property*

One reason individuals purchase bump-stock-type devices is so that they can simulate automatic firing on a semiautomatic firearm. Commenters noted a variety of purposes for which bump-stock-type devices have been advertised and used, including for recreation and fun, assisting persons with mobility issues in firing quickly, self-defense, killing invasive pig species, and target practice (although, as some commenters observed, bump-stock-type devices impede firing accuracy). After implementation of this final rule, bump-stock-type devices that meet the definition of ''machinegun'' under the NFA and GCA cannot be lawfully possessed because the pertinent provision of the GCA, 18 U.S.C. 922(o), prohibits persons from possessing a machinegun unless it was lawfully possessed before the effective date of section 922(o). Bump-stock-type devices currently possessed by individuals will have to be destroyed or abandoned prior to the effective date of this regulation.

The lost value from no longer being able to use or purchase bump-stock-type devices will depend on the volume of sales in the market and the value that consumers place on the devices. ATF has limited information about the market for bump-stock-type devices. ATF first developed an estimate of the number of bump-stock-type devices in the marketplace based on information on retail sales provided in response to the ANPRM. One ANPRM commenter estimated that more than 400,000 bump-stock-type devices may have been sold. Based on publicly available information, ATF estimates that in the first two years that bump-stock-type devices were in the market, approximately 35,000 were sold per year.[17] However, after 2011, other manufacturers entered the market and there is no available information regarding the total number of bump-stock-type devices manufactured. ATF is using publicly available information on manufacturing and combining it with the information on retail sales to estimate a range of the number of bump-stock-type devices in the marketplace.

One retailer stated that it sold an average of 4,000 to 5,000 bump-stock-type devices per year.[18] One commenter indicated that one retailer sold 3,800 bump-stock-type devices annually, one sold 60 per year, and one sold approximately 5–10 per year.[19] For the purposes of this regulatory analysis (RA), ATF assumes that a large retailer has sold 4,400, a midrange retailer has sold 60, and a small retailer has sold 8.[20] For the purposes of this analysis, ATF assumes the number of retailers by size are as follows:

- 4 large * 4,400 annual sales
- 755 midrange * 60 annual sales
- 1,511 small * 8 annual sales

The number of large retailers is a known number. As stated in the Affected Population section above, based on ATF's internal database and online research, the remaining number of retailers is 2,270. For the purposes of this RA, ATF estimated that one-third of the remaining retailer population are midrange retailers, and the remaining 1,511 are small retailers. Using these estimated numbers of retailers and annual sales by size of retailer, ATF estimated annual sales of about 75,000 [(4 * 4,400) + (755 * 60) + (1,511 * 8)].

ATF next developed an estimate of the number of bump-stock-type devices in the United States based on information about the number of bump-stock-type devices manufactured. Based on publicly available information, ATF estimates that approximately 35,000 bump-stock-type devices were sold in 2010.[21] Only in 2012 did other manufacturers enter the marketplace. For the purposes of this RA, ATF assumes that in the first two years of production, the one manufacturer produced the same 35,000 in years 2010 and 2011. ATF has two sets of production estimates. Because no information is otherwise known about the production of bump-stock-type devices, ATF assumes that the low estimate of annual bump-stock-type device production is a constant 35,000, based on the one data point. As stated earlier, a public commenter provided an estimate of 400,000 bump-stock-type devices currently in circulation. To account for how these were purchased over the last 8 years, ATF also assumed the same 35,000 production in the first 2 years, but spread out the remaining 330,000 over the remaining 6 years, or about 55,000 per year. However, there were public comments that stated how many bump-stock-type devices were sold by that retailer. Using the retail sales information, ATF developed a third, higher estimate reflecting that when the other manufacturers entered the market, the number of bump-stock-type devices sold on the market annually could have been 75,000.

The high estimate is ATF's primary estimate because ATF knows that there

[17] Donnie A. Lucas, *Firing Up Some Simple Solutions,* Albany News (Dec. 22, 2011), *http://www.thealbanynews.net/archives/2443.*

[18] Based on an internal survey of large retailers.

[19] *Regulations.gov, Docket ID: ATF–2018–0001–27509, https://www.regulations.gov/document?D=ATF-2018-0001-27509* (last visited on Nov. 16, 2018); *Regulations.gov, Docket ID: ATF–2018–0001–0433, https://www.regulations.gov/document?D=ATF-2018-0001-0433* (last visited on Nov. 16, 2018); *Regulations.gov, Docket ID: ATF–2018–0001–0128, https://www.regulations.gov/document?D=ATF-2018-0001-0128* (last visited on Nov. 16, 2018).

[20] For a large retailer the average sales were 4,400 = (3,800 + 5,000)/2. For a small retailer, the average sales were 8 = (5 + 10)/2.

[21] Lucas, *supra* note 17.

was an increase in production starting in 2012. In 2012, there were other manufacturers who entered the market, and the first manufacturer increased production at some point thereafter. Furthermore, the primary estimate includes information provided by retailers as a more comprehensive outlook on the overall production numbers. For the purposes of this analysis, ATF assumes that both the increase in production and the market entry of other manufacturers all occurred in 2012. Table 4 provides the breakdown of production for the low estimate, public comment estimate, and primary estimate.

TABLE 4—NUMBER OF BUMP-STOCK-TYPE DEVICES PRODUCED, BASED ON MANUFACTURER AND RETAIL SALES

| Year | Low estimate | Public comment estimate | Primary estimate |
|---|---|---|---|
| 2010 | 35,000 | 35,000 | 35,000 |
| 2011 | 35,000 | 35,000 | 35,000 |
| 2012 | 35,000 | 55,000 | 75,000 |
| 2013 | 35,000 | 55,000 | 75,000 |
| 2014 | 35,000 | 55,000 | 75,000 |
| 2015 | 35,000 | 55,000 | 75,000 |
| 2016 | 35,000 | 55,000 | 75,000 |
| 2017 | 35,000 | 55,000 | 75,000 |
| Total | 280,000 | 400,000 | 520,000 |

In other words, the number of bump-stock-type devices held by the public could range from about 280,000 to about 520,000.

ATF does not know the production cost of bump-stock-type devices, but for the purposes of this RA, ATF uses the retail sales amounts as a proxy for the total value of these devices. For devices that have already been sold, there are two countervailing effects that affect the value of the devices. There may have been some depreciation of the devices since they were originally purchased, resulting in a value somewhat reduced from the retail price. On the other hand, some consumers may have been willing to pay more than the retail price for a bump-stock-type device, and for these individuals the devices would have a higher valuation than the retail price. Both of these effects are difficult to estimate, and here ATF assumes that the retail sales price is a reasonable proxy for the value of the devices.

The primary manufacturer of bump-stock-type devices sells them at a price of $179.95 to $425.95.[22] For the purposes of this RA, ATF estimates that the average sale price, including State and local taxes, for these bump-stock-type devices was $320.00 during the first two years they were sold. In 2012, at least one other manufacturer entered the market and started selling its devices at the rate of $99.99, making the overall prices for these devices lower.[23] For the purposes of this RA, ATF assumes that the average sale price, including State and local taxes, for bump-stock-type devices from 2012 to 2017 was $213.00. Based on these costs, multiplied by the number of bump-stock-type devices in the market, Table 5 provides the sales value that the public has spent on these devices over the course of the last eight years.

TABLE 5—AMOUNT SPENT ON BUMP-STOCK-TYPE DEVICES

[Undiscounted]

| Year | Low estimate | Midrange estimate | Primary |
|---|---|---|---|
| 2011 | $11,214,896 | $11,214,896 | $11,214,896 |
| 2012 | 11,214,896 | 11,214,896 | 11,214,896 |
| 2013 | 7,470,511 | 11,739,374 | 16,008,237 |
| 2014 | 7,470,511 | 11,739,374 | 16,008,237 |
| 2015 | 7,470,511 | 11,739,374 | 16,008,237 |
| 2016 | 7,470,511 | 11,739,374 | 16,008,237 |
| 2017 | 7,470,511 | 11,739,374 | 16,008,237 |
| Total | 59,782,345 | 81,126,661 | 102,470,977 |

ATF estimates that the total, undiscounted amount spent on bump-stock-type devices was $102.5 million. While the retail prices of these bump-stock-type devices remained constant over the eight years of sales, these purchases occurred over time; therefore, ATF presents the discounted value at 3% and 7% in Table 6 to account for the present value of these purchases.

[22] Slide Fire AR–15 Bump Fire Stocks (archived page on Jan. 28, 2017), *https://web.archive.org/web/20170128085532/http://www.slidefire.com/products/ar-platform* (last visited Nov. 28, 2018).

[23] Bump Fire Systems (archived page on Feb. 21, 2015), *https://web.archive.org/web/20150221050223/http://bumpfiresystems.com/* (last visited Nov. 28, 2018).

TABLE 6—THE AMOUNT SPENT PURCHASING BUMP-STOCK-TYPE DEVICES, DISCOUNTED AT 3% AND 7%

| Year | Undiscounted | 3% | 7% |
|---|---|---|---|
| 2011 | $11,214,896 | $13,001,138 | $15,729,472 |
| 2012 | 11,214,896 | 12,622,464 | 14,700,441 |
| 2013 | 16,008,237 | 17,492,633 | 19,610,779 |
| 2014 | 16,008,237 | 16,983,139 | 18,327,831 |
| 2015 | 16,008,237 | 16,488,484 | 17,128,814 |
| 2016 | 16,008,237 | 16,008,237 | 16,008,237 |
| 2017 | 16,008,237 | 15,541,978 | 14,960,969 |
| Total | 102,470,977 | 108,138,073 | 116,466,542 |
| Annualized Cost | ..... | 15,404,959 | 19,504,391 |

Because these purchases occurred in the past, ATF's discount years start at -5 and increase to 0 to account for the Executive Order 13771 standard that costs be presented in 2016 dollars. With these assumptions, ATF estimates that the annualized, discounted amount spent on bump-stock-type devices was $15.4 million and $19.5 million at 3% and 7%, respectively.

Based on the same discounting formula, ATF estimates that the total undiscounted cost for the low estimate is $59.7 million, and the total discounted values are $64.1 million and $70.6 million at 3% and 7%, respectively. The annualized values for the low estimates of the total number of bump-stock-type devices sold are $9.1 million and $11.8 million at 3% and 7%, respectively. For the 400,000-unit estimate provided by the public commenter, the total undiscounted amount is $81.1 million, and the total discounted values would be $86.1 million and $93.5 million at 3% and 7%, respectively. The annualized values for the 400,000-unit sales estimate are $12.3 million and $15.7 million at 3% and 7%, respectively.

*Forgone Future Production and Sales*

ATF has estimated the lost production and lost sales that will occur in the 10 years after the implementation of this final rule. These estimates take into account lost revenue from manufacturers and retailers. ATF does not parse out manufacturing and retail sales, in order to limit double counting. In order to do this, ATF needed to predict the number of devices that would have been sold in the future in the absence of a rule. Such a prediction should take account of recent expected changes in the demand for and supply of bump-stock-type devices. For example, based on a survey, three of the four known, large former retailers of bump-stock-type devices no longer sell bump-stock-type devices as a result of the Las Vegas shooting, nor do they intend to sell them in the future. Moreover, while ATF has estimated the number of bump-stock-type devices manufactured since 2010, ATF is without sufficient information to estimate the number of individuals who were interested in acquiring bump-stock-type devices prior to the Las Vegas shooting but would no longer want them due to the shooting.

Another recent change affecting individuals' future purchases of bump-stock-type devices is that certain States have already banned such devices. These States are California, Connecticut, Delaware, Florida, Hawaii, Maryland, Massachusetts, New Jersey, Rhode Island, Vermont, and Washington.[24] The effect of States' bans on individuals' future purchases of bump-stock-type devices should not be attributed to this final rule since these reductions in purchases will happen with or without the rule. However, ATF was unable to quantify the impact of States' bans and thus was unable to account for the future effects of these bans in the estimate of the effects of the final rule.

Based on previously mentioned comments from large retailers, ATF expects that, even in the absence of this rule, some retailers would not sell bump-stock-type devices in the future. In order to estimate the expected future reduction in demand for bump-stock-type devices as a result of the Las Vegas shooting, ATF assumes that the reduction of sales by large retailers that has already occurred would be a reasonable estimate of the future reduction of sales overall that would occur in the absence of this rule. In the NPRM, ATF estimated that two of the four large retailers would remain in the market to sell bump-stock-type devices. 83 FR at 13452. Since then, one of these remaining retailers merged with one of the large retailers that opted not to sell bump-stock-type devices, resulting in only one large retailer remaining in the market. For the purposes of this regulatory analysis, it is estimated that the one large retailer that would otherwise intend to keep selling bump-stock-type devices sells 4,400 of such devices annually. Removing the effects of these three large retailers from the future market reduces ATF's primary estimate of 74,988 in past annual production to an estimate of 62,084 (= 75,284 − 13,200) in annual sales that would have occurred in the future in the absence of this rule. Table 7 provides the estimated breakdown of lost production and sales forgone due to this rule.

TABLE 7—FORGONE PRODUCTION AND SALES OF FUTURE BUMP-STOCK-TYPE DEVICES

| Year | Number of bump-stock-type devices | Undiscounted | 3% | 7% |
|---|---|---|---|---|
| 2018 | 62,084 | $19,893,303 | $19,313,886.10 | $18,591,871.67 |
| 2019 | 62,084 | 19,893,303 | 18,751,345.73 | 17,375,581.00 |
| 2020 | 62,084 | 19,893,303 | 18,205,190.03 | 16,238,860.74 |

[24] Cal. Penal Code sections 16930, 32900 (2018); 2018 Conn. Acts 18–29 (Reg. Sess.); Del. Code Ann. tit. 11, section 1444(a)(6) (2018); Fla. Stat. section 790.222 (2018); Haw. Rev. Stat. section 134–8.5 (2018); Md. Code. Ann., Crim. Law section 4–305.1 (2018); Mass. Gen. Laws ch. 140, section 121, 131 (2018); N.J. Stat. Ann. sections 2C:39–3(*l*), 2C:39–9(j); 11 R.I. Gen. Laws section 11–47–8(d) (2018); Vt. Stat. Ann. tit. 13, section 4022 (2018); 2018 Wash. Sess. Laws ch. 7, pp. 196–220.

TABLE 7—FORGONE PRODUCTION AND SALES OF FUTURE BUMP-STOCK-TYPE DEVICES—Continued

| Year | Number of bump-stock-type devices | Undiscounted | 3% | 7% |
|---|---|---|---|---|
| 2021 | 62,084 | 19,893,303 | 17,674,941.77 | 15,176,505.37 |
| 2022 | 62,084 | 19,893,303 | 17,160,137.64 | 14,183,649.88 |
| 2023 | 62,084 | 19,893,303 | 16,660,327.81 | 13,255,747.55 |
| 2024 | 62,084 | 19,893,303 | 16,175,075.54 | 12,388,549.11 |
| 2025 | 62,084 | 19,893,303 | 15,703,956.84 | 11,578,083.28 |
| 2026 | 62,084 | 19,893,303 | 15,246,560.04 | 10,820,638.58 |
| 2027 | 62,084 | 19,893,303 | 14,802,485.47 | 10,112,746.34 |
| Total | | 198,933,027 | 169,693,906.98 | 139,722,233.51 |
| Annualized Cost | | | 24,173,981.19 | 23,398,969.82 |

Based on these estimates, ATF estimates that the undiscounted value of forgone future sales over 10 years is $198.9 million, undiscounted, or $24.2 million and $23.4 million, annualized and discounted at 3% and 7%.

Disposal

This final rule requires the destruction of existing bump-stock-type devices. The cost of disposal has several components. For individuals who own bump-stock-type devices, there is a cost for the time and effort to destroy the devices or ensure that they are destroyed by another party. For retailers, wholesalers, and manufacturers, there is a cost of the time and effort to destroy or ensure the destruction of any devices held in inventory. In addition, this final rule incorporates the option of abandoning bump-stock-type devices at an ATF office. Based on the response from commenters, this cost is taken into consideration under the foregone sales section.

Individuals who have purchased bump-stock-type devices prior to the implementation of this rule must destroy the devices themselves prior to the effective date of the rule or abandon them at their local ATF office. Options for destroying the devices include melting, crushing, or shredding in a manner that renders the device incapable of ready restoration. Since the majority of bump-stock-type devices are made of plastic material, individuals can use a hammer to break apart the devices and throw the pieces away. Other destruction options that ATF has historically accepted include torch cutting or sawing the device in a manner that removes at least ¼ inch of material for each cut and completely severs design features critical to the functionality of the device as a bump-stock-type device.

Current possessors are encouraged to undertake destruction of the devices. However, current possessors also have the option to abandon bump-stock-type devices at the nearest ATF office. Current possessors of bump-stock-type devices will have until the effective date of the rule (90 days from date of publication in the **Federal Register**) to comply. Additional information on the destruction of bump-stock-type devices will be available on *www.atf.gov.*

Based on comments received on the ANPRM, unsellable inventory could be worth approximately $35,000 per large retailer. One commenter, assumed to be a large retailer, stated that its gross sales were $140,000. Another commenter assumed to be a midrange retailer had gross sales of $18,000. No known sales were reported for a small retailer. Based on the proportion of sales among the large, midrange, and small retailers, ATF estimates that the amounts in existing inventory for each type of retailer are as follows:

- Large retailer: $35,000;
- midrange retailer: $4,500; and
- small retailer: $74.[25]

There were no comments on the NPRM about these assumptions or the methodology used based on the ANPRM comments. Therefore, the analysis used to determine the cost of unsellable inventory remains the same for this final rule.

The commenter assumed to be a large retailer also commented that the opportunity cost of time needed to destroy existing inventory will be approximately $700. ATF's subject matter experts estimate that a retailer could use a maintenance crew to destroy existing inventory. To determine the hourly time needed to destroy existing inventory, ATF used the $700 reported amount, divided by the loaded wage rate of a building cleaning worker. ATF subject matter experts also suggest that existing packers would be used for a midrange retailer and the minimum wage would be used for a small retailer. A multiplier of 1.43 was applied to unloaded wage rates to account for fringe benefits.[26] Table 9 provides the wages used for this analysis.

TABLE 9—WAGE SERIES TO DESTROY EXISTING INVENTORY

| Wage series | Series code | Unloaded wage rate | Loaded wage rate | Source |
|---|---|---|---|---|
| Individual | | $13.60 | $13.60 | *https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20Travel%20Time%20Guidance.pdf.* |
| Minimum Wage Rate | Min Wage | 7.25 | 10.40 | *https://www.bls.gov/opub/reports/minimum-wage/2016/home.htm.* |
| Packers, Packagers, and Handlers. | 53–7064 | 11.74 | 16.84 | *https://www.bls.gov/oes/2016/may/oes537064.htm.* |
| Retail Salespersons | 41–2031 | 13.07 | 18.75 | *https://www.bls.gov/oes/2016/may/oes412031.htm.* |

[25] Midrange: $4,500 = ($18,000/$140,000) * $35,000. Small: $74 = (8/3,800) * $35,000.

[26] BLS Series ID CMU2010000000000D, CMU2010000000000P (Private Industry Compensation = $32.35)/(Private Industry Wages and Salaries = $22.55) = 1.43. BLS average 2016. U.S. Bureau of Labor Statistics, *https://beta.bls.gov/dataQuery/find?fq=survey:[cm]&s=popularity:D.*

TABLE 9—WAGE SERIES TO DESTROY EXISTING INVENTORY—Continued

| Wage series | Series code | Unloaded wage rate | Loaded wage rate | Source |
|---|---|---|---|---|
| Building Cleaning Workers, All Other. | 37–2019 | 14.88 | 21.34 | *https://www.bls.gov/oes/2016/may/oes372019.htm.* |

Based on the estimated wages and reported opportunity cost of time, ATF estimates that it will take a large retailer 32.8 hours, a midrange retailer 0.45 hours, and a small retailer 0.25 hours to destroy existing inventory. Table 10 provides the per-retailer estimated opportunity cost of time.

TABLE 10—OPPORTUNITY COST OF TIME TO DESTROY EXISTING INVENTORY

| Population | Incremental cost | Hourly burden | Opportunity cost of time |
|---|---|---|---|
| Individual | $13.60 | 0.25 | $3.40 |
| Retailer (Large) | 21.34 | 32.8 | 699.95 |
| Retailer (Midrange) | 16.84 | 0.45 | 7.58 |
| Retailer (Small) | 19.51 | 0.25 | 4.88 |

As stated earlier, ATF estimates that there are 520,000 bump-stock-type devices already purchased by the public. For the purposes of this analysis, we estimate the following calculations to destroy bump-stock-type devices:

- Individual: $1.3 million = (1.8 million * 75%)
- Retailer (Large): 3 retailers * $699.95 opportunity cost of time + ($35,000 inventory * 75%)
- Retailer (Midrange): 569 retailers * $7.58 opportunity cost of time + ($4,500 inventory * 75%)
- Retailer (Small): 1139 retailers * $4.88 opportunity cost of time + ($74 inventory * 75%)

Based on the opportunity cost of time per bump-stock-type device, and the estimated opportunity cost of time per retailer, ATF provides the cost to destroy all existing bump-stock-type devices in Table 11.

TABLE 11—COST OF EXISTING INVENTORY AND OPPORTUNITY COST OF TIME TO DESTROY EXISTING DEVICES BY INDIVIDUAL AND RETAILER SIZE

| | Original cost | Reduced cost | Net change |
|---|---|---|---|
| Individual | $1,768,000 | $1,326,000 | $442,000 |
| Retailer (Large) | 142,800 | 80,850 | 61,950 |
| Retailer (Midrange) | 3,421,252 | 1,924,687 | 1,496,565 |
| Retailer (Small) | 116,279 | 66,176 | 50,103 |
| Total Disposal Cost | 5,448,330 | 3,397,713 | 2,050,618 |

For those abandoning bump-stock-type devices, we estimate that 130,000 individuals, 1 large retailer, 138 midrange retailers, and 139 small retailers will abandon them at their nearest ATF office. Table 12 provides the cost of gas, travel time, and mileage to abandon them.

TABLE 12—COST OF GAS, TRAVEL TIME, AND MILEAGE

| Cost item | Rate | Source |
|---|---|---|
| Gas Consumption | $0.545 | *https://www.gsa.gov/travel-resources.* |
| Hours of Weekend Travel Time | 1.556 | *https://nhts.ornl.gov/2009/pub/stt.pdf.* |
| Miles Traveled | 7 | *https://nhts.ornl.gov/2009/pub/stt.pdf.* |

Assuming these devices will be abandoned during leisure hours, ATF uses the leisure wage rate of $13.60. ATF estimates that the cost to travel to ATF offices will be $24.98 per trip = (13.60 leisure wage * 1.556 hours of weekend travel time) + ($0.545 gas consumption * 7 miles traveled). For the purposes of this analysis, we estimate the following calculations to destroy bump-stock-type devices:

- Individual: 520,000 bump-stock-type devices * 25% * $24.98
- Retailer (Large): (1 retailer * $24.98 travel cost) + ($35,000 inventory * 25%)
- Retailer (Midrange): (190 retailers *$24.98 travel cost) + ($4,500 inventory * 25%)
- Retailer (Small): (379 retailers * $24.98 travel cost) + ($74 inventory * 75%)

Table 13 provides the additional cost of abandoning bump-stock-type devices at ATF offices.

TABLE 13—DISPOSAL COST TO ABANDON BUMP-STOCK-TYPE DEVICES AT ATF OFFICES

| | |
|---|---|
| Individual | $3,247,400 |
| Retailer (Large) | 8,775 |
| Retailer (Midrange) | 1,375,025 |
| Retailer (Small) | 1,373,974 |
| Total Cost to Abandon | 6,005,174 |

We treat all costs of disposal of existing devices owned by individuals or held in inventory by retailers or manufacturers as if they occur in 2018. Therefore, the disposal costs of the rule in 2018 would include the total undiscounted value of existing stock of bump-stock-type devices and the total cost of disposal from Tables 11 and 13 for the total disposal cost of $9.4 million.

Government Costs

Because ATF allows bump-stock-type device owners to abandon these devices at ATF offices, ATF incorporates the government cost to dispose of these devices. ATF estimates that an agent at a GS–13 level will dispose of the device in 0.25 hours at a loaded wage rate of $41.07 per hour.[27] ATF anticipates that it will cost $1.3 million to destroy these devices in-house.

Overall, ATF estimates that the total cost of this final rule would be $312.1 million over a 10-year period of future analysis. This cost includes the first-year cost to destroy all existing bump-stock-type devices, including unsellable inventory and opportunity cost of time. Table 14 provides the 10-year cost of this final rule.

TABLE 14—10-YEAR COST OF FINAL RULE

| Year | Undiscounted | 3% | 7% |
|---|---|---|---|
| 2018 | 133,101,942 | 129,225,186 | 124,394,338 |
| 2019 | 19,893,303 | 18,751,346 | 17,375,581 |
| 2020 | 19,893,303 | 18,205,190 | 16,238,861 |
| 2021 | 19,893,303 | 17,674,942 | 15,176,505 |
| 2022 | 19,893,303 | 17,160,138 | 14,183,650 |
| 2023 | 19,893,303 | 16,660,328 | 13,255,748 |
| 2024 | 19,893,303 | 16,175,076 | 12,388,549 |
| 2025 | 19,893,303 | 15,703,957 | 11,578,083 |
| 2026 | 19,893,303 | 15,246,560 | 10,820,639 |
| 2027 | 19,893,303 | 14,802,485 | 10,112,746 |
| Total | 312,141,666 | 279,605,207 | 245,524,700 |
| Annualized Cost | ..... | 32,778,260 | 34,957,194 |

The total 7% discounted cost is $249.6 million, and the annualized discounted costs would be $32.8 million and $35.0 million annualized at 3% and 7% respectively.

**Cost Savings**

ATF did not calculate any cost savings for this final rule.

**Benefits**

As reported by commenters, the purpose of this rule is to amend ATF regulations to clarify that bump-stock-type devices are ''machineguns'' as defined by the NFA and GCA. Additionally, a desired outcome of this rule is increased public safety. While there has been only one known shooting involving bump-stock-type devices, banning such devices could result in reduced casualties as a consequence of reducing incidents of shootings involving a weapon fitted with a bump-stock-type device. A ban also could result in less danger to first responders when responding to incidents, because it prevents shooters from using devices that allow them to shoot semiautomatic firearms automatically.

**Alternatives**

Alternative 1—No change alternative. This alternative would leave the regulations in place as they currently stand. Since there would be no changes to regulations, there would be no cost, savings, or benefits to this alternative.

Alternative 2—Patronizing a shooting range. Individuals wishing to experience shooting a ''full-auto'' firearm could go to a shooting range that provides access to lawfully registered ''pre-1986'' machineguns to customers, where the firearm remains on the premises and under the control of the shooting range. ATF does not have the information to determine which, where, or how many gun ranges provide such a service and is therefore not able to quantify this alternative.

Alternative 3—Opportunity alternatives. Based on public comments, individuals wishing to replicate the effects of bump-stock-type devices could also use rubber bands, belt loops, or otherwise train their trigger finger to fire more rapidly. To the extent that individuals are capable of doing so, this would be their alternative to using bump-stock-type devices.

Public comments from the NPRM suggested other alternatives:

1. Provide amnesty or ''grandfathering.'' This alternative was rejected because since the passage of 18 U.S.C. 922(o), amnesty registration of machineguns is not legally permissible; all devices determined to be machineguns are prohibited except as provided by exceptions established by statute.

2. Provide licensing and background checks. This alternative was rejected because only Congress can add a new class of firearm to the GCA and impose licensing or acquisition requirements on it.

3. Provide compensation for the destruction of the devices. This alternative was rejected because only Congress has the authority to offer monetary compensation.

4. Provide a medical exemption. This alternative was rejected because neither the NFA nor the GCA provides for medical exemptions to acquire an otherwise prohibited firearm. Only Congress can add medical exemptions.

5. Prohibit only future manufacture and sales. This alternative was rejected because ATF does not have the authority to restrict only the future manufacture or sale of bump-stock-type devices.

6. Provide a quota. This alternative was rejected because ATF lacks authority to implement it, as all devices determined to be machineguns are prohibited across the board.

7. Institute a tax. This alternative was rejected because ATF lacks authority to establish excise taxes.

8. Improve security at mass events. This alternative was rejected because improved security must be paired with reasonable regulations to increase public safety and reduce violent crime.

9. Congressional legislation. This alternative was rejected because issuance of this rule will not prevent Congress from taking action on bump-stock-type devices.

10. Leave the issue to the States. This alternative was rejected because ATF is responsible for implementing the NFA and GCA, Federal laws designed to maintain public safety. Issuance of this rule will not

[27] Office of Personnel Management, *Salary Table 2018–GS, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/GS_h.pdf.*

prevent States from taking action on bump-stock-type devices.

11. Improved law enforcement capabilities. This alternative was rejected because while training and equipment may assist law enforcement efforts, they are not a substitute for the Department's exercise of its public safety responsibility of interpreting the NFA and GCA appropriately.

*B. Executive Order 13132*

This regulation will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132 (Federalism), the Attorney General has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*C. Executive Order 12988*

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

*D. Regulatory Flexibility Act (RFA)*

Summary of Findings

ATF performed a Final Regulatory Flexibility Analysis of the impacts on small businesses and other entities from the final rule. Based on the information from this analysis, ATF found:

- It is estimated that the remaining manufacturer will go out of business;
- There are 2,281 retailers, of which most are estimated to be small;
- There are no relevant government entities.

Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (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.'' Pub. L. 96–354, section 2(b), 94 Stat. 1164 (1980).

Under the RFA, the agency is required to consider if this rule will have a significant economic impact on a substantial number of small entities. Agencies must perform a review to determine whether a rule will have such an impact. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

Under the RFA (5 U.S.C. 604(a)), the final regulatory flexibility analysis must contain:

- A statement of the need for, and objectives of, the rule;
- A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;
- A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency that affect the impact on small entities was rejected.

The RFA covers a wide range of small entities. 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. 5 U.S.C. 601(3)–(6). ATF determined that the rule affects a variety of large and small businesses (see the section below titled ''A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available''). Based on the requirements above, ATF prepared the following regulatory flexibility analysis assessing the impact on small entities from the rule.

**A Statement of the Need for, and Objectives of, the Rule**

Agencies take regulatory action for various reasons. One of the reasons is to carry out Congress's policy decisions, as expressed in statutes. Here, this rulemaking aims to apply Congress's policy decision to prohibit machineguns. Another reason underpinning this regulatory action is the failure of the market to compensate for negative externalities caused by commercial activity. A negative externality can be the byproduct of a transaction between two parties that is not accounted for in the transaction. This final rule is addressing a negative externality. The negative externality of the commercial sale of bump-stock-type devices is that they could be used for criminal purposes. This poses a public safety issue, which the Department is trying to address.

**A Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments**

Several commenters suggested that this rule will devastate companies that manufacture bump-stock-type devices and the local communities that they employ. The Department concurs that this rule will prevent manufacturers of bump-stock-type devices from producing and selling them. Based on publicly available information, the Department estimates that there is only one manufacturer actively producing and selling such devices. For the purposes of this rule, it is considered a small business. Due to the requirements of the NFA, there are no alternatives that are scalable by business size for this rule.

Some commenters suggested that the RFA requires agencies to consider the innovative impacts that small businesses have on the firearms market. ATF interprets the RFA's usage of ''innovation'' in terms of regulatory approaches that the agency could use to allow for small businesses to compete against non-small businesses. As there are no non-small businesses that manufacture bump-stock-type devices, ATF was unable to determine any regulatory approaches that would allow small manufacturers to compete with non-small businesses with respect to manufacturing bump-stock-type devices.

**The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of Any Change Made to the Proposed Rule in the Final Rule as a Result of the Comments**

There were no comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule. Therefore, no

changes were made to the proposed rule in the final rule as a result of comments.

**A Description of and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available**

This rule would affect primarily manufacturers of bump-stock-type devices, FFLs that sell bump-stock-type devices, and other small retailers of firearm accessories that have invested in the bump-stock-type device industry. Based on publicly available information, there is one manufacturer affected. Of the known retailers, the large retailers do not intend to continue selling bump-stock-type devices. There may be some small retailers that would have intended to continue selling these devices had this final rule not been promulgated and would thus be affected by this final rule. Based on the information from this analysis, ATF found:

- There is 1 manufacturer who is likely to be a small entity;
- There are 2,270 retailers who are likely to be small entities;
- There are no government jurisdictions affected by this final rule; and
- There are no nonprofits found in the data.

**A Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record**

There are no reporting or recordkeeping requirements for this final rule. The only relevant compliance requirement consists of disposing of all existing inventory of bump-stock-type devices for small entities that carry them. There would not be any professional skills necessary to record or report in this final rulemaking.

**A Description of the Steps the Agency Has Taken to Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected**

Alternatives were considered in this final rule. Alternatives include making no regulatory changes. ATF rejected this alternative because it would not be consistent with ATF's interpretation of the statutory term ''machinegun.'' There were no other regulatory alternatives to this proposal that ATF has been able to identify that accomplish the objective of this final rule.

*E. Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule is likely to be considered major as it is economically significant and is projected to have an effect of over $100 million on the economy in at least the first year of the rule.

*F. Congressional Review Act*

This rule is a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This rule is likely to be considered major as it is economically significant and is projected to have an effect of over $100 million on the economy in at least the first year of the rule's existence.

*G. Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48.

*H. Paperwork Reduction Act of 1995*

This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. 3501–3521.

**Disclosure**

Copies of the final rule, proposed rule, and comments received in response to the proposed rule will be available for public inspection through the Federal eRulemaking portal, *http://regulations.gov,* or by appointment during normal business hours at: ATF Reading Room, Room 1E–062, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648–8740.

**List of Subjects**

*27 CFR Part 447*

Administrative practice and procedure, Arms and munitions, Chemicals, Customs duties and inspection, Imports, Penalties, Reporting and recordkeeping requirements, Scientific equipment, Seizures and forfeitures.

*27 CFR Part 478*

Administrative practice and procedure, Arms and munitions, Customs duties and inspection, Exports, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

*27 CFR Part 479*

Administrative practice and procedure, Arms and munitions, Excise taxes, Exports, Imports, Military personnel, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures, Transportation.

**Authority and Issuance**

Accordingly, for the reasons discussed in the preamble, 27 CFR parts 447, 478, and 479 are amended as follows:

## PART 447—IMPORTATION OF ARMS, AMMUNITION AND IMPLEMENTS OF WAR

■ 1. The authority citation for 27 CFR part 447 continues to read as follows:

**Authority:** 22 U.S.C. 2778, E.O. 13637, 78 FR 16129 (Mar. 8, 2013).

■ 2. In § 447.11, revise the definition of ''Machinegun'' to read as follows:

**§ 447.11 Meaning of terms.**

* * * * *

*Machinegun.* A ''machinegun'', ''machine pistol'', ''submachinegun'', or ''automatic rifle'' is a firearm which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. For purposes of this definition, the term ''automatically'' as it modifies ''shoots, is designed to shoot, or can be readily restored to shoot,'' means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and ''single function of the trigger'' means a single pull of the trigger and analogous motions. The term ''machinegun'' includes a bump-stock-type device, *i.e.,* a device that allows a semi-automatic firearm to shoot more than one shot

with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

* * * * *

## PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 3. The authority citation for 27 CFR part 478 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 18 U.S.C. 921–931; 44 U.S.C. 3504(h).

■ 4. In § 478.11, revise the definition of ''Machine gun'' by adding two sentences at the end of the definition to read as follows:

### § 478.11 Meaning of terms.

* * * * *

*Machine gun.* * * * For purposes of this definition, the term ''automatically'' as it modifies ''shoots, is designed to shoot, or can be readily restored to shoot,'' means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and ''single function of the trigger'' means a single pull of the trigger and analogous motions. The term ''machine gun'' includes a bump-stock-type device, *i.e.,* a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

* * * * *

## PART 479—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS

■ 5. The authority citation for 27 CFR part 479 continues to read as follows:

**Authority:** 26 U.S.C. 5812; 26 U.S.C. 5822; 26 U.S.C. 7801; 26 U.S.C. 7805.

■ 6. In § 479.11, revise the definition of ''Machine gun'' by adding two sentences at the end of the definition to read as follows:

### § 479.11 Meaning of terms.

* * * * *

*Machine gun.* * * * For purposes of this definition, the term ''automatically'' as it modifies ''shoots, is designed to shoot, or can be readily restored to shoot,'' means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and ''single function of the trigger'' means a single pull of the trigger and analogous motions. The term ''machine gun'' includes a bump-stock-type device, *i.e.,* a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

* * * * *

Dated: December 18, 2018.

**Matthew G. Whitaker,**

*Acting Attorney General.*

[FR Doc. 2018–27763 Filed 12–21–18; 8:45 am]

BILLING CODE 4410–FY–P

# Reader Aids

**Federal Register**

Vol. 83, No. 246

Wednesday, December 26, 2018

## CUSTOMER SERVICE AND INFORMATION

| | |
|---|---|
| **Federal Register/Code of Federal Regulations** | |
| General Information, indexes and other finding aids | **202–741–6000** |
| **Laws** | **741–6000** |
| **Presidential Documents** | |
| Executive orders and proclamations | **741–6000** |
| **The United States Government Manual** | **741–6000** |
| **Other Services** | |
| Electronic and on-line services (voice) | **741–6020** |
| Privacy Act Compilation | **741–6050** |

## ELECTRONIC RESEARCH

### World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

### E-mail

**FEDREGTOC** (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

**PENS** (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

**FEDREGTOC** and **PENS** are mailing lists only. We cannot respond to specific inquiries.

**Reference questions.** Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

## FEDERAL REGISTER PAGES AND DATE, DECEMBER

62241–62448 ..... 3
62449–62688 ..... 4
62689–63040 ..... 6
63041–63382 ..... 7
63383–63558 .....10
63559–63774 .....11
63775–64022 .....12
64023–64222 .....13
64223–64432 .....14
64433–64728 .....17
64729–65074 .....18
65075–65278 .....19
65279–65480 .....20
65481–66076 .....21
66077–66554 .....26

## CFR PARTS AFFECTED DURING DECEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

**2 CFR**

**Proposed Rules:**
3187 .....66163

**3 CFR**

**Proclamations:**
9828 .....62683
9829 .....62685
9830 .....63039
9831 .....63771
9832 .....64021
9833 .....65271

**Executive Orders:**
13852 .....62687
13853 .....65071
13854 .....65481

**Administrative Orders:**
Memorandums:
Memorandum of November 5, 2018 .....62679
Memorandum of November 29, 2018 .....65279
Memorandum of December 18, 2018 .....65483
Notices:
Notice of December 18, 2018 .....65275
Presidential Determinations:
No. 2019–05 of November 29, 2018 .....65281

**5 CFR**

211 .....63041
531 .....63042

**6 CFR**

Ch. I .....63775

**7 CFR**

12 .....63046
66 .....65814
210 .....63775
215 .....63775
220 .....63775
226 .....63775
457 .....63383
920 .....66077
927 .....62449

**Proposed Rules:**
927 .....64294
956 .....64296
3565 .....64488

**8 CFR**

1240 .....65485

**Proposed Rules:**
214 .....62406

**9 CFR**

93 .....64223
317 .....63052
381 .....63052

**10 CFR**

Ch. I .....65283
9 .....65075
72 .....63794, 64729, 65077, 66079
207 .....66080
218 .....66080
429 .....66080
431 .....66080
490 .....66080
501 .....66080
590 .....65078
601 .....66080
820 .....66080
824 .....66080
851 .....66080
1013 .....66080
1017 .....66080
1045 .....66000
1050 .....66080

**Proposed Rules:**
9 .....65110
72 .....63814, 64750
590 .....65111

**11 CFR**

**Proposed Rules:**
100 .....62282
112 .....62283

**12 CFR**

252 .....64023
1231 .....65283
1271 .....63054

**Proposed Rules:**
3 .....64659, 66024, 66166
32 .....64659
34 .....63110
50 .....66024
217 .....64659, 66024
225 .....63110
229 .....63431
249 .....66024
323 .....63110
324 .....64659, 66024
329 .....66024
Ch. VII .....65924
1030 .....63431
Ch. X .....64036
1254 .....65575

**13 CFR**

**Proposed Rules:**
121 .....62516
124 .....62516
125 .....62516
126 .....62516

127 ....62516
129 ....62516

**14 CFR**

21 ....65485
25 ....62689, 65486, 66084, 66086
39 ....62690, 62694, 62697, 62701, 63389, 63392, 63394, 63397, 63400, 63559,63561, 63565, 63799, 64225, 64228, 64230, 64233, 64433, 64435, 64438, 64441, 64734, 66088, 66090, 66093
71 ....62451, 62453, 63402, 63403, 63405, 63406, 63407, 63409, 63567, 64239, 64241, 64242, 64244, 64245, 64247, 64248, 64249, 64250, 64252, 64736, 65080, 65486, 66095
91 ....63410, 65487
95 ....64253
97 ....62703, 62705, 66096, 66097

**Proposed Rules:**

39 ....62736, 62738, 62741, 63444, 63594, 63596, 63598, 65592, 66167, 66172, 66175, 66178
61 ....65316
71 ....63447, 63449, 63601, 63603, 64490, 64491, 65113
93 ....63817

**15 CFR**

774 ....65292
902 ....64257

**Proposed Rules:**

744 ....64299

**16 CFR**

1210 ....62241

**Proposed Rules:**

681 ....63604

**17 CFR**

229 ....66344
230 ....64180, 66344
232 ....66100
239 ....62454, 66344
242 ....64180
249 ....64180, 66344
270 ....64180
274 ....62454

**Proposed Rules:**

160 ....63450
210 ....65601
230 ....65601
239 ....65601
240 ....65601
243 ....65601
249 ....65601

**18 CFR**

284 ....62242

**19 CFR**

181 ....64942
190 ....64942
191 ....64942
220 ....66102

**20 CFR**

401 ....63415
404 ....62455
411 ....62455
416 ....62455

**Proposed Rules:**

404 ....64493
416 ....64493
655 ....63430, 63456

**21 CFR**

74 ....64443
101 ....65294, 65493
216 ....63569
510 ....64738
520 ....64738
522 ....64738
524 ....64738
556 ....64738
558 ....64738
882 ....66103
860 ....64443

**Proposed Rules:**

15 ....64752
50 ....65322
73 ....64045
312 ....65322
314 ....64299
600 ....63817
601 ....64299
812 ....65322
860 ....63127

**22 CFR**

**Proposed Rules:**

147 ....64046

**24 CFR**

203 ....64269

**Proposed Rules:**

51 ....63457

**25 CFR**

543 ....65506

**26 CFR**

1 ....64458

**Proposed Rules:**

1 ....63200, 64757, 65966

**27 CFR**

9 ....62707, 64272, 64274, 64276
447 ....66514
478 ....66514
479 ....66514

**Proposed Rules:**

9 ....62743, 62750, 63824, 64047, 64495

**28 CFR**

2 ....66124
16 ....66125

**29 CFR**

1630 ....65296
1635 ....65296
4022 ....64280
4044 ....63802, 64280

**Proposed Rules:**

Ch. I ....64053
1910 ....63745

**31 CFR**

148 ....65509
270 ....65297
317 ....65298
358 ....65298

**32 CFR**

199 ....63574
701 ....62249

**Proposed Rules:**

199 ....65323
220 ....64768

**33 CFR**

100 ....62249, 66128
117 ....62250, 64023, 64024, 65081, 65299, 66131
165 ....62251, 62253, 62256, 62258, 62259, 62710, 63059, 63416, 63578, 63804, 64744, 65083, 65085, 65521, 65523, 65225, 66131
334 ....64024

**Proposed Rules:**

110 ....65609
117 ....65326
165 ....64771
334 ....64053

**34 CFR**

**Proposed Rules:**

Ch. VI ....66181

**37 CFR**

6 ....62711
201 ....63061
203 ....63061
210 ....63061
380 ....63418
382 ....65209
387 ....62714

**Proposed Rules:**

202 ....65612, 66182

**38 CFR**

9 ....65527
36 ....64459

**39 CFR**

111 ....63578, 65087
3020 ....65529

**40 CFR**

9 ....62463, 63066
16 ....62716
51 ....62998
52 ....62262, 62464, 62466, 62468, 62470, 62719, 62720, 63579, 64026, 64282, 64285, 64470, 64472, 64746, 65088, 65091, 65093, 65301, 65535, 65537, 65878, 66133, 66136
68 ....62268
70 ....64285
80 ....63703
81 ....62269
180 ....62475, 62479, 62486, 62489, 62724, 62730, 64027, 65541, 65546, 66138
261 ....64289
271 ....65101, 66143
281 ....65104
300 ....63067, 63068
721 ....62463, 63066

**Proposed Rules:**

9 ....63460
16 ....62757
26 ....62760
52 ....62532, 62771, 62774, 63607, 64055, 64056, 64495, 64497, 64774, 64795, 64797, 65617, 66184, 66196, 66197, 66200
55 ....62283
60 ....65423, 65617
62 ....66209
70 ....65115
81 ....66200
131 ....64059
147 ....62536
258 ....66210
271 ....63461, 65116
281 ....65117
300 ....63146
721 ....63460
1552 ....65328

**42 CFR**

**Proposed Rules:**

405 ....62778
423 ....62778
488 ....65331

**44 CFR**

64 ....62494, 64030

**45 CFR**

153 ....63419
156 ....62496
2551 ....64635
2552 ....64635
2553 ....64635

**Proposed Rules:**

160 ....64302
162 ....65118
164 ....64302
302 ....64803
303 ....64803
307 ....64803
309 ....64803
1181 ....66163
1182 ....66163
1184 ....66163

**46 CFR**

545 ....64478

**Proposed Rules:**

10 ....64807
515 ....64502

**47 CFR**

0 ....63073
1 ....63076
20 ....63098
22 ....66145
36 ....63581
51 ....66146
63 ....66147
73 ....65551
74 ....65551
76 ....66149
87 ....63806
96 ....63076

**Proposed Rules:**

15 ....64506

**48 CFR**

Ch. 1 ....65466, 65478
22 ....65466
52 ....65466
204 ....66066
212 ....62498, 66062, 66066
216 ....65559
217 ....62501, 62502
225 ....62498, 66060, 66066
232 ....66062

246 ....66062
252 ....62498, 62502, 65560, 65562, 66062, 66066
App. F to Ch. 2 ....66060
**Proposed Rules:**
3 ....66223
19 ....62540
31 ....66223
52 ....62540, 66223
201 ....65618
208 ....62550
209 ....65618
211 ....65618
212 ....62550
213 ....62550
215 ....62550
216 ....62550
217 ....62550
219 ....62554
234 ....62550
237 ....62550
252 ....65618

**49 CFR**

270 ....63106
383 ....62503, 65564
384 ....62503
390 ....62505
555 ....66158
655 ....63812
**Proposed Rules:**
571 ....66228
1002 ....66229
1312 ....66229

**50 CFR**

300 ....62732
622 ....62508, 62735, 63813, 64032, 64480, 64748
635 ....62512, 65571
648 ....64257, 64481, 64482, 65313, 65574, 66160, 66161
660 ....62269, 63587, 63970, 64293
665 ....63428
679 ....62514, 64034, 65107, 65108
**Proposed Rules:**
17 ....62778, 65127
217 ....64078
622 ....62555
648 ....66234
679 ....62794, 62815

## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. This list is also available online at *http://www.archives.gov/federal-register/laws*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO's Federal Digital System (FDsys) at *http://www.gpo.gov/fdsys*. Some laws may not yet be available.

**H.R. 2/P.L. 115–334**

Agriculture Improvement Act of 2018 (Dec. 20, 2018; 132 Stat. 4490)

**H.R. 1918/P.L. 115–335**

Nicaragua Human Rights and Anticorruption Act of 2018 (Dec. 20, 2018; 132 Stat. 5019)

**H.R. 5759/P.L. 115–336**

21st Century Integrated Digital Experience Act (Dec. 20, 2018; 132 Stat. 5025)

**S. 1050/P.L. 115–337**

Chinese-American World War II Veteran Congressional Gold Medal Act (Dec. 20, 2018; 132 Stat. 5029)

**S. 2101/P.L. 115–338**

USS Indianapolis Congressional Gold Medal Act (Dec. 20, 2018; 132 Stat. 5033)

**Last List December 21, 2018**

## Public Laws Electronic Notification Service (PENS)

**PENS** is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

**Note:** This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.