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Contents

Federal Register

Vol. 83, No. 248

Friday, December 28, 2018

Agriculture Department
See Rural Housing Service
See Rural Utilities Service
See The U.S. Codex Office

Air Force Department
NOTICES
Meetings:
Scientific Advisory Board, 67238–67239

Bureau of Safety and Environmental Enforcement
NOTICES
Oil and Gas and Sulfur Operations in the Outer Continental Shelf:
Request for Information Regarding Potential Impacts of Decommissioning-in-Place of Pipeline-Related Infrastructure in Deepwater, 67343–67345

Centers for Medicare & Medicaid Services
RULES
Medicare Program:
Changes to Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Correction, 67083–67094
End-Stage Renal Disease Prospective Payment System, Payment for Renal Dialysis Services Furnished to Individuals With Acute Kidney Injury, End-Stage Renal Disease Quality Incentive Program, Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Competitive Bidding Program (CBP) and Fee Schedule Amounts, and Technical Amendments To Correct Existing Regulations Related to the CBP for Certain DMEPOS; Correction, 67082–67083

Children and Families Administration
NOTICES
Meetings:
Office of Trafficking in Persons, 67286–67287

Coast Guard
RULES
Safety Zones:
Brandon Road Lock and Dam to Lake Michigan Including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, and Calumet-Saganashkee Channel, Chicago, IL, 67074, 67081–67082
Fireworks Displays in the Fifth Coast Guard District, 67079
Lower Mississippi River, Mile Markers 99.3 to 100.3 Above Head of Passes, New Orleans, LA, 67075–67076
Sacramento New Year's Eve Fireworks Display, Sacramento River, Sacramento, CA, 67077–67079
Spa Creek, Annapolis, MD, 67079–67081
NOTICES
Random Drug Testing Rate for Covered Crewmembers for 2019, 67325–67326

Commerce Department
See International Trade Administration
See National Oceanic and Atmospheric Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67213–67222

Comptroller of the Currency
RULES
Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks, 67033–67035

Corporation for National and Community Service
RULES
Annual Civil Monetary Penalties Inflation Adjustment, 67096–67098

Defense Department
See Air Force Department
See Engineers Corps
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67239

Drug Enforcement Administration
PROPOSED RULES
Schedules of Controlled Substances:
Temporary Placement of 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, and FUB-144 in Schedule I, 67166–67171
NOTICES
Established Aggregate Production Quotas for Schedule I and II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2019, 67348–67354

Education Department
NOTICES
Applications for New Awards;
Expanding Opportunity Through Quality Charter Schools Program; Grants to State Entities, 67241–67250

Employee Benefits Security Administration
NOTICES
Proposed Exemptions From Certain Prohibited Transaction Restrictions, 67654–67676

Employment and Training Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
H–1B Technical Skills Training and Jobs and Innovation Accelerator Challenge Grants, 67356–67357
Short-Time Compensation Grants, 67357–67358
Transmittal for Unemployment Insurance Materials, 67354–67355
Unemployment Compensation for Ex-Servicemembers, 67355–67356

Energy Department
See Federal Energy Regulatory Commission

NOTICES
Environmental Impact Statements; Availability, etc.:
Disposition of Depleted Uranium Oxide Conversion Product Generated From DOE's Inventory of Depleted Uranium Hexafluoride, 67250–67251
Study on Macroeconomic Outcomes of LNG Exports:
Response to Comments Received on Study; Jordan Cove Energy Project, LP, et al., 67251–67273

Engineers Corps
PROPOSED RULES
Definition of Waters of the United States:
Public Hearing, 67174–67175
NOTICES
Environmental Impact Statements; Availability, etc.:
Chicago Area Waterway System Dredged Material Management Plan Study, Chicago, IL, 67240–67241
Selection of the Ten Pilot Projects Pursuant to the Water Resources Development Act, Beneficial Use of Dredged Material, 67239–67240

Environmental Protection Agency
PROPOSED RULES
Definition of Waters of the United States:
Public Hearing, 67174–67175
NOTICES
Access to Confidential Business Information by Chemical Abstracts Service, 67284
Access to Confidential Business Information by Science Applications International Corporation, 67283
Environmental Impact Statements; Availability, etc.:
Weekly Receipts, 67282
Meetings:
Environmental Modeling Public Meeting, 67282–67283

Federal Aviation Administration
RULES
Airworthiness Directives:
Airbus SAS Airplanes, 67036–67038, 67049–67053
The Boeing Company Airplanes, 67038–67049
Amendment of Class E Airspace:
Atqasuk, AK, 67053–67055
Nuiqsut, AK; Perryville, AK; Pilot Point, AK; and Point Lay, AK, 67057–67059
Amendment of VOR Federal Airways V–170 and V–219:
Vicinity of Fairmont, MN, 67056–67057
Establishment of Class E Airspace and Amendment of Class D and Class E Airspace:
Olympia, WA, 67059–67060
Establishment of Class E Airspace:
Engelhard, NC, 67055–67056
PROPOSED RULES
Airworthiness Directives:
Airbus SAS Airplanes, 67156–67160
Dassault Aviation Airplanes, 67155–67156
Amendment of Area Navigation (RNAV) Route T–299, and Establishment of T 318 and T–360:
Eastern United States, 67160–67162
Amendment of VOR Federal Airway V–18:
Vicinity of Talladega, AL, 67165–67166
Amendment of VOR Federal Airways V–115, V–184, V–188, and V–542:
Vicinity of Tidioute, PA, 67163–67165
Removal of Jet Route J–147:
Eastern United States, 67162–67163

Federal Communications Commission
RULES
Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers; Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers, 67098–67123
PROPOSED RULES
Earth Stations in Motion to Include Non-Geostationary-Satellite Orbit Satellite Systems, 67180–67185

Federal Deposit Insurance Corporation
RULES
Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks, 67033–67035
PROPOSED RULES
Company-Run Stress Testing Requirements for FDIC-Supervised State Nonmember Banks and State Savings Associations, 67149–67155

Federal Emergency Management Agency
RULES
Suspension of Community Eligibility, 67094–67096
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
National Urban Search and Rescue Response System, 67329–67330
Emergency and Related Determinations:
Alaska, 67330
Flood Hazard Determinations; Changes, 67326–67328, 67332–67334
Major Disaster and Related Determinations:
Connecticut, 67328–67329
Major Disaster Declarations:
Alabama; Amendment No. 1, 67326
California; Amendment No. 2, 67329
Proposed Flood Hazard Determinations, 67330–67332

Federal Energy Regulatory Commission
RULES
Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects, 67060–67069
NOTICES
Combined Filings, 67273–67274, 67276–67277, 67279–67280
Determinations of Qualifying Conduit Hydropower Facilities:
Upcountry LLC, 67280–67281
Environmental Assessments; Availability, etc.:
Algonquin Gas Transmission, LLC; Yorktown M and R Replacement & Reliability Project, 67274–67276
Hydroelectric Applications:
Lassen Research, 67281–67282
Yuba County Water Agency, 67279
Initial Market-Based Rate Filings Including Requests for Blanket Section 204 Authorizations:
Marengo Battery Storage, LLC, 67278–67279
Institution of Section 206 Proceedings:
Exelon Generation Company, LLC, 67278
Michigan Electric Transmission Co., LLC, 67273
Requests Under Blanket Authorizations:
Equitrans, L.P., 67277–67278

Federal Motor Carrier Safety Administration
RULES
Fees for the Unified Carrier Registration Plan and Agreement, 67124–67131

NOTICES
California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers; Petition for Determination of Preemption, 67470–67480

Federal Railroad Administration
NOTICES
Drug and Alcohol Testing:
Determination of Minimum Random Testing Rates for 2019, 67480–67481
Request for Positive Train Control Safety Plan Approval and System Certification:
National Railroad Passenger Corp., 67481

Federal Reserve System
RULES
Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks, 67033–67035
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67285–67286
Changes in Bank Control:
Acquisitions of Shares of a Bank or Bank Holding Company, 67284–67285
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 67284

Financial Crimes Enforcement Network
NOTICES
Requests for Nominations:
Bank Secrecy Act Advisory Group, 67487

Fish and Wildlife Service
RULES
Endangered and Threatened Species:
Threatened Species Status for Trispot Darter, 67131–67140
PROPOSED RULES
Endangered and Threatened Species:
Designation of Critical Habitat for Trispot Darter, 67190–67210
Section 4(d) Rule for Trispot Darter, 67185–67189

Food and Drug Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Generic Clearance for Quantitative Testing for the Development of Food and Drug Administration Communications, 67300–67301
Medical Device User Fee Cover Sheet, 67287–67288
Medical Devices; Shortages Data Collection System, 67298–67299
Determinations of Regulatory Review Periods for Purposes of Patent Extensions:
PARSABIV, 67293–67295
RUBRACA, 67290–67292
RYDAPT, 67295–67296
XERMELO, 67296–67298
Guidance:
International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products; Stability Testing of New Veterinary Drug Substances and Medicinal Products in Climatic Zones III and IV, 67289–67290
Product-Specific Guidance for Linaclotide, 67292–67293

Health and Human Services Department
See Centers for Medicare & Medicaid Services
See Children and Families Administration
See Food and Drug Administration
See Health Resources and Services Administration
See Indian Health Service
See National Institutes of Health
See Substance Abuse and Mental Health Services Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67306–67307
Findings of Research Misconduct, 67305–67306

Health Resources and Services Administration
NOTICES
Meetings:
National Advisory Council on Nurse Education and Practice, 67301
National Vaccine Injury Compensation Program:
List of Petitions Received, 67301–67305

Homeland Security Department
See Coast Guard
See Federal Emergency Management Agency
See U.S. Customs and Border Protection
RULES
Rescinding Department of Homeland Security Acquisition Regulation Clause Regarding Small Business Subcontracting Plan Reporting, 67123–67124

Housing and Urban Development Department
NOTICES
Privacy Act; Matching Programs, 67334–67337

Indian Health Service
NOTICES
Funding Opportunities:
4-in-1 Grant Programs, 67307–67315

Institute of Museum and Library Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
A Needs Assessment of Programs, Services, and Operations of Tribal Archives, Libraries, and Museums, 67364–67365

Interior Department
See Bureau of Safety and Environmental Enforcement
See Fish and Wildlife Service
See Land Management Bureau
See National Park Service
PROPOSED RULES
Freedom of Information Act, 67175–67180

Internal Revenue Service
PROPOSED RULES
Certain Hybrid Arrangements, 67612–67651
Investing in Qualified Opportunity Funds; Correction, 67171
Limitation on Deduction for Business Interest Expense, 67490–67610

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China, 67228
Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China, 67222–67226
Drawn Stainless Steel Sinks From the People's Republic of China, 67226–67228
Multilayered Wood Flooring From the People's Republic of China, 67229–67233

International Trade Commission
NOTICES
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Electronic Nicotine Delivery Systems and Components Thereof; Correction, 67345
Certain Industrial Automation Systems and Components Thereof Including Control Systems, Controllers, Visualization Hardware, Motion and Motor Control Systems, Networking Equipment, Safety Devices, and Power Supplies, 67346–67348
Certain LED Devices, LED Power Supplies, and Components Thereof, 67345–67346

Judicial Conference of the United States
NOTICES
Hearings:
Judicial Conference Advisory Committee on the Federal Rules of Evidence, 67348

Justice Department
See Drug Enforcement Administration

Labor Department
See Employee Benefits Security Administration
See Employment and Training Administration
See Labor Statistics Bureau
See Workers Compensation Programs Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
The Study of the Great Recession and the Unemployment Insurance System in the 21st Century, 67359–67360
Meetings:
Advisory Committee on Veterans' Employment, Training and Employer Outreach, 67358–67359

Labor Statistics Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67360–67361

Land Management Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Forest Management Decision Protest Process and Log Export and Substitution, 67338–67339
Environmental Impact Statements; Availability, etc.:
Coastal Plain Oil and Gas Leasing Program and Announcement of Public Subsistence-Related Hearings, 67337–67338
Meetings:
Lake Pleasant Expansion Area, Arizona, 67338

National Aeronautics and Space Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67362–67364
Intent To Grant Partially Exclusive Term Licenses, 67362

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

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 67315–67318
National Eye Institute, 67323
National Heart, Lung, and Blood Institute, 67318–67320
National Human Genome Research Institute, 67316–67317
National Institute of Allergy and Infectious Diseases, 67320
National Institute of Biomedical Imaging and Bioengineering, 67320
National Institute of Mental Health, 67322
National Institute of Neurological Disorders and Stroke, 67318–67319, 67321
National Institute on Aging, 67319
National Institute on Alcohol Abuse and Alcoholism, 67320–67321
National Institute on Deafness and Other Communication Disorders, 67319
National Library of Medicine, 67317

National Oceanic and Atmospheric Administration
RULES
Atlantic Highly Migratory Species:
Atlantic Bluefin Tuna Fisheries, 67140–67142
Fisheries of the Exclusive Economic Zone Off Alaska:
Inseason Adjustment to the 2019 Bering Sea and Aleutian Islands Pollock, Atka Mackerel, and Pacific Cod Total Allowable Catch Amounts, 67144–67148
Fisheries of the Exclusive Economic Zone Off Alaska:
Reallocation of Pacific Cod in the Central Regulatory Area of the Gulf of Alaska, 67143–67144
Fisheries of the Northeastern United States:
Atlantic Sea Scallop Fishery; Closure of the Mid-Atlantic Scallop Access Area to General Category Individual Fishing Quota Scallop Vessels, 67142
Summer Flounder Fishery; 2018 Commercial Quota Harvested for the State of Rhode Island, 67142–67143
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67233–67237
Meetings:
Fisheries of the South Atlantic; Southeast Data, Assessment, and Review, 67237
New England Fishery Management Council, 67233–67235
U.S. Coral Reef Task Force, 67235
Whaling Provisions:
Aboriginal Subsistence Quotas, 67237–67238

National Park Service
NOTICES
Meetings:
Native American Graves Protection and Repatriation Review Committee, 67341
Paterson Great Falls National Historical Park Advisory Commission, 67340–67341
National Register of Historic Places:
Pending Nominations and Related Actions, 67341–67343

Requests for Nominations:
Native American Graves Protection and Repatriation Review Committee, 67339–67340

National Transportation Safety Board
NOTICES
Meetings; Sunshine Act, 67365

Nuclear Regulatory Commission
NOTICES
Exemptions:
Exelon Generation Company, LLC Oyster Creek Nuclear Generating Station, 67365–67372

Office of the Director of National Intelligence
PROPOSED RULES
Privacy Act; Systems of Records, 67172–67174

Pension Benefit Guaranty Corporation
RULES
Adjustment of Civil Penalties for Inflation, 67073–67074

Postal Regulatory Commission
NOTICES
New Postal Products, 67373

Postal Service
NOTICES
Product Changes:
Parcel Return Service Negotiated Service Agreement, 67373–67374
Parcel Select and Parcel Return Service Negotiated Service Agreement, 67374
Priority Mail Express Negotiated Service Agreement, 67373–67374
Priority Mail Negotiated Service Agreement, 67374

Rural Housing Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67212–67213

Rural Utilities Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67213

Securities and Exchange Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67408, 67416–67417
Applications:
AQR Trust and AQR Capital Management, LLC, 67438–67443
Hercules Capital, Inc., 67447–67451
MIAX EMERALD, LLC, 67421–67438
TigerShares Trust, et al., 67417–67418
Meetings:
Fixed Income Market Structure Advisory Committee, 67396–67397
Self-Regulatory Organizations; Proposed Rule Changes:
BOX Exchange, LLC, 67443–67445
Chicago Stock Exchange, Inc., 67376–67390
Financial Industry Regulatory Authority, Inc., 67408–67416
ICE Clear Credit LLC, 67445–67447
ICE Clear Europe Limited, 67451–67452
Miami International Securities Exchange LLC, 67390, 67394–67395
MIAX PEARL, LLC, 67452–67455
Nasdaq ISE, LLC, 67440–67441
New York Stock Exchange LLC, 67395–67396, 67455–67458
NYSE Arca, Inc., 67397–67405
NYSE National, Inc., 67390–67392, 67405–67408
The Depository Trust Co., 67418–67421
The Nasdaq Stock Market LLC, 67374–67376
The Options Clearing Corp., 67392–67394

Small Business Administration
NOTICES
Conflicts of Interest; Exemptions:
Ballast Point Ventures III, LP, 67458–67459
Graycliff Mezzanine III (SBIC), L.P., 67458
Plexus Fund IV–C, L.P., 67459
Disaster Declarations:
Oklahoma; Administrative, 67458
Interest Rates, 67459

State Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Affidavit of Identifying Witness, 67459–67460
Culturally Significant Objects Imported for Exhibition:
Visiting Masterpiece: Juan de Mesa's Saint Louis of France, 67460
Global Magnitsky Human Rights Accountability Act Annual Report, 67460–67463

Substance Abuse and Mental Health Services Administration

NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67323–67325

The U.S. Codex Office
NOTICES
Meetings:
Codex Committee on Fats and Oils, 67211–67212

Trade Representative, Office of United States
NOTICES
Product Exclusions:
China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 67463–67468
Public Hearings:
2019 Special 301 Review, 67468–67470

Transportation Department
See Federal Aviation Administration
See Federal Motor Carrier Safety Administration
See Federal Railroad Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67484–67487
Federal Agency Actions:
Texas; Proposed Highway Projects, 67481–67484

Treasury Department
See Comptroller of the Currency
See Financial Crimes Enforcement Network
See Internal Revenue Service

NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Quarterly Dealer Agenda Survey, 67487–67488

U.S. Customs and Border Protection
RULES
Civil Monetary Penalty Adjustments for Inflation, 67069–67073

Workers Compensation Programs Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67361–67362

Separate Parts In This Issue

Part II
Treasury Department, Internal Revenue Service, 67490–67610

Part III
Treasury Department, Internal Revenue Service, 67612–67651

Part IV
Labor Department, Employee Benefits Security Administration, 67654–67676

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.

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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.

12 CFR
4.....67033
208.....67033
211.....67033
337.....67033
347.....67033
Proposed Rules:
325.....67149

14 CFR
39 (4 documents) 67036, 67038, 67043, 67049
71 (5 documents) 67053, 67055, 67056, 67057, 67059
Proposed Rules:
39 (3 documents) 67155, 67156, 67158
71 (4 documents) 67160, 67162, 67163, 67165

18 CFR
8.....67060
141.....67060

19 CFR
4.....67069

21 CFR
Proposed Rules:
1308.....67166

26 CFR
Proposed Rules:
1 (3 documents) 67171, 67490, 67612
301.....67612

29 CFR
4071.....67073
4302.....67073

32 CFR
Proposed Rules:
1701.....67172

33 CFR
165 (6 documents) 67074, 67075, 67077, 67079, 67081
Proposed Rules:
328.....67174

40 CFR
Proposed Rules:
110.....67174
112.....67174
116.....67174
117.....67174
122.....67174
232.....67174
300.....67174
302.....67174
401.....67174

42 CFR
413.....67082
414.....67082
416.....67083
419.....67083

43 CFR
Proposed Rules:
2.....67175

44 CFR
64 (2 documents) 67094, 67095

45 CFR
1230.....67096
2554.....67096

47 CFR
1.....67098
32.....67098
51.....67098
61.....67098
69.....67098
Proposed Rules:
2.....67180
25.....67180

48 CFR
3019.....67123
3052.....67123

49 CFR
367.....67124

50 CFR
17.....67131
635.....67140
648 (2 documents) 67142
679 (2 documents) 67143, 67144
Proposed Rules:
17 (2 documents) 67185, 67190

Rules and Regulations

Federal Register
Vol. 83, No. 248
Friday, December 28, 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.

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 4

[Docket ID OCC–2018–0014]

RIN 1557–AE37

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 211

[Docket No. R–1615]

RIN 7100–AF09

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 337 and 347

RIN 3064–AE76

Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rules.

SUMMARY: On August 29, 2018, the OCC, Board, and FDIC (collectively, the agencies) issued interim final rules that were effective immediately to implement section 210 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (Economic Growth Act), which was enacted on May 24, 2018. The agencies are now adopting the interim final rules as final without change. The interim final rules and final rules implement section 210 of the Economic Growth Act, which amended section 10(d) of the Federal Deposit Insurance Act (FDI Act) to permit the agencies to examine qualifying insured depository institutions (IDIs) with under $3 billion in total assets not less than once during each 18-month period. In addition, these final rules adopt as final the parallel changes to the agencies' regulations governing the on-site examination cycle for U.S. branches and agencies of foreign banks, consistent with the International Banking Act of 1978 (IBA).

DATES: These final rules are effective on January 28, 2019.

FOR FURTHER INFORMATION CONTACT:

OCC: Enice Thomas, Senior Advisor to Senior Deputy Comptroller, Midsize and Community Bank Supervision, (202) 649–5420; and Deborah Katz, Assistant Director, Melissa J. Lisenbee, Senior Attorney, or Christopher Rafferty, Attorney, Chief Counsel's Office, (202) 649–5490; for persons who are deaf or hearing impaired, TTY, (202) 649–5597.

Board: Division of Supervision and Regulation—Richard Naylor, Associate Director, (202) 728–5854; Jonathan Rono, Manager, (202) 721–4568; Assetou Traore, Supervisory Financial Analyst, (202) 974–7066; Virginia Gibbs, Manager, (202) 452–2521; or Alexander Kobulsky, Supervisory Financial Analyst, (202) 452–2031; and Legal Division—Laurie Schaffer, Associate General Counsel, (202) 452–2277; Victoria Szybillo, Senior Counsel, (202) 475–6325; or Mary Watkins, Senior Attorney, (202) 452–3722.

FDIC: Policy Branch Division of Risk Management and Supervision—Thomas F. Lyons, Chief, Policy and Program Development, (202) 898–6850, *tlyons@FDIC.gov;* Karen J. Currie, Senior Examination Specialist, (202) 898–3981, Policy and Program Development, Division of Risk Management Supervision; Legal Division—Suzanne J. Dawley, Counsel, (202) 898–6509; or Gregory S. Feder, Counsel, (202) 898–8724.

SUPPLEMENTARY INFORMATION:

I. Background

Section 210 of the Economic Growth Act [1] amended section 10(d) of the FDI Act [2] to permit the agencies to examine qualifying IDIs (generally, those IDIs that are well capitalized and well managed) with under $3 billion in total assets not less than once during each 18-month period, rather than not less than once during each 12-month period. Prior to the enactment of the Economic Growth Act, only qualifying IDIs with under $1 billion in total assets were eligible for an 18-month on-site examination cycle.[3]

On August 29, 2018, the agencies issued interim final rules to implement the Economic Growth Act's amendments to sections 10(d)(4) and 10(d)(10) of the FDI Act [4] that allow qualifying IDIs with under $3 billion in total assets to benefit from the extended 18-month examination cycle. In addition, the interim final rules made parallel changes to the agencies' regulations governing the on-site examination cycle for U.S. branches and agencies of foreign banks, consistent with the IBA.[5]

Section 10(d)(1) of the FDI Act [6] generally requires the appropriate Federal banking agency for an IDI [7] to conduct a full-scope, on-site examination of an IDI at least once during each 12-month period. With the enactment of section 210 of the Economic Growth Act, section 10(d)(4) of the FDI Act authorizes the appropriate Federal banking agency to extend the on-site examination cycle for an IDI to at least once during an 18-month period if the IDI (1) has total assets of less than $3 billion; (2) is well capitalized (as defined in 12 U.S.C. 1831o (prompt corrective action)); (3) was found, at its most recent examination, to be well managed [8] and

[1] Public Law 115–174, 132 Stat. 1296 (2018).

[2] 12 U.S.C. 1820(d).

[3] *See* section 83001 of the Fixing America's Surface Transportation Act (the FAST) Act, enacted on December 4, 2015. Public Law 114–94, 129 Stat. 1312 (permitting the agencies to examine qualifying IDIs with under $1 billion in total assets not less than once during each 18-month period). The agencies published interim final rules implementing the FAST Act amendments in February 2016, and final rules in December 2016. *See* 81 FR 10069 (Feb. 29, 2016) and 81 FR 90949 (Dec. 16. 2016), respectively, codified at 12 CFR 4.6 and 4.7 (OCC), 12 CFR 208.64 and 211.26 (Board), 12 CFR 337.12 and 347.211 (FDIC).

[4] 12 U.S.C. 1820(d)(4) and 1820(d)(10).

[5] 12 U.S.C. 3105(c)(1)(C).

[6] 12 U.S.C. 1820(d)(1).

[7] The Board, FDIC, or OCC. *See* 12 U.S.C. 1813(q).

[8] IDIs are evaluated under the Uniform Financial Institutions Rating System (commonly referred to as CAMELS). CAMELS is an acronym that is drawn from the first letters of the individual components of the rating system: *C*apital adequacy, *A*sset quality, *M*anagement, *E*arnings, *L*iquidity, and *S*ensitivity to market risk. CAMELS ratings of ''1'' and ''2'' correspond with ratings of ''outstanding'' and ''good,'' respectively. In addition to having a CAMELS composite rating of ''1'' or ''2,'' an IDI is

Continued

to have a composite condition of ''outstanding'' or, in the case of an IDI with total assets of not more than $200 million, ''outstanding'' or ''good;'' (4) is not subject to a formal enforcement proceeding or order by the FDIC or its appropriate Federal banking agency; and (5) has not undergone a change in control during the previous 12-month period in which a full-scope, on-site examination otherwise would have been required. The Economic Growth Act also amended section 10(d)(10) of the FDI Act to give each appropriate Federal banking agency discretionary authority to extend eligibility for an 18-month examination cycle, by regulation, to qualifying IDIs with an ''outstanding'' or ''good'' composite condition and total assets not greater than $3 billion, if the agency determines that this amount would be consistent with the principles of safety and soundness for IDIs.[9]

In addition, section 7(c)(1)(C) of the IBA provides that a Federal or a State branch or agency of a foreign bank shall be subject to on-site examination by its appropriate Federal banking agency or State bank supervisor as frequently as a national or State bank would be subject to such an examination by the agency.

II. Description of the Final Rules

The agencies received three comment letters addressing the interim final rules, two from trade associations and one from a multi-bank financial holding company. All three letters were supportive of the interim final rules.

After considering the comments on the interim final rules, the agencies are adopting the interim final rules as final without change. The final rules, like the interim final rules implement section 10(d)(4) of the FDI Act to increase, from $1 billion to $3 billion, the total asset threshold under which an agency may apply an 18-month on-site examination cycle for qualified IDIs that have an ''outstanding'' composite rating.

The agencies also are exercising their discretionary authority under section 10(d)(10) of the FDI Act to extend eligibility for an 18-month examination cycle, by regulation, to qualifying IDIs with an ''outstanding'' or ''good'' composite rating with total assets under $3 billion. The agencies have determined that increasing the maximum asset amount limitation for qualifying IDIs with less than $3 billion in total assets is consistent with the principles of safety and soundness.

In determining whether the reduction in examination frequency is consistent with the principles of safety and soundness for such IDIs, the agencies considered several factors. The agencies acknowledge that extending the examination cycle could make it more likely that there will be a delay in an agency's ability to detect deterioration in an IDI's performance. However, the agencies believe that extending the examination cycle from 12 months to 18 months for these small IDIs with relatively simple risk profiles should not appreciably increase their risk of financial deterioration or failure. In addition, the agencies will continue their off-site monitoring activities and have the ability to examine IDIs more frequently as necessary or appropriate. The agencies also note that, in order to qualify for an 18-month examination cycle, any IDI with total assets under $3 billion—including one with a composite rating of ''good''—must meet the other capital, managerial, and supervisory criteria set forth in section 10(d) of the FDI Act and the agencies' implementing regulations.

Considering the agencies' off-site monitoring activities; their discretion to examine IDIs more frequently as necessary; and the capital, managerial, and supervisory criteria in section 10(d) of the FDI Act, the agencies believe that increasing the maximum asset amount limitation for IDIs from less than $1 billion to less than $3 billion is consistent with the principles of safety and soundness. Additionally, the agencies expect that this increase will allow the agencies to better focus their supervisory resources on the IDIs and U.S. branches and agencies of foreign banks (collectively, financial institutions) that may present capital, managerial, or other issues of supervisory concern, and therefore, the final rules have the potential to enhance safety and soundness collectively for all financial institutions. The agencies will continue to monitor financial institutions in this asset range between examinations and the impact of the extended examination cycle.

In accordance with section 7(c)(1)(C) of the IBA, the agencies also are finalizing conforming changes to their regulations governing the on-site examination cycle for the U.S. branches and agencies of foreign banks. For the same reasons as discussed above with respect to qualifying IDIs, the agencies believe that extending similar treatment to qualifying U.S. branches and agencies of foreign banks is consistent with the principles of safety and soundness.

Based on data available at publication, the agencies estimate that the number of banks and savings associations that may qualify for an extended 18-month examination cycle increased by approximately 430 (241 of which are supervised by the FDIC, 99 by the OCC, and 90 by the Board), bringing the total number to 4,706 banks and savings associations since the interim rules took effect.[10] Approximately 30 U.S. branches and agencies of foreign banks would be eligible for the extended examination cycle based on the final rules (2 of which are supervised by the FDIC, 8 by the OCC, and 20 by the Board).[11]

For all the reasons described above, the agencies are adopting the interim final rules as final without change.

Effective Date

The Administrative Procedure Act (APA) generally requires that a final rule be published in the **Federal Register** no less than 30 days before its effective date.[12] Therefore, the final rules will become effective on January 28, 2019. The interim final rules will continue to be in effect until the final rules become effective.

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosures, or other requirements on IDIs, consider, consistent with the principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations.[13] Further, new regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[14] The RCDRIA does not apply to the final rules because the rules do not impose any additional reporting,

considered to be ''well managed'' for the purposes of section 10(d) of the FDI Act *only* if the IDI also received a rating of ''1'' or ''2'' for the management component of the CAMELS rating at its most recent examination. *See* 72 FR 17798 (Apr. 10, 2007).

[9] The Board and the FDIC, as the appropriate Federal banking agencies for State-chartered insured banks and savings associations, are permitted to conduct on-site examinations of such IDIs on alternating 12-month or 18-month periods with an IDI's State supervisor, if the Board or FDIC, as appropriate, determines that the alternating examination conducted by the State carries out the purposes of section 10(d) of the FDI Act. 12 U.S.C. 1820(d)(3).

[10] Call Report data, Sept. 30, 2018.

[11] *Id.*

[12] 5 U.S.C. 553(d).

[13] 12 U.S.C. 4802(a).

[14] 12 U.S.C. 4802(b).

disclosures, or other new requirements on IDIs.

III. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act [15] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies' staff believe the final rules are presented in a simple and straightforward manner. Having received no comments with respect to making the interim final rules easier to understand, the agencies are adopting the final rules without change.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [16] requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.[17] The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed in the joint interim final rules, consistent with section 553(b)(B) of the APA, the agencies determined for good cause that general notice and opportunity for public comment was unnecessary, and therefore the agencies did not issue a notice of proposed rulemaking. Accordingly, the agencies have concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply. Further, the agencies note that no small entities, as defined by the Small Business Administration's rules implementing the RFA, will be affected by the final rules' increased asset thresholds.

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 [18] states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. Because the final rules do not create a new, or revise an existing, collection of information, no information collection request submission needs to be made to the OMB.

[15] Public Law 106–102, section 722, 113 Stat. 1338, 1471 (1999).

[16] 5 U.S.C. 601 *et seq.*

[17] Under regulations issued by the Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of $550 million or less and trust companies with total assets of $38.5 million or less.

[18] 44 U.S.C. 3501–3521.

VI. OCC Unfunded Mandates Reform Act of 1995 Determination

Consistent with section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), before promulgating any final rule for which a general notice of proposed rulemaking was published, the OCC prepares an economic analysis of the final rules. Because the OCC determined that the publication of a general notice of proposed rulemaking was unnecessary, the OCC has not prepared an economic analysis of the joint final rules under UMRA.

List of Subjects

12 CFR Part 4

Administrative practice and procedure, Freedom of information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Women.

12 CFR Part 208

Accounting, Agriculture, Banks, banking, Confidential business information, Crime, Currency, Federal Reserve System, Flood insurance, Mortgages, Reporting and recordkeeping requirements, Safety and soundness, Securities.

12 CFR Part 211

Exports, Federal Reserve System, Foreign banking, Holding companies, Investments, Reporting and recordkeeping requirements.

12 CFR Part 337

Banks, banking, Reporting and recordkeeping requirements, Savings Associations.

12 CFR Part 347

Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Credit, Foreign banking, Investments, Reporting and recordkeeping requirements, U.S. investments abroad.

Office of the Comptroller of the Currency

12 CFR Chapter I

PART 4—ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS

■ The interim final rule amending 12 CFR part 4 of chapter I, title 12 of the Code of Federal Regulations, which was published at 83 FR 43961 on August 29, 2018, is adopted as a final rule without change.

FEDERAL RESERVE SYSTEM

12 CFR Chapter II

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

PART 211—INTERNATIONAL BANKING OPERATIONS (REGULATION K)

■ The interim final rule amending parts 208 and 211 of chapter II, title 12 of the Code of Federal Regulations, which was published at 83 FR 43961 on August 29, 2018, is adopted as a final rule without change.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

PART 337—UNSAFE AND UNSOUND BANK PRACTICES

PART 347—INTERNATIONAL BANKING

■ The interim final rule amending parts 337 and 347 of chapter III of title 12 of the Code of Federal Regulations, which was published at 83 FR 43961 on August 29, 2018, is adopted as a final rule without change.

Dated: December 13, 2018.

Joseph M. Otting,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary to the Board.

Dated at Washington, DC, on December 18, 2018.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2018–28267 Filed 12–27–18; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–1062; Product Identifier 2018–NM–163–AD; Amendment 39–19534; AD 2018–26–04]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Airbus SAS Model A350–941 and –1041 airplanes. This AD was prompted by a report that due to an issue with the flight warning system (FWS) logic, it is possible that the ''AIR Auxiliary Power Unit (APU) BLEED LEAK'' electronic centralized aircraft monitoring (ECAM) alert can trigger several times. This AD requires revising the airplane flight manual (AFM) to incorporate procedures related to an APU bleed leak. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective January 14, 2019.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 14, 2019.

We must receive 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 the incorporation by reference (IBR) material described in the ''Related IBR material under 1 CFR part 51'' section in **SUPPLEMENTARY INFORMATION**, contact European Aviation Safety Agency (EASA), Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 1000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material 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 in the AD docket on the internet at *http://www.regulations.gov.*

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–2018–1062; 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 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: Kathleen Arrigotti, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218.

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2018–0246, dated November 13, 2018 (''EASA AD 2018–0246'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus SAS Model A350–941 and –1041 airplanes. The MCAI states:

> Due to a misbehaviour in the establishment of the FWS logic, it is possible that the <<AIR Auxiliary Power Unit (APU) BLEED LEAK>> Electronic Centralized Aircraft Monitoring (ECAM) alert triggers several times. Therefore, several resets of the engine 1 bleed may need to be performed. Each time the flight crew performs an engine 1 bleed reset, structural parts are exposed to hot air for several seconds.
>
> This condition, if not corrected, could lead to exposure of critical locations and surrounding structure to heat stress, possibly resulting in reduced structural integrity of the aeroplane.
>
> To address this potential unsafe condition, Airbus issued the AFM TR [temporary revision] to provide an updated procedure <<AIR APU BLEED LEAK>> operations, and Flight Operations Transmission (FOT) 999.0062/18, informing operators that Airbus provides two different Temporary Quick Changes (ATQC) to the ECAM, as applicable, depending on the installed FWS standard, either STD S4/2.0 or STD S5/2.2.
>
> Installation of that ATQC is already required by EASA AD 2018–0213, related to a different unsafe condition and is therefore not mandated again by this [EASA] AD [we are considering additional rulemaking to mandate incorporating the ATQCs].
>
> For the reasons described above, this [EASA] AD requires only the amendment of the applicable AFM to update the procedures related to <<AIR APU BLEED LEAK>> operations.

Related IBR Material Under 1 CFR Part 51

EASA AD 2018–0246 describes procedures for revising the AFM to incorporate procedures related to an APU bleed leak. This material 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, and it is publicly available through the EASA website.

FAA's Determination

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

Requirements of This AD

This AD requires accomplishing the actions specified in EASA AD 2018–0246 described previously.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. As a result, EASA AD 2018–0246 will be incorporated by reference in the FAA final rule. This AD would, therefore, require compliance with the provisions specified in EASA AD 2018–0246, except for any differences identified as exceptions in the regulatory text of this AD. Service information specified in EASA AD 2018–0246 that is required for compliance with EASA AD 2018–0246 will be available at *http://www.regulations.gov* under Docket No.

FAA–2018–1062 after the FAA final rule is published.

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 because an issue with the FWS logic makes it possible that the ''AIR APU BLEED LEAK'' ECAM alert can trigger several times. An engine bleed reset in response to the ECAM alert could lead to exposure of critical locations and the surrounding structure to heat stress, possibly resulting in reduced structural integrity of the airplane. Therefore, we find good cause that notice and opportunity for prior public comment are impracticable. In addition, for the reason(s) 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 precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2018–1062; Product Identifier 2018–NM–163–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD based on 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 AD.

Costs of Compliance

We estimate that this AD affects 11 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
1 work-hour × $85 per hour = $85	$0	$85	$935

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 transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

We 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 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2018–26–04 Airbus SAS: Amendment 39–19534; Docket No. FAA–2018–1062; Product Identifier 2018–NM–163–AD.

(a) Effective Date

This AD becomes effective January 14, 2019.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus SAS Model A350–941 and –1041 airplanes, certificated in any category, as identified in European Aviation Safety Agency (EASA) AD 2018–0246, dated November 13, 2018 (''EASA AD 2018–0246'').

(d) Subject

Air Transport Association (ATA) of America Code 36, Pneumatic.

(e) Reason

This AD was prompted by a report that due to an issue with the flight warning system (FWS) logic, it is possible that the ''AIR Auxiliary Power Unit (APU) BLEED LEAK'' electronic centralized aircraft monitoring (ECAM) alert can trigger several times. We are issuing this AD to address engine bleed

reset in response to the ECAM alert, which could lead to exposure of critical locations and the surrounding structure to heat stress, possibly resulting in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2018–0246.

(h) Exceptions to EASA AD 2018–0246

(1) For purposes of determining compliance with the requirements of this AD: Where EASA AD 2018–0246 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2018–0246 does not apply to this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards 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 International Section, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* For any service information referenced in EASA AD 2018–0246 that contain RC procedures and tests: Except as required by paragraph (i)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified 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 procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Related Information

For more information about this AD, contact Kathleen Arrigotti, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218.

(k) 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.

(i) EASA AD 2018–0246, dated November 13, 2018.

(ii) [Reserved]

(3) For EASA AD 2018–0246, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 6017; email *ADs@easa.europa.eu;* Internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this EASA AD 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. EASA AD 2018–0246 may be found in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1062.

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

Issued in Des Moines, Washington, on December 14, 2018.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–28067 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–4219; Product Identifier 2015–NM–169–AD; Amendment 39–19535; AD 2018–26–05]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 777 airplanes. This AD was prompted by reports of latently failed engine fuel shutoff spar valves discovered during fuel filter replacement. This AD requires inspecting to determine the part numbers (P/Ns) of the motor-operated valve (MOV) actuators at the engine fuel shutoff spar valve positions, installing MOV actuators having a certain acceptable part number or software if necessary, and revising the maintenance or inspection program to add a new airworthiness limitation. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 1, 2019.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of February 1, 2019.

ADDRESSES: For service information identified in this final rule, 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–2016–4219.

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–2016–4219; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kevin Nguyen, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3555; email: *Kevin.Nguyen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 777 airplanes. The NPRM published in the **Federal Register** on March 8, 2016 (81 FR 12039). The NPRM was prompted by reports of latently failed engine fuel shutoff spar valves discovered during fuel filter replacement. The NPRM proposed to require replacing certain MOV actuators with MOV actuators having a certain acceptable part number on both airline information management system (AIMS) Version 1- and 2-equipped airplanes, or installing a newer software version on AIMS Version 2-equipped airplanes.

We issued a SNPRM to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 777 airplanes. The SNPRM published in the **Federal Register** on August 21, 2017 (82 FR 39545). We issued the SNPRM to add a part number inspection, add an AWL, and specify new AIMS software.

We are issuing this AD to address latent failure of the fuel shutoff spar valve to the engine, which could result in the inability to terminate fuel flow to the engine and, in the case of an engine fire, could lead to wing failure.

Comments

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

Request To Omit Inspection Requirement

American Airlines (American) requested that we revise paragraph (g) of the proposed AD (in the SNPRM) to omit the requirement to inspect for the MOV actuator part numbers, and to reflect only the essential compliance requirements as stated in paragraphs (g)(1) and (g)(2) of the proposed AD (in the SNPRM) (the conditional requirements that depend on the part number found). The commenter stated that the inspection is not necessary to accomplish any of the compliance options and adds no value to the process.

We disagree with the request. The MOV actuator is a rotable part. Several previously approved and existing interchangeable MOV actuator part numbers may be installed at the engine fuel shutoff spar valve positions. The MOV actuator installed at the engine fuel shutoff spar valve positions at the time of airplane manufacture may have been later replaced by an MOV actuator of a different part number. Because an unsafe condition exists with certain part numbers, we have determined that it is necessary to control the method by which an operator may determine what part number is installed. In the absence of such a control, an operator might simply assume that the part number delivered with the airplane is still in place. The most positive method to verify the installed part number is to inspect the part. Alternatively, as stated in paragraph (g) of this AD, the FAA will accept verification through a maintenance records check if the records positively show the installed part number. We have not changed the AD regarding this issue.

Request To Incorporate AWL After MOV Actuator Installation

American requested that we revise paragraph (g)(1) of the proposed AD (in the SNPRM) to include incorporation of new airworthiness limitation (AWL) 28–AWL–MOVA, which is specified in paragraph (h) of the proposed AD (in the SNPRM).

We disagree with the request. The commenter did not provide rationale for the requested change, but we infer their request was to have all required actions within paragraph (g) of this AD. We have determined that it is better to structure the AD by separating required actions that are discretely different into separate paragraphs. As such, all required actions associated with inspecting and replacing the affected MOV actuators are in paragraph (g) of this AD and all required actions associated with the AWL revisions are in paragraph (h) of this AD. Therefore, we find it unnecessary to change this AD regarding this issue.

Request To Clarify Airplanes Subject to Inspection

Cathay Pacific noted a discrepancy in Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015. Some airplanes that subsequently installed AIMS–2 Block Point (BP) Version 17A software may no longer match the conditions for the service bulletin groups, and do not fit the criteria of either paragraph (g)(1) or (g)(2) of the proposed AD (in the SNPRM). Cathay Pacific therefore requested that we revise paragraph (g) of the proposed AD (in the SNPRM) to clarify that the inspection is required only on airplanes without AIMS–2 BP Version 17A software. The commenter reported that Boeing confirmed that the service bulletin will be revised to address this discrepancy.

We agree with the request. We had intended to exclude the inspection requirement for airplanes with AIMS–2 BP Version 17A software installed. We have therefore revised paragraph (g) of this AD to also state that no further action is required by paragraph (g) of this AD if AIMS–2 BP Version 17 or later software is installed, which also include AIMS–2 BP Versions 17.1 and 17A.

Request To Allow Alternative Service Information

Delta Air Lines (Delta) requested that we revise paragraph (g)(2)(ii) of the proposed AD (in the SNPRM) to allow Boeing Service Bulletin 777–31–0275, dated June 8, 2017, as another method to use to install AIMS–2 BP Version 17A software or later-approved version. Delta explained that this service bulletin describes procedures for modifying the hardware and software related to converting from AIMS–1 to AIMS–2 software, including AIMS–2 BP Version 17A software. Delta added that Boeing Service Bulletin 777–31–0275 specifies installation of the same software as that specified in Boeing Service Bulletin 777–31–0218, and provides an equivalent level of safety to that of the SNPRM.

We partially agree with the request. We agree that installation of AIMS–2 BP Version 17A and later-approved software is an acceptable alternative to replacing the MOV actuator, because that software allows failure of any of the previously approved MOV actuator part numbers to be detected and annunciated by the airplane display system. However, we find it unnecessary to revise paragraph (g)(2)(ii) of this AD to add another acceptable method of compliance (Boeing Service Bulletin 777–31–0275) for the installation of AIMS–2 BP Version 17A software during conversion of an airplane from AIMS–1 to AIMS–2 software. Instead, we have revised paragraph (g) of this AD to clarify that no further action is required by paragraph (g) of this AD if AIMS–2 BP Version 17 or later software is installed.

Request To Provide Credit for AIMS–2 BP Version 17A Software

American and Delta requested that we revise paragraph (j) of the proposed AD (in the SNPRM) to provide credit for installation of AIMS–2 BP Version 17A software. Delta noted a conflict between the ''Actions Since the NPRM was Issued'' section of the SNPRM (which specified the proposed AD would require installing AIMS–2 BP Version 17A software) and paragraph (j) of the proposed AD (in the SNPRM) (which

specified credit for paragraph (g)(2)(ii) when AIMS–2 BP Version 17 or 17.1 software was installed before the effective date of this AD).

We agree to clarify that we have achieved similar results to the commenters request since we have clarified the multiple references to AIMS–2 BP Version 17 software in this AD, and that we have revised this AD to exclude airplanes with AIMS–2 BP Version 17 or later software installed from the requirements of paragraph (g) of this AD. Therefore, we have not changed paragraph (j) and have determined that no further change to the AD is necessary regarding this issue.

Request To Remove AWL Requirement

Boeing requested that we revise paragraph (h) of the proposed AD (in the SNPRM) to remove the requirement to incorporate the new AWL. Boeing noted that paragraphs (g)(1) and (g)(2)(i) of the proposed AD (in the SNPRM) would require inspection of all affected airplanes and replacement of all MOV actuators at the engine fuel shutoff spar valve positions with MOV actuators having P/N MA30A1017 (Boeing P/N S343T003–76). Boeing asserted that those proposed requirements would therefore be redundant with the proposed requirement of paragraph (h) of the proposed AD (in the SNPRM), since the AWL prohibits installation of MA20A2027 (Boeing P/N S343T003–56) and P/N MA30A1001 (Boeing P/N S343T003–66) MOV actuators at the engine fuel shutoff spar valve positions.

We disagree with the request. As previously explained in the SNPRM, the new AWL is necessary to prevent an airplane from being modified to a pre-AD condition. Although the AWL would prohibit installation of the MOV actuators at the engine fuel shutoff spar valve positions, these two MOV actuator part numbers may still be installed at other locations (as their failure in the other locations is of economic impact only), and could be inadvertently re-installed at the engine fuel shutoff spar valve positions. To address this concern, we added paragraph (h) to the proposed AD (in the SNPRM) to specify the incorporation of the new AWL. We have not changed this AD regarding this issue.

Request To Add Instructions for Maintenance Program Revision

Delta recommended that we add details on how to conduct the maintenance or inspection program, such as inspection methods and repetitive intervals, in order to clarify the proposed requirements of paragraph (h) of the proposed AD (in the SNPRM). That proposed requirement would require revising the maintenance program to incorporate a new airworthiness limitation prohibiting the installation of certain MOV actuators, and to maintain this limitation in the operator's fleet maintenance program. Delta inferred that the purpose of the proposed requirement is to ensure that P/Ns MA30A1001 and MA20A2027 are not installed in the two engine fuel shutoff spar valve positions once the requirements of paragraph (g) of the AD have been complied with.

Delta stated that the requirement to incorporate a statement indicating that a part is prohibited is not a maintenance program. Delta stated that an aircraft maintenance program is not the appropriate way to do this, adding that a ''parts prohibition'' statement (including locations—left and right engine fuel shutoff spar valve positions, in this case) would be more appropriate to ensure that a specific part number is not installed in the future. Delta stated that similar parts prohibition statements are included in AD 2016–04–20, Amendment 39–18414 (81 FR 10460, March 1, 2016), and AD 2013–05–03, Amendment 39–17375 (78 FR 17290, March 21, 2013), such that operators could then add notes to the airplane illustrated parts catalog (IPC), aircraft maintenance manual (AMM), etc., to ensure that those parts are not installed at the specified location in the future.

We disagree with the request. An AWL containing a parts prohibition statement for a maintenance or inspection program has been required by other ADs, and is appropriate in this case. Paragraph (h) of this AD requires only the incorporation of the AWL item into the operator's fleet, not specific ways to accomplish the AWL task or comply with the restriction. Each operator is responsible for accomplishing the AWL task and maintaining the AWL restriction. Although a parts prohibition statement could be included in the AD, we chose to mandate this requirement via incorporation of an AWL to be consistent with the requirements of AD 2015–19–01, Amendment 39–18264 (80 FR 55521, September 16, 2015) (''AD 2015–19–01''). AD 2015–19–01 required revising the existing maintenance or inspection program to include a new AWL that required certain actions for The Boeing Company Model 777 airplanes with MOV actuators having P/N MA20A2027 or P/N MA30A1001 installed at the engine fuel shutoff spar valve positions. The prohibited MOV actuator part numbers at the engine fuel shutoff spar valve positions are still physically interchangeable with the acceptable part numbers and may be used in other valve locations, and they are expected to remain in operators' parts stores for a long period of time. We have not changed this AD regarding this issue.

Request To Revise Compliance Time to Incorporate AWL

Delta requested that we clarify the compliance time for incorporating the new AWL into the maintenance program, as specified in paragraph (h) of the proposed AD (in the SNPRM): 24 months after the effective date of the AD, and after accomplishing the actions required by (g). Delta recommended that the compliance time be changed to within 24 months after the effective date of the AD or after accomplishment of the actions required by paragraph (g)(1) or (g)(2)(i) of the AD, whichever occurs first. Delta also asked that we remove the condition ''after accomplishing the actions required by paragraph (g) of this AD on all airplanes in an operator's fleet.'' Delta stated that the current wording is unclear and appears to indicate operators must wait until the actions of paragraph (g) of the AD are complete on their Model 777 fleets before they can insert 28–AWL–MOVA into the maintenance program. Delta believes the FAA's intent is to put in place a part prohibition for MOV actuators at the engine fuel shutoff spar valve positions on applicable airplanes without AIMS–2 BP Version 17 software or later version, and that when the requirements of paragraph (g)(2)(ii) of the AD are completed, this AWL would no longer be applicable.

We agree with the request. We have revised the compliance time in paragraph (h) of this AD to ''within 24 months after the effective date of the AD.'' This allows operators to incorporate the new AWL into their maintenance program at any time within that 24-month period, without waiting until all required actions on all affected airplanes in the fleet are completed. This would also allow continued operation of an airplane if another airplane having the pre-AD configuration is introduced into an operator's fleet before the end of the compliance time, even if this were to occur after the accomplishment of the required actions on all other airplanes in the fleet.

Request To Exclude Model 777F Series Airplanes

FedEx requested that we exclude Model 777F series airplanes from the proposed requirements of paragraphs (g), (h), and (i) of the proposed AD (in the SNPRM). The service information,

Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015, specifies that no work is necessary for airplanes in Group 7, which includes Model 777F series airplanes.

We disagree with the request. Even though the commenter is correct in that Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015, specifies that no work is necessary for airplanes in Group 7, which includes Model 777F series airplanes, the intent of this AD is to ensure that all airplanes identified in paragraph (c) of this AD, which includes Model 777F series airplanes and other Group 7 airplanes, address the unsafe condition through compliance with the requirements of the AD. Compliance with the requirements of paragraph (g) of this AD may be accomplished by installing a certain MOV actuator in accordance with Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015, or installing certain AIMS–2 BP Version 17 or later software in accordance with Boeing Service Bulletin 777–31–0218, dated September 8, 2016 (depending on configuration).

We have clarified the options available for some of the affected airplanes, *i.e.,* Group 7 airplanes with AIMS–2 BP Version 16 or earlier software. Specifically, if the actions specified in paragraph (g)(2)(i) of this AD are done, Figures 35 and 37 of Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015, can be used for compliance regarding installation of the MOV actuator. Operators may also install AIMS–2 BP Version 17A software in accordance with paragraph (g)(2)(ii) of this AD. It is also necessary for operators of affected Boeing Model 777F airplanes to incorporate the AWL requirements specified in paragraph (h) of this AD.

Additional Changes to AD

The effectivity of Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015, incorrectly categorizes airplanes in Group 4 as only those with AIMS–1 software installed. We have confirmed with Boeing that Group 4 airplanes includes airplanes with AIMS–1 software or AIMS–2 BP Version 16 or earlier software; or AIMS–2 BP Version 17 or later software. The airplane variable number listing in the service information does include the AIMS–2 equipped airplanes. We have therefore clarified for the purposes of the requirements in paragraph (g)(2) of this AD to state that Group 4, as identified in Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015, includes airplanes with AIMS–1 software or AIMS–2 BP Version 16 or earlier software installed.

We have revised paragraph (i) in this AD to clarify that the requirements of AD 2015–19–01 may be terminated only when the requirements of paragraph (g) and (h) of this AD have been done on ''all affected airplanes in an operator's fleet.''

Conclusion

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

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

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

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015. This service information describes procedures for, among other things, inspection and replacement of the MOV actuators at the engine fuel shutoff spar valve positions.

We also reviewed Boeing Service Bulletin 777–31–0218, dated September 8, 2016. This service information describes procedures for installing the AIMS–2 BP Version 17A software upgrade.

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 154 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	1 work-hour × $85 per hour = $85	$0	$85	$13,090.
Replacement of two MOV actuators without fuel tank access.	5 work-hours × $85 per hour = $425	12,000	12,425	Up to $422,450.
Installation of AIMS–2 BP Version 17A software.	7 work-hours × $85 per hour = $595	0	595	Up to 71,400.

We have determined that revising the maintenance or inspection program takes an average of 90 work-hours per operator, although we recognize that this number may vary from operator to operator. In the past, we have estimated that this action takes 1 work-hour per airplane. Since operators incorporate maintenance or inspection program changes for their affected fleets, we have determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, we estimate the total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

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 transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2018–26–05 The Boeing Company: Amendment 39–19535; Docket No. FAA–2016–4219; Product Identifier 2015–NM–169–AD.

(a) Effective Date

This AD is effective February 1, 2019.

(b) Affected ADs

This AD affects AD 2015–19–01, Amendment 39–18264 (80 FR 55521, September 16, 2015) (''AD 2015–19–01'').

(c) Applicability

This AD applies to The Boeing Company Model 777–200, 777–200LR, 777–300, 777–300ER, and 777F series airplanes, certificated in any category, excluding line numbers 1165 and subsequent.

(d) Subject

Air Transport Association (ATA) of America Code 28, Fuel.

(e) Unsafe Condition

This AD was prompted by reports of latently failed engine fuel shutoff spar valves discovered during fuel filter replacement. We are issuing this AD to address latent failure of the fuel shutoff spar valve to the engine, which could result in the inability to terminate fuel flow to the engine and, in the case of an engine fire, could lead to wing failure.

(f) Compliance

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

(g) Inspection and Replacement

Within 24 months after the effective date of this AD: Do an inspection to determine the part numbers (P/Ns) of the motor-operated valve (MOV) actuators at the fuel shutoff spar valve positions for the left and right engines, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015. A review of airplane maintenance records is acceptable in lieu of this inspection if the part numbers can be conclusively determined from that review. If it can be definitively determined, by visual inspection or airplane maintenance records review, that P/N MA30A1017 (Boeing P/N S343T003–76) is installed, or that airplane information management system (AIMS) 2 Block Point (BP) Version 17 or later software is installed, no further action is required by paragraph (g) of this AD.

(1) For any MOV actuator with a P/N other than P/N MA30A1017 (Boeing P/N S343T003–76) on an airplane having AIMS–1 installed: Within 24 months after the effective date of this AD, install MOV actuators having part number (P/N) MA30A1017 at the engine fuel shutoff spar positions, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015.

(2) For any MOV actuator with a P/N other than P/N MA30A1017 (Boeing P/N S343T003–76) on an airplane having AIMS–2 BP Version 16 software or earlier version, installed: Within 24 months after the effective date of this AD, do the actions specified in paragraph (g)(2)(i) or (g)(2)(ii) of this AD. For purposes of this AD, airplanes identified as Group 4 in Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015, also include airplanes with AIMS–2 BP Version 16 or earlier software installed.

(i) Install MOV actuators having P/N MA30A1017 at the engine fuel shutoff spar valve positions, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015. For airplanes identified as Group 7 in Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015, with AIMS–2 BP Version 16 or earlier software, the instructions for installing P/N MA30A1017 (Boeing P/N S343T003–76) are in Figures 35 and 37 of Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015.

(ii) Install AIMS–2 BP Version 17A software or later-approved version, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–31–0218, dated September 8, 2016. Later-approved versions of the software are only those Boeing software versions that are approved as a replacement for AIMS–2 BP Version 17A software, and approved as part of the type design by the FAA after issuance of Boeing Service Bulletin 777–31–0218, dated September 8, 2016.

(h) Revision of Maintenance or Inspection Program

Within 24 months after the effective date of this AD, revise the maintenance or inspection program, as applicable, to add Airworthiness Limitation (AWL) 28–AWL–MOVA by incorporating the information specified in figure 1 to paragraph (h) of this AD into the Airworthiness Limitations Section of the Instructions for Continued Airworthiness.

Figure 1 to paragraph (h) of this AD –

AWL for installation prohibition of certain MOV actuators at the engine fuel shutoff spar valve positions

AWL No.	Applicability	Description
28-AWL-MOVA	1) Airplanes with AIMS-1 system, or 2) Airplanes with AIMS-2 Block Point (BP) Version 16 and earlier software.	Motor-Operated Valve (MOV) Actuator – Prohibition of Installation of Specific Part Numbers (P/Ns) Installation of MOV actuator P/N MA30A1001 (Boeing P/N S343T003-66) and P/N MA20A2027 (Boeing P/N S343T003-56) is prohibited at the following positions: 1. Left engine fuel shutoff spar valve position 2. Right engine fuel shutoff spar valve position

(i) Terminating Action for AD 2015–19–01

Accomplishment of the actions required by paragraphs (g) and (h) of this AD on all affected airplanes in an operator's fleet terminates all requirements of AD 2015–19–01.

(j) 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 (k) 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 (j)(4)(i) and (j)(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. 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.

(k) Related Information

For more information about this AD, contact Kevin Nguyen, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3555; email: *Kevin.Nguyen@faa.gov*.

(l) Material Incorporated by Reference

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

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

(i) Boeing Service Bulletin 777–28A0034, Revision 3, dated September 25, 2015.

(ii) Boeing Service Bulletin 777–31–0218, dated September 8, 2016.

(3) 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*.

(4) 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.

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

Issued in Des Moines, Washington, on December 18, 2018.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–28075 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0393; Product Identifier 2018–NM–010–AD; Amendment 39–19536; AD 2018–26–06]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. This AD was prompted by reports of loose, worn, or missing attachment bolts for the main landing gear (MLG) center door assemblies. This AD requires repetitive detailed inspections of the forward and aft MLG center door assembly attachments for loose, missing, damaged, or bottomed-out attachment bolts, and any wear to the retention clip assemblies as applicable; and applicable on-condition actions. This AD also provides an

optional terminating action for the repetitive inspections. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 1, 2019.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 1, 2019.

ADDRESSES: For service information identified in this final rule, 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–2018–0393.

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–2018–0393; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Alan Pohl, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3527; email: *alan.pohl@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. The NPRM published in the **Federal Register** on May 11, 2018 (83 FR 21948). The NPRM was prompted by reports of loose, worn, or missing attachment bolts for the MLG center door assemblies. The NPRM proposed to require repetitive detailed inspections of the forward and aft MLG center door assembly attachments for loose, missing, damaged, or bottomed-out attachment bolts, and any wear to the retention clip assemblies as applicable; and applicable on-condition actions. The NPRM also provided an optional terminating action for the repetitive inspections.

We are issuing this AD to address loose, missing, damaged, or bottomed-out attachment bolts, and any wear to the retention clip assemblies, which could result in departure of the center and inboard MLG door assemblies, subsequent damage to the main flap and horizontal stabilizer, and loss of control of the airplane.

Comments

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

Support for the NPRM

Boeing and The Air Line Pilots Association, International, each stated that it concurred with the intent of the NPRM.

Request for Changes to Service Information

Alaska Airlines (Alaska) requested that changes be made to Boeing Special Attention Service Bulletin 737–52–1170, Revision 1, dated December 19, 2017 (''BSASB 737–52–1170, R1''). Alaska noted that operators cannot comply with the requirements specified in paragraph (g) of the proposed AD in cases where BSASB 737–52–1170, R1, directs the operator to inspect a Group 3 airplane using Figure 3 or Figure 4 of BSASB 737–52–1170, R1, because those figures are not applicable to Group 3 airplanes.

We agree with the commenter's observations concerning Figure 3 and Figure 4 of BSASB 737–52–1170, R1. We contacted Boeing and have determined that the actions for Group 2 airplanes are appropriate for all airplanes to comply with the requirements of paragraph (g) of this AD. We have revised paragraph (h) of this AD, ''Exceptions to Service Information Specifications,'' by adding paragraph (h)(2), which states that ''Where BSASB 737–52–1170, R1, limits use of Figures 3 and 4 to Group 2 airplanes, for the purposes of this AD, those figures apply to all airplane groups.''

Request for Clarification of the Requirements of Paragraph (j) of the Proposed AD

Alaska requested clarification of the requirements specified in paragraph (j) of the proposed AD and clarification of which airplane groups would be affected by these requirements. Alaska asked if ''all actions for Group 3'' means that this paragraph is for Group 3 airplanes only or for all airplane groups. Alaska also noted that an inspection of the ''door assembly'' implies an inspection of the door, but BSASB 737–52–1170, R1, describes procedures for inspection of the ''door installation.''

We agree with the commenter's request and have revised paragraph (j) of this AD as follows:

> As of the effective date of this AD, no person may install an MLG assembly or MLG center door assembly on any airplane identified in paragraphs (c)(1) through (c)(4) of this AD unless all actions for Group 3 airplanes pertaining to that MLG center door attachment, and identified as RC in, and in accordance with, the Accomplishment Instructions of BSASB 737–52–1170, R1, have been accomplished on that MLG assembly or MLG center door assembly within the compliance times specified in Tables 4, 5, and 6, as applicable, of paragraph 1.E., ''Compliance,'' of BSASB 737–52–1170, R1. The actions for Group 3 airplanes apply to all airplanes for the requirement of this paragraph.

Request To Include Identification Method for Post-Modification Door

American Airlines (American) requested that BSASB 737–52–1170, R1, be revised to include an identifying stencil or placard that could be placed on an affected MLG center door assembly once it has been modified. The commenter stated that the MLG center door assembly is a rotable part. However, neither the NPRM nor BSASB 737–52–1170, R1, addresses the issue of a post-modification MLG center door assembly being removed from an airplane and replaced with a pre-modification MLG center door assembly.

We acknowledge the commenter's concern that BSASB 737–52–1170, R1, does not address the rotability of an MLG center door assembly. We addressed the issue of rotability in this AD in two ways. First, the applicability in paragraph (c) of this AD includes all Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, not just the airplanes specified in the effectivity of BSASB 737–52–1170, R1. Second, we added paragraph (j) of this AD, ''Parts Installation Limitation''.

While marking or part marking might provide some benefit for operator awareness and recordkeeping, the issue

of rotability is approached in different ways by different operators. When there have been similar issues regarding rotable parts, operators expressed a preference to not have a requirement to mark and/or part mark, although operators may do this at their own discretion. We also note that this AD addresses not only the MLG center door assembly but also the attachments to the MLG strut assemblies. We have not changed this AD in regard to this issue.

Request To Extend the Compliance Time

Delta Air Lines (DAL) and SunExpress (SXS) requested that the compliance time specified in paragraph (g) of the proposed AD be extended. SXS requested that the compliance time for the initial inspection be extended from 12,000 total flight cycles to 20,000 total flight cycles, or from 800 flight cycles after the effective date of the proposed AD to 1,500 flight cycles after the effective date of the proposed AD, and that the interval for the repetitive inspection be extended from 5,500 flight cycles to 6,600 flight cycles. SXS stated that 41 airplanes in its fleet have exceeded 12,000 total flight cycles, and it would have a short period of time to perform the required inspection as described in BSASB 737–52–1170, R1, and it would have to operate some airplanes a long time without the MLG shock strut doors. SXS noted that performing operations without a MLG shock strut door incurs a fuel burn penalty, which is approximately 0.77% more fuel burned per flight.

DAL stated that the compliance time for the initial inspection would require them to inspect approximately 80 airplanes in a 200-day period, requiring them to accomplish the work for most of its airplanes in the line environment, which increases the risk for an ''airplane on ground'' situation if there is a finding on the MLG structure. DAL noted that BSASB 737–52–1170, R1, does not provide relief for operators when a crack or corrosion is found in the MLG lug after removal of the bushing. For an MLG that requires re-work, DAL typically removes the MLG, replaces it with another MLG, and sends the discrepant MLG to a shop for repair. We infer that DAL is requesting that the compliance time for the initial inspection be extended.

In addition, DAL pointed out that the procedures in BSASB 737–52–1170, R1, would restrict an operator from dispatching an affected airplane until corrective is taken to repair the MLG. DAL requested that this situation be considered in the final rule by providing a limited return to service. DAL stated that if several MLG lugs are found with discrepancies, there is the potential of the operator grounding airplanes outside of a heavy maintenance check to either replace the MLG gear or go through its spare parts inventory.

We do not agree with the commenters' requests. We appreciate the impact that the required actions and the associated compliance times will have on operators. However, both the FAA and Boeing have identified this issue as an unsafe condition, and the commenters have not provided substantiating data for their proposals. In addition, a limited return to service would not be appropriate for dispatching airplanes with known cracking or corrosion. As SXS has noted, airplanes may be operated with the MLG shock strut center and inner doors removed until repairs can be made.

We have reviewed the related service information and note that while repair of the MLG lug parts is required for compliance (''RC''), certain steps are either labeled as ''RC Exempt,'' or contain technical instructions that are prefaced by ''Refer to.'' Paragraph (l)(4) of this AD and paragraph 3A., ''General Information,'' of BSASB 737–52–1170, R1 specify the actions labeled as ''RC Exempt'' are not required in order to show compliance to this AD. When the words ''refer to'' are used within an RC step and the operator has an accepted alternative procedure, the accepted alternative procedure can be used. When the words ''in accordance with'' are included in an RC step, the procedure in the Boeing document must be used. In addition, for proposals that provide an acceptable level of safety and have substantiating data, operators may apply for an AMOC using the procedures specified in paragraph (l) of this AD. We have not changed this AD in regard to this issue.

Request To Allow Installation of New, Overhauled, or Serviceable MLG

DAL requested that operators be allowed to install a new, overhauled, or serviceable MLG instead of repairing a damaged lug and installing a new bushing if excessive wear, galling, or cracking is found during a detailed inspection/measurement of the MLG shock strut bushing. DAL stated that it would have to remove the damaged MLG and send it to the shop for repair, and it would be easier to install a new, overhauled, or serviceable MLG than to wait for the damaged MLG to be repaired. DAL explained that installing a new, overhauled, or serviceable MLG provides an equivalent level of safety because the intent of the proposed AD is to repair and install new bushings. DAL observed that the damaged MLG would be repaired and then be ready for use on another airplane.

We agree with the commenter's request for the reasons provided by the commenter. We have revised paragraph (g) of this AD to clarify that replacement of an entire MLG assembly within the required compliance time satisfies the requirements of paragraph (g), provided that the requirements of paragraph (j) of this AD, ''Parts Installation Limitation,'' are satisfied for that MLG assembly.

Since the unsafe condition is also affected by rotability, we have revised paragraph (j) of this AD to clarify that an MLG assembly cannot be installed on any airplane identified in paragraphs (c)(1) through (c)(4) of this AD unless all actions for Group 3 airplanes have been accomplished on the MLG assembly. Paragraph (j) of this AD states that:

> As of the effective date of this AD, no person may install an MLG assembly or MLG center door assembly on any airplane identified in paragraphs (c)(1) through (c)(4) of this AD unless all actions for Group 3 airplanes pertaining to that MLG center door attachment, and identified as RC in, and in accordance with, the Accomplishment Instructions of BSASB 737–52–1170, R1, have been accomplished on that MLG assembly or MLG center door assembly within the compliance times specified in Tables 4, 5, and 6, as applicable, of paragraph 1.E., ''Compliance,'' of BSASB 737–52–1170, R1. The actions for Group 3 airplanes apply to all airplanes for the requirement of this paragraph.

In the proposed AD, paragraph (j) specified only an MLG center door assembly.

Request for Clarification of Intent of Parts Installation Paragraph (j)

DAL stated that paragraph (j), ''Parts Installation Paragraph,'' of the proposed AD was confusing because it stated that an operator may not install an MLG center door assembly on an airplane unless all actions identified as RC in BSASB 737–52–1170, R1, are accomplished within the compliance times specified in Tables 4, 5, and 6, as applicable, of paragraph 1.E., ''Compliance,'' of BSASB 737–52–1170, R1. DAL observed that if an operator receives a spare door with an FAA Form 8130, ''Authorized Release Certificate—Airworthiness Approval Tag,'' attached, the tag might include the AD number but the number of flight cycles at the last inspection or total flight cycles of the door would not be provided. DAL suggested that operators ensure that the inspection and corrective actions are accomplished before the spare part is installed on the airplane. Therefore, if the flight cycles on the door are unknown, the operator would still be in

compliance with the intent of the NPRM by inspecting the door before installation, and that it would be an equivalent level of safety that meets the intent of the NPRM.

We appreciate the commenter's concern and the opportunity to clarify the intent of the ''Parts Installation Limitation'' paragraph. The compliance times specified in Tables 4, 5, and 6, as applicable, of paragraph 1.E., ''Compliance,'' of BSASB 737–52–1170, R1, are in airplane flight cycles. There is no requirement in this AD or any statement in BSASB 737–52–1170, R1, that it is necessary to determine the flight cycles accumulated on the MLG door assembly. The compliance times in this AD are based on flight cycles of the airplane instead of the MLG door assembly. Our strategy in addressing the unsafe condition is to first inspect all affected airplanes, and then to address future possible unsafe conditions with the requirements in the ''Parts Installation Limitation'' paragraph.

We have not made any changes to this AD in regard to this issue.

Request To Delay Issuance of Final Rule Until Service Information is Corrected

American, subsequent to its earlier comments, requested that the final rule not be issued until discrepancies in BSASB 737–52–1170, R1, are rectified and the instructions made clearer. The commenter stated that operators cannot comply with the requirements specified in the NPRM because of discrepancies in BSASB 737–52–1170, R1. The commenter identified the following discrepancies.

1. BSASB 737–52–1170, R1, has quantities listed in Figures 1 and 2 that are double what is actually on the aircraft. Although there is a note that says ''The QTY numbers shown below are the number or parts necessary for each airplane,'' there is a Figure 1 for the left and a Figure 2 for the right. Each side has only one of each bolt, not two. Note that all of the other figures list the quantity of parts that is needed for only the left side or the right side, as applicable. Figures 1 and 2 are different than the other figures in this regard.

2. In Figure 5 (and Figures 6, 7, and 8), step 6 says to remove three laminated shims. The airplane only has two laminated shims.

3. In Figure 13 (and Figure 14) step #4 has you install and torque the bolt. However, the bolt in #4 has to go through the kept bracket and if you install the bolt first, you have to take it back out to install the bracket. Steps #4 and #5 should be reversed.

4. In Figure 13 (and Figure 14), step #6 states to install 3 each shims, but only 2 were removed, so do we install 3 each in the new configuration or just put 2 back?

5. In Figure 13 (and Figure 14), once we installed the forward bolt in step 4, with the correct washers installed, the bolt bottomed out in the barrel nut housing, since the bolt is too long. New bolts are slightly longer than old. The bolt needs another thick washer to fix the issue. The kits that are being delivered do not have an adequate amount of the necessary washers.

Alaska also noted that Figure 13 and Figure 14 of BSASB 737–52–1170, R1, depict view C with a pre-modification installation in lieu of a post-modification installation.

We acknowledge the commenters' concerns regarding the information in the service information that requires clarification. The amount of clarification needed would be overly complex for inclusion in this AD. We expect to work with Boeing to issue a global AMOC addressing any known errors as soon as possible. In addition, we have revised paragraph (h) of this AD, ''Exceptions to Service Information Specifications,'' by adding paragraph (h)(3) to provide operators with information regarding how to address any other issues, if needed.

In light of the critical nature of the identified unsafe condition, we do not consider it warranted to delay the issuance of this final rule. When Boeing provides a revision to BSASB 737–52–1170, R1, we will review it in consideration of an AMOC to this AD or may consider future rulemaking action.

Request To Revise Compliance Time Specifications

DAL noted that paragraph (h) of the proposed AD states that ''For purposes of determining compliance with the requirements of this AD: Where BSASB 737–52–1170, Revision 1, uses the phrase 'the original issue date of this service bulletin', this AD requires using 'the effective date of this AD'.'' DAL pointed out that in Table 4 of BSASB 737–52–1170, R1, the compliance times for the Group 3 airplanes, states that the actions should be completed ''Within 800 flight cycles after the Revision 1 date of this service bulletin.'' DAL asked if the AD effective date should also replace the Revision 1 date of the service information. We infer that DAL is requesting a revision to paragraph (h) of the proposed AD to clarify that for purposes of determining compliance with the requirements of the final rule that the effective date of the AD should be used instead of the original issue date or the Revision 1 date of the service information.

We agree with the commenter's request for the reasons provided by the commenter. We have re-designated paragraph (h) of the proposed AD as paragraph (h)(1) in this AD, and revised the text to state that for purposes of determining compliance with the requirement of this AD, where BSASB 737–52–1170, Revision 1, uses the phrase ''the original issue date of this service bulletin'' or ''the Revision 1 date of this service bulletin'' this AD requires using ''the effective date of this AD.''

Observations Regarding Service Information

American stated that BSASB 737–52–1170, R1, is confusing and unnecessarily complex. American observed that BSASB 737–52–1170, R1, provides for 14 possible conditions, multiple options for corrective actions, 3 multi-page logic diagrams, and 10 different parts of instructions. American stated that the complexity could be simplified if the service information pointed the operator straight to the modification of the MLG center door assembly retention clip assemblies and, if needed, repair to the lugs and replacement of the bushings. American declared that the unnecessary complexity of the service bulletin invites non-compliance issues.

We acknowledge the commenter's concerns regarding BSASB 737–52–1170, R1. The reason BSASB 737–52–1170, R1, includes 14 possible conditions, multiple options for corrective actions, 3 multi-page logic diagrams, and 10 different parts of instructions is to provide a comprehensive set of procedures to address the unsafe condition that exists in the affected fleet of airplanes. We suggest that the commenter provide its comments regarding improvements to this document directly to Boeing. We have not changed this AD in regard to this issue.

Effect of Winglets on Accomplishment of the Proposed Actions

Aviation Partners Boeing stated that accomplishing the Supplemental Type Certificate (STC) ST00830SE does not affect the ability to accomplish the actions specified in the NPRM.

We concur with the commenter. We have added paragraph (c)(5) to this AD to state that installation of STC ST00830SE does not affect the ability to accomplish the actions required by this final rule. Therefore, for airplanes on which STC ST00830SE is installed, a ''change in product'' alternative method of compliance (AMOC) approval request is not necessary to comply with the requirements of 14 CFR 39.17.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this final rule with the changes described

previously and minor editorial changes. We have determined that these minor changes:

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

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

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Special Attention Service Bulletin 737–52–1170, Revision 1, dated December 19, 2017. The service information describes procedures for repetitive detailed inspections of the forward and aft MLG center door assembly attachments for loose, missing, damaged, or bottomed-out attachment bolts, and any wear to the retention clip assemblies as applicable; and applicable on-condition actions. The service information also describes procedures for modification of the MLG center door assembly retention clip assemblies as an optional terminating action for the repetitive inspections. 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 1,814 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	2 work-hours × $85 per hour = $170 per inspection cycle.	$0	$170 per inspection cycle.	$308,380 per inspection cycle.

ESTIMATED COSTS FOR OPTIONAL TERMINATING ACTION

Action	Labor cost	Parts cost	Cost per product
Modification	Up to 6 work-hours × $85 per hour = $510	$2,900	Up to $3,410.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this AD.

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

Authority for This Rulemaking

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

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

This 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

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2018–26–06 The Boeing Company: Amendment 39–19536; Docket No. FAA–2018–0393; Product Identifier 2018–NM–010–AD.

(a) Effective Date

This AD is effective February 1, 2019.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category, as specified in paragraphs (c)(1) through (c)(4) of this AD.

(1) Airplanes in Group 1, and in Group 2, Configuration 1, as identified in Boeing Special Attention Service Bulletin 737–52–1170, Revision 1, dated December 19, 2017 (''BSASB 737–52–1170, R1'').

(2) Airplanes in Group 2, Configuration 2, as identified in BSASB 737–52–1170, R1.

(3) Airplanes in Group 3, as identified in BSASB 737–52–1170, R1, except where this service bulletin specifies the groups as line numbers 4275 through 6724 inclusive, and 6736, this AD specifies those groups as line number 4275 through any line number of an airplane with an original Certificate of Airworthiness or an original Export Certificate of Airworthiness dated on or before the effective date of this AD.

(4) All Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes with an original Certificate of Airworthiness or an original Export Certificate of Airworthiness dated after the effective date of this AD.

(5) Installation of Supplemental Type Certificate (STC) ST00830SE does not affect the ability to accomplish the actions required by this AD. Therefore, for airplanes on which STC ST00830SE is installed, a ''change in product'' alternative method of compliance (AMOC) approval request is not necessary to comply with the requirements of 14 CFR 39.17.

(d) Subject

Air Transport Association (ATA) of America Code 52, Doors.

(e) Unsafe Condition

This AD was prompted by reports of loose, worn, or missing attachment bolts for the main landing gear (MLG) center door assemblies. We are issuing this AD to address loose, missing, damaged, or bottomed-out attachment bolts, and any wear to the retention clip assemblies, which could result in departure of the center and inboard MLG door assemblies, subsequent damage to the main flap and horizontal stabilizer, and loss of control of the airplane.

(f) Compliance

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

(g) Required Actions

For airplanes identified in paragraphs (c)(1), (c)(2), or (c)(3) of this AD: Except as required by paragraph (h) of this AD, at the applicable time specified in Tables 1 through 6, as applicable, of paragraph 1E., ''Compliance,'' of BSASB 737–52–1170, R1, do all applicable actions identified as ''RC'' (required for compliance) in, and in accordance with, the Accomplishment Instructions of BSASB 737–52–1170, R1. Replacement of an entire MLG assembly within the required compliance time satisfies the requirements of this paragraph, provided that the requirements of paragraph (j) of this AD are satisfied for that MLG assembly.

(h) Exceptions to Service Information Specifications

(1) For purposes of determining compliance with the requirements of this AD: Where BSASB 737–52–1170, R1, uses the phrase ''the original issue date of this service bulletin'' or ''the Revision 1 date of this service bulletin'' this AD requires using ''the effective date of this AD.''

(2) Where BSASB 737–52–1170, R1, limits use of Figures 3 and 4 to Group 2 airplanes, for the purposes of this AD, those figures apply to all airplane groups.

(3) If any action(s) identified as RC in BSASB 737–52–1170, R1, cannot be accomplished as specified therein, those action(s) must be accomplished using a method approved in accordance with the procedures specified in paragraph (l) of this AD.

(i) Optional Terminating Action for Repetitive Inspections

Accomplishment of the modification of the MLG center door retention clip assemblies specified in Part 5 of the Accomplishment Instructions of BSASB 737–52–1170, R1, terminates the repetitive inspections required by paragraph (g) of this AD for that MLG center door retention clip only. The requirements of paragraph (j) of this AD continue to apply.

(j) Parts Installation Limitation

As of the effective date of this AD, no person may install an MLG assembly or MLG center door assembly on any airplane identified in paragraphs (c)(1) through (c)(4) of this AD unless all actions for Group 3 airplanes pertaining to that MLG center door attachment, and identified as RC in, and in accordance with, the Accomplishment Instructions of BSASB 737–52–1170, R1, have been accomplished on that MLG assembly or MLG center door assembly within the compliance times specified in Tables 4, 5, and 6, as applicable, of paragraph 1.E., ''Compliance,'' of BSASB 737–52–1170, R1. The actions for Group 3 airplanes apply to all airplanes for the requirement of this paragraph.

(k) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Special Attention Service Bulletin 737–52–1170, dated July 29, 2014.

(l) 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 (m)(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) Except as required by paragraph (h) of this AD: For service information that contains steps that are labeled as RC, the provisions of paragraphs (l)(4)(i) and (l)(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.

(m) Related Information

(1) For more information about this AD, contact Alan Pohl, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3527; email: *alan.pohl@faa.gov.*

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

(n) Material Incorporated by Reference

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

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

(i) Boeing Special Attention Service Bulletin 737–52–1170, Revision 1, dated December 19, 2017.

(ii) [Reserved]

(3) 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.*

(4) 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.

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

Issued in Des Moines, Washington, on December 18, 2018.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–28077 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0641; Product Identifier 2018–NM–032–AD; Amendment 39–19519; AD 2018–25–08]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

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

ACTION: Final rule.

SUMMARY: We are superseding Airworthiness Directive (AD) 2017–22–07, which applied to certain Airbus SAS Model A319 series airplanes; Model A320–211,–212, –214, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes. AD 2017–22–07 required repetitive inspections of the frame forks, and corrective actions if necessary. AD 2017–22–07 also included optional modifications that constituted terminating action. This AD requires modifying certain forward and aft cargo compartment doors, and related investigative and corrective actions. This AD was prompted by an evaluation done by the design approval holder indicating that certain areas of certain cargo compartment doors are subject to widespread fatigue damage, and a determination was made that a modification of the frame forks must be done. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 1, 2019.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 1, 2019.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of January 2, 2018 (82 FR 56158, November 28, 2017).

ADDRESSES: For service information identified in this final rule, contact Airbus, Airworthiness Office—EIAS, 2 Rond Point Emile Dewoitine, 31700 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 44 51; email: *account.airworth-eas@airbus.com;* internet: *http://www.airbus.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–2018–0641.

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–2018–0641; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2017–22–07, Amendment 39–19087 (82 FR 56158, November 28, 2017) (''AD 2017–22–07''). AD 2017–22–07 applied to certain Airbus SAS Model A319 series airplanes; Model A320–211, –212, –214, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes. The NPRM published in the **Federal Register** on August 3, 2018 (83 FR 38091). The NPRM was prompted by an evaluation done by the design approval holder (DAH) indicating that the frame forks and outer skin on the forward and aft cargo compartment doors are subject to widespread fatigue damage (WFD), and a determination was made that a modification of the frame forks must be accomplished. The NPRM proposed to continue to require repetitive inspections of the frame forks, and corrective actions if necessary, and to include optional modifications that constitute terminating action. The NPRM also proposed to require modifying certain forward and aft cargo compartment doors, and related investigative and corrective actions. We are issuing this AD to address cracks on the frame forks and outer skin on the forward and aft cargo compartment doors, which could lead to reduced structural integrity and failure of the cargo compartment door, possible decompression of the airplane, and injury to occupants.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2018–0024, dated January 29, 2018 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus SAS Model A319 series airplanes; Model A320–211, –212, –214, –216, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes. The MCAI states:

> During full scale fatigue test, cracks were found on frame forks and outer skin on forward and aft cargo doors. To improve the fatigue behaviour of the frame forks, Airbus introduced modification (mod) 22948 in production, and issued inspection Service Bulletin (SB) A320–52–1032 and mod SB A320–52–1042, both recommended. Since those actions were taken, further improved cargo compartment doors were introduced in production through Airbus mod 26213, on aeroplanes having [manufacturer serial number] MSN 0759 and up.
>
> In the frame of the Widespread Fatigue Damage (WFD) study, it was determined that repetitive inspection are necessary for aft and forward cargo compartment doors on aeroplanes that are in pre-mod 26213 configuration. Failure to detect cracks would reduce the cargo door structural integrity.
>
> This condition, if not detected and corrected, could lead to cargo door failure, possibly resulting in decompression of the aeroplane and injury to occupants.
>
> To address this unsafe condition, Airbus issued SB A320–52–1171 to provide instructions for repetitive special detailed inspections (SDI). This SB was later revised to correct the list of affected cargo doors. Airbus also issued SB A320–52–1170, introducing a door modification which would allow terminating the repetitive SDI[s].
>
> Consequently, EASA issued AD 2016–0187 [which corresponds to FAA AD 2017–22–07] to require repetitive SDI[s] of the affected cargo doors and, depending on findings, the accomplishment of applicable repairs. That [EASA] AD also included reference to SB A320–52–1170 as optional terminating action.
>
> Since that [EASA] AD was issued, further investigations linked to the WFD analysis highlighted that, to meet the WFD requirements, it is necessary to require

embodiment of the terminating action modification.

For the reason described above, this [EASA] AD retains the requirements of EASA AD 2016–0187, which is superseded, and requires modification of all affected cargo doors, which constitutes terminating action for the repetitive SDI[s] required by this [EASA] AD.

The related investigative action is a high frequency eddy current (HFEC) rotating probe inspection for cracks. Corrective actions include, among other things, oversizing and cold-expanding any affected holes and repair.

The Airbus SAS Model A320–216 was U.S. type certificated on December 19, 2016. Before that date, any EASA ADs that affected Model A320–216 airplanes were included on the Required Airworthiness Actions List (RAAL). One or more Model A320–216 airplanes have subsequently been placed on the U.S. Register, and will now be included in FAA AD actions. For Model A320–216 airplanes, the requirements that correspond to AD 2017–22–07 were mandated by the MCAI via the RAAL. Although that RAAL requirement is still in effect, for continuity and clarity we have identified Model A320–216 airplanes in paragraph (c) of this AD.

You may examine the MCAI in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0641.

Comments

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

Support for the NPRM

United Airlines (UA) stated its agreement with the intent of the NPRM.

Request To Refer to Revised Service Information

UA asked that the NPRM reference Airbus Service Bulletin A320–52–1170, Revision 01, dated June 14, 2018. UA stated that this latest revision only includes various updates and clarifications. Further, UA pointed out that an existing alternative method of compliance (AMOC) already allows this revision. UA also asked that we include credit for doing previous actions using Airbus Service Bulletin A320–52–1170, dated September 5, 2016.

We agree with the commenter's request. For the reasons provided by the commenter, and because the revised service information does not include any additional actions, we have updated the preamble and paragraphs (j) and (k)(2) of this AD to refer to the revised service information. We have also added paragraph (o)(1) to this AD to provide credit for actions accomplished prior to the effective date of this AD using Airbus Service Bulletin A320–52–1170, dated September 5, 2016. We have redesignated subsequent paragraphs accordingly.

Request To Reference Later Revisions of Service Information

UA asked that we change paragraph (h) of the proposed AD to allow use of later EASA-approved service bulletins. UA stated that EASA AD 2018–0024, dated January 29, 2018, allows the use of later-approved revisions of Airbus Service Bulletin A320–52–1170, dated September 5, 2016. UA added that it has an approved AMOC that allows for the use of Airbus Service Bulletin A320–52–1170, Revision 01, dated June 14, 2018, as well as ''all corresponding later EASA-approved service information'' for accomplishing the requirements in the proposed AD.

We do not agree with the commenter's request. We may not refer to any document that does not yet exist. In general terms, we are required by Office of the Federal Register (OFR) regulations to either publish the service document contents as part of the actual AD language; or submit the service document to the OFR for approval as referenced material, in which case we may only refer to such material in the text of an AD. The AD may refer to the service document only if the OFR approved it for incorporation by reference. See 1 CFR part 51. To allow operators to use later revisions of the referenced document (issued after publication of the AD), either we must revise the AD to reference specific later revisions, or operators must request approval to use later revisions as an AMOC with this AD under the provisions of paragraph (q)(1) of this AD. Therefore, we made no change to this AD in this regard.

Request for Correction to Service Information

UA asked for approval for a correction to Appendix 02, page 1, of Airbus Service Bulletin A320–52–1170, Revision 01, dated June 14, 2018. UA asked that the following sentence ''For the alternate fasteners for ASNA2657K3 series, refer to the next page'' be changed to ''For the alternate fasteners for ASNA2657K3 series, refer to table in page 1.''

We acknowledge the commenter's concern. However, page 2 of Appendix 02, does contain a table referencing alternative fasteners; there is no table on page 1 of Appendix 02. Therefore, the service information is correct regarding this issue. Further, only the manufacturer may revise its service information. Therefore, we have made no change to this AD in this regard.

Additional Change Made to This AD

We have added paragraph (o)(2) to this AD to provide credit for actions accomplished prior to the effective date of this AD using Airbus Service Bulletin A320–52–1042, Revision 2, dated January 14, 1997. As explained previously, we have redesignated subsequent paragraphs accordingly.

Conclusion

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

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

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

Related Service Information Under 1 CFR Part 51

Airbus SAS has issued Service Bulletin A320–52–1170, Revision 01, dated June 14, 2018, which describes procedures for modifying all affected forward and aft cargo compartment doors, including oversizing and cold working of riveting for all frame forks.

Airbus SAS has also issued Service Bulletin A320–52–1171, Revision 02, dated April 10, 2017, which the Director of the Federal Register approved for incorporation by reference as of January 2, 2018 (82 FR 56158, November 28, 2017).

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 88 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Modification ..	24 work-hours × $85 per hour = $2,040	Up to $240 ..	Up to $2,280	Up to $200,640.
Inspection	25 work-hours × $85 per hour = $2,125 per inspection cycle.	$0	$2,125 per inspection cycle.	$187,000 per inspection cycle.

We have received no definitive data that would enable us to provide cost estimates for the on-condition repairs and replacements specified in this 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 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 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 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.

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) 2017–22–07, Amendment 39–19087 (82 FR 56158, November 28, 2017), and adding the following new AD:

2018–25–08 Airbus SAS: Amendment 39–19519; Docket No. FAA–2018–0641; Product Identifier 2018–NM–032–AD.

(a) Effective Date

This AD is effective February 1, 2019.

(b) Affected ADs

This AD replaces AD 2017–22–07, Amendment 39–19087 (82 FR 56158, November 28, 2017) (''AD 2017–22–07'').

(c) Applicability

This AD applies to Airbus SAS Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–211, –212, –214, –216, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes; certificated in any category; manufacturer serial numbers through 0758 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 52, Doors.

(e) Reason

This AD was prompted by an evaluation by the design approval holder (DAH) indicating that the frame forks and outer skin on the forward and aft cargo compartment doors are subject to widespread fatigue damage (WFD), and a determination that a modification of the frame forks must be accomplished. We are issuing this AD to address cracks on the frame forks and outer skin on the forward and aft cargo compartment doors, which could lead to reduced structural integrity and failure of the cargo compartment door, possible decompression of the airplane, and injury to occupants.

(f) Compliance

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

(g) Retained Definition of Affected Door, With No Changes

This paragraph restates the definition in paragraph (g) of AD 2017–22–07, with no changes. For the purpose of this AD, an ''affected door'' is a forward or aft cargo compartment door, having any part number listed in table 1 to paragraph (g) of this AD, except a cargo compartment door on which Airbus Service Bulletin A320–52–1042 or Airbus Service Bulletin A320–52–1170 is embodied.

Table 1 to Paragraph (g) of this AD – *Affected Cargo Doors*

Forward cargo compartment door part numbers	Aft cargo compartment door part numbers
D52371000000	D52371900000
D52371000002	D52371900002
D52371000004	D52371900004
D52371000006	D52371900008
D52371000008	D52371900010
D52371000010	D52371900012
D52371000012	D52371900014
D52371000014	D52371900016
D52371000016	D52371900018
D52371000018	D52371900022
D52371000022	

(h) Retained Repetitive Special Detailed Inspection of Frame Forks, With No Changes

This paragraph restates the requirements of paragraph (h) of AD 2017–22–07, with no changes. At the latest of the compliance times listed in paragraphs (h)(1) through (h)(4) of this AD: Do a special detailed inspection of all frame forks in the beam 4 area of any affected door as defined in paragraph (g) of this AD, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1171, Revision 02, dated April 10, 2017, except as specified in paragraphs (l) and (m) of this AD. Repeat the inspection thereafter at intervals not to exceed 3,000 flight cycles. A review of the airplane delivery or maintenance records is acceptable to identify any affected door installed on the airplane, provided that the cargo compartment door part number can be conclusively determined from that review.

(1) Before exceeding 37,500 flight cycles since first installation of the door on an airplane.

(2) Within 900 flight cycles after January 2, 2018 (the effective date of AD 2017–22–07), without exceeding 41,950 flight cycles since first installation of the door on an airplane.

(3) Within 50 flight cycles after January 2, 2018 (the effective date of AD 2017–22–07), for a door having reached or exceeded 41,900 flight cycles since first installation on an airplane.

(4) Within 3,000 flight cycles since the last inspection of the door as specified in Airbus Service Bulletin A320–52–1032.

(i) Retained Corrective Actions, With No Changes

This paragraph restates the requirements of paragraph (i) of AD 2017–22–07, with no changes. If any crack is found during any inspection required by paragraph (h) of this AD, before further flight, do all applicable corrective actions in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1171, Revision 02, dated April 10, 2017, except as specified in paragraphs (l) and (m) of this AD. Accomplishment of applicable corrective actions does not constitute terminating action for the repetitive inspections.

(j) Terminating Modification for Repetitive Inspections

Before the accumulation of 56,300 flight cycles, but not before the accumulation of 21,700 flight cycles since first installation of the affected door on an airplane: Modify all affected doors of an airplane, including accomplishment of all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1170, Revision 01, dated June 14, 2018. Accomplishing this modification constitutes terminating action for the repetitive inspections specified in paragraph (h) of this AD for that airplane, provided that, after modification, no affected door is re-installed on that airplane.

(k) Retained Optional Terminating Action, With Changes Related to Compliance

This paragraph restates the requirements of paragraph (j) of AD 2017–22–07, with changes related to compliance.

(1) Modification of all affected doors of an airplane before the effective date of this AD, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1042, Revision 2, dated January 14, 1997 (which is incorporated by reference in AD 2017–22–07 and is not incorporated in this AD), constitutes terminating action for the repetitive inspections specified in paragraph (h) of this AD and a method of compliance for the modification required by paragraph (j) of this AD, for that airplane, provided that, after modification, no affected door is re-installed on that airplane. For airplanes not previously modified before the effective date of this AD, the modification required by paragraph (j) of this AD must be done.

(2) Modification of all affected doors of an airplane including accomplishment of all applicable related investigative and corrective actions, if done before the effective date of this AD in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–52–1170, Revision 01, dated June 14, 2018, except as specified in paragraph (l) of this AD, constitutes terminating action for the repetitive inspections specified in paragraph (h) of this AD and a method of compliance for the modification required by paragraph (j) of this AD, for that airplane, provided that, after modification, no affected door is re-installed on that airplane. For airplanes not previously modified before the effective date of this AD, the modification required by paragraph (j) of this AD must be done.

(3) Modification of all affected doors on an airplane, in case of finding damaged frame forks, as specified in an Airbus Repair Design Approval Sheet (RDAS), if done before the effective date of this AD and done in accordance with a method approved by the Manager, International Section, Transport Standards Branch, FAA; or the European Aviation Safety Agency (EASA); or Airbus SAS's EASA Design Organization Approval

(DOA); constitutes terminating action for the repetitive inspection specified in paragraph (h) of this AD and a method of compliance for the modification required by paragraph (j) of this AD, for that airplane, provided that, after modification, no affected door is re-installed on that airplane. For airplanes not previously modified before the effective date of this AD, the modification required by paragraph (j) of this AD must be done.

(l) Retained Exception to Service Information, With Updated Service Information

This paragraph restates the requirements of paragraph (k) of AD 2017–22–07, with updated service information. Where Airbus Service Bulletin A320–52–1170, dated September 5, 2016; Airbus Service Bulletin A320–52–1170, Revision 01, dated June 14, 2018; or Airbus Service Bulletin A320–52–1171, Revision 02, dated April 10, 2017; specifies to contact Airbus for appropriate action, and specifies that action as ''RC'' (Required for Compliance): Before further flight, accomplish corrective actions in accordance with the procedures specified in paragraph (q)(2) of this AD.

(m) Retained Provision: No Reporting Requirement

This paragraph restates the provision provided in paragraph (l) of AD 2017–22–07, with no changes. Although Airbus Service Bulletin A320–52–1171, Revision 02, dated April 10, 2017, specifies to submit certain information to the manufacturer, and specifies that action as ''RC,'' this AD does not include that requirement.

(n) Retained Credit for Previous Actions

This paragraph restates the provisions specified in paragraph (m) of AD 2017–22–07, with no changes.

(1) This paragraph provides credit for the actions required by paragraphs (h) and (i) of this AD, if those actions were performed before January 2, 2018 (the effective date of AD 2017–22–07), using Airbus Service Bulletin A320–52–1171, dated October 29, 2015, provided that it can be conclusively determined that any part number D52371000018 was also inspected as specified in paragraph (h) of this AD.

(2) This paragraph provides credit for the actions required by paragraphs (h) and (i) of this AD, if those actions were performed before January 2, 2018 (the effective date of AD 2017–22–07), using Airbus Service Bulletin A320–52–1171, Revision 01, dated September 5, 2016.

(o) New Credit for Previous Actions

(1) This paragraph provides credit for the actions required by paragraphs (j) and (k)(2) of this AD, if those actions were performed before the effective date of this AD using Airbus Service Bulletin A320–52–1170, dated September 5, 2016.

(2) This paragraph provides credit for the optional terminating modification specified in paragraph (k)(1) of this AD, if those actions were performed before the effective date of this AD using Airbus Service Bulletin A320–52–1042, Revision 2, dated January 14, 1997.

(p) Parts Installation Limitation

As of the effective date of this AD, no person may install, on any airplane, an affected door specified in paragraph (g) of this AD, unless less than 56,300 flight cycles have accumulated since first installation of the door on an airplane, and unless the door has been inspected in accordance with the requirements of paragraph (h) of this AD and all applicable corrective actions have been done in accordance with paragraph (i) of this AD.

(q) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards 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 International Section, send it to the attention of the person identified in paragraph (r)(2) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or the EASA; or Airbus SAS's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as specified in paragraphs (l) and (m) of this AD: If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified 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 procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(r) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2018–0024, dated January 29, 2018, for related information. This MCAI may be found in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0641.

(2) For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223.

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (s)(5) and (s)(6) of this AD.

(s) 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 February 1, 2019.

(i) Airbus Service Bulletin A320–52–1170, Revision 01, dated June 14, 2018.

(ii) [Reserved]

(4) The following service information was approved for IBR on January 2, 2018 (82 FR 56158, November 28, 2017).

(i) Airbus Service Bulletin A320–52–1171, Revision 02, dated April 10, 2017.

(ii) [Reserved]

(5) For service information identified in this AD, contact Airbus, Airworthiness Office—EIAS, 2 Rond Point Emile Dewoitine, 31700 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 44 51; email: *account.airworth-eas@airbus.com;* internet: *http://www.airbus.com.*

(6) 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.

(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 Des Moines, Washington, on November 23, 2018.

John P. Piccola,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–26533 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0577; Airspace Docket No. 18–AAL–9]

RIN 2120–AA66

Amendment of Class E Airspace; Atqasuk, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class E airspace extending upward from 1,200

feet above the surface at Atqasuk Edward Burnell Sr. Memorial Airport, Atqasuk, AK. This action adds exclusionary language to the legal description of the airport to ensure the safety and management of aircraft within the National Airspace System. Also, the geographic coordinates of the airport are updated.

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

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

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

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

FOR FURTHER INFORMATION CONTACT: Bonnie Malgarini, Federal Aviation Administration, Operations Support Group, Western Service Center, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–2329.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Class E airspace extending upward from 1,200 feet above the surface at Atqasuk Edward Burnell Sr. Memorial Airport, AK, to support IFR operations in standard instrument approach and departure procedures at the airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (83 FR 46434; September 13, 2018) for Docket No. FAA–2018–0577 to modify Class E airspace extending upward from 1,200 feet above the surface at Atqasuk Edward Burnell Sr. Memorial Airport, Atqasuk, AK, and to add exclusionary language to the legal description of the airport to ensure the safety and management of aircraft within the National Airspace System. Also, the geographic coordinates of the airport would be updated. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

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

Availability and Summary of Documents for Incorporation by Reference

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

The Rule

The FAA is amending Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying Class E airspace extending upward from 1,200 feet above the surface at Atqasuk Edward Burnell Sr. Memorial Airport, Atqasuk, AK. Also, language has been added to the legal description of the airport to exclude that airspace extending beyond 12 miles of the shoreline. This action supports IFR operations in standard instrument approach and departure procedures at the airport.

Additionally, an editorial change made to the airport's geographic coordinates brings them up to date with FAA's aeronautical database.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

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

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

* * * * *

AAL AK E5 Atqasuk, AK [Amended]

Atqasuk Edward Burnell Sr. Memorial Airport, AK

(Lat. 70°28′02″ N, long. 157°26′08″ W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Atqasuk Edward Burnell Sr. Memorial Airport; and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of Atqasuk Edward Burnell Sr. Memorial Airport, excluding that airspace extending beyond 12 miles of the shoreline.

Issued in Seattle, Washington, on December 14, 2018.

Byron Chew,

Acting Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2018–28086 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0626; Airspace Docket No. 18–ASO–9]

RIN 2120–AA66

Establishment of Class E Airspace; Engelhard, NC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace extending upward from 700 feet above the surface at Hyde County Airport, Engelhard, NC, to accommodate new area navigation (RNAV) global positioning system (GPS) standard instrument approach procedures serving this airport. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations at this airport.

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

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

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

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Ave., College Park, GA 30337; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes Class E airspace at Hyde County Airport, Engelhard, NC, to support standard instrument approach procedures for IFR operations at this airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (83 FR 51903, October 15, 2018) for Docket No. FAA–2018–0626 to establish Class E airspace extending upward from 700 feet above the surface at Hyde County Airport, Engelhard, NC. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

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

Availability and Summary of Documents for Incorporation by Reference

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

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 establishes Class E airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Hyde County Airport, Engelhard, NC, providing the controlled airspace required to support the new RNAV (GPS) standard instrument approach procedures. These changes are necessary for continued safety and management of IFR operations at this airport.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

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

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

* * * * *

ASO NC E5 Engelhard, NC [New]

Hyde County Airport, NC
(Lat. 35°33′43″ N, long. 75°57′20″ W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Hyde County Airport.

Issued in College Park, Georgia, on December 18, 2018.

Geoff Lelliott,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2018–28087 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0280; Airspace Docket No. 17–AGL–27]

RIN 2120–AA66

Amendment of VOR Federal Airways V–170 and V–219 in the Vicinity of Fairmont, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies VHF Omnidirectional Range (VOR) Federal airways V–170 and V–219 in the vicinity of Fairmont, MN. The FAA is taking this action due to the planned decommissioning of the Fairmont, MN, VOR navigation aid (NAVAID), which provides navigation guidance for portions of the affected air traffic service (ATS) routes. The Fairmont VOR is being decommissioned as part of the VOR Minimum Operational Network (MON) program.

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.

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

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

History

The FAA published a notice of proposed rulemaking in the **Federal Register** for Docket No. FAA–2018–0280 (83 FR 16804; April 17, 2018), amending VOR Federal airways V–170 and V–219 due to the planned decommissioning of the Fairmont, MN, VOR. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

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

Availability and Summary of Documents for Incorporation by Reference

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

The Rule

The FAA is amending Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying VOR Federal airways V–170 and V–219. The planned decommissioning of the Fairmont, MN, VOR has made these actions necessary. The VOR Federal airway changes are outlined below.

V–170: V–170 extends between the Devils Lake, ND, VOR/DME and the Salem, MI VORTAC; and between the Bradford, PA, VOR/DME and the intersection of the Andrews 060° and Baltimore, MD, 165° radials (POLLA fix); excluding the airspace within R–5802 when active. The airway segment between the Worthington, MN, VOR/DME and the Rochester, MN, VOR/DME is removed. The unaffected portions of the existing airway remain as charted.

V–219: V–219 extends between the Hayes Center, NE, VORTAC and the Mankato, MN, VOR/DME. The airway segment between the Sioux City, IA, VORTAC and the Mankato, MN, VOR/DME is removed. The unaffected portions of the existing airway remain as charted.

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

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under

Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of modifying VOR Federal airways V–170 and V–219 near Fairmont, MN, qualifies for categorical exclusion under the National Environmental Policy Act and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points). As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–170 [Amended]

From Devils Lake, ND; INT Devils Lake 187° and Jamestown, ND, 337° radials; Jamestown; Aberdeen, SD; Sioux Falls, SD; to Worthington, MN. From Rochester, MN; Nodine, MN; Dells, WI; INT Dells 097° and Badger, WI, 304° radials; Badger; INT Badger 121° and Pullman, MI, 282° radials; Pullman; to Salem, MI. From Bradford, PA; Slate Run, PA; Selinsgrove, PA; Ravine, PA; INT Ravine 125° and Modena, PA, 318° radials; Modena; Dupont, DE; INT Dupont 223° and Andrews, MD, 060° radials; to INT Andrews 060° and Baltimore, MD, 165° radials. The airspace within R–5802 is excluded when active.

* * * * *

V–219 [Amended]

From Hayes Center, NE; INT Hayes Center 059° and Wolbach, NE, 251° radials; Wolbach; Norfolk, NE; to Sioux City, IA.

Issued in Washington, DC, on December 19, 2018.

Scott M. Rosenbloom,

Acting Manager, Airspace Policy Group.

[FR Doc. 2018–28111 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2017–0348; Airspace Docket No. 17–AAL–4]

RIN 2120–AA66

Amendment of Class E Airspace for the following Alaska Towns; Nuiqsut, AK; Perryville, AK; Pilot Point, AK; and Point Lay, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class E airspace extending upward from 1,200 feet above the surface in Alaska at Nuiqsut Airport; Oooguruk Island Heliport, Nuiqsut; Pioneer Heliport, Nuiqsut; Perryville Airport; Pilot Point Airport; and Point Lay Airport. This action adds exclusionary language to the legal descriptions of these airports to exclude Class E airspace extending beyond 12 miles from the shoreline, and ensures the safety and management of aircraft within the National Airspace System. Also, this action removes the heliport name from the airspace designation of Oooguruk Island Heliport and Pioneer Heliport.

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

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

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

FOR FURTHER INFORMATION CONTACT: Bonnie Malgarini, Federal Aviation Administration, Operations Support Group, Western Service Center, 2200 S 216th St., Des Moines, WA 98198–6547; telephone (206) 231–2329.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Class E airspace extending upward from 1,200 feet above the surface at Nuiqsut Airport, Oooguruk Island Heliport, Pioneer Heliport, Perryville Airport,

Pilot Point Airport, and Point Lay Airport, AK, to support IFR operations in standard instrument approach and departure procedures at these airports.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (83 FR 37776; August 2, 2018) for Docket No. FAA–2017–0348 to modify Class E airspace for the following Alaska Towns; Nuiqsut, AK; Perryville, AK; Pilot Point, AK; and Point Lay, AK. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

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

Availability and Summary of Documents for Incorporation by Reference

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

The Rule

The FAA is amending Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying Class E airspace extending upward from 1,200 feet above the surface at Nuiqsut Airport, Nuiqsut, AK; Oooguruk Island Heliport, Nuiqsut, AK; Pioneer Heliport, Nuiqsut, AK; Perryville Airport, Perryville, AK; Pilot Point Airport, Pilot Point, AK; and Point Lay Airport, Point Lay, AK. This action adds language to the legal descriptions of these airports that reads ''excluding that airspace that extends beyond 12 miles from the shoreline.''

Also, this action removes the airport name from the airspace designation for Oooguruk Island Heliport and Pioneer Heliport, to conform with recent change to FAA Order 7400.2L, Procedures for Handling Airspace Matters.

Regulatory Notices and Analyses

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

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

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

Paragraph 6005 Class E Airspace Areas Extending Upward From 1,200 Feet or More Above the Surface of the Earth

* * * * *

AAL AK E5 Nuiqsut AK [Amended]

Nuiqsut Airport, AK
(Lat. 70°12′35″ N, long. 151°00′23″ W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Nuiqsut Airport, and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of Nuiqsut Airport, excluding that airspace which overlies Control 1485L, and excluding that airspace that extends beyond 12 miles of the shoreline.

AAL AK E5 Nuiqsut, AK [Amended]

Oooguruk Island Heliport, AK
(Lat. 70°29′44″ N, long. 150°15′12″ W)

That airspace extending upward from 700 feet above the surface within a 6-mile radius of Oooguruk Island Heliport; and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of Oooguruk Island Heliport, excluding that airspace that extends beyond 12 miles of the shoreline.

AAL AK E5 Nuiqsut, AK [Amended]

Pioneer Heliport, AK
(Lat. 70°24′51″ N, long. 150°01′07″ W)

That airspace extending upward from 700 feet above the surface within a 6-mile radius of Pioneer Heliport; and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of Pioneer Heliport, excluding that airspace that extends beyond 12 miles of the shoreline.

* * * * *

AAL AK E5 Perryville, AK [Amended]

Perryville Airport, AK
(Lat. 55°54′24″ N, long. 159°09′39″ W)

That airspace extending upward from 700 feet above the surface within a 14.7-mile radius of Perryville Airport; and that airspace east of long. 160°00′00″ W extending upward from 1,200 feet above the surface within an 81.2-mile radius of Perryville Airport, excluding that airspace that extends beyond 12 miles of the shoreline.

* * * * *

AAL AK E5 Pilot Point, AK [Amended]

Pilot Point Airport, AK
(Lat. 57°34′49″ N, long. 157°34′19″ W)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of Pilot Point Airport; and that airspace extending upward from 1,200 feet above the surface within an area bounded by lat. 57°51′00″ N, long. 158°03′00″ W, to lat. 57°51′00″ N, long. 157°05′00″ W, to lat. 57°24′45″ N, long. 157°05′00″ W, to lat. 57°24′45″ N, long. 158°03′00″ W, to the point of beginning, excluding that airspace that extends beyond 12 miles of the shoreline.

* * * * *

AAL AK E5 Point Lay, AK [Amended]

Point Lay Airport, AK
(Lat. 69°43′58″ N, long. 163°00′19″ W)

That airspace extending upward from 700 feet above the surface within an 8-mile radius of Point Lay Airport; and that airspace extending upward from 1,200 feet above the surface within a 46-mile radius of the Point Lay Airport, excluding that airspace that extends beyond 12 miles from the shoreline.

* * * * *

Issued in Seattle, Washington, on December 14, 2018.

Byron Chew,

Acting Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2018–28085 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2017–1012; Airspace Docket No. 17–ANM–20]

RIN 2120–AA66

Establishment of Class E Airspace and Amendment of Class D and Class E Airspace; Olympia, WA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace extending upward from 700 feet above the surface and modifies Class E airspace designated as an extension at Olympia Regional Airport (formerly Olympia Airport). This action removes the Notice to Airmen (NOTAM) part-time status for Class E airspace designated as an extension, and updates the airport name and geographic coordinates in the associated Class D and E airspace areas to match the FAA's aeronautical database. These changes are necessary to accommodate airspace redesign for the safety and management of instrument flight rules (IFR) operations at the airport within the National Airspace System. Also, an editorial change is made to the Class D and Class E airspace legal descriptions replacing Airport/Facility Directory with the term Chart Supplement.

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

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

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

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

FOR FURTHER INFORMATION CONTACT: Bonnie Malgarini, Federal Aviation Administration, Operations Support Group, Western Service Center, 2200 S 216th Street, Des Moines, WA 98198–6547; telephone (206) 231–2329.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes Class E airspace extending upward from 700 feet above the surface and modifies Class E airspace designated as an extension at Olympia Regional Airport (formerly Olympia Airport). This action removes the Notice to Airmen (NOTAM) part-time status for Class E airspace designated as an extension, and updates the airport name and geographic coordinates in the associated Class D and E airspace areas to match the FAA's aeronautical database. These changes are necessary to accommodate airspace redesign for the safety and management of instrument flight rules (IFR) operations within the National Airspace System.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (83 FR 1201; January 10, 2018) for Docket No. FAA–2017–1012 to modify Class D airspace, Class E surface area airspace, Class E airspace designated as an extension, and Class E airspace extending upward from 700 feet above the surface at Olympia Regional Airport (formerly Olympia Airport), WA; remove the Notice to Airmen (NOTAM) part-time status for Class E airspace designated as an extension; and update the airport name and geographic coordinates in the associated Class D and E airspace areas to match the FAA's aeronautical database. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

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

Availability and Summary of Documents for Incorporation by Reference

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

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 establishes Class E airspace extending upward from 700 feet above the surface at Olympia Regional Airport to contain IFR departure and arrival aircraft below 1,200 and 1,500 feet above the surface, respectively. This airspace duplicates the larger Seattle Class E airspace extending upward from 700 feet above the surface, but ensures no future changes at Seattle inadvertently impact aircraft operations at Olympia Regional Airport.

The FAA also modifies the Class E airspace designated as an extension to a Class D or Class E surface area at Olympia Regional Airport, Olympia, WA, by removing the segments north (within 1.8 miles each side of the Olympia VORTAC 010° radial extending from the 4-mile radius of the airport to 4.8 miles north of the VORTAC) and south (within 3.5 miles each side of the Olympia VORTAC 195° radial extending from the 4-mile radius of Olympia Airport to 9.2 miles south of the VORTAC) of the airport, and establishing a 2-mile wide segment extending to approximately 5.5 miles southeast of the airport.

Also, this action also eliminates the following language from the legal description of Class E airspace designated as an extension to a Class D or Class E surface area at the airport, ''This Class E airspace is effective

during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.''

Finally, this action updates the airport name from Olympia Airport to Olympia Regional Airport, updates the geographic coordinates of the airport to match the FAA's aeronautical database, and replaces the outdated term Airport/Facility Directory with the term Chart Supplement in the associated Class D and Class E airspace legal descriptions. This airspace redesign is necessary for the safety and management of IFR operations at the airport.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 5000 Class D Airspace.

* * * * *

ANM OR D Olympia, WA [Amended]

Olympia Regional Airport, WA
(Lat. 46°58′10″ N, long. 122°54′09″ W)

That airspace extending upward from the surface to and including 2,700 feet MSL within a 4-mile radius of Olympia Regional Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6002 Class E Airspace Designated as Surface Areas.

* * * * *

ANM OR E2 Olympia, WA [Amended]

Olympia Regional Airport, WA
(Lat. 46°58′10″ N, long. 122°54′09″ W)

That airspace within a 4-mile radius of Olympia Regional Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6004 Class E Airspace Designated as an Extension to a Class D or Class E Surface Area.

* * * * *

ANM OR E4 Olympia, WA [Amended]

Olympia Regional Airport, WA
(Lat. 46°58′10″ N, long. 122°54′09″ W)

That airspace extending upward from the surface within the area bounded by a line beginning at lat. 46°57′14″ N, long. 122°48′28″ W; to lat. 46°56′44″ N, long. 122°47′08″ W; to lat. 46°55′28″ N, long. 122°47′10″ W; to lat. 46°54′42″ N, long. 122°47′45″ W; to lat. 46°55′28″ N, long. 122°49′51″ W; thence counter-clockwise along the 4-mile radius of the airport to the point of beginning.

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

* * * * *

ANM OR E5 Olympia, WA [New]

Olympia Regional Airport, WA
(Lat. 46°58′10″ N, long. 122°54′09″ W)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Olympia Regional Airport from the airport 211° bearing clockwise to the airport 088° bearing, and within an 8.2-mile radius of the airport from the airport 088° bearing clockwise to the airport 122° bearing, and within a 12.4-mile radius of the airport from the airport 122° bearing clockwise to the airport 211° bearing, and within 1 mile each side of the 011° bearing from the airport extending to 11.6 miles north of the airport.

Issued in Seattle, Washington, on December 14, 2018.

Byron Chew,

Acting Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2018–28098 Filed 12–27–18; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 8 and 141

[Docket No. RM18–14–000; Order No. 852]

Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) issues this Final Rule to amend its regulations to eliminate the Licensed Hydropower Development Recreation Report, designated as FERC Form No. 80 (Form 80). Form 80 solicits information on the use and development of recreation facilities at hydropower projects licensed by the Commission under the Federal Power Act. In addition, the Commission is revising its regulations on recreational use and development at licensed hydropower projects in order to modernize licensee public notice practices, clarify recreational signage requirements, and provide flexibility to assist licensees' compliance with these requirements.

DATES: This rule is effective March 28, 2019.

FOR FURTHER INFORMATION CONTACT: Jon Cofrancesco (Technical Information), Office of Energy Projects, Federal Energy Regulatory Commission. 888 First Street NE, Washington, DC 20426, (202) 502–8951, *jon.cofrancesco@ferc.gov*.

Tara DiJohn (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8671, *tara.dijohn@ferc.gov*.

SUPPLEMENTARY INFORMATION:

United States of America

Federal Energy Regulatory Commission

Docket No. RM18–14–000

Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects

ORDER NO. 852

FINAL RULE

(Issued December 20, 2018)

Table of Contents

	Paragraph Nos.
I. Background	2
II. Notice of Proposed Rulemaking	5
III. Discussion	6
A. Removal of § 8.11—Information Respecting Use and Development of Public Recreational Opportunities	6
1. Licensees' General Recreation Obligations	9
2. Recreational Use Monitoring	14
3. Mandatory Conditioning Authority	22
4. Recreation Costs, Revenues, and User Fees	28
5. Commission Determination	30
B. Removal of § 141.14—Form No. 80, Licensed Hydropower Development Recreation Report	31
C. Amendments of 18 CFR 8.1 and 8.2	33
1. Section 8.1—Publication of License Conditions Relating to Recreation	34
2. Section 8.2—Posting of Project Lands as to Recreation Use and Availability of Information	43
IV. Regulatory Requirements	48
A. Information Collection Statement	48
B. Environmental Analysis	63
C. Regulatory Flexibility Act	64
D. Document Availability	69
E. Effective Date and Congressional Notification	72

1. The Federal Energy Regulatory Commission (Commission) is amending its regulations to remove § 8.11, thereby eliminating the requirement for licensees to file a Licensed Hydropower Development Recreation Report, designated as FERC Form No. 80 (Form 80). Form 80 solicits information on the use and development of recreation facilities at hydropower projects licensed by the Commission under the Federal Power Act (FPA). In addition, the Final Rule revises §§ 8.1 and 8.2 of the Commission's regulations to modernize licensee public notice practices, clarify recreational signage requirements, and provide flexibility to assist licensees' compliance with these requirements.

I. Background

2. Section 10(a)(1) of the FPA requires the Commission to ensure that any licensed project is best adapted to a comprehensive plan for improving and developing a waterway for a variety of beneficial public uses, including recreational use.[1] Although section 10(a) of the Federal Water Power Act of June 10, 1920[2] did not refer specifically to recreation, in 1935 when the Federal Water Power Act was re-enacted as Part I of the Federal Power Act,[3] the words 'including recreational purposes' were added to section 10(a) to make clear that recreation considerations were to be included in the comprehensive development of the nation's water resources. Pursuant to this obligation, the Commission required licensees to allow public access to project lands and waters for recreational use and began to include standard conditions in licenses for the provision of recreational facilities.

3. In the 1960s, the Commission developed specific policies and practices to ensure that licensees provided reasonable recreational opportunities and notice of such opportunities to the public. In 1963, the Commission began requiring recreation plans for the public utilization of project water and land,[4] and in 1965 amended its regulations by adding part 8, entitled ''Recreation Opportunities and Development at Licensed Projects,'' in order to require licensees to widely publicize to the general public recreational opportunities at individual projects.[5] Order 313, issued on December 27, 1965, amended the Commission's general policy regulations (18 CFR part 2) by adding § 2.7 to clarify that licensees whose projects include land and water resources with outdoor recreational potential have a responsibility to develop those resources in accordance with area needs, to the extent that such development is not inconsistent with the primary purpose of the project.[6] In 1966, the Commission further amended part 8 of its regulations to require licensees to file Form 80, a report that provides an inventory of the use and development of recreational facilities at each development contained within a licensed project.[7]

4. Over the years, the Commission has continued to revise its regulations to reflect the Commission's current public recreation policies and practices. And once again, the Commission has decided to modify certain recreation-related regulations in order to eliminate unnecessary reporting requirements, modernize licensee public notice practices, clarify recreational signage requirements, and provide flexibility to assist licensees' compliance with these requirements.

[1] *See* 16 U.S.C. 803(a)(1) (2012).

[2] 41 Stat. 1063.

[3] 49 Stat. 838, 16 U.S.C. 791a–825r.

[4] Exhibit R, 18 CFR 4.41 (2018), *License Applications—Revision of Regulations,* Order 260–A, 29 FPC 777 (1963).

[5] *Publicizing License Conditions Relating to Recreational Opportunities at Hydroelectric Projects,* Order No. 299, 33 FPC 1131 (1965) (Order 299). Section 1 of part 8 requires licensees to publicize license conditions related to recreation; section 2 requires licensees to post, at points of public access, signs providing recreation use information and requires licensees to make such information available for inspection; and section 3 requires licensees to permit use without discrimination. 18 CFR 8.1–8.3 (2018).

[6] *Recreational Development at Licensed Projects,* Order No. 313, 34 FPC 1546, 1548 (1965) (Order 313).

[7] *Inventory of Recreation Facilities at Licensed Hydroelectric Projects,* Order No. 330, 36 FPC 1030 (1966) (Order 330). Section 8.11 requires the filing of information on the use and development of public recreation opportunities. 18 CFR 8.11 (2018).

II. Notice of Proposed Rulemaking

5. On May 17, 2018, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to eliminate the Form 80, and further revise its regulations governing recreational use and development at licensed hydropower projects.[8] In response to the NOPR, the Commission received 14 comments from the following entities: eight licensees, two federal land management agencies, two local governments, and two trade associations.[9] The proposal set forth in the NOPR, the comments received, and the Commission's determinations are discussed below.

III. Discussion

A. Removal of § 8.11—Information Respecting Use and Development of Public Recreational Opportunities

6. Section 8.11 requires licensees to file Form 80, which is a report on the use and development of recreational facilities at each development contained within a licensed hydropower project, on April 1 of every sixth year, documenting data compiled during the previous calendar year.[10] For each project development,[11] the Form 80 requires licensees to report the number of visits (i.e., recreation days),[12] the use capacity of each type of public recreation facility, and the licensee's annual costs and revenues associated with the public recreation facilities within the project boundary. In order to complete the Form 80, licensees must collect data on recreation use, facilities, and capacity for a 12-month period. Licensees may request an exemption from the Form 80 requirement if they demonstrate that a project development has little or no existing use or recreation potential (i.e., less than 100 recreation days per year).[13]

7. In the NOPR, the Commission proposed to remove § 8.11 from its regulations, thereby eliminating the requirement for licensees to file the Form 80. The Commission advanced several reasons for eliminating Form 80.[14] First, unlike in 1965 when Form 80 was adopted, licensed projects with significant recreation opportunities are often now required to comply with project-specific license conditions that direct licensees to prepare and implement a recreation plan, conduct recreation monitoring, and file periodic updates to an approved recreation plan.[15] Second, for licensed projects with limited recreation opportunities—many of which are exempt from filing Form 80—Commission staff relies on a variety of tools other than the Form 80 to determine whether the projects are meeting public recreation needs, including periodic inspections and investigation of non-compliance allegations (e.g., any recreation-related inquiries or complaints submitted by resource agencies, recreation users, or local residents). Third, Commission staff reports limited use of Form 80 data and cites concerns about the data's validity and lack of specificity. Finally, advances in technology since the advent of the Form 80 (e.g., websites, publicly-available aerial photography, and the Commission's eLibrary system) allow interested parties and the general public to easily access information about a project's recreational opportunities and any recreation-related license requirements.

8. All eight licensees that commented on the NOPR support the Commission's proposal to eliminate the Form 80 reporting requirement. Alaska Power Association and NHA also filed comments in support of the NOPR's proposal to eliminate the Form 80. The Park Service conditionally supports the Commission's proposal, provided that the Commission strengthens its oversight of licensees' recreation-related planning, monitoring, and information dissemination.

1. Licensees' General Recreation Obligations

NOPR Comments

9. In response to the NOPR's proposal to eliminate Form 80, the Park Service commented that additional guidance, training, and technical assistance is needed to ensure new and existing recreation management plans satisfy the general obligations set forth in § 2.7 of the Commission's regulations. The Park Service recommends that the Commission: (i) Conduct a comprehensive evaluation of its recreation planning and monitoring programs for licensing and post-licensing compliance; (ii) develop guidance and offer training and technical assistance for recreation management planning and monitori[16] and (iii) establish a public process for periodic review of recreation facilities, conditions, needs, and recreation flows.

Commission Response

10. Pursuant to its obligations under the FPA and the Commission's regulations, Commission staff evaluates the existing recreation resources, facilities, and needs at each existing or proposed hydropower project on a case-by-case basis during the licensing process and, as appropriate, also during the amendment process. Similarly, as appropriate, Commission staff continues to evaluate a project's recreational resources, facilities, and needs over the term of a license by considering license-required recreation plan updates and monitoring reports, conducting periodic project inspections, and addressing allegations of non-compliance.

11. Commission staff frequently provides guidance to licensees on a

[8] *Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects,* FERC Stats. & Regs. ¶ 32,726 (2018) (NOPR).

[9] The eight licensees include: Duke Energy; Public Utility District No. 2 of Grant County, Washington; Idaho Power Company; Pacific Gas and Electric Company; PacifiCorp; KEI (USA) Power Management, Inc.; Public Utility District No. 1 of Chelan County, Washington; and Alabama Power. Comments were also filed by the National Park Service (Park Service); the U.S. Forest Service (Forest Service); Roanoke County, Virginia; the Town of Vinton, Virginia; Alaska Power Association; and the National Hydropower Association (NHA).

[10] *Modification of Hydropower Procedural Regulations, Including the Deletion of Certain Outdated or Non-Essential Regulations,* Order No. 540, FERC Stats. & Regs. ¶ 30,944 (1992) (cross-referenced at 59 FERC ¶ 61,124). Order 330 originally required licensees to file a Form 80 every two years. Order 330, 36 FPC 1030, 1031. The Commission subsequently amended § 8.11 to revise the form and reduce the filing frequency. *See Revision of Licensed Hydropower Development Recreation Report: FERC Form No. 80,* Order No. 179, FERC Stats. & Regs. ¶ 30,295 (1981) (cross-referenced at 16 FERC ¶ 61,248 (consolidating, simplifying, and reducing the size of the Form 80 by approximately 60 percent); *Deletion of a 1987 Filing Requirement for FERC Form No. 80,* Order No. 419, FERC Stats. & Regs. ¶ 30,640 (1985) (cross-referenced at 31 FERC ¶ 61,154) (committing to re-evaluate the need for Form 80, and take further action if Form 80 is found unnecessary or in need of modification).

[11] Most licensed projects have only one project development. However, licensees of projects with more than one development must file a separate Form 80 report for each development.

[12] The Form 80 defines a recreation day as each visit by a person to a development for recreational purposes during any portion of a 24-hour period.

[13] 18 CFR 8.11(c) (2018).

[14] NOPR, FERC Stats. & Regs. ¶ 32,726 at PP 5–8.

[15] In addition, between fiscal years 2016 and 2030, over 500 projects will begin the relicensing process. During relicensing, the Commission's Division of Hydropower Licensing will evaluate the need for, and may require, project-specific recreation monitoring in new licenses on a case-by-case basis.

[16] The Park Service recommends that the Commission consider incorporating the basic planning and monitoring framework developed by the Interagency Visitor Use Management Council—a collaboration between six federal agencies (the Bureau of Land Management, Forest Service, National Oceanic and Atmospheric Administration, the Park Service, U.S. Army Corps of Engineers, and U.S. Fish and Wildlife Service). The Interagency Council's Visitor Use Management Framework describes a process for managing visitor use on federally-managed lands and waters, and can be accessed at *https://visitorusemanagement.nps.gov/VUM/Framework*. The Commission is not a federal land management agency. Staff evaluates and develops recreation planning and monitoring requirements that respond to the unique resource issues and site conditions at individual projects.

range of recreation management planning and monitoring matters. Staff regularly participates in recreation and land use management trainings, workshops, and conferences. Staff also strives to provide timely and constructive advice to licensees in response to project-specific recreation inquiries. In addition, Commission staff is currently developing a guidance document for licensees, which will provide general guidance on how to prepare a recreation management plan in consultation with stakeholders. This guidance document will describe the components of an effective recreation management plan, such as recreation use monitoring, periodic plan review and updates, and circumstances warranting a plan amendment.

12. The Commission's hydropower licensing and compliance programs already incorporate a robust public process that allows for periodic review of recreation facilities, conditions, needs, and, where appropriate, recreation flows. Most often, public engagement opportunities arise during the pre-filing consultation process and the Commission's public notice process for license applications and recreation-related compliance proceedings (e.g., consideration of a recreation management plan or amendment application). During the term of a license, agencies, members of the public, and other stakeholders have additional opportunities to review and provide input on any license-required recreation plan updates, periodic recreation plan assessments, or recreation-related monitoring results. Finally, members of the public may, at any time during the license term, access and review recreation-related documents on the Commission's website, seek available project-specific recreation plans or other information from individual licensees, or contact Commission staff regarding recreation inquiries or complaints.

13. The foregoing demonstrates that there are sufficient safeguards to ensure that our recreation requirements are understood and implemented.

2. Recreational Use Monitoring

NOPR Comments

14. The Park Service expresses concern that the Commission would not require projects with limited recreation opportunities to implement any new or additional recreation monitoring efforts if it eliminates the Form 80 reporting requirement. Rather, for all projects including those with little or no recreation opportunities, the Park Service recommends that the Commission: (i) Notice project inspections and invite stakeholders and the public to participate; (ii) inspect projects on a regular basis using staff with recreation expertise; and (iii) improve or clarify the process for submitting recreation-related complaints to the Commission.

15. If Form 80 is eliminated, Roanoke County and the Town of Vinton urge the Commission to include language in every project license requiring licensees to develop a recreation monitoring plan in consultation with the appropriate federal agencies, state agencies, local governments, and other stakeholders.[17] Roanoke County and the Town of Vinton also ask the Commission to reconsider the NOPR's statement that licensed projects with little to no recreation, including projects previously exempted from the Form 80 reporting requirement pursuant to § 8.11(c), would not be expected to implement any new or additional recreation monitoring efforts, but should continue to comply with any project-specific license conditions related to public recreation.

16. PacifiCorp asks the Commission to clarify that projects that do not have any license-required recreation use reporting other than Form 80 submittals will no longer have any routine recreation use reporting obligations if the Form 80 is eliminated.

Commission Response

17. The Commission considers the need for recreation monitoring on a project-specific basis, based on the conditions at that project at the time of licensing and during post-licensing review, as appropriate. Roughly half of all licensed projects will begin the relicensing process within the next 12 years and during the relicensing proceeding the Commission will conduct a comprehensive review of each project's recreational resources and determine the appropriate level of recreational use monitoring, if any, needed for each project.

18. In addition, Commission staff periodically conducts project inspections that focus on an individual license's environmental and recreation-related requirements. Generally, Commission staff also will conduct an environmental inspection for projects with significant environmental or public use license requirements—e.g., projects with high recreational use, fish passage facilities, or wildlife mitigation areas. These inspections allow Commission staff to inspect project features, facilities, and areas to ensure that licensees are complying with the requirements of their respective project licenses. Commission staff also regularly conducts environmental inspections at projects with on-going non-compliance or identified resource issues.

19. Finally, the most efficient way to bring a recreation-related complaint or non-compliance allegation to the Commission's attention is by directly contacting the Commission's Office of Energy Projects through its enforcement hotline telephone number.[18] Once a recreation-related allegation of non-compliance is received by the Commission, it is forwarded to staff within the Commission's Office of Energy Projects' Division of Hydropower Administration and Compliance for investigation and any necessary follow-up action.

20. In response to PacifiCorp's clarification request, unless recreation use reporting is required by a license condition—including any approved recreation plan or report or mandatory agency condition—licensees will no longer have any specific recreation use reporting obligation once the Form 80 is eliminated.

21. For the reasons discussed above, we will not establish a standard requirement for recreational use monitoring at every licensed project.[19] Considering recreation planning and monitoring needs on a project-by-project basis is the most appropriate method for Commission staff to ensure that each licensed project protects its recreational opportunities and is best adapted to the comprehensive development of the waterway.

3. Mandatory Conditioning Authority

NOPR Comments

22. The Forest Service comments that it values the type of information reported by licensees in Form 80 submittals.

23. The Forest Service expresses concern that if the Form 80 reporting requirement is eliminated, there will be no long-term baseline information on recreational usage to inform the development of operational plans or license conditions, and suggests that in

[17] Roanoke County and the Town of Vinton acknowledge that their comments on the NOPR are informed by their experience consulting as stakeholders on two licensed projects—Smith Mountain Project No. 2210 and Niagara Project No. 2466.

[18] For potential violations and wrongdoing involving Commission hydropower projects, individuals or stakeholders are encouraged to contact the Commission's Office of Energy Projects directly at 844–434–0053.

[19] Doing otherwise would merely be retaining the Form 80's standardized monitoring approach under the guise of a different name (i.e., a standard license condition), defeating the purpose of this Final Rule.

future relicensing proceedings it will rely increasingly on its mandatory conditioning authority under section 4(e) of the FPA to ensure that licensees monitor recreation usage, and facility features and operations meet public recreational needs on Forest Service lands.

24. The Forest Service also asks the Commission to clarify how eliminating Form 80 will affect projects that are currently awaiting final license orders, including projects with 4(e) license conditions that may rely on Form 80 information. Under such circumstances, the Forest Service cautions that it may need to revise previously-submitted 4(e) license conditions.

Commission Response

25. As previously explained in the NOPR, most projects with significant recreation resources have a recreation management plan or recreation monitoring report requirements and thus are already responsible for recreational monitoring or oversight above and beyond that required by the Form 80 filing requirement.[20] In the absence of the Form 80 reporting requirement, licensees will remain subject to any other recreation monitoring requirements contained within a license condition or approved recreation plan.

26. Going forward, Commission staff evaluating future license and amendment applications will continue to make case-by-case determinations on whether recreation monitoring is warranted for a particular project and, if so, the type and degree of monitoring needed. We anticipate that Federal land management agencies will likewise continue to provide input on the appropriateness of recreation monitoring during individual licensing proceedings. In any event, Federal land management agencies, such as Forest Service, are not precluded by this Final Rule from continuing to use their mandatory 4(e) conditioning authority to require recreational monitoring for individual projects during licensing proceedings, as they deem appropriate.

27. As to Forest Service's concern regarding current pending license applications, while we have explained that we believe sufficient information regarding recreation usage and needs will continue to be available after Form 80 is eliminated, the Forest Service may, if it deems it necessary, timely amend its 4(e) license conditions.

4. Recreation Costs, Revenues, and User Fees

28. The Park Service states that, following the elimination of Form 80, the Commission should require all licensees to report annual recreation costs and revenues, as well as user fees for specific facilities, on a regular basis.

29. The Commission's regulations allow a licensee to charge reasonable fees to help defray the cost of constructing, operating, and maintaining recreation facilities.[21] Form 80 required licensees to include data on its annual recreation costs and revenues, but it did not require licensees to identify specific user fees for individual facilities. Typically, the Commission does not review or approve the reasonableness of such fees.[22] However, if the Commission receives an inquiry or complaint regarding recreation costs, revenues, or user fees at a particular project, staff may request that the licensee provide such information to assist in its investigation of a non-compliance allegation. Therefore, the Commission does not believe that establishing a standard requirement for every licensee to report to the Commission recreation costs, revenues, and user fees on an annual basis is necessary, nor does the Park Service elaborate on the utility of such a standard reporting requirement.

5. Commission Determination

30. For the reasons discussed above, the Commission concludes that the benefits and the reduced burden for licensees and staff that result from eliminating the Form 80 outweigh the potential minor obstacles that may arise during the transition from the Form 80 data to specific recreation data gained through licensee compliance with project-specific license conditions. By this Final Rule, we adopt the NOPR's proposal to delete § 8.11 of our regulations, thereby eliminating the Form 80 filing requirement.

B. Removal of § 141.14—Form No. 80, Licensed Hydropower Development Recreation Report

31. Added to the Commission's regulations alongside the Form 80 requirement in 1966,[23] § 141.14 approved licensee use of Form 80 in the manner prescribed in § 8.11 of our regulations.[24] To parallel the proposed removal of § 8.11, the NOPR also proposed to remove § 141.14 of its regulations.

32. The Commission did not receive any comments addressing the NOPR's proposed removal of § 141.14 of the Commission's regulations. Therefore, we retain the NOPR's proposal to delete § 141.14.

C. Amendments of 18 CFR 8.1 and 8.2

33. The Commission amends §§ 8.1 and 8.2 of its regulations to modernize licensee public notice practices, clarify recreational signage requirements, and provide flexibility to assist licensees' compliance with these requirements. All licensees that filed comments in response to the NOPR generally support the Commission's proposal to revise §§ 8.1 and 8.2 of the Commission's regulations to update licensee public notice practices. Forest Service also expressed support for the Commission's efforts to modernize and diversify licensee options for keeping the public informed of recreation opportunities at licensed projects.

1. Section 8.1—Publication of License Conditions Relating to Recreation

34. Section 8.1 directs licensees to publicize information about the availability of projects lands and waters for recreational purposes, and any recreation-related license conditions.[25] Section 8.1 requires licensees, at a minimum, to publish notice in a local newspaper once each week for four weeks of any recreation-related license conditions that the Commission may designate in an order issuing or amending a license.[26]

35. In addition to publishing notice in the local newspaper, the NOPR proposed to require licensees with project websites to also post notice of recreation-related license conditions on its website. This requirement would only apply to a licensee that already has an existing project website, or decides to develop a project website in the future. As explained in the NOPR, this additional publication method will ensure that the public is informed of

[20] Commission staff estimates that between January 2015 and the end of September 2018, the Commission issued a total of 73 licenses for original or relicensed hydropower projects. Of these licenses, the Commission specifically included conditions requiring the development and implementation of recreation management plans for 54 of these projects and also specifically exempted another nine of these projects from the current Form 80 filing requirement, due to little or no project-specific recreation resources or opportunities. In other words, of the licenses issued between January 2015 and the end of September 2018, licensees for 63 licenses (i.e., 86 percent) were required to develop a project-specific recreation management plan or were exempt from the Form 80 filing requirement.

[21] 18 CFR 2.7 (2018).

[22] *See, e.g., Public Utility District No. 2 of Grant County, Washington,* 160 FERC ¶ 61,099, at P 23 (2017).

[23] Order 330, 36 FPC 1030.

[24] 18 CFR 141.14 (2018).

[25] 18 CFR 8.1 (2018).

[26] *See id.*

recreational opportunities and recreation-related license conditions regardless of whether members of the public rely on a newspaper or the internet as their main information source.

a. Availability of Information

36. The Park Service recommends that the Commission ensure that the information it receives from licensees is available to the public, and develop standardized information about recreation facilities and flows at licensed projects.[27] In addition, the Park Service recommends that the Commission require every licensee to create and maintain a project website that publicizes information about available public recreation opportunities. To this end, the Park Service recommends that all licensees be required to maintain a project website that, at minimum, provides: (i) Operating status of recreation facilities; (ii) notice of future recreation reviews and inspections, and the outcome of any such evaluations; (iii) recreation management plans, recreation-related reports, and the entire license instrument; and (iv) a map that provides standard Geographic Information System (GIS) layers identifying recreation facilities, public access, and the project boundary.

37. As revised by this Final Rule, §§ 8.1 and 8.2 of the Commission's regulations require licensees to publicize specific recreation use and availability information to the public for its licensed project through newspaper notices, project signage, its local office, and any existing licensee website. We are satisfied that the existing publication requirements provide a variety of ways to sufficiently inform the public of recreation and public access information. Therefore, we decline to adopt the Park Service's recommendation that all licensees be required to create and maintain a project website.

38. On occasion, the Commission has required a licensee to provide recreation information to the public on a recurring basis through telephone recordings or website updates (e.g., periodic notifications communicating recreational streamflow data, whitewater boating opportunities, or recreation site accessibility). However, we do not believe that a blanket requirement directing licensees to regularly notify the public of recreation flows or recreation site accessibility is appropriate for all licensed projects. In addition, members of the public may obtain information about a project's recreational opportunities—including detailed information about recreation facility availability and use, project boundary maps, and inspection reports—by searching the project docket on the Commission's eLibrary website, registering for the Commission's e-Subscription service, and participating in publicly-noticed licensing and post-licensing proceedings, such as the consideration of a recreation plan or significant recreation-related license amendment.

b. Newspaper Publication

39. NHA supports the proposed changes to § 8.1, but asks the Commission to eliminate the newspaper publication requirement for licensees that publicly notice recreation-related license conditions by publication on a project website. In addition, where a licensee does not maintain a project website and there is no local newspaper, NHA posits that licensees should be allowed to post notice on municipal or county websites.

40. We decline to eliminate the requirement that licensees publish notice of recreation-related license conditions in a local newspaper. As we noted in the NOPR, requiring licensees to publish notice in a local newspaper and, if applicable, on a project website ensures that the public is on notice of recreational opportunities and recreation-related license conditions or amendments regardless of whether a particular member of the public relies on a newspaper or the internet as their primary news source. Further, the possibility that newspaper publication will reach local community members that may not have reliable internet access outweighs the negligible time and expense necessary to publish a notice in a local newspaper. Licensees are not precluded from supplementing the required methods of public notice by also posting notice on municipal or country websites or at local government offices.

c. Project Website Definition

41. Pacific Gas and Electric Company (PG&E) asks the Commission to clarify which types of websites will be considered ''project websites.'' PG&E recommends that the Commission exclude from its definition ''relicensing websites,'' which it describes as websites maintained during the relicensing process for stakeholders to access documents associated with the pre-filing process and the relicensing application process. PG&E further explains that relicensing websites are generally targeted to the stakeholders participating in the relicensing process, and do not provide specific information about the recreation opportunities provided near or on project reservoirs.

42. We agree that temporary websites developed specifically for a relicensing proceeding do not constitute the type of project website the Commission expects to be used for the purposes of § 8.1 publication. To clarify, by using the term ''project website,'' the Commission intended to capture any existing website, or webpage, used by a licensee to communicate information to the public about recreation opportunities provided by a particular project over the duration of the project's license. We anticipate that the information required by § 8.1 is the type of information that is already offered by many website-ready licensees in an electronic format or can be easily uploaded to an existing project webpage.

2. Section 8.2—Posting of Project Lands as to Recreation Use and Availability of Information

43. Section 8.2(a) requires the licensee to post at each public access point a visible sign that identifies: The project name, project owner, project number, directions to project areas available for public recreation, permissible times and activities, and other regulations regarding recreation use. Section 8.2(a) also requires licensees to post visible notice that project recreation facilities are open to all members of the public without discrimination. Section 8.2(b) directs the licensee to make available for inspection at its local offices the Commission-approved recreation plan and the entire license order indexed for easy reference to the recreation-related license conditions designated for publication in accordance with § 8.1 of the Commission's regulations. As the Commission explained in Order 299, the rationale behind the types of public notice required by §§ 8.1 and 8.2 is two-fold: (i) It puts prospective purchasers of land in the project vicinity on notice of the project's public access and

[27] Specifically, the Park Service suggests that the Commission consider partnering with the Department of Energy's National Laboratories to develop standardized reporting of flow data, including scheduled recreational flow releases. The Park Service also encourages the Commission to consider a partnership with the Park Service to publicize information about public recreation opportunities at licensed hydropower projects on the National Rivers Project website. As discussed further below, we are satisfied that our existing publication requirements keep the public informed of recreation opportunities at licensed projects. Commission staff will continue to evaluate and include, where appropriate, license conditions that require licensees to notify the public of scheduled recreation flows on a case-by-case basis.

recreation purposes; and (ii) it informs the general public of the location and terms of use of the project's recreation facilities.[28]

a. Recreation Signage

44. To streamline the amount of information that must appear on recreation signage, the NOPR proposed revisions to § 8.2(a) that would require signs to, at a minimum, identify: The project name and number, and a statement that the project is licensed by the Commission; the licensee name and contact information for obtaining additional project recreation information; and permissible times and activities. As explained in the NOPR, the revisions reduce the information licensees must include on recreation signage at each public access point and afford licensees greater flexibility to design signs that effectively communicate recreation information to the public.

45. A number of commenters filed comments in support of this aspect of the Commission's proposal.[29] No negative comments were filed. The Final Rule retains the NOPR's revisions to § 8.2(a).

b. Recreation Document Availability

46. The NOPR also proposed to revise § 8.2(b) to require licensees with project websites to include on their websites copies of any approved recreation plan, recreation-related reports approved by the Commission, and the entire license instrument. This requirement would only apply to a licensee that already has an existing project website, or establishes a project website in the future.

47. No negative comments were filed on this aspect of the Commission's proposal. The Final Rule retains the NOPR's revisions to § 8.2(b).

IV. Regulatory Requirements

A. Information Collection Statement

48. The Paperwork Reduction Act [30] requires each federal agency to seek and obtain the Office of Management and Budget's (OMB) approval before undertaking a collection of information (including reporting, record keeping, and public disclosure requirements) directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contained in final rules published in the **Federal Register**.[31] Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

49. *Public Reporting Burden:* By eliminating the Form 80 filing requirement, this Final Rule eliminates an existing data collection, FERC–80 (OMB Control No. 1902–0106). In addition, the Final Rule modifies certain reporting and recordkeeping requirements included in FERC–500 (OMB Control No. 1902–0058) [32] and FERC–505 (OMB Control No. 1902–0115).[33]

50. Under the most recent Form 80 reporting cycle,[34] 346 licensees prepared and filed 843 Form 80 reports.[35] Every three years, the Commission is required to request from OMB an extension of any currently approved information collection. Since the Form 80 is only filed every six years, the most recent annual burden and cost figures provided to OMB were based on an estimate of 400 respondents. To determine the total number of responses per year for OMB submittal purposes, we multiplied the number of respondents (400) by the annual number of responses per respondent (0.167) to arrive at 67 responses per year. The Commission estimated the current public reporting burden to be an average of three hours per form, with an associated cost of approximately $224 per form. Because the Form 80 is filed every six years, the estimated annualized cost to complete each form is $37.44, with a total annual cost for all licenses of approximately $14,974.50.[36] This estimate includes the time required to review instructions, research existing data sources, and complete and review the collection of information.

51. This Final Rule eliminates certain information collection and recordkeeping requirements. The removal of the Form 80 report eliminates the estimated annual information collection burden (201 hours) and cost ($14,974.50) associated with FERC–80 (OMB Control No. 1902–0106).[37]

52. In addition, the revisions to §§ 8.1 and 8.2, associated with the FERC–500 and FERC–505 information collections,[38] are intended to modernize licensee public notice practices, clarify recreational signage requirements, and provide flexibility to assist licensees' compliance with these requirements. With regard to modernized public notice practices, the revisions require licensees that have a project website to (1) publish notice on its website of license conditions related to recreation; and (2) maintain on its website copies of any approved recreation plan, recreation-related reports, and the license instrument. If a licensee does not have a project website, the website publication requirements would not apply. Accordingly, there is a slight increase in the reporting requirements and burden for FERC–500 and FERC–505.

53. The estimated changes to the burden and cost of the information collections affected by this Final Rule follow.

[28] Order 299, 33 F.P.C. 1131.

[29] The Park Service asks the Commission to supplement recreation signage by encouraging licensees to provide on-site interpretive kiosks that explain the history of the project. As a general matter, we agree with the Park Service and encourage the use of interpretive kiosks or signage to educate visitors about a unique or important aspect of the project area (*e.g.,* cultural resources, special-status species, etc.). However, installation of interpretive kiosks in addition to recreation-related signage is not appropriate or necessary for every licensed project. Commission staff will continue to consider the appropriateness of on-site interpretive kiosks on a project-by-project basis as part of any relevant licensing or amendment proceeding before the Commission.

[30] 44 U.S.C. 3501–3521 (2012).

[31] *See* 5 CFR 1320.12 (2018).

[32] FERC–500 includes the reporting and recordkeeping requirements for ''Application for License/Relicense for Projects with Capacity Greater Than 5MW.''

[33] FERC–505 includes the reporting and recordkeeping requirements for ''Small Hydropower Projects and Conduit Facilities including License/Relicense, Exemption, and Qualifying Conduit Facility Determination.''

[34] Licensees were required to file Form 80 reports by April 1, 2015, containing recreational use and development data compiled during the 2014 calendar year.

[35] For projects with more than one development, the licensee is required to submit a Form 80 report for each development.

[36] These estimates, from the current OMB-approved inventory figures for Form 80, used $74.50 per hour for wages and benefits. The most recent OMB approval of the Form 80 was issued December 8, 2016.

[37] These figures are annual averages (for Paperwork Reduction Act purposes) of the burden and cost for the six-year cycle for the Form 80. The most recent OMB approval of the Form 80 was issued December 8, 2016.

[38] As of September 30, 2018, the Commission currently has 480 licenses for projects with an installed capacity more than 5 MW (reporting requirements covered by FERC–500) and 573 licenses for projects 5 MW or less (reporting requirements covered by FERC–505).

ANNUAL CHANGES IMPLEMENTED BY THE FINAL RULE IN RM18–14–000 [39]

	Number of respondents	Number of responses per respondent	Total number of responses	Average burden hours & cost per response	Total annual burden hours & total annual cost	Cost per respondent ($)
	(1)	(2)	(1) × (2) = (3)	(4)	(3) × (4) = 5	(5) / (1)
FERC–80 (reduction) [40]	400	[41] 0.167	67 (rounded)	3 hrs.; $224 (rounded); (reduction).	201 hrs.; $14,974.50 (rounded); (reduction).	$224 (reduction).
FERC–500	[42] 432	1	432	0.5 hr.; $26.77 (rounded)	216 hrs.; $11,565 (rounded) ...	$26.77 (rounded).
FERC–505	[43] 287	1	287	0.5 hr.; $26.77 (rounded)	144 hrs.; $7,683 (rounded)	$26.77 (rounded).

54. *Titles:* FERC–80 (Licensed Hydropower Development Recreation Report), FERC–500 (Application for License/Relicense for Water Projects with More than 5 Megawatt (MW) Capacity), and FERC–505 (Small Hydropower Projects and Conduit Facilities including License/Relicense, Exemption, and Qualifying Conduit Facility Determination).

55. *Action:* Deletion of information collection (FERC–80), and revisions to existing collections FERC–500 and FERC–505.

56. *OMB Control Nos.:* 1902–0106 (FERC–80), 1902–0058 (FERC–500), and 1902–0115 (FERC–505).

57. *Respondents:* Hydropower licensees, including municipalities, businesses, private citizens, and for-profit and not-for-profit institutions.

58. *Frequency of Information:* Ongoing (FERC–500 and FERC–505).

59. *Necessity of Information:* The revised regulations eliminate unnecessary reporting requirements, modernize licensee public notice practices, and clarify recreational signage requirements.

60. *Internal Review:* The Commission has reviewed the revisions and has determined they are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has specific, objective support for the burden estimates associated with the information collection requirements.

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

62. Comments concerning the collections of information and the associated burden estimates may also be sent to: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. Due to security concerns, comments should be sent electronically to the following e-mail address: *oira_submission@omb.eop.gov.* Comments submitted to OMB should refer to FERC–80, FERC–500, and FERC–505 and OMB Control Nos. 1902–0106 (FERC–80), 1902–0058 (FERC–500), and 1902–0115 (FERC–505).

B. Environmental Analysis

63. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant effect on the human environment.[44] Excluded from this requirement are rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or the regulations being amended.[45] This Final Rule updates the Commission's recreation-related regulations by clarifying public notice and signage requirements, and eliminating unnecessary reporting requirements. Because this rule is clarifying and procedural in nature, preparation of an Environmental Assessment or Environmental Impact Statement is not required.

C. Regulatory Flexibility Act

64. The Regulatory Flexibility Act of 1980 (RFA) [46] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a rulemaking while minimizing any significant economic impact on a substantial number of small entities.[47] In lieu of preparing a regulatory flexibility analysis, an agency may certify that a final rule will not have a significant economic impact on a substantial number of small entities.[48]

65. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[49] The SBA size standard for electric utilities (effective January 22, 2014) is based on the number of employees, including affiliates.[50] Under SBA's current size standards, a hydroelectric power generator (NAICS code 221111) [51] is small if, including its affiliates, it employs 500 or fewer people.[52]

66. This Final Rule directly affects all hydropower licensees that are currently required to file the Form 80. The Final Rule removes the Form 80 filing requirement, eliminating (for small and large entities) the cost of $224

[39] Hourly costs are based on Bureau of Labor Statistics figures for May 2017 wages in Sector 22—Utilities (*https://www.bls.gov/oes/current/naics2_22.htm*) and December 2017 benefits (*https://www.bls.gov/news.release/pdf/ecec.pdf*). For web developers (code 15–1134), the estimated average hourly cost (salary plus benefits) is $53.53.

[40] The figures are annualized figures contained in the current OMB inventory for FERC–80. While OMB requires existing information collections to be submitted for approval every three years, the Commission's hydropower licenses are only required to submit the Form 80 every six years. Therefore, the estimated figures for the entire six-year Form 80 cycle would be a total of 400 respondents, spending an estimated three hours per report, for a total of 1,200 hours. Form 80 will be discontinued.

[41] This figure indicates that a respondent files a Form 80 once every six years.

[42] We assume approximately 90 percent of the 480 licenses for projects with an installed capacity of more than 5 MW (*i.e.,* an estimated 432 licenses) have project websites.

[43] We assume approximately 50 percent of the 573 licenses for projects 5 MW or less (*i.e.,* an estimated 287 licenses) have project websites.

[44] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987) (cross-referenced at 41 FERC ¶ 61,284).

[45] 18 CFR 380.4(a)(2)(ii) (2018).

[46] 5 U.S.C. 601–612 (2012).

[47] 5 U.S.C. 603(c) (2012).

[48] 5 U.S.C. 605(b) (2012).

[49] 13 CFR 121.101 (2018).

[50] SBA Final Rule on ''Small Business Size Standards: Utilities,'' 78 FR 77343 (Dec. 23, 2013).

[51] The North American Industry Classification System (NAICS) is an industry classification system that Federal statistical agencies use to categorize businesses for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. economy. United States Census Bureau, *North American Industry Classification System, https://www.census.gov/eos/www/naics/* (accessed April 11, 2018).

[52] 13 CFR 121.201, Sector 22, Utilities (2018).

associated with filing the Form 80 every six years.

67. In addition, the revisions to §§ 8.1 and 8.2 of the Commission's regulations would directly affect all hydropower licensees of projects that offer existing or potential recreational use opportunities. These revisions are intended to modernize licensee public notice practices, clarify recreational signage requirements, and provide flexibility to assist licensees' compliance with these requirements. We expect the clarified signage requirements to benefit licensees by providing them more flexibility to design recreation-related signage strategies that best fit the needs of their individual projects. To modernize public notice practices, the revisions will require licensees that have a project website, or develop one in the future, to publish and maintain certain recreation-related information on its website. If a licensee does not have a project website, the website publication requirements would not apply. Therefore, there is a slight increase in the information collection reporting requirements and burden for FERC–500 and FERC–505.[53] However, we do not anticipate the impact on affected entities, regardless of their status as a small or large entity, to be significant.

68. Based on this understanding, pursuant to section 605(b) of the RFA, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities. Accordingly, no regulatory flexibility analysis is required.

D. Document Availability

69. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE, Room 2A, Washington, DC 20426.

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

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

E. Effective Date and Congressional Notification

72. This regulation is effective March 28, 2019. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a ''major rule'' as defined in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.[54] This rule is being submitted to the Senate, House, Government Accountability Office, and Small Business Administration.

List of Subjects

18 CFR Part 8

Electric power, Recreation and recreation areas, Reporting and recordkeeping requirements.

18 CFR Part 141

Electric power, Reporting and recordkeeping requirements.

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

Commissioner McNamee is voting present.

Issued: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Federal Energy Regulatory Commission amends parts 8 and 141, chapter I, title 18, *Code of Federal Regulations,* as follows:

PART 8—RECREATIONAL OPPORTUNITIES AND DEVELOPMENT AT LICENSED PROJECTS

■ 1. The authority citation for part 8 continues to read as follows:

Authority: 5 U.S.C. 551–557; 16 U.S.C. 791a–825r; 42 U.S.C. 7101–7352.

■ 2. Revise § 8.1 to read as follows:

§ 8.1 Publication of license conditions relating to recreation.

Following the issuance or amendment of a license, the licensee shall make reasonable efforts to keep the public informed of the availability of project lands and waters for recreational purposes, and of the license conditions of interest to persons who may be interested in the recreational aspects of the project or who may wish to acquire lands in its vicinity. Such efforts shall include, but are not limited to: the publication of notice in a local newspaper once each week for 4 weeks, and publication on any project website, of the project's license conditions which relate to public access to and the use of the project waters and lands for recreational purposes, recreational plans, installation of recreation and fish and wildlife facilities, reservoir water surface elevations, minimum water releases or rates of change of water releases, and such other conditions of general public interest as the Commission may designate in the order issuing or amending the license.

■ 3. Revise § 8.2 to read as follows:

§ 8.2 Posting of project lands as to recreational use and availability of information.

(a) Following the issuance or amendment of a license, the licensee shall post and maintain at all points of public access required by the license (or at such access points as are specifically designated for this purpose by the licensee) and at such other points as are subsequently prescribed by the Commission on its own motion or upon the recommendation of a public recreation agency operating in the project vicinity, a conspicuous sign that, at a minimum, identifies: the FERC project name and number, and a statement that the project is licensed by the Commission; the licensee name and contact information for obtaining additional project recreation information; and permissible times and activities. In addition, the licensee shall post at such locations conspicuous notice that the recreation facilities are open to all members of the public without discrimination.

(b) The licensee shall make available for inspection at its local offices in the project vicinity, and on any project website, the approved recreation plan, any recreation-related reports approved by the Commission, and the entire license instrument, properly indexed for easy reference to the license conditions designated for publications in § 8.1.

§ 8.11 [Removed]

■ 4. Remove § 8.11.

PART 141—STATEMENTS AND REPORTS (SCHEDULES)

■ 5. The authority citation for part 141 continues to read as follows:

[53] In the Information Collection section, we estimated the average burden and cost per respondent to be approximately 30 minutes and $26.77 per year.

[54] 5 U.S.C. 804(2) (2012).

Authority: 15 U.S.C. 79; 15 U.S.C. 717–717z; 16 U.S.C. 791a–828c, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

§ 141.14 [Removed]

■ 6. Remove § 141.14.

[FR Doc. 2018–28250 Filed 12–27–18; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Part 4

[CBP Dec. 18–16]

RIN 1651–AB32

Civil Monetary Penalty Adjustments for Inflation

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Final rule.

SUMMARY: This rule adjusts for inflation the amounts that U.S. Customs and Border Protection (CBP) can assess as civil monetary penalties for the following two violations—transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions; and employing a vessel in a trade without a required Certificate of Documentation. These adjustments are being made in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act) which was enacted on November 2, 2015. Other CBP civil penalty amounts were adjusted pursuant to this 2015 Act in rule documents published in the **Federal Register** on July 1, 2016; January 27, 2017; December 8, 2017; and April 2, 2018, but the adjustments for these two civil penalties were inadvertently left out of those documents.

DATES: This rule is effective on December 28, 2018. The adjusted penalty amounts will be applicable for penalties assessed after December 28, 2018 if the associated violations occurred after November 2, 2015.

FOR FURTHER INFORMATION CONTACT: Millie Gleason, Office of Field Operations, U.S. Customs and Border Protection. Phone: (202) 325–4291.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74 section 701 (Nov. 2, 2015)) (2015 Act).[1] The 2015 Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note) (1990 Inflation Adjustment Act) to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The 2015 Act required agencies to: (1) Adjust the level of civil monetary penalties with an initial ''catch-up'' adjustment through issuance of an interim final rule (IFR) and (2) make subsequent annual adjustments for inflation. Through the ''catch-up'' adjustment, agencies were required to adjust the maximum amounts of civil monetary penalties to more accurately reflect inflation rates. The 2015 Act directed the Office of Management and Budget (OMB) to issue guidance to agencies on implementing the initial ''catch-up'' adjustment. The 2015 Act required that agencies publish their IFRs in the **Federal Register** no later than July 1, 2016 and that the adjusted amounts were to take effect no later than August 1, 2016.

For the subsequent annual adjustments, the 2015 Act requires agencies to increase the penalty amounts by a cost-of-living adjustment. The 2015 Act directs OMB to provide guidance to agencies each year to assist agencies in making the annual adjustments. The 2015 Act requires agencies to make the annual adjustments no later than January 15 of each year and to publish the adjustments in the **Federal Register**.

The Department of Homeland Security (DHS) undertook a review of the civil penalties that DHS and its components administer to determine which penalties would need adjustments. On July 1, 2016, DHS published an IFR adjusting the civil monetary penalties with an initial ''catch-up'' adjustment, as required by the 2015 Act. *See* 81 FR 42987. DHS calculated the adjusted penalties based upon nondiscretionary provisions in the 2015 Act and upon guidance issued by OMB on February 24, 2016.[2] The adjusted penalties were effective for civil penalties assessed after August 1, 2016 (the effective date of the IFR) where the associated violations occurred after November 2, 2015 (the date of enactment of the 2015 Act).[3] On January 27, 2017, DHS published a final rule adopting as final the civil monetary penalty adjustment methodology from the IFR and making the 2017 annual inflation adjustment pursuant to the 2015 Act and upon guidance OMB issued to agencies on December 16, 2016.[4] *See* 82 FR 8571. On April 2, 2018, DHS published a final rule making the 2018 annual inflation adjustment pursuant to the 2015 Act and the guidance OMB issued to agencies on December 15, 2017.[5] *See* 83 FR 13826.

As discussed in Section II below, several civil monetary penalties assessed by CBP and subject to the 2015 Act were inadvertently omitted from these DHS rulemakings.

II. CBP Penalties

CBP assesses or enforces penalties under various titles of the United States Code (U.S.C.) and the Code of Federal Regulations (CFR). These penalties include civil monetary penalties for certain violations of title 8 of the CFR pursuant to the Immigration and Nationality Act of 1952,[6] as well as certain civil monetary penalties for customs violations for laws codified in title 19 of the U.S.C. and the CFR. CBP assesses many of the title 19 penalties under the Tariff Act of 1930, as amended, and as discussed in the IFR preamble at 81 FR 42987, the 2015 Act specifically exempts Tariff Act penalties from the inflation adjustment requirements in the 2015 Act. For that reason, DHS did not list those penalties in the tables of CBP penalty adjustments in the DHS rulemakings. There are also various other monetary penalties found throughout the U.S.C. and CFR which CBP may seek to issue or enforce but which were not included in the tables because they fall within the purview of

[1] The 2015 Act was enacted as part of the Bipartisan Budget Act of 2015, Public Law 114–74 (Nov. 2, 2015).

[2] OMB, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, February 24, 2016. *https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf.*

[3] DHS published a correction to the IFR on August 23, 2016 to correct one amendatory instruction. *See* 81 FR 57442.

[4] OMB, Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, December 16, 2016. *https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2017/m-17-11_0.pdf.*

[5] OMB, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, December 15, 2017. *https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf.*

[6] Public Law 82–414, as amended (INA). The INA contains provisions that impose penalties on persons, including carriers and aliens, who violate specified provisions of the INA. While CBP is responsible for enforcing various provisions of the INA and assessing penalties for violations of those provisions, all the penalty amounts CBP can assess for violations of the INA are set forth in one section of title 8 of the CFR—8 CFR 280.53. For a complete list of the INA sections for which penalties are assessed, in addition to a brief description of each violation, see the IFR preamble at 81 FR 42989–42990.

another Department or Agency for purposes of the 2015 Act.[7]

Several non-Tariff Act penalties that are assessed by CBP were inadvertently omitted from the DHS rulemakings. On December 8, 2017, CBP published a rule, correcting for three penalties that had been omitted from the DHS rulemakings for the following three violations—transporting passengers between coastwise points in the United States by a non-coastwise qualified vessel; towing a vessel between coastwise points in the United States by a non-coastwise qualified vessel; and dealing in or using an empty stamped imported liquor container after it has already been used once. *See* 82 FR 57821.

However, two additional non-Tariff Act penalties that are assessed by CBP were inadvertently omitted from the DHS rulemakings and the CBP correction rulemaking. The first is a penalty set forth at 46 U.S.C. 12118(f)(3) for transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions. This penalty is incurred if a vessel that is used primarily in manufacturing or mineral industries and owned by a Bowaters corporation transports passengers for hire except as a service for a parent or subsidiary of the corporation owning the vessel or under a bareboat charter to a corporation otherwise qualifying as a citizen of the United States.[8] The conditions under which a vessel identified as a Bowaters vessel under the authority of 46 U.S.C. 12118 may transport passengers coastwise for hire are detailed in 46 U.S.C. 12118(d)(2) and 19 CFR 4.80(d). The penalty amount is only set forth in the statute and is not reflected in the CBP regulations. The second is a penalty for employing a vessel in a trade without a required Certificate of Documentation pursuant to 19 U.S.C. 1706a and 19 CFR 4.80(i). A Certificate of Documentation is form CG–1270 issued by the U.S. Coast Guard. This form is required for the operation of a vessel in certain trades. *See* 19 CFR 4.0(c) and 46 CFR part 67.

This final rule adjusts these penalty amounts using the same civil monetary penalty adjustment methodology that DHS announced in the IFR (81 FR 42987) and finalized in the DHS final rule (82 FR 8571), and detailed below.

III. Inflation Adjustment Methodology Required by 2015 Act

A. Overview

The 2015 Act provides a new method for calculating inflation adjustments. The new method differs substantially from the methods that agencies used in the past when conducting inflation adjustments pursuant to the 1990 Inflation Adjustment Act. The new method is intended to more accurately reflect inflation. Previously, when agencies conducted adjustments to civil penalties, they did so under rules that required significant rounding of figures. For example, an agency would round a penalty increase that was greater than $1,000, but less than or equal to $10,000, to the nearest multiple of $1,000. While this allowed penalties to be kept at round numbers, it meant that agencies would often not increase penalties at all if the inflation factor was not large enough. Furthermore, increases to penalties were capped at 10 percent, which meant that longer periods without an inflation adjustment could cause a penalty to rapidly lose value in real terms. Over time, the formula used in the 1990 Inflation Adjustment Act calculations frequently caused penalties to lose value relative to actual inflation. The 2015 Act removed these rounding rules, and instead instructs agencies to round penalties to the nearest $1. While this creates penalty values that are no longer round numbers, it does ensure that agencies will increase penalties each year to a figure commensurate with the actual calculated inflation.

To better reflect the original impact of civil penalties, the 2015 Act ''resets'' the inflation calculations by excluding prior inflationary adjustments under the Inflation Adjustment Act. To do this, the 2015 Act requires agencies to identify, for each penalty, the year that Congress originally enacted the maximum penalty level/range of minimum and maximum penalty levels or the year that the agency last adjusted the penalty amount other than pursuant to the Inflation Adjustment Act, and the corresponding penalty amount(s). The 2015 Act then requires agencies to perform an initial ''catch-up'' adjustment, using the original amounts of civil penalties as a baseline, so that the 2016 penalty levels are equal, in real terms, to the penalty amounts as they were originally established. The 2015 Act also requires agencies to make subsequent annual adjustments to increase the penalty amounts by a cost-of-living adjustment.

B. Catch-Up Adjustment

This section sets forth the initial ''catch-up'' adjustment for the two civil monetary penalties assessed by CBP that were inadvertently omitted from the DHS rulemakings and CBP correction rulemaking. The catch-up adjustments for these two penalties are listed in Table 1 below. This table shows how DHS would have initially increased the penalties pursuant to the 2015 Act. The table contains the following information:

- In the first column (penalty name), we provide a description of the penalty.
- In the second column (citation), we provide the statutory cite from the United States Code (U.S.C.) and the regulatory cite from the Code of Federal Regulations (CFR).
- In the third column (current penalty), we list the existing penalty in effect on November 2, 2015.
- In the fourth column (baseline penalty (year)), we provide the amount and year of the penalty as enacted by Congress or as last changed through a mechanism other than pursuant to the Inflation Adjustment Act, whichever is later.
- In the fifth column (2016 multiplier), we list the multiplier used to adjust the penalty pursuant to the initial OMB catch-up guidance. The multiplier is determined by the year of enactment or last adjustment of the penalty. The multiplier is based upon the Consumer Price Index (CPI–U) for the month of October 2015, not seasonally adjusted.
- In the sixth column (preliminary new penalty), we list the amount obtained by multiplying the Baseline Penalty from column 4 with the Multiplier from column 5. This amount will be the catch-up adjustment amount, if, in accordance with the 2015 Act, this level does not increase penalty levels by more than 150 percent of the corresponding levels in effect on November 2, 2015.
- In the seventh column (adjusted 2016 penalty), we provide the number for the penalty as it would have been adjusted for 2016. To derive this number, we compare the preliminary new penalty with the current penalty from column 3. The adjusted new penalty is the lesser of either the preliminary new penalty or an amount

[7] For example, CBP may enforce the Clean Diamond Trade Act penalty set forth in 19 U.S.C. 3907, which falls within the purview of the Department of the Treasury. *See* 31 CFR part 501, app. A.

[8] The term ''Bowaters corporation'' is defined in 46 U.S.C. 12118(a)(1). It means a corporation that has filed a certificate under oath with the Secretary of Homeland Security stating that the corporation meets the conditions set forth in 46 U.S.C. 12118(a)(1)(A)–(F). Among other things, the corporation must be incorporated under the laws of the United States or a State, the majority of the officers and directors must be citizens of the United States, and it must buy or produce in the United States at least 75 percent of the raw materials used or sold in its operations.

equal to 150 percent more than the current penalty.

TABLE 1—U.S. CUSTOMS AND BORDER PROTECTION CIVIL PENALTIES INITIAL CATCH-UP ADJUSTMENTS

Penalty name	Citation	Current penalty	Baseline penalty * (year)	2016 Multiplier **	Preliminary new penalty [2016 multiplier × baseline penalty]	Adjusted 2016 penalty [increase capped at 150% more than current penalty]
Penalty for transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions.	46 U.S.C. 12118(f)(3)	$200	$200 (1958)	8.22969	$1,646	$500
Penalty for employing a vessel in a trade without a required Certificate of Documentation.	19 U.S.C. 1706a, 19 CFR 4.80(i).	500	$500 (1980)	2.80469	1,402	1,250

* The amount of the penalty and the year when the penalty was established or last adjusted in statute or regulation other than pursuant to the Inflation Adjustment Act of 1990.

** OMB, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Table A: 2016 Civil Monetary Penalty Catch-Up Adjustment Multiplier by Calendar Year, February 24, 2016. *https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf.*

C. 2017 Adjustments

This table shows how DHS would have made the 2017 annual inflation adjustment for the two civil monetary penalties assessed by CBP that were inadvertently omitted from the DHS rulemakings and CBP correction rulemaking, pursuant to the 2015 Act and the guidance OMB issued to agencies on December 16, 2016.[9] In Table 2 below, we show: (1) The civil penalty (or penalties) name, (2) the penalty statutory and/or regulatory citation, (3) the penalty amount as it would have been adjusted in 2016 (See Table 1), (4) the cost-of-living adjustment multiplier for 2017 that OMB provided in its December 16, 2016 guidance, and (5) the 2017 adjusted penalty.

TABLE 2— U.S. CUSTOMS AND BORDER PROTECTION CIVIL PENALTIES 2017 ADJUSTMENTS

Penalty name	Citation	Adjusted 2016 penalty (see Table 1)	2017 Multiplier *	Adjusted 2017 penalty
Penalty for transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions.	46 U.S.C. 12118(f)(3) ..	$500	1.01636	$508
Penalty for employing a vessel in a trade without a required Certificate of Documentation.	19 U.S.C. 1706a, 19 CFR 4.80(i).	1,250	1.01636	1,270

* OMB, Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, December 16, 2016. *https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2017/m-17-11_0.pdf.*

D. 2018 Adjustments

This final rule also makes the 2018 annual inflation adjustment pursuant to the 2015 Act and the guidance OMB issued to agencies on December 15, 2017.[10] Pursuant to 28 U.S.C. 2461 note sec. 6, as amended by the 2015 Act, the penalty amounts adjusted by this final rule will be applicable for penalties assessed after December 28, 2018 where the associated violation occurred after November 2, 2015 (*i.e.,* the date the 2015 Act was signed into law). Consistent with OMB guidance, the 2015 Act does not change previously assessed penalties that the agency is actively collecting or has collected.

In Table 3 below, we show: (1) The civil penalty (or penalties) name, (2) the penalty statutory and/or regulatory citation, (3) the penalty amount as it would have been adjusted in 2017 (See Table 2), (4) the cost-of-living adjustment multiplier for 2018 that OMB provided in its December 15, 2017 guidance, and (5) the new 2018 adjusted penalty.

Additionally, we have made conforming edits to the regulatory text for the new adjusted penalty amounts in 19 CFR 4.80(i). Because the 46 U.S.C. 12118 penalty is not included in 19 CFR 4.80(d), there are no conforming edits to be made to the regulatory text. However, this penalty is listed in Table 3 for informational purposes.

[9] See footnote 4.

[10] See footnote 5.

TABLE 3—U.S. CUSTOMS AND BORDER PROTECTION CIVIL PENALTIES 2018 ADJUSTMENTS

Penalty name	Citation	Adjusted 2017 penalty (see Table 2)	2018 Multiplier *	New penalty as adjusted by this final rule
Penalty for transporting passengers coastwise for hire by certain vessels (known as Bowaters vessels) that do not meet specified conditions.	46 U.S.C. 12118(f)(3)	$508	1.02041	** $518
Penalty for employing a vessel in a trade without a required Certificate of Documentation.	19 U.S.C. 1706a, 19 CFR 4.80(i).	1,270	1.02041	1,296

* OMB, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, December 15, 2017. *https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf.*

** No applicable conforming edit to regulatory text.

IV. Administrative Procedure Act

The Administrative Procedure Act (APA) generally requires agencies to publish a notice of proposed rulemaking in the **Federal Register** (5 U.S.C. 553(b)) and to provide interested persons with the opportunity to submit comments (5 U.S.C. 553(c)). The APA also requires agencies to provide a delayed effective date (of not less than 30 days) for substantive rules. 5 U.S.C. 553(d). The 2015 Act, however, specifically instructed that agencies are to make the required annual adjustments notwithstanding section 553 of title 5 of the U.S.C.

DHS is promulgating this final rule to ensure that the amounts for civil penalties that CBP assesses or enforces that were inadvertently omitted from the DHS rulemakings reflect the statutorily mandated ranges as adjusted for inflation. The 2015 Act provides a clear nondiscretionary formula for adjustment of the civil penalties; DHS and CBP have been charged only with performing ministerial computations to determine the amounts of adjustments for inflation to civil monetary penalties. Additionally, although the 2015 Act requires publication of an IFR to take effect not later than August 1, 2016, that date has passed and publishing a separate IFR to account for these inadvertently omitted penalty adjustments would cause unnecessary delay. Further, this final rule merely applies the adjustment methodology that DHS provided for public comment in the 2016 IFR and finalized in the 2017 final rule. DHS finds that it is unnecessary to seek further public comment regarding the application of the finalized methodology to these two penalties. For these reasons, and as specified in the 2015 Act, DHS finds good cause to promulgate these CBP civil monetary penalty adjustments as a final rule and finds that the prior public notice-and-comment procedures and delayed effective date requirements of the APA are unnecessary and do not apply to this rule.

As described in Section I above, the 2015 Act requires agencies to make annual adjustments to civil monetary penalties no later than January 15 of each year and to publish the adjustments in the **Federal Register**. DHS will make future annual inflation adjustments required pursuant to the 2015 Act by final rule notwithstanding the notice-and-comment and delayed effective date requirements of the APA, as required by the 2015 Act. For future annual adjustments, DHS will update the penalty amounts by applying a cost-of-living adjustment multiplier pursuant to OMB guidance. DHS will publish a final rule that provides a table with the adjusted penalty amounts and that updates the numbers in the regulatory text accordingly. DHS will incorporate the two CBP penalties adjusted in this final rule into such future annual adjustment final rules.

V. Regulatory Analyses

A. Executive Orders 12866, 13563, and 13771

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory 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, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (''Reducing Regulation and Controlling Regulatory Costs'') directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.''

OMB has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. As this rule is not a significant regulatory action it is not subject to the requirements of Executive Order 13771. *See* OMB's Memorandum, ''Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs' '' (April 5, 2017) at Q2.

This final rule makes nondiscretionary adjustments to existing civil monetary penalties in accordance with the 2015 Act and OMB guidance.[11] DHS therefore did not consider alternatives and does not have the flexibility to alter the adjustments of the civil monetary penalty amounts as provided in this rule. To the extent this final rule increases civil monetary penalties, it would result in an increase in transfers from persons or entities assessed a civil monetary penalty to the government.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act applies only to rules for which an agency publishes a notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). See 5 U.S.C. 601–612. The Regulatory Flexibility Act does not apply to this final rule because a notice of proposed rulemaking was not required for the reasons stated above.

C. 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. This final rule will not result in such an expenditure.

[11] See footnotes 2 and 4.

D. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule, because this final rule does not trigger any new or revised recordkeeping or reporting.

VI. Signing Authority

The signing authority for this document falls under 19 CFR 0.2(a). Accordingly, this document is signed by the Secretary of Homeland Security.

List of Subjects in 19 CFR Part 4

Exports, Freight, Harbors, Maritime carriers, Oil pollution, Reporting and recordkeeping requirements, Vessels.

Amendments to the Regulations

For the reasons stated in the preamble, CBP amends 19 CFR part 4 as follows:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

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

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

* * * * *

Sections 4.80, 4.80a, and 4.80b also issued under 19 U.S.C. 1706a; 28 U.S.C. 2461 note; 46 U.S.C. 12112, 12117, 12118, 50501–55106, 55107, 55108, 55110, 55114, 55115, 55116, 55117, 55119, 56101, 55121, 56101, 57109; Pub. L. 108–7, Division B, Title II, § 211;

* * * * *

■ 2. Revise § 4.80(i) to read as follows:

§ 4.80 Vessels entitled to engage in coastwise trade.

* * * * *

(i) Any vessel, entitled to be documented and not so documented, employed in a trade for which a Certificate of Documentation is issued under the vessel documentation laws (see § 4.0(c)), other than a trade covered by a registry, is liable to a civil penalty of $500 for each port at which it arrives without the proper Certificate of Documentation on or before November 2, 2015, and $1296 for each port at which it arrives without the proper Certificate of Documentation after November 2, 2015 (19 U.S.C. 1706a, as adjusted by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015). If such a vessel has on board any foreign merchandise (sea stores excepted), or any domestic taxable alcoholic beverages, on which the duty and taxes have not been paid or secured to be paid, the vessel and its cargo are subject to seizure and forfeiture.

Claire M. Grady,

Under Secretary for Management and Senior Official Performing the Duties of the Deputy Secretary.

[FR Doc. 2018–28141 Filed 12–27–18; 8:45 am]

BILLING CODE 9111–14–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4071 and 4302

RIN 1212–AB45

Adjustment of Civil Penalties for Inflation

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation is required to amend its regulations annually to adjust for inflation the maximum civil penalty for failure to provide certain notices or other material information and for failure to provide certain multiemployer plan notices.

DATES: *Effective date:* This rule is effective on December 28, 2018.

Applicability date: The increases in the civil monetary penalties under sections 4071 and 4302 of the Employee Retirement Income Security Act provided for in this rule apply to such penalties assessed after December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Stephanie Cibinic, Deputy Assistant General Counsel for Regulatory Affairs (*cibinic.stephanie@pbgc.gov*), Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026; 202–326–4400 extension 6352. (TTY users may call the Federal relay service toll-free at 800–877–8339 and ask to be connected to 202–326–4400 extension 6352.)

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the Regulatory Action

This rule is needed to carry out the requirements of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and Office of Management and Budget guidance M–19–04. The rule adjusts, as required for 2019, the maximum civil penalties under 29 CFR part 4071 and 29 CFR part 4302 that the Pension Benefit Guaranty Corporation (PBGC) may assess for failure to provide certain notices or other material information and certain multiemployer plan notices.

PBGC's legal authority for this action comes from the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and from sections 4002(b)(3), 4071, and 4302 of the Employee Retirement Income Security Act of 1974 (ERISA).

Major Provisions of the Regulatory Action

This rule adjusts as required by law the maximum civil penalties that PBGC may assess under sections 4071 and 4302 of ERISA. The new maximum amounts are $2,194 for section 4071 penalties and $292 for section 4302 penalties.

Background

PBGC administers title IV of ERISA. Title IV has two provisions that authorize PBGC to assess civil monetary penalties.[1] Section 4302, added to ERISA by the Multiemployer Pension Plan Amendments Act of 1980, authorizes PBGC to assess a civil penalty of up to $100 a day for failure to provide a notice under subtitle E of title IV of ERISA (dealing with multiemployer plans). Section 4071, added to ERISA by the Omnibus Budget Reconciliation Act of 1987, authorizes PBGC to assess a civil penalty of up to $1,000 a day for failure to provide a notice or other material information under subtitles A, B, and C of title IV and sections 303(k)(4) and 306(g)(4) of title I of ERISA.

Adjustment of Civil Penalties

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015,[2] which requires agencies to adjust civil monetary penalties for inflation and to publish the adjustments in the **Federal Register**. An initial adjustment was required to be made by interim final rule published by July 1, 2016, and effective by August 1, 2016. Subsequent adjustments must be published by January 15 each year after 2016.

On December 14, 2018, the Office of Management and Budget issued

[1] Under the Federal Civil Penalties Inflation Adjustment Act of 1990, a penalty is a civil monetary penalty if (among other things) it is for a specific monetary amount or has a maximum amount specified by Federal law. Title IV also provides (in section 4007) for penalties for late payment of premiums, but those penalties are neither in a specified amount nor subject to a specified maximum amount.

[2] Sec. 701, Public Law 114–74, 129 Stat. 599–601 (Bipartisan Budget Act of 2015).

memorandum M–19–04 on implementation of the 2019 annual inflation adjustment pursuant to the 2015 act.[3] The memorandum provides agencies with the cost-of-living adjustment multiplier for 2019, which is based on the Consumer Price Index (CPI–U) for the month of October 2018, not seasonally adjusted. The multiplier for 2019 is 1.02522. The adjusted maximum amounts are $2,194 for section 4071 penalties and $292 for section 4302 penalties.

Compliance With Regulatory Requirements

The Office of Management and Budget has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866 and therefore not subject to its review. As this is not a significant regulatory action under E.O. 12866, it is not considered an E.O. 13771 regulatory action.

The Office of Management and Budget also has determined that notice and public comment on this final rule are unnecessary because the adjustment of civil penalties implemented in the rule is required by law. See 5 U.S.C. 553(b).

Because no general notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects

29 CFR Part 4071

Penalties.

29 CFR Part 4302

Penalties.

In consideration of the foregoing, PBGC amends 29 CFR parts 4071 and 4302 as follows:

PART 4071—PENALTIES FOR FAILURE TO PROVIDE CERTAIN NOTICES OR OTHER MATERIAL INFORMATION

■ 1. The authority citation for part 4071 continues to read as follows:

Authority: 28 U.S.C. 2461 note, as amended by sec. 701, Pub. L. 114–74, 129 Stat. 599–601; 29 U.S.C. 1302(b)(3), 1371.

§ 4071.3 [Amended]

■ 2. In § 4071.3, the figures ''$2,140'' are removed and the figures ''$2,194'' are added in their place.

[3] See M–19–04, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, *https://www.whitehouse.gov/omb/information-for-agencies/memoranda/.*

PART 4302—PENALTIES FOR FAILURE TO PROVIDE CERTAIN MULTIEMPLOYER PLAN NOTICES

■ 3. The authority citation for part 4302 continues to read as follows:

Authority: 28 U.S.C. 2461 note, as amended by sec. 701, Pub. L. 114–74, 129 Stat. 599–601; 29 U.S.C. 1302(b)(3), 1452.

§ 4302.3 [Amended]

■ 4. In § 4302.3, the figures ''$285'' are removed and the figures ''$292'' are added in their place.

Issued in Washington, DC.

William Reeder,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2018–28177 Filed 12–27–18; 8:45 am]

BILLING CODE 7709–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2018–1094]

Safety Zone, Brandon Road Lock and Dam to Lake Michigan Including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, and Calumet-Saganashkee Channel, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a segment of the Safety Zone; Brandon Road Lock and Dam to Lake Michigan including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, Calumet-Saganashkee Channel on all waters of the main branch of the Chicago River 600 feet west of the Franklin/Orleans Street Bridge and 1,000 feet east of the Columbus Drive Bridge from 11:45 p.m. on December 31, 2018 through 12:15 a.m. on January 1, 2019. This action is necessary and intended to ensure the safety of life and property on navigable waters prior to, during, and immediately after this fireworks display. During the enforcement period listed below transiting within the safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan or a designated representative.

DATES: The regulations in 33 CFR 165.930 will be enforced from 11:45 p.m. on December 31, 2018 through 12:15 a.m. on January 1, 2019.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email LT John Ramos, Waterways Management Division, Marine Safety Unit Chicago, at 630–986–2155, email address *D09-DG-MSUChicago-Waterways@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce a segment of the Safety Zone; Brandon Road Lock and Dam to Lake Michigan including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, Calumet-Saganashkee Channel, Chicago, IL, listed in 33 CFR 165.930. Specifically, the Coast Guard will enforce this safety zone on all waters of the main branch of the Chicago River 600 feet west of the Franklin/Orleans Street Bridge and 1,000 feet east of the Columbus Drive Bridge from 11:45 p.m. on December 31, 2018 through 12:15 a.m. on January 1, 2019. During the enforcement period, no vessel may enter into, transit, moor lay up or anchor within this regulated area without approval from the Captain of the Port Lake Michigan or a Captain of the Port Lake Michigan designated representative. Vessels and persons granted permission to enter the safety zone shall obey all lawful orders or directions of the Captain of the Port Lake Michigan, or his or her on-scene representative.

This notice of enforcement is issued under the authority of 33 CFR 165.930 and 5 U.S.C. 552(a). In addition to this publication in the **Federal Register**, the Captain of the Port Lake Michigan will also provide notice through other means, which will include Broadcast Notice to Mariners, distribution in leaflet form, and/or on-scene oral notice. Additionally, the Captain of the Port Lake Michigan may notify representatives from the maritime industry through telephonic and email notifications. If the Captain of the Port or a designated representative determines that the regulated area need not be enforced for the full duration stated in this notice of enforcement, he or she may use a Broadcast Notice to Mariners to grant general permission to enter the regulated area. The Captain of the Port Lake Michigan or a designated on-scene representative may be contacted via Channel 16, VHF–FM or at (414) 747–7182.

Dated: December 14, 2018.

Thomas J. Stuhlreyer,

Captain, U.S. Coast Guard, Captain of the Port Lake Michigan.

[FR Doc. 2018–28138 Filed 12–27–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–1108]

RIN 1625–AA00

Safety Zone; Lower Mississippi River, Mile Markers 99.3 to 100.3 Above Head of Passes, New Orleans, LA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters between Lower Mississippi River mile marker 99.3 and mile marker 100.3, above Head of Passes. Entry of vessels or persons into this zone, or movement of vessels within this zone, is prohibited unless specifically authorized by the Captain of the Port Sector New Orleans or a designated representative.

DATES: This rule is effective from 10 p.m. through 11 p.m. on December 31, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2018–1108 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Commander Benjamin Morgan, Sector New Orleans, U.S. Coast Guard; telephone 504–365–2281, email *Benjamin.P.Morgan@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Sector New Orleans
DHS Department of Homeland Security
FR Federal Register
MM Mile Marker
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 it is impracticable. The Coast Guard was notified of this event on December 17, 2018. We must establish this safety zone by December 31, 2018 and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing this rule. Immediate action is needed to respond to the potential safety hazards associated with a fireworks display.

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

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 Sector New Orleans (COTP) has determined that potential hazards associated with a fireworks display are a safety concern for anyone within a one-mile stretch of the Lower Mississippi River between Mile Marker (MM) 99.3 and MM 100.3. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during the fireworks display.

IV. Discussion of the Rule

This rule establishes a safety zone from 10 p.m. through 11 p.m. on December 31, 2018. The safety zone will cover all navigable waters between Mile Marker (MM) 99.3 and MM 100.3 on the Lower Mississippi River, above Head of Passes. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters from the hazards associated with a fireworks display. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Sector New Orleans. Vessels requiring entry into this safety zone must request permission from the COTP or a designated representative. They may be contacted on VHF–FM Channel 16 or 67. Persons and vessels permitted to enter or to move within this safety zone must transit at their slowest safe speed and comply with all lawful directions issued by the COTP or the designated representative. The COTP or a designated representative will inform the public through Broadcast Notices to Mariners of any changes in the planned schedule.

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 of the safety zone. Vessel traffic will be able to transit around the safety zone, which will impact a small designated area of the Lower Mississippi River for one hour during the evening. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners 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 temporary 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 being established for one hour in the evening and encompassing one mile of the Lower Mississippi River for a fireworks display. 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 recordkeeping requirements, Security measures, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T08–1108 to read as follows:

§ 165.T08–1108 Safety Zone; Lower Mississippi River, New Orleans, LA.

(a) *Location.* The following area is a safety zone: All navigable waters between mile marker (MM) 99.3 and MM 100.3.

(b) *Effective period.* This section is effective without actual notice from 10 p.m. through 11 p.m. on December 31, 2018.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into this zone or moving within this zone is prohibited unless specifically authorized by the Captain of the Port Sector New Orleans (COTP) or designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Sector New Orleans.

(2) Vessels requiring entry into this safety zone must request permission from the COTP or a designated representative via VHF–FM Channel 16 or 67.

(3) Persons and vessels permitted to enter or to move within this safety zone must transit at their slowest safe speed and comply with all lawful directions issued by the COTP or the designated representative.

(d) *Information broadcasts.* The COTP or a designated representative will inform the public through Broadcast Notices to Mariners of any changes in the planned schedule.

Dated: December 21, 2018.

K.M. Luttrell,

Captain, U.S. Coast Guard, Captain of the Port Sector New Orleans.

[FR Doc. 2018–28230 Filed 12–27–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2018–1089]

RIN 1625–AA00

Safety Zone; Sacramento New Year's Eve Fireworks Display, Sacramento River, Sacramento, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing three temporary safety zones in the navigable waters of the Sacramento River near River Walk Park and the Tower Bridge in Sacramento, CA in support of the Sacramento New Year's Eve Fireworks Display on December 31, 2018. These safety zones are necessary to protect personnel, vessels, and the marine environment from the dangers associated with pyrotechnics. Unauthorized persons or vessels are prohibited from entering into, transiting through, or remaining in the safety zones without permission of the Captain of the Port or a designated representative.

DATES: This rule is effective from 8:30 p.m. to 9:46 p.m. on December 31, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2018–1089 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Junior Grade Jennae Cotton, U.S. Coast Guard Sector San Francisco; telephone (415) 399–3585, email *SFWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

APA Administrative Procedure Act
CFR Code of Federal Regulations
COTP Captain of the Port
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. Since the Coast Guard received notice of this event on December 10, 2018, notice and comment procedures would be impracticable in this instance.

For similar reasons as those stated above, 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**.

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 (COTP) San Francisco has determined that potential hazards associated with the Sacramento New Year's Eve fireworks display on December 31, 2018, will be a safety concern for anyone within a 175-foot radius of the fireworks firing sites. This rule is needed to protect spectators, vessels, and other property from hazards associated with pyrotechnics.

IV. Discussion of the Rule

This rule establishes three temporary safety zones from 8:30 p.m. to 9:46 p.m. on December 31, 2018. At 8:30 p.m. on December 31, 2018, 30 minutes prior to the commencement of the 16 minute fireworks display, the safety zones for the Sacramento New Year's Eve Fireworks Display will encompass the navigable waters around the fireworks firing sites within a radius of 175 feet in approximate positions:

Near River Walk Park at 38°35′02″ N, 121°30′30″ W,

Near River Walk Park at 38°34′54″ N, 121°30′33″ W, and

Near the Tower Bridge at 38°34′50″ N, 121°30′30″ W (NAD83).

This portion of the Sacramento River is depicted on National Oceanic and Atmospheric Administration (NOAA) Chart 18662, available for free at *http://www.charts.noaa.gov/OnLineViewer/18662.shtml.* The safety zones will terminate at 9:46 p.m. on December 31, 2018.

The effect of the temporary safety zones is to restrict navigation in the vicinity of the fireworks firing sites during the scheduled display. Except for persons or vessels authorized by the COTP or a designated representative, no person or vessel may enter or remain in the restricted areas. These regulations are needed to keep spectators and vessels away from the immediate vicinity of the fireworks firing sites to ensure the safety of participants, spectators, and transiting vessels.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the limited duration and narrowly tailored geographic area of the safety zones. Although this rule restricts access to the waters encompassed by the safety zones, the effect of this rule will not be significant because the local waterway users will be notified via public Notice to Mariners to ensure the safety zone will result in minimum impact. The entities most likely to be affected are waterfront facilities, commercial vessels, and pleasure craft engaged in recreational activities.

B. Impact on Small Entities

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

This rule may affect the following entities, some of which may be small entities: Owners and operators of waterfront facilities, commercial

vessels, and pleasure craft engaged in recreational activities and sightseeing, if these facilities or vessels are in the vicinity of the safety zones at times when these zones are being enforced. This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: (i) This rule will encompass only a small portion of the waterway for a limited period of time, and (ii) the maritime public will be advised in advance of these safety zones via Broadcast Notice to Mariners.

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 safety zones of limited size and duration. It is categorically excluded from further review under Categorical Exclusion 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**.

E. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T11–965 to read as follows:

§ 165.T11–965 Safety zone; Sacramento New Year's Eve Fireworks Display, Sacramento River, Sacramento, CA.

(a) *Location.* These temporary safety zones are established in the navigable waters of the Sacramento River within a radius of 175 feet of the fireworks firing sites, near River Walk Park and the Tower Bridge in Sacramento, CA, in approximate positions: Near River Walk Park at 38°35′02″ N, 121°30′30″ W, Near River Walk Park at 38°34′54″ N, 121°30′33″ W, and Near the Tower Bridge at 38°34′50″ N, 121°30′30″ W (NAD83).

(b) *Enforcement period.* The zones described in paragraph (a) of this section will be enforced from 8:30 p.m. until approximately 9:46 p.m. on December 31, 2018. The Captain of the Port San Francisco (COTP) will notify the maritime community of periods during which these zones will be enforced via Notice to Mariners in accordance with § 165.7.

(c) *Definitions.* As used in this section, ''designated representative'' means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer on a Coast Guard vessel or a Federal, State, or local officer designated by or assisting the COTP in the enforcement of the safety zones.

(d) *Regulations.* (1) Under the general regulations in subpart C of this part, entering into, transiting through, or anchoring within these safety zones is prohibited unless authorized by the COTP or a designated representative.

(2) The safety zones are closed to all vessel traffic, except as may be permitted by the COTP or a designated representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or a designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zones must comply with all directions given to them by the COTP or a designated representative. Persons and vessels may

request permission to enter the safety zones on VHF–23A or through the 24-hour Command Center at telephone (415) 399–3547.

Dated: December 19, 2018.

Anthony J. Ceraolo,

Captain, U.S. Coast Guard, Captain of the Port, San Francisco.

[FR Doc. 2018–28146 Filed 12–27–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2018–1075]

Safety Zones; Fireworks Displays in the Fifth Coast Guard District

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Penn's Landing, Delaware River, Philadelphia, PA; safety zone from 5:45 p.m. through 6:45 p.m. on December 31, 2018, and from 11:45 p.m. on December 31, 2018, through 12:45 a.m. on January 1, 2019. This action is necessary to ensure safety of life on the navigable waters of the United States immediately prior to, during, and immediately after the fireworks displays. Our regulation for safety zones of fireworks displays in the Fifth Coast Guard District identifies the regulated area for this event at Penn's Landing in Philadelphia, PA. During the enforcement periods, vessels may not enter, remain in, or transit through the safety zones during these enforcement periods unless authorized by the Captain of the Port or designated Coast Guard patrol personnel on scene.

DATES: The regulations in the table to 33 CFR 165.506 at (a)(16) will be enforced from 5:45 p.m. through 6:45 p.m. on December 31, 2018, and from 11:45 p.m. on December 31, 2018, through 12:45 a.m. on January 1, 2019.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, you may call or email Petty Officer Thomas Welker, U.S. Coast Guard, Sector Delaware Bay, Waterways Management Division, telephone 215–271–4814, email *Thomas.J.Welker@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone in the Table to 33 CFR 165.506, entry (a)(16), as effective as of Dec. 19, 2018, for the Delaware River Waterfront Corporation New Year's Eve Fireworks displays from 5:45 p.m. through 6:45 p.m. on December 31, 2018, and from 11:45 p.m. on December 31, 2018, through 12:45 a.m. on January 1, 2019. (The Coast Guard published a final rule on November 18, 2018, amending entry (a)(16) to table 33 CFR 165.506 that will go into effect on December 19, 2018, 83 FR 58186.) This action is necessary to ensure safety of life on the navigable waters of the United States immediately prior to, during, and immediately after the fireworks displays. Our regulation for safety zones of fireworks displays within the Fifth Coast Guard District, table to § 165.506, entry (a)(16) specifies the location of the regulated area as all waters of Delaware River, adjacent to Penn's Landing, Philadelphia, PA, within 500 yards of a fireworks barge at approximate position latitude 39°56′49″ N, longitude 075°08′11″ W. During the enforcement periods, as reflected in § 165.506(d), vessels may not enter, remain in, or transit through the safety zones during these enforcement periods unless authorized by the Captain of the Port or designated Coast Guard patrol personnel on scene.

In addition to this notice of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of this enforcement period via broadcast notice to mariners.

Dated: December 20, 2018.

Scott E. Anderson,

Captain, U.S. Coast Guard, Captain of the Port, Delaware Bay.

[FR Doc. 2018–28246 Filed 12–27–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–1021]

RIN 1625–AA00

Safety Zone for Fireworks Display; Spa Creek, Annapolis, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for certain waters of Spa Creek. This action is necessary to provide for the safety of life on these navigable waters of Spa Creek at Annapolis, MD, for a fireworks display on December 31, 2018. This regulation prohibits persons and vessels from entering the safety zone unless authorized by the Captain of the Port Maryland-National Capital Region or a designated representative.

DATES: This rule is effective from 11 p.m. on December 31, 2018, through 1 a.m. on January 1, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2018–1021 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 about this rule, call or email Mr. Ron Houck, Sector Maryland-National Capital Region Waterways Management Division, U.S. Coast Guard; telephone 410–576–2674, email *Ronald.L.Houck@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
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, Pyrotecnico, Inc., of New Castle, PA, notified the Coast Guard that it will be conducting a fireworks display from 11:55 p.m. on December 31, 2018, to 12:30 a.m. on January 1, 2019, sponsored by the City of Annapolis, MD. The fireworks are to be launched from a barge in Spa Creek, in Annapolis, MD. Additional details were received on November 5, 2018. In response, on November 27, 2018, the Coast Guard published a notice of proposed rulemaking (NPRM) titled ''Safety Zone for Fireworks Display; Spa Creek, Annapolis, MD'' (83 FR 60802). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this fireworks display. During the comment period that ended December 12, 2018, we received seven comments.

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

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 (COTP) Maryland-NCR has determined that potential hazards associated with the planned fireworks display on December 31, 2018, will be a safety concern for anyone within a 400-foot radius of the fireworks barge. This rule is needed to ensure safety of vessels on the navigable waters within 400 feet of the fireworks barge on Spa Creek before, during, and after the scheduled event.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received 7 public submissions to the docket responding to our NPRM published November 27, 2018. We thank all of the commenters for taking time to review the NPRM and submit comments regarding this action.

The majority of commenters expressed support for the rule, but there were some concerns. Below in this section we have presented our summaries of comments in italics, and have stated our responses after each summary.

Winds during winter could carry burning embers and projectiles farther than the 400 feet distance established for the zone. The 400 feet from the fireworks barge is an insufficient distance and the safety zone should be increased in size.

The minimum safe distance from the fireworks barge used by the Coast Guard to determine the size of the safety zone is based on industry standards for outdoor aerial fireworks set by the National Fire Protection Association (NFPA). The NFPA standard for this fireworks display is 280 feet from the discharge site. At the request of the contracted fireworks company, Pyrotecnico, the Coast Guard is using 400 feet for the size of its safety zone, which is an increase of more than 40 percent above the safe distance set by the NFPA.

Like people and property, the protection of wildlife should be considered and any fireworks that end up in the waterway should be recovered and disposed of following the display.

After completing the required analysis for the rule, the Coast Guard has determined that this rulemaking will not have a significant effect on the human environment. In accordance with applicable environmental laws, this analysis is of the action being taken by the Coast Guard, the creation of the safety zone, not the underlying triggering event—the fireworks, which appear to be the commenter's source of concern with respect to wildlife. The Coast Guard agrees that considering the effects of fireworks on the environment is important; however, it is up to the event sponsor to determine the appropriate level of clean up for falling debris and the potential impact of the fireworks on wildlife.

There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes a temporary safety zone from 11 p.m. on December 31, 2018, through 1 a.m. on January 1, 2019. The safety zone will cover all navigable waters within 400 feet of the fireworks barge in Spa Creek located within 400 feet of the fireworks barge in approximate position latitude 38°58′32.48″ N, longitude 076°28′57.55″ W, located at Annapolis, MD. The duration of the safety zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled fireworks display. 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, duration, and time-of-day of the safety zone. This zone covers the entire navigable channel. Although vessel traffic will not be able to safely transit around this safety zone, the impact will be for 2 hours during the evening when vessel traffic in Spa Creek is normally low. The Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about 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 2 hours that prohibits entry within a portion of Spa Creek. Normally such actions are 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 recordkeeping requirements, Security measures, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T05–1021 to read as follows:

§ 165.T05–1021 Safety Zone for Fireworks Display; Spa Creek, Annapolis, MD.

(a) *Location.* The following area is a safety zone: All navigable waters of Spa Creek within 400 feet of the fireworks barge in approximate position latitude 38°58′32.48″ N, longitude 076°28′57.55″ W, located at Annapolis, MD. All coordinates refer to datum NAD 1983.

(b) *Definitions.* As used in this section:

(1) *Captain of the Port (COTP)* means the Commander, U.S. Coast Guard Sector Maryland-National Capital Region.

(2) *Designated representative* means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Maryland-National Capital Region to assist in enforcing the safety zone described in paragraph (a) of this section.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative. All vessels underway within this safety zone at the time it is activated are to depart the zone.

(2) To seek permission to enter, contact the COTP or the COTP's designated representative by telephone at 410–576–2693 or on Marine Band Radio VHF–FM channel 16 (156.8 MHz). The Coast Guard vessels enforcing this section can be contacted on Marine Band Radio VHF–FM channel 16 (156.8 MHz).

(3) Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement officials.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement period.* This section will be enforced from 11 p.m. on December 31, 2018 through 1 a.m. on January 1, 2019.

Dated: December 21, 2018,

Joseph B. Loring,

Captain, U.S. Coast Guard, Captain of the Port Maryland-National Capital Region.

[FR Doc. 2018–28245 Filed 12–27–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–1105]

Safety Zone, Brandon Road Lock and Dam to Lake Michigan Including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, and Calumet-Saganashkee Channel, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the following segment of the Safety Zone: Brandon Road Lock and Dam to Lake Michigan including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, and Calumet-Saganashkee Channel on all waters of the Chicago Sanitary and Ship Canal between Mile Marker 296.1 to Mile Marker 296.7 at specified times from December 21, 2018 until February 8, 2019. This action is necessary to protect the waterway and vessels from the potential hazards associated with maintenance operations being conducted by the U.S. Army Corps of Engineers at the U.S. Army Corps of Engineer's Electric Dispersal Barrier.

DATES: The regulations in 33 CFR 165.930 will be enforced each Monday through Friday, from 7 a.m. until 5 p.m., without actual notice from December 28, 2018 until February 8, 2019. For purposes of enforcement, actual notice will be used from December 21, 2018 until December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Call or email LT John Ramos (Waterways Management Division Chief, Marine Safety Unit Chicago, U.S. Coast Guard) if you have questions about this notice of enforcement; telephone 630–986–2155; email address *D09-DG-MSUChicago-Waterways@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the following segment of the Safety Zone: Brandon Road Lock and Dam to Lake Michigan including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, Calumet-Saganashkee Channel, Chicago, IL, listed in 33 CFR 165.930. Specifically, the Coast Guard will enforce this safety zone on all waters of the Chicago Sanitary and Ship Canal between Mile Marker 296.1 to Mile Marker 296.7. Enforcement will occur on each Monday through Friday from 7 a.m. until 5 p.m., from December 21, 2018 until February 8, 2019. All vessels must obtain permission from the Captain of the Port, Sector Lake Michigan, or his or her designated representative to enter into, transit, moor, lay up or anchor within any enforced segment of the safety zone when the safety zone is enforced. Vessels and persons granted permission to enter the safety zone shall obey all lawful orders or directions of the Captain of the Port Lake Michigan, or his or her on-scene representative.

This notice of enforcement is issued under the authority of 33 CFR 165.930 and 5 U.S.C. 552(a). In addition to this publication in the **Federal Register**, the Captain of the Port Lake Michigan will also provide notice through other means, which will include Broadcast Notice to Mariners, Local Notice to Mariners, and distribution in leaflet form. Additionally, the Captain of the Port Lake Michigan may notify representatives from the maritime industry through telephonic and email notifications. If the Captain of the Port or a designated representative determines that the regulated area need not be enforced for the full duration stated in this notice of enforcement or suspends the safety zone in part, he or she may use a Broadcast Notice to Mariners, Local Notice to Mariners, and may notify representatives from the maritime industry through telephonic and email notifications to grant general permission to enter the regulated area. The Captain of the Port Lake Michigan or a designated on-scene representative may be contacted via Channel 16, VHF–FM or at (414) 747–7182.

Dated: December 20, 2018.

Thomas J. Stuhlreyer,

Captain, U.S. Coast Guard, Captain of the Port Lake Michigan.

[FR Doc. 2018–28162 Filed 12–27–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 413 and 414

[CMS–1691–CN]

RIN 0938–AT28

Medicare Program; End-Stage Renal Disease Prospective Payment System, Payment for Renal Dialysis Services Furnished to Individuals With Acute Kidney Injury, End-Stage Renal Disease Quality Incentive Program, Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Competitive Bidding Program (CBP) and Fee Schedule Amounts, and Technical Amendments To Correct Existing Regulations Related to the CBP for Certain DMEPOS; Correction

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

ACTION: Final rule; correction.

SUMMARY: This document corrects technical and typographical errors that appeared in the final rule published in the **Federal Register** on November 14, 2018 titled ''Medicare Program; End-Stage Renal Disease Prospective Payment System, Payment for Renal Dialysis Services Furnished to Individuals With Acute Kidney Injury, End-Stage Renal Disease Quality Incentive Program, Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Competitive Bidding Program (CBP) and Fee Schedule Amounts, and Technical Amendments To Correct Existing Regulations Related to the CBP for Certain DMEPOS.''

DATES: *Effective Date:* This correction is effective on January 1, 2019.

FOR FURTHER INFORMATION CONTACT: Alexander Ullman, (410) 786–9671 and *DMEPOS@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2018–24238 of November 14, 2018 (83 FR 56922), there were technical and typographical errors that are identified and corrected in the Correction of Errors section below. The provisions in this correction document are effective as if they had been included in the document published on November 14, 2018. Accordingly, the corrections are effective January 1, 2019.

II. Summary of Errors

On page 57029, we inadvertently made several technical and typographical errors by referencing the final rule instead of the proposed rule. We are correcting those errors by replacing references to ''this rule'' and ''this final rule'' with the correct reference to the Calendar Year (CY) 2019 End-Stage Renal Disease Prospective Payment System, Durable Medical Equipment, Prosthetics, Orthotics and Supplies (CY 2019 ESRD PPS DMEPOS) proposed rule.

III. Waiver of Proposed Rulemaking

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of the proposed rule in the **Federal Register** before the provisions of a rule take effect. Similarly, section 1871(b)(1) of the Social Security Act (the Act) requires the Secretary of the Department of Health and Human Services to provide for notice of the proposed rule in the **Federal Register** and provide a period of not less than 60 days for public comment. In addition, section 553(d) of the APA, and section 1871(e)(1)(B)(i) of the Act mandate a 30-day delay in effective date after issuance or publication of a rule. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the notice and comment and delay in effective date requirements; in cases in which these exceptions apply, sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act provide exceptions from the notice and 60-day comment period and delay in effective date requirements of the Act as well. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act authorize an agency to dispense with normal rulemaking requirements for good cause if the agency makes a finding that the notice and comment process is impracticable, unnecessary, or contrary to the public interest. In addition, both section 553(d)(3) of the APA and section 1871(e)(1)(B)(ii) of the Act allow the agency to avoid the 30-day delay in effective date where such delay is contrary to the public interest and an agency includes a statement of support.

We believe that this correcting document does not constitute a rulemaking that would be subject to the notice and comment or delayed effective date requirements of the APA or section 1871 of the Act. This document simply corrects technical and typographical errors in the preamble, but does not make substantive changes to the policies or payment methodologies that were adopted in the final rule. As a result,

this correcting document is intended to ensure that the information in the final rule accurately reflects the policies adopted in that document.

Even if this were a rulemaking to which the notice and comment and delayed effective date requirements applied, we find there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the corrections in this document in the final rule or delaying the effective date of the corrections would be contrary to the public interest to ensure that the rule accurately reflects our policies as of the date they take effect. Further, such procedures would be unnecessary because we are not making any substantive revisions to the final rule, but rather, we are simply correcting the **Federal Register** document to reflect the policies we previously proposed, received public comment on, and subsequently finalized in the final rule. For these reasons, we believe that we have good cause to waive the notice and comment and delay in effective date requirements.

IV. Correction of Errors

In FR Doc. 2018–24238 of November 14, 2018 (83 FR 56922), make the following corrections:

1. On page 57029, first column, second full paragraph,

a. In line 16, the reference ''this rule'' is corrected to read ''the CY 2019 ESRD PPS DMEPOS proposed rule''.

b. In line 17, the reference ''this final rule'' is corrected to read ''the CY 2019 ESRD PPS DMEPOS proposed rule''.

2. On page 57029, second column, second full paragraph, in lines 27 and 28, the reference ''this final rule'' is corrected to read ''the CY 2019 ESRD PPS DMEPOS proposed rule''.

Dated: December 20, 2018.

Ann C. Agnew,

Executive Secretary to the Department, Department of Health and Human Services.

[FR Doc. 2018–28347 Filed 12–21–18; 4:15 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 416 and 419

[CMS–1695–CN2]

RIN 0938–AT30

Medicare Program: Changes to Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Correction

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

ACTION: Final rule; correction.

SUMMARY: This document corrects technical and typographical errors in the final rule with comment period that appeared in the November 21, 2018 **Federal Register** titled ''Changes to Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs.''

DATES: The corrections in this document are effective January 1, 2019.

FOR FURTHER INFORMATION CONTACT: Marjorie Baldo via email *Marjorie.Baldo@cms.hhs.gov* or at (410) 786–4617.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2018–24243 of November 21, 2018 (83 FR 58818), there were a number of technical and typographical errors that are identified and corrected in the Correction of Errors section of this correcting document. The provisions in this correction document are effective as if they had been included in the document that appeared in the November 21, 2018 **Federal Register**. Accordingly, the corrections are effective January 1, 2019.

II. Summary of Errors

A. Summary of Errors in the Preamble

1. Hospital Outpatient Prospective Payment System (OPPS) Corrections

On page 58822, we are correcting the section ''Payment of Drugs, Biologicals, and Radiopharmaceuticals If Average Sales Price (ASP) Data Are Not Available'' to remove the language that suggests that drugs with pass-through status with partial quarter WAC-based pricing are not paid at WAC + 3, which is incorrect. This correction is necessary to conform the introductory language regarding OPPS payment policy for drugs, biologicals, and radiopharmaceuticals with WAC-based pricing with the policy adopted in the final rule to pay for these drugs, biologicals, and radiopharmaceuticals, including those with pass-through status, at WAC + 3 percent.

On page 58825, the headings for subsections ''c. Impact of the Changes to the Hospital OQR Program'' and ''d. Impact of the Changes to the ASCQR Program'' were alphabetically mislabeled and are corrected to be ''g. Impact of the Changes to the Hospital OQR Progam'' and ''h. Impact of the Changes to the ASCQR Program,'' respectively.

On page 58833, Healthcare Common Procedure Coding System (HCPCS) code P9072 (Platelets, pheresis, pathogen reduced or rapid bacterial tested, each unit) was cited in a comment in error. The correct HCPCS code is ''P9073'' not ''P9072''.

On page 58834, we transposed two numbers in the Healthcare Common Procedure Coding System (HCPCS) code P9037 (Platelets, pheresis, leukocytes reduced, irradiated, each unit). The correct HCPCS code is ''P9037'', not ''P9073''.

On page 58880, in ''Table 12.—New Level II HCPCS Codes Effective April 1, 2018,'' we incorrectly stated that the Medicare Ambulatory Payment Classification (APC) assignment for HCPCS code C9749 (Repair nasal stenosis w/imp) is ''APC 5164,'' rather than ''APC 5165.'' The correct APC assignment for this code is APC 5165, which we finalized on page 58922.

On page 58909, under section ''6. Endovascular Procedures (APCs 5191 through 5194)'' of the ''OPPS APC-Specific Policies'' section, we inadvertently omitted a summary of a public comment and our response related to new calendar year (CY) 2019 Common Procedural Terminology (CPT) code 33274. Therefore, we are revising the discussion to include the comment and response.

On pages 58894 to 58897, we occasionally stated the wrong APC assignment for procedure code C9734 (Focused ultrasound ablation/therapeutic intervention, other than uterine leiomyomata, with magnetic resonance (mr) guidance) for CY 2018 and CY 2019. The correct APC assignment for procedure code C9734 is APC 5114 for CY 2018 and APC 5115 for CY 2019.

On page 58928 of the ''OPPS APC-Specific Policies'' section, we inadvertently omitted a summary of a public comment and response related to existing CPT code 47382 and new CY 2019 CPT code 95983. Therefore, we are adding a new subsection titled ''21.

Other Procedures/Services'' that includes this comment and response.

On page 58954, in ''Table 37.—Drugs and Biologicals For Which Pass-through Payment Status Expires December 31, 2018,'' we included an incorrect Pass-Through Payment Effective Date for HCPCS code Q5101. The correct Pass-Through Payment Effective Date for HCPCS code Q5101 is 01/01/2016, not 07/01/2015.

On page 58958, in Table 38.—Drugs and Biologicals With Pass-through Payment Status in CY 2019,'' we included an incorrect Pass-Through Payment Effective Date for HCPCS code J7328. The correct Pass-Through Payment Effective Date for HCPCS code J7328 is 04/01/2017, not 01/01/16.

On page 58969, we inadvertently stated, ''We also are finalizing our proposal to retain our established policy to assign new skin substitute products with pricing information to the low cost group.'' We are correcting the word ''with'' to read ''without'' to clarify that skin substitutes *without* pricing information are assigned to the low cost group, consistent with our established policy, which is described on page 58967.

2. Ambulatory Surgical Center (ASC) Payment System Corrections

The ASC payment system uses the same APC classification groupings as the OPPS; however, ASC payment indicators and OPPS status indicators are not compatible across the two payment systems. In our final rule ratesetting for CY 2019, we inadvertently carried over OPPS C–APC status indicators in our ASC ratesetting process. This error impacted the application of our multiple procedure discounting rules and the calculation of the ASC weight scalar, which led to the calculation of incorrect ASC payment rates. Accordingly, on page 59079, in our response to a comment regarding our process of applying a weight scalar in calculation of ASC payment rates, and on page 59169, we are correcting our weight scalar in ASC payment rate calculations of ''0.8792'' to ''0.8800.''

Additionally, on pages 59079, 59080 and 59169, we inadvertently excluded certain core-based statistical areas (CBSAs) and, therefore, incorrectly calculated the wage index budget neutrality factor that we applied to the 2018 ASC conversion factor. We previously calculated a wage index adjustment of 1.0004. We have recalculated the wage index adjustment taking into account the appropriate CBSAs, resulting in a corrected wage index adjustment of ''1.0000.''

On pages 59080 and 59169, we are correcting the final CY 2019 conversion factor of $46.551 for ASCs who meet quality reporting requirements and the final CY 2019 conversion factor of $45.639 for ASCs who do not meet quality reporting requirements. These conversion factors are incorrect because they utilize the incorrect wage index adjustment. The correct conversion factors, calculated utilizing the correct wage index adjustment, are ''$46.532'' and ''45.621'' for ASCs that meet quality reporting requirements and for ASCs that do not meet quality reporting requirements, respectively.

On page 59170, we are correcting our estimate of the increase in aggregate payments for ancillary items and services of 79 percent for CY 2019. The correct percentage is 68 percent, which accounts for removing HCPCS code 0474T from our list of covered surgical procedures and, therefore, no longer includes any estimated 2019 spending from HCPCS code 0474T. Further, on page 59170 in ''Table 63.—Estimated Impact of the CY 2019 Update to the ASC Payment System on Aggregate CY 2019 Medicare Program Payments by Surgical Specialty or Ancillary Items and Services Group'', we are correcting the figure in the third column, titled ''Estimated CY 2019 Percent Change'' for the Ancillary Items and Services Group to reflect the change from 79 percent to 68 percent.

On page 59171, in ''Table 64.—Estimated Impact of the CY 2019 Update to the ASC Payment System on Aggregate Payments for Selected Procedures'', we are correcting the figures in the fourth column of the table titled ''Estimated CY 2019 Percent Change'' to account for payment rates changes from the corrected ASC weight scalar and corrected ASC conversion factor.

3. Hospital Outpatient Quality Reporting (OQR) Program Corrections

On page 59088, first column, first full paragraph, the word ''retaining'' is corrected to ''removing.'' We inadvertently included the wrong word.

On page 59100 through 59102, the table footnoting for the Hospital OQR Program Measure Set for both the CY 2020 and CY 2021 Payment Determinations are corrected. Specifically, the footnote pertaining to OP–26 is removed from the un-numbered tables titled ''Hospital OQR Program Measure Set for the CY 2020 Payment Determination'' and ''Hospital OQR Program Measure Set for the CY 2021 Payment Determination and Subsequent Years.'' The measure is no longer in the program beginning with the CY 2020 payment determination. In addition, for both tables, the National Quality Forum (NQF) status for OP–8: MRI Lumbar Spine for Low Back Pain and OP–33: External Beam Radiotherapy for Bone Metastases is updated to indicate that the NQF endorsement for these measures was removed. Furthermore, in both tables, we added an additional footnote to OP–31 to indicate ''Measure voluntarily collected as set forth in section XIII.D.3.b. of the CY 2015 OPPS/ASC final rule with comment period (79 FR 66946 through 66947).'' Subsequently, asterisks for the remaining footnotes are renumbered, as are the corresponding notations under the measure name in both tables. As a result of the renumbering, both tables are revised such that OP–37a, OP–37b, OP–37c, OP–37d, and OP–37e correspond with the appropriate footnote reading ''Measure reporting delayed beginning with CY 2018 reporting and for subsequent years as discussed in section XIII.B.5. of the CY 2018 OPPS/ASC final rule with comment period (82 FR 59432 through 59433).''

4. Ambulatory Surgical Center Quality Reporting Program (ASCQR) Corrections

On page 59117, second column, first paragraph, the word ''retaining'' is corrected to ''removing.'' We inadvertently included the wrong word.

On page 59129, first column, second paragraph, the language, ''Furthermore, this is the only measure in the ASCQR Program measure set that deals with cataract surgery, which is commonly performed in the ASC setting. If it is removed, the program will have a gap in coverage for this clinical area. As a result, we now believe that meaningful information can be provided to consumers regarding those facilities'' is removed. This text pertains only to the Hospital OQR Program; it is factually inaccurate with respect to the ASCQR Program, since the ASC–14:Unplanned Anterior Vitrectomy measure also includes cataract surgery, and was erroneously included.

B. Summary of Errors in and Corrections to the OPPS and ASC Addenda Posted on the CMS Website

We are summarizing below the errors we have corrected in the addenda available on the internet at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html.* The addenda that are available on the internet have been updated to reflect the revisions discussed in this correcting document.

1. Summary of Errors in and Corrections to the OPPS Addenda Posted on the CMS Website

In Addendum B (Final OPPS Payment by HCPCS Code for CY 2019), we corrected the following:

• CPT code 0100T (Prosth retina receive&gen): APC revision from APC 1906 (New Technology—Level 51 ($130,001–$145,000)) to APC 1908 (New Technology—Level 52 ($145,001–$160,000)). In the preamble text, CPT code 0100T had been assigned to APC 1908. This action ensures the information in Addendum B reflects the APC assignment that was finalized in the preamble.

• CPT code 0474T (Insj aqueous drg dev io rsvr): Status indicator revision from status indicator ''J1'' (Hospital Part B Services Paid Through a C–APC) to status indicator ''E1'' (Not Paid by Medicare) because the device associated with this procedure was withdrawn from marketing in September 2018 and the procedure is no longer separately payable under the OPPS.

• HCPCS code A6460: We made a typographical error in listing the HCPCS short descriptor. Specifically, we are correcting the short descriptor from ''Arg II ext com/sup/acc misc'' to ''Synthetic drsg <= 16 sq in''.

• HCPCS code A6461: We made a typographical error in listing the HCPCS short descriptor. Specifically, we are correcting the short descriptor from ''Enzyme cartridge enteral nut'' to ''Synthetic drsg >16 <=48 sq in''.

• HCPCS code C9752 (Intraosseous des lumb/sacrum): We made a typographical error in listing the APC assignment. Specifically, we are correcting the APC assignment from APC 5155 (Level 5 Airway Endoscopy) to APC 5115 (Level 5 Musculoskeletal Procedures).

In Addendum C (Final HCPCS Codes Payable Under the 2019 OPPS by APC), we corrected the following:

• APC 1906 (New Technology—Level 51 ($130,001–$145,000)): Deleted HCPCS code 0100T from the list We inadvertently listed the code in this APC when it should have been listed under APC 1908 (New Technology—Level 52 ($145,001–$160,000)), as correctly listed in the preamble and Addendum B of the CY 2019 OPPS/ASC final rule with comment period.

• APC 1908 (New Technology—Level 52 ($145,001–$160,000)): Added HCPCS code 0100T to the list.

• APC 5115 (Level 5 Musculoskeletal Procedures): We made a typographical error by assigning HCPCS code C9752 to APC 5155 (Level 5 Airway Endoscopy) when it should have been assigned to APC 5115. Specifically, we are correcting the APC assignment for HCPCS code C9752 to APC 5115.

• APC 5155 (Level 5 Airway Endoscopy): Removed HCPCS code C9752 from the list.

• APC 5492 (Level 2 Intraocular Procedures): Deleted CPT code 0474T from the list because the device associated with this procedure was withdrawn from marketing in September 2018 and the procedure is no longer separately payable under the OPPS.

In Addendum P (Device-Intensive Procedures for CY 2019), we corrected the following errors in both tabs, 2019 FR Device Intensive List and 2019 FR HCPCS Offsets:

• CPT code 0100T: Revised the APC assignment from APC 1906 to APC 1908 and the final payment rate. We inadvertently listed the code in APC 1906 when it should have been listed under APC 1908 (New Technology—Level 52 ($145,001–$160,000)), as correctly listed in Addendum B of the CY 2019 OPPS/ASC final rule.

• CPT code 0474T: Removed from the list because the device associated with this procedure was withdrawn from marketing in September 2018 and this procedure is no longer separately payable under the OPPS.

• HCPCS code C9752: Added to the list along with the associated status indicator, APC, final CY 2019 payment rate, device offset percentage, and device offset amount, because we inadvertently omitted this code from Addendum P. This code should have received device-intensive status based on the CY 2019 policy to apply device-intensive status with a default device offset set at 31 percent for new HCPCS codes describing procedures requiring the implantation or insertion of a medical device that do not yet have associated claims data until claims data are available to establish the HCPCS code-level device offset for the procedures adopted in the final rule.

• HCPCS code C9754 (Perc av fistula, direct): Added to the list along with the associated status indicator, APC, final CY 2019 payment rate, device offset percentage, and device offset amount, because we inadvertently omitted this code from Addendum P. This code should have received device-intensive status based on the CY 2019 policy to apply device-intensive status with a default device offset set at 31 percent for new HCPCS codes describing procedures requiring the implantation or insertion of a medical device that do not yet have associated claims data until claims data are available to establish the HCPCS code-level device offset for the procedures adopted in the final rule.

• HCPCS code C9755 (Rf magnetic-guide av fistula): Added to the list along with the associated status indicator, APC, final CY 2019 payment rate, device offset percentage, and device offset amount, because we inadvertently omitted this code from Addendum P. This code should have received device-intensive status based on the CY 2019 policy to apply device-intensive status with a default device offset set at 31 percent for new HCPCS codes describing procedures requiring the implantation or insertion of a medical device that do not yet have associated claims data until claims data are available to establish the HCPCS code-level device offset for the procedures adopted in the final rule.

• In the tab titled ''2019 FR Device Intensive List,'' we inadvertently excluded CPT code 33285 (Insj subq car rhythm mntr) from the list. Therefore, we added this code along with the associated status indicator, APC, final CY 2019 payment rate, device offset percentage, and device offset amount to the list. This code should have received device-intensive status based on the device-intensive policy adopted in the final rule.

In the tab titled ''2019 FR HCPCS Offsets,'' the first bullet of the header was corrected from ''*List of HCPCS codes payable under the OPPS that are designated as device-intensive procedures.'' to ''*List of all HCPCS codes payable under the OPPS that describe a clinical service including both those that are designated as device-intensive and those that are not designated as device intensive'' because this tab in Addendum P includes device offsets for all codes for which we have data.

To view the corrected CY 2019 OPPS status indicators, APC assignments, relative weights, copayment rates, device-intensive status, and short descriptors for Addenda A, B, C, and P that resulted from these technical and typographical corrections, we refer readers to the Addenda and supporting files that are posted on the CMS website at: *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html*. Select ''CMS–1695–CN2'' from the list of regulations. All corrected Addenda for this correcting document are contained in the zipped folder titled ''2019 OPPS Final Rule Addenda'' at the bottom of the page for CMS–1695–CN2.

2. Summary of Errors in and Corrections to the ASC Payment System Addenda Posted on the CMS Website

In Addendum AA, we inadvertently mislabeled several CPT codes in the ''Subject to Multiple Procedure Discounting'' column. As discussed in section II.A.2 of this correction notice, we inadvertently carried over OPPS C–APC status indicators in our ASC ratesetting process. This error impacted the application of our multiple procedure discounting rules and the calculation of the ASC weight scalar, and ASC payment rates. Accordingly, we have updated Addenda AA to accurately reflect the list of CPT codes that are subject to multiple procedure discounting.

As stated in the CY 2018 final rule with comment period (83 FR 59409), ASC device intensive procedures are those with a HCPCS code-level device offset percentage greater than the threshold when calculated according to the standard OPPS APC ratesetting methodology, among other criteria. In inputting OPPS APC rate data into the ASC payment system for the CY 2019 OPPS/ASC final rule, several procedures were inadvertently assigned incorrect payment indicators. Accordingly, we have reviewed the ASC payment system data for consistency with the OPPS APC rates and have corrected the payment indicators for the following procedures in Addendum AA:

- CPT Code 19298: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 28435: Revised the payment indicator from ''J8'' to ''A2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 28446: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 32550: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 33210: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 33226: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 33274: Revised the payment indicator from ''G2'' to ''J8'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 33285: Revised the payment indicator from ''G2'' to ''J8'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 36560: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 36563: Revised the payment indicator from ''J8'' to ''A2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 36578: Revised the payment indicator from ''J8'' to ''A2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 36583: Revised the payment indicator from ''J8'' to ''A2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 36904: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 37211: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 37212: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 43274: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 43276: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 44384: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 47554: Revised the payment indicator from ''J8'' to ''A2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 58356: Revised the payment indicator from ''J8'' to ''P3'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- CPT code 65125: Revised the payment indicator from ''J8'' to ''G2'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- HCPCS code C9752 (Intraosseous des lumb/sacrum): Revised the payment indicator from ''G2'' to ''J8'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- HCPCS code C9754 (Perc av fistula, direct): Revised the payment indicator from ''G2'' to ''J8'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.
- HCPCS code C9755 (RF magnetic-guide AV fistula): Revised the payment indicator from ''G2'' to ''J8'' in addition to the payment weight and payment rate; this code had inadvertently been assigned the incorrect payment indicator in the final rule.

We also corrected the following in Addendum AA:

- CPT code 0100T: Updated the payment rate from $134,051.87 to $141,780.75 to reflect the New Tech APC to which this code was assigned in the CY 2019 OPPS/ASC final rule with comment period.
- CPT code 0474T: Removed the code from the list because the device associated with this procedure was withdrawn from marketing in September 2018 and this procedure is no longer separately payable under the ASC payment system.
- CPT code 28540: Revised the payment indicator from ''P3'' to ''P2'' in addition to the payment rate; the revised OPPS-based payment rate for CPT code 28540 is less than the PFS-based payment rate and the corrected payment indicator reflects this fact.
- HCPCS code C9753 (Intraosseous destruct add'l): Added to Addendum AA with a payment indicator of ''N1''; this is a new code beginning January 1, 2019 and had inadvertently been left out of Addendum AA in the final rule.

In Addendum BB, we corrected the following:

- CPT code 74485 (Dilation urtr/urt rs&i): Revised the payment indicator to ''N1''; this code had inadvertently been assigned no payment indicator in the final rule.

To view the corrected final CY 2019 ASC payment indicators, payment weights, payment rates, and multiple procedure discounting indicator for Addenda AA and BB that resulted from these technical corrections, we refer readers to the Addenda and supporting files on the CMS website at: *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ASCPayment/ASC-Regulations-and-Notices.html.* Select ''CMS–1695–CN2'' from the list of regulations. All corrected ASC addenda for this correcting document are contained in the zipped folder entitled ''Addendum AA, BB, DD1, DD2, and EE'' at the bottom of the page for CMS–1695–CN2.

III. Waiver of Proposed Rulemaking

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of the proposed rule in the **Federal Register** before the provisions of a rule take effect. Similarly, section 1871(b)(1) of the Act requires the Secretary to provide for notice of the proposed rule in the **Federal Register** and provide a period of not less than 60 days for public comment. In addition, section 553(d) of the APA, and section 1871(e)(1)(B)(i) of the Act mandate a 30-day delay in effective date after issuance or publication of a rule. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the notice and comment and delay in effective date of the APA requirements; in cases in which these exceptions apply, sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act provide exceptions from the notice and 60-day comment period and delay in effective date requirements of the Act as well. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act authorize an agency to dispense with normal rulemaking requirements for good cause if the agency makes a finding that the notice and comment process is impracticable, unnecessary, or contrary to the public interest. In addition, both section 553(d)(3) of the APA and section 1871(e)(1)(B)(ii) of the Act allow the agency to avoid the 30-day delay in effective date where such delay is contrary to the public interest and an agency includes a statement of support.

We believe that this correcting document does not constitute a rulemaking that would be subject to the notice and comment or delayed effective date requirements. This correcting document corrects technical and typographical errors in the preamble, addenda, payment rates, and tables included or referenced in the CY 2019 OPPS/ASC final rule with comment period but does not make substantive changes to the policies or payment methodologies that were adopted in the final rule with comment period. The corrections made through this correcting document are intended to ensure that the information in the CY 2019 OPPS/ASC final rule with comment period accurately reflects the policies adopted in that rule.

In addition, even if this were a rule to which the notice and comment procedures and delayed effective date requirements applied, we find that there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the corrections in this document into the final rule with comment period or delaying the effective date would be contrary to the public interest because it is in the public's interest for providers to receive appropriate payments in as timely a manner as possible, and to ensure that the CY 2019 OPPS/ASC final rule with comment period accurately reflects our methodologies and policies as of the date they take effect and are applicable.

Furthermore, such procedures would be unnecessary, as we are not making substantive changes to our payment methodologies or policies, but rather, we are simply implementing correctly the methodologies and policies that we previously proposed, received comment on, and subsequently finalized. This correcting document is intended solely to ensure that the CY 2019 OPPS/ASC final rule with comment period accurately reflects these methodologies and policies. Therefore, we believe we have good cause to waive the notice and comment and effective date requirements.

IV. Correction of Errors

In FR Doc. 2018–24243 of November 21, 2018 (83 FR 58818), make the following corrections:

1. On page 58822, third column, second bullet point, in the section titled ''Payment of Drugs, Biologicals, and Radiopharmaceuticals If Average Sales Price (ASP) Data Are Not Available,'' in lines 3 through 11, the sentence ''For CY 2019, we are making payment for separately payable drugs and biologicals that do not have pass-through payment status and are not acquired under the 340B Program at wholesale acquisition cost (WAC)+3 percent instead of WAC+6 percent if ASP data are not available'' is replaced with ''For CY 2019, we are making payment for separately payable drugs and biologicals that have partial quarter wholesale acquisition cost (WAC)-based pricing and are not acquired under the 340B Program at WAC+3 percent instead of WAC+6 percent if ASP data are not available.''

2. On page 58825, first column,

a. The first section heading ''c. Impact of the Changes to the Hospital OQR Program'' is corrected to read ''g. Impact of the Changes to the Hospital OQR Program''.

b. The second section heading ''d. Impact of the Changes to the ASCQR Program'' is corrected to read ''h. Impact of the Changes to the ASCQR Program''.

3. On page 58833, last column, last partial paragraph, in line 8, the code ''P9072'' is corrected to read ''P9073''.

4. On page 58834, first column, first partial paragraph, in lines 3 and 7, the code ''P9073'' is corrected to read ''P9037''.

5. On page 58880, Table 12.—New Level II HCPCS Codes Effective April 1, 2018, in the last row, last column, titled ''Final CY 2019 APC'' for CY 2018 and CY 2019 HCPCS Code C9749, the figure ''5164'' is corrected to read ''5165''.

6. On page 58894, first column, last paragraph, in the fourth line from the bottom of the paragraph, in the phrase ''In addition, we proposed to continue to assign the services described by HCPCS code C9734 . . .'', the words ''continue to'' are removed.

7. On page 58895, last column, last paragraph, in line 13, the reference to ''APC 5114'' is corrected to read ''APC 5115''.

8. On page 58897, in Table 17.—CY 2019 Status Indicator (SI), APC Assignment, and Payment Rate for the Magnetic Resonance Image Guided High Intensity Focused Ultrasound (MRgFUS) Procedures, in the row for CPT/HCPCS Code C9734, in the column ''CY 2018 OPPS APC,'' the figure ''5115'' is corrected to read ''5114''.

9. On page 58909, third column, after the first full paragraph that ends with ''. . . at each level and clinical homogeneity.'' and before the following paragraph, which begins with ''Comment: Several commenters believed that the current structure . . . ,'' the following text is added:

In addition, we received a comment related to CPT code 33274 (Transcatheter insertion or replacement of permanent leadless pacemaker, right ventricular, including imaging guidance (for example, fluoroscopy, venous ultrasound, ventriculography, femoral venography) and device evaluation (for example, interrogation or programming), when performed). We note that in Addendum B to the CY 2019 OPPS/ASC proposed rule, we proposed to assign CPT code 33274 to APC 5194 (Level 4 Endovascular Procedures), which is the same APC assignment as its predecessor code 0387T (Transcatheter insertion or replacement of permanent leadless pacemaker, ventricular), which was effective January 1, 2015 and deleted on December 31, 2018. CPT code 33274 was listed as 33X05 (the 5-digit CMS placeholder code) in Addendum B with the short descriptor and Addendum O with the long descriptor of the CY 2019 OPPS/ASC proposed rule. We also assigned the code to comment indicator ''NP'' in Addendum B to the proposed rule to indicate that the code is new for CY 2019 with a proposed APC assignment and that public comments would be accepted on the proposed APC assignment. We note that CPT code 33274 will be effective January 1, 2019. Although the code is new for CY 2019, the service associated with CPT code 33274 was previously described by CPT codes 0387T, which will be deleted on December 31, 2018.

Comment: We received a comment to the CY 2019 OPPS/ASC proposed rule requesting the assignment of CPT code 33274 from APC 5194 (Level 4 Endovascular Procedures) to APC 5224 (Level 4 Pacemaker and Similar Procedures).

Response: We appreciate the suggestion, however, as noted above, CPT code 33274 is assigned to the same APC as its predecessor code 0387T. Accordingly, we do not believe that a change in APC is warranted at this time.

10. On page 58928, third column, after the first full paragraph ending with ''Addendum B is available via the internet on the CMS website.'' and before Table 35, the following section and text are added:

21. Other Procedures/Services

For CY 2019, we proposed to continue to assign CPT code 47382 (Ablation, 1 or more liver tumor(s), percutaneous, radiofrequency) to APC 5361.

Comment: A commenter requested the reassignment of CPT code 47382 from APC 5361 (Level 1 Laparoscopy and Related Services) to APC 5362 (Level 2 Laparoscopy and Related Services).

Response: Based on the latest hospital outpatient claims data used for this final rule with comment period, we disagree that CPT code 47382 should be assigned to APC 5362 for CY 2019. Our analysis of the claims data show a geometric mean cost of approximately $6,063 for CPT code 47382, based on 2,220 single claims (out of 2,242 total claims), which is significantly less than the geometric mean cost of about $7,809 for APC 5362. We believe that APC 5361 is the most appropriate APC assignment for CPT code 47382 based on its clinical and resource homogeneity to the other procedures assigned to this APC.

Therefore, after consideration of the public comment we received, we are finalizing our proposal, without modification, to assign CPT code 47382 to APC 5361 for CY 2019. The final CY 2019 payment rate for the code can be found in Addendum B to this final rule with comment period (which is available via the internet on the CMS website).

In addition, for CY 2019, we proposed to assign CPT code 95983 (Electronic analysis of implanted neurostimulator pulse generator/transmitter (for example, contact group[s], interleaving, amplitude, pulse width, frequency [Hz], on/off cycling, burst, magnet mode, dose lockout, patient selectable parameters, responsive neurostimulation, detection algorithms, closed loop parameters, and passive parameters) by physician or other qualified health care professional; with brain neurostimulator pulse generator/transmitter programming, first 15 minutes face-to-face time with physician or other qualified health care professional) to APC 5741 (Level 1 Electronic Analysis of Devices). We note that in Addendum B to the CY 2019 OPPS/ASC proposed rule, CPT code 95983 was listed as 95X85 (the 5-digit CMS placeholder code) in Addendum B with the short descriptor and Addendum O with the long descriptor of the CY 2019 OPPS/ASC proposed rule. We also assigned the code to comment indicator ''NP'' in Addendum B to the proposed rule to indicate that the code is new for CY 2019 with a proposed APC assignment and that public comments would be accepted on the proposed APC assignment. We note that CPT code 95983 will be effective January 1, 2019.

Comment: A commenter requested the assignment of CPT code 95983 from APC 5741 (Level 1 Electronic Analysis of Devices) to APC 5742 (Level 2 Electronic Analysis of Devices).

Response: Based on input from our medical advisors and our review of the procedure, we believe that CPT code 95983 is appropriately placed in APC 5741 since it shares similar characteristics as other electronic analysis services in the APC. Therefore, after consideration of the public comment we received, we are finalizing our proposal, without modification, to assign CPT code 95983 to APC 5741 for CY 2019. The final CY 2019 payment rate for the code can be found in Addendum B to this final rule with comment period (which is available via the internet on the CMS website).

We will reevaluate the APC assignments for CPT code 47382 and 95983 for the next rulemaking cycle. We remind hospitals that we review, on an annual basis, the APC assignments for all items and services paid under the OPPS.

11. On page 58954, Table 37, last column, the Pass-Through Payment Effective Date for CY 2019 HCPCS code Q5101 that reads ''07/01/2015'' is corrected to read ''01/01/2016''.

12. On page 58958, Table 38, last column, the Pass-Through Payment Effective Date for CY 2018 and CY 2019 HCPCS code J7328 that reads ''01/01/2016'' is corrected to read ''04/01/2017''.

13. On page 58969, second column, in line 3, the word ''with'' is corrected to read ''without''.

14. On page 59079,

a. Second column, last partial paragraph, in line 4, the figure ''0.8792'' is corrected to read ''0.8800''.

b. Third column, last partial paragraph, in line 4, the figure ''1.0004'' is corrected to read ''1.0000''.

15. On page 59080,

a. First column, first partial paragraph,

(1) In line 2, the figure ''$46.551'' is corrected to read ''$46.532''.

(2) In line 8, the figure ''1.0004'' is corrected to read ''1.0000''.

(3) In line 13, the figure ''$45.639'' is corrected to read ''$45.621''.

b. Second column, second full paragraph, in line 7, the figure ''$46.551'' is corrected to read ''$46.532.''

16. On page 59088, first column, first full paragraph, in line 12, the word ''retaining'' is corrected to read ''removing''.

17. On pages 59100 and 59101, the un-numbered table—Hospital OQR Program Measure Set for the CY 2020 Payment Determination, and the footnotes for the table, are corrected to read as follows:

Hospital OQR Program Measure Set for the CY 2020 Payment Determination	
NQF #	**Measure Name**
0288	OP-2: Fibrinolytic Therapy Received Within 30 Minutes of ED Arrival†
0290	OP-3: Median Time to Transfer to Another Facility for Acute Coronary Intervention
0289	OP-5: Median Time to ECG†
0514	OP-8: MRI Lumbar Spine for Low Back Pain†
None	OP-9: Mammography Follow-up Rates
None	OP-10: Abdomen CT – Use of Contrast Material
0513	OP-11: Thorax CT – Use of Contrast Material
None	OP-12: The Ability for Providers with HIT to Receive Laboratory Data Electronically Directly into their ONC-Certified EHR System as Discrete Searchable Data
0669	OP-13: Cardiac Imaging for Preoperative Risk Assessment for Non-Cardiac, Low-Risk Surgery
None	OP-14: Simultaneous Use of Brain Computed Tomography (CT) and Sinus Computed Tomography (CT)
0491	OP-17: Tracking Clinical Results between Visits†
0496	OP-18: Median Time from ED Arrival to ED Departure for Discharged ED Patients
0499	OP-22: Left Without Being Seen†
0661	OP-23: Head CT or MRI Scan Results for Acute Ischemic Stroke or Hemorrhagic Stroke who Received Head CT or MRI Scan Interpretation Within 45 minutes of ED Arrival
0658	OP-29: Appropriate Follow-Up Interval for Normal Colonoscopy in Average Risk Patients*
0659	OP-30: Colonoscopy Interval for Patients with a History of Adenomatous Polyps – Avoidance of Inappropriate Use*
1536	OP-31: Cataracts: Improvement in Patient's Visual Function within 90 Days Following Cataract Surgery**
2539	OP-32: Facility 7-Day Risk-Standardized Hospital Visit Rate after Outpatient Colonoscopy
1822	OP-33: External Beam Radiotherapy for Bone Metastases†
None	OP-35: Admissions and Emergency Department (ED) Visits for Patients Receiving Outpatient Chemotherapy
2687	OP-36: Hospital Visits after Hospital Outpatient Surgery
None	OP-37a: OAS CAHPS – About Facilities and Staff***
None	OP-37b: OAS CAHPS – Communication About Procedure***
None	OP-37c: OAS CAHPS – Preparation for Discharge and Recovery***
None	OP-37d: OAS CAHPS – Overall Rating of Facility***

Hospital OQR Program Measure Set for the CY 2020 Payment Determination	
NQF #	**Measure Name**
None	OP-37e: OAS CAHPS – Recommendation of Facility***

† We note that NQF endorsement for this measure was removed.
* We note that measure name was revised to reflect NQF title.
** Measure voluntarily collected as set forth in section XIII.D.3.b. of the CY 2015 OPPS/ASC final rule with comment period (79 FR 66946 through 66947).
*** Measure reporting delayed beginning with CY 2018 reporting and for subsequent years as discussed in section XIII.B.5. of the CY 2018 OPPS/ASC final rule with comment period (82 FR 59432 through 59433).

18. On page 59102, the un-numbered table—Hospital OQR Program Measure Set for the 2021 Payment Determination and Subsequent years, and the footnotes for the table, are corrected to read as follows:

Hospital OQR Program Measure Set for the CY 2021 Payment Determination and Subsequent Years	
NQF #	**Measure Name**
0288	OP-2: Fibrinolytic Therapy Received Within 30 Minutes of ED Arrival†
0290	OP-3: Median Time to Transfer to Another Facility for Acute Coronary Intervention
0514	OP-8: MRI Lumbar Spine for Low Back Pain†
None	OP-10: Abdomen CT – Use of Contrast Material
0669	OP-13: Cardiac Imaging for Preoperative Risk Assessment for Non-Cardiac, Low-Risk Surgery
0496	OP-18: Median Time from ED Arrival to ED Departure for Discharged ED Patients
0499	OP-22: Left Without Being Seen†
0661	OP-23: Head CT or MRI Scan Results for Acute Ischemic Stroke or Hemorrhagic Stroke who Received Head CT or MRI Scan Interpretation Within 45 minutes of ED Arrival
0658	OP-29: Appropriate Follow-Up Interval for Normal Colonoscopy in Average Risk Patients*
1536	OP-31: Cataracts: Improvement in Patient's Visual Function within 90 Days Following Cataract Surgery**
2539	OP-32: Facility 7-Day Risk-Standardized Hospital Visit Rate after Outpatient Colonoscopy
1822	OP-33: External Beam Radiotherapy for Bone Metastases†
None	OP-35: Admissions and Emergency Department (ED) Visits for Patients Receiving Outpatient Chemotherapy
2687	OP-36: Hospital Visits after Hospital Outpatient Surgery
None	OP-37a: OAS CAHPS – About Facilities and Staff***
None	OP-37b: OAS CAHPS – Communication About Procedure***
None	OP-37c: OAS CAHPS – Preparation for Discharge and Recovery***
None	OP-37d: OAS CAHPS – Overall Rating of Facility***
None	OP-37e: OAS CAHPS – Recommendation of Facility***

† We note that NQF endorsement for this measure was removed.
* We note that measure name was revised to reflect NQF title.
** Measure voluntarily collected as set forth in section XIII.D.3.b. of the CY 2015 OPPS/ASC final rule with comment period (79 FR 66946 through 66947).
*** Measure reporting delayed beginning with CY 2018 reporting and for subsequent years as discussed in section XIII.B.5. of the CY 2018 OPPS/ASC final rule with comment period (82 FR 59432 through 59433).

19. On page 59117, the word ''retaining'' is corrected to read ''removing''.

20. On page 59129, first column, first full paragraph,

a. In lines 1 through 10, the following text is removed: ''Furthermore, this is the only measure in the ASCQR Program measure set that deals with cataract surgery, which is commonly performed in the ASC setting. If it is removed, the program will have a gap in coverage for this clinical area. As a result, we now believe that meaningful information can be provided to consumers regarding those facilities.''

b. In Lines 10 through 16, the following text is moved to the end of the previous paragraph: ''In addition, when this measure was made voluntary in the CY 2015 OPPS/ASC final rule with comment period (79 FR 66984) commenters stated that the measure would promote and improve care coordination among providers.''

21. On page 59169, first column,

a. First full paragaraph, in line 10, the figure ''0.8792'' is corrected to read ''0.8800''.

b. Last paragraph, in line 26, the figure ''1.0004'' is corrected to read ''1.0000''.

c. Last paragraph, in the third line from the bottom, the figure ''$46.555'' is corrected to read ''$46.532''.

22. On page 59170,

a. Third column, first partial paragraph, in line 5, the figure ''79 percent'' is corrected to read ''68 percent''.

b. In Table 63.—Estimated Impact of the CY 2019 Update to the ASC Payment System on Aggregate CY 2019 Medicare Program Payments by Surgical Speciality or Ancillary Items and Services Group, in the last row, third column, titled ''Estimated CY 2019 Percent Change'' for Ancillary items and services, the figure ''79'' is corrected to read ''68''.

23. On page 59171, Table 64.—Estimated Impact of the CY 2019 Update to the ASC Payment System on Aggregate Payments for Selected Procedures, the fourth column, ''Estimated CY 2019 Percent Change,'' is corrected to read as follows:

Estimated CY 2019 Percent Change (4)
-1
3
-1
1
-3
3
11
4
-1
0
1
1
11
8
3
4
4
4
0
-2
-2
2
-2
0
-2
-5
-2
5
-2
8

Dated: December 20, 2018.

Ann C. Agnew,

Executive Secretary to the Department, Department of Health and Human Services.

[FR Doc. 2018–28348 Filed 12–21–18; 4:15 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2018–0002; Internal Agency Docket No. FEMA–8561]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date. Also, information identifying the current participation status of a community can be obtained from FEMA's Community Status Book (CSB). The CSB is available at *https://www.fema.gov/national-flood-insurance-program-community-status-book.*

DATES: The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact Adrienne L. Sheldon, PE, CFM, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 400 C Street SW, Washington, DC 20472, (202) 212–3966.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase Federal flood insurance that is not otherwise generally available from private insurers. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits the sale of NFIP flood insurance unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. We recognize that some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue to be eligible for the sale of NFIP flood insurance. A notice withdrawing the suspension of such communities will be published in the **Federal Register**.

In addition, FEMA publishes a Flood Insurance Rate Map (FIRM) that identifies the Special Flood Hazard Areas (SFHAs) in these communities. The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial FIRM for the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment procedures under 5 U.S.C. 553(b), are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. FEMA has determined that the community suspension(s) included in this rule is a non-discretionary action and therefore the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) does not apply.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, Section 1315, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region X				
Alaska: Valdez, City of, Valdez-Cordova Census Area.	020094	May 13, 1975, Emerg; September 3, 1980, Reg; January 3, 2019, Susp.	January 3, 2019	January 3, 2019.

*.....do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: December 17, 2018.

Eric Letvin,

Deputy Assistant Administrator for Mitigation, Federal Insurance and Mitigation Administration—FEMA Resilience, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2018–28151 Filed 12–27–18; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2018–0002; Internal Agency Docket No. FEMA–8563]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date. Also, information identifying the current participation status of a community can be obtained from FEMA's Community Status Book (CSB). The CSB is available at *https://www.fema.gov/national-flood-insurance-program-community-status-book.*

DATES: The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact Adrienne L. Sheldon, PE, CFM, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 400 C Street SW, Washington, DC 20472, (202) 212–3966.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase Federal flood insurance that is not otherwise generally available from private insurers. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits the sale of NFIP flood insurance unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. We recognize that some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue to be eligible for the sale of NFIP flood insurance. A notice withdrawing the suspension of such communities will be published in the **Federal Register**.

In addition, FEMA publishes a Flood Insurance Rate Map (FIRM) that identifies the Special Flood Hazard Areas (SFHAs) in these communities. The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial FIRM for the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment procedures under 5 U.S.C. 553(b), are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. FEMA has determined that the community suspension(s) included in this rule is a non-discretionary action and therefore the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) does not apply.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, Section 1315, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have

federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region IV				
Florida: Inglis, Town of, Levy County	120586	January 10, 1986, Emerg; January 10, 1986, Reg; January 18, 2019, Susp.	Jan. 18, 2019.	Jan. 18, 2019.
South Carolina:				
Greenville, City of, Greenville County	450091	January 15, 1974, Emerg; February 1, 1980, Reg; January 18, 2019, Susp	do*	Do.
Greenville County, Unincorporated Areas	450089	February 12, 1974, Emerg; December 2, 1980, Reg; January 18, 2019, Susp.	do	Do.
Region X				
Oregon:				
Clackamas County, Unincorporated Areas	415588	April 2, 1971, Emerg; March 1, 1978, Reg; January 18, 2019, Susp.	do	Do.
Sandy, City of, Clackamas County	410023	June 25, 1974, Emerg; December 11, 1979, Reg; January 18, 2019, Susp.	do	Do.
Washington:				
Bellingham, City of, Whatcom County	530199	April 30, 1975, Emerg; September 2, 1982, Reg; January 18, 2019, Susp.	do	Do.
Blaine, City of, Whatcom County	530273	June 10, 1975, Emerg; July 16, 1979, Reg; January 18, 2019, Susp.	do	Do.
Everson, City of, Whatcom County	530200	August 16, 1974, Emerg; August 2, 1982, Reg; January 18, 2019, Susp.	do	Do.
Ferndale, City of, Whatcom County	530201	May 27, 1975, Emerg; June 1, 1983, Reg; January 18, 2019, Susp.	do	Do.
Lummi Indian Reservation, Whatcom County	530331	October 14, 1997, Emerg; January 16, 2004, Reg; January 18, 2019, Susp.	do	Do.
Lynden, City of, Whatcom County	530202	May 27, 1975, Emerg; November 3, 1982, Reg; January 18, 2019, Susp.	do	Do.
Nooksack, City of, Whatcom County	530203	November 28, 1975, Emerg; September 2, 1982, Reg; January 18, 2019, Susp.	do	Do.
Sumas, City of, Whatcom County	530204	February 14, 1975, Emerg; May 15, 1985, Reg; January 18, 2019, Susp.		Do.
Whatcom County, Unincorporated Areas	530198	February 18, 1972, Emerg; September 30, 1977, Reg; January 18, 2019, Susp.	January 18, 2019.	January 18, 2019.

*.....do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: December 19, 2018.

Eric Letvin,

Deputy Assistant Administrator for Mitigation, Federal Insurance and Mitigation Administration—FEMA Resilience, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2018–28153 Filed 12–27–18; 8:45 am]

BILLING CODE 9110–12–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Parts 1230 and 2554

RIN 3045–AA71

Annual Civil Monetary Penalties Inflation Adjustment

AGENCY: Corporation for National and Community Service.

ACTION: Interim final rule.

SUMMARY: The Corporation for National and Community Service (CNCS) is updating its regulations to reflect required annual inflation-related increases to the civil monetary penalties in its regulations, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES:

Effective date: This rule is effective January 15, 2019.

Comment due date: Technical comments may be submitted until January 28, 2019.

ADDRESSES: You may send your comments electronically through the Federal government's one-stop rulemaking website at *www.regulations.gov.* Also, you may mail or deliver your comments to Stephanie Soper, Law Office Manager, Office of General Counsel, at the Corporation for National and Community Service, 250 E Street SW, Washington, DC 20525. Due to continued delays in CNCS's receipt of mail, we strongly encourage comments to be submitted online electronically. The TDD/TTY number is 800–833–3722. You may request this notice in an alternative format for the visually impaired.

FOR FURTHER INFORMATION CONTACT: Stephanie Soper, Law Office Manager, Office of General Counsel, at 202–606–6747 or email to *ssoper@cns.gov.* Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 800–833–3722 between 8 a.m. and 8 p.m. Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

I. Background

The Corporation for National and Community Service (CNCS) is a federal agency that engages millions of Americans in service through its AmeriCorps, Senior Corps, and Volunteer Generation Fund programs to further its mission to improve lives, strengthen communities, and foster civic engagement through service and volunteering. For more information, visit *NationalService.gov*.

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Sec. 701 of Pub. L. 114–74) (the ''Act''), which is intended to improve the effectiveness of civil monetary penalties and to maintain the deterrent effect of such penalties, requires agencies to adjust the civil monetary penalties for inflation annually.

II. Method of Calculation

CNCS has two civil monetary penalties in its regulations. A civil monetary penalty under the Act is a penalty, fine, or other sanction that is for a specific monetary amount as provided by Federal law or has a maximum amount provided for by federal law and is assessed or enforced by an agency pursuant to federal law and is assessed or enforced pursuant to an administrative proceeding or a civil action in the federal courts. (*See* 28 U.S.C. 2461 note).

The inflation adjustment for each applicable civil monetary penalty is determined using the percent increase in the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October of the year in which the amount of each civil money penalty was most recently established or modified. In the December 14, 2018, OMB Memo for the Heads of Executive Agencies and Departments, M–19–04, *Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015,* OMB published the multiplier for the required annual adjustment. The cost-of-living adjustment multiplier for 2019, based on the CPI–U for the month of October 2018, not seasonally adjusted, is 1.02522.

CNCS identified two civil penalties in its regulations: (1) The penalty associated with Restrictions on Lobbying (45 CFR 1230.400) and (2) the penalty associated with the Program Fraud Civil Remedies Act (45 CFR 2554.1).

The civil monetary penalties related to Restrictions on Lobbying (Section 319, Pub. L. 101–121; 31 U.S.C. 1352) range from $19,639 to $196,387. Using the 2019 multiplier, the new range of possible civil monetary penalties is from $20,134 to $201,340.

The Program Fraud Civil Remedies Act of 1986 (Pub. L. 99–509) civil monetary penalty has an upper limit of $11,181. Using the 2019 multiplier, the new upper limit of the civil monetary penalty is $11,463.

III. Summary of Final Rule

This final rule adjusts the civil monetary penalty amounts related to Restrictions on Lobbying (45 CFR 1230.400) and the Program Fraud Civil Remedies Act of 1986 (45 CFR 2554.1). The range of civil monetary penalties related to Restrictions on Lobbying increase from ''$19,639 to $196,387'' to ''$20,134 to $201,340.'' The civil monetary penalties for the Program Fraud Civil Remedies Act of 1986 increase from ''up to $11,181'' to ''up to $11,463.''

IV. Regulatory Procedures

A. Determination of Good Cause for Publication Without Notice and Comment

CNCS finds, under 5 U.S.C. 553(b)(3)(B), that there is good cause to except this rule from the public notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b). Because CNCS is implementing a final rule pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which requires CNCS to update its regulations based on a prescribed formula, CNCS has no discretion in the nature or amount of the change to the civil monetary penalties. Therefore, notice and comment for these proscribed updates is impracticable and unnecessary. As an interim final rule, no further regulatory action is required for the issuance of this legally binding rule. If you would like to provide technical comments, however, they may be submitted until January 28, 2019.

B. Review Under Procedural Statutes and Executive Orders

CNCS has determined that making technical changes to the amount of civil monetary penalties in its regulations does not trigger any requirements under procedural statutes and Executive Orders that govern rulemaking procedures.

V. Effective Date

This rule is effective January 15, 2019. The adjusted civil penalty amounts apply to civil penalties assessed on or after January 15, 2019, when the violation occurred after November 2, 2015. If the violation occurred prior to November 2, 2015, or a penalty was assessed prior to August 1, 2016, the pre-adjustment civil penalty amounts in effect prior to August 1, 2106, will apply.

List of Subjects

45 CFR Part 1230

Government contracts, Grant programs, Loan programs, Lobbying, Penalties, Reporting and recordkeeping requirements.

45 CFR Part 2554

Claims, Fraud, Organization and functions (Government agencies), Penalties.

For the reasons discussed in the preamble, under the authority of 42 U.S.C. 12651c(c), the Corporation for National and Community Service amends chapters XII and XXV, title 45 of the Code of Federal Regulations as follows:

PART 1230—NEW RESTRICTIONS ON LOBBYING

■ 1. The authority citation for part 1230 continues to read as follows:

Authority: Section 319, Pub. L. 101–121 (31 U.S.C. 1352); Pub. L. 93–113; 42 U.S.C. 4951, *et seq.;* 42 U.S.C. 5060.

§ 1230.400 [Amended]

■ 2. Amend § 1230.400:

■ a. In paragraphs (a), (b), and (e), by removing ''$19,639'' and adding in its place ''$20,134'' each place it appears.

■ b. In paragraphs (a), (b), and (e), by removing ''$196,387'' and adding in its place ''$201,340'' each place it appears.

Appendix A to Part 1230 [Amended]

■ 3. Amend appendix A to part 1230 in both the undesignated paragraph following paragraph (3) and the last paragraph by removing ''$19,639'' and adding in its place ''$20,134'' and by removing ''$196,387'' and adding in its place ''$201,340''.

PART 2554—PROGRAM FRAUD CIVIL REMEDIES ACT REGULATIONS

■ 4. The authority citation for part 2554 continues to read as follows:

Authority: Pub. L. 99–509, Secs. 6101–6104, 100 Stat. 1874 (31 U.S.C. 3801–3812); 42 U.S.C. 12651c–12651d.

§ 2554.1 [Amended]

■ 5. Amend § 2554.1 in paragraph (b) by removing ''$11,181'' and adding in its place ''$11,463.''

Dated: December 21, 2018.

Tim Noelker,

General Counsel.

[FR Doc. 2018–28266 Filed 12–27–18; 8:45 am]

BILLING CODE 6050–28–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 32, 51, 61, and 69

[WC Docket Nos. 17–144, 16–143, 05–25; FCC 18–146]

Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers; Business Data Services in an internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission continues its efforts to modernize its rules governing the pricing of business data services (BDS) by allowing rate-of-return carriers to voluntarily elect to transition their BDS offerings out of rate-of-return regulation to a lighter-touch regulatory framework. This action is intended to promote competition and reduce costly regulatory burdens which no longer serve the public interest. Under this new framework, rate-of-return carriers would be incentivized to use the savings realized from the regulatory relief to improve existing networks and service.

DATES: The amendments contained in this final rule shall become effective February 26, 2019.

ADDRESSES: Federal Communications Commission, 445 12th Street SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Justin Faulb, Pricing Policy Division of the Wireline Competition Bureau at 202–418–1540 or by email at *Justin.Faulb@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, released October 24, 2018. A full-text version may be obtained at the following internet address: *https://www.fcc.gov/document/fcc-spurs-competition-rural-business-data-services-0*.

I. Background

1. In 1990, the Commission began the process of encouraging carriers to move from rate-of-return to incentive regulation by adopting price cap rules governing the largest incumbent LECs' interstate access charges and allowing other incumbent LECs to elect price cap regulation voluntarily. Price cap regulation was designed to ''reward companies that became more productive and efficient, while ensuring that productivity and efficiency gains are shared with ratepayers.'' Through a series of subsequent decisions, the Commission allowed other carriers to convert voluntarily from rate-of-return to price cap regulation.

2. Since then, the Commission has taken additional steps to transition certain services and revenues of rate-of-return carriers from rate-of-return regulation to other more efficient forms of regulation. In 2011, as part of comprehensive universal service and intercarrier compensation reform, the Commission imposed rate caps on rate-of-return carriers' switched access services, removing those services from the obligations that accompany traditional rate-or-return regulation. In the *USF/ICC Transformation Order,* 76 FR 73830, November 29, 2011, the Commission also changed its method for calculating high-cost universal service support received by rate-of-return affiliates of price cap carriers. Specifically, the Commission began to treat rate-of-return operating companies affiliated with price-cap holding companies as price cap LECs for the purposes of the Connect America Fund (CAF) Phase I distribution mechanism. As a result, rate-of-return carriers affiliated with price-cap companies now receive the same type of fixed universal service support that their price cap affiliates receive.

3. Two years ago, the Commission gave rate-of-return carriers the option of receiving forward looking, model-based universal service support based on the Alternative Connect America Cost Model (A–CAM), which more than 200 carriers opted to receive (A–CAM carriers). The Commission observed that ''the carriers that choose to take the voluntary path to the model are electing incentive regulation for common line offerings.'' Consequently, for A–CAM carriers, only their BDS offerings are currently subject to rate-of-return regulation.

4. In 2016, the Commission also adopted the *Alaska Plan Order,* 81 FR 69696, October 7, 2016, which allowed Alaskan rate-of-return carriers to elect fixed universal service support on a state-wide basis for a defined term in exchange for committing to deployment obligations. Specifically, the Commission provided a one-time opportunity for Alaskan rate-of-return carriers to elect to receive universal service support frozen at adjusted 2011 levels for a 10-year term in exchange for meeting individualized performance benchmarks to offer voice and broadband services. Subsequently, in 2016, the Wireline Competition Bureau (Bureau) authorized 13 Alaskan rate-of-return carriers to receive universal service support under the Alaska Plan (Alaska Plan carriers). Similar to A–CAM carriers, Alaska Plan carriers receive fixed universal service support that is not based on current cost, and only file cost studies for purposes of their BDS offerings.

5. In addition to encouraging carriers to migrate from cost-based to incentive regulation, over time the Commission has reduced ex ante pricing regulation in favor of relying on competition to the extent possible. In 1999, the Commission granted pricing flexibility to price cap carriers that provided service in areas where carriers could demonstrate threshold levels of deployment by competitive providers. Pricing flexibility allowed eligible carriers to offer BDS using contract tariffs, volume and term discounts and, in markets that demonstrated higher levels of competition, at unregulated rates. Beginning in 2007, the Commission granted forbearance from dominant carrier regulation, including tariffing and pricing regulation, to a number of price cap incumbent LECs for their newer packet-based broadband services. These forbearance orders concluded that forbearance from dominant carrier regulation was warranted given the existence of competition for these newer services, which ensured that rates and practices for these services remained just and reasonable, adequately protected consumers, and was in the public interest.

6. In 2017, the Commission adjusted BDS pricing regulation to the reality of a dynamically competitive BDS market in areas where incumbent LECs were subject to price cap regulation. The Commission premised its reductions in ex ante pricing regulation in part on a substantial data collection and in part on its predictive judgment that dynamic and growing competition in the BDS market, driven increasingly by the emergence of cable competition, would allow reliance on competition rather than regulation to ensure rates remain just and reasonable. The *BDS Order,* 82 FR 25660, June 2, 2017, represented yet another step in the process of reducing dominant carrier regulation in response to the growth of competition. In that order, the Commission found that reducing government intervention and allowing market forces to continue working would further spur entry, innovation, and competition in BDS markets served by price cap carriers.

The Commission applied ex ante pricing regulation ''only where competition is expected to materially fail to ensure just and reasonable rates'' and stated its preference to rely ''on competition rather than regulation, wherever purchasers can realistically turn to a supplier beyond the incumbent LEC.'' Based on the record before it, the Commission found that, on balance, competition was sufficient to ensure just and reasonable rates for packet-based business data services, TDM transport services, and higher bandwidth (*i.e.,* above a DS3-level) TDM services (including OCn services) in the absence of ex ante pricing regulation in areas served by price cap carriers. It also adopted a competitive market test for lower bandwidth TDM end user channel terminations (*i.e.,* DS3-level and lower) in price cap areas and refrained from ex ante pricing regulation of those services in areas deemed competitive by that test.

7. Recently, the Eighth Circuit Court of Appeals upheld all aspects of the *BDS Order* save the portions of the order affecting price cap carriers' TDM transport service, which it vacated and remanded on notice grounds—namely that the Commission had not provided sufficient notice that it might relieve those services of ex ante pricing regulation.

8. After the Commission adopted changes to its rules governing price cap carriers' BDS offerings, ITTA and USTelecom (together, Petitioners) filed a petition seeking the same regulatory treatment of BDS offerings for rate-of-return carriers receiving fixed support as that the Commission had recently adopted for price cap carriers (Joint Petition). According to Petitioners, rate-of-return regulation deters investment in networks and harms competition. Petitioners argue that the inflexibility of rate-of-return regulation makes it difficult to justify and fund upgrades to their rural networks. They point out that for rate-of-return carriers, ''the need to perform annual cost studies now applies only with respect to BDS.'' As a result, they argue that the expense associated with conducting cost studies and complying with other rate-of-return expenses are difficult to recover and burden rate-of-return carriers receiving fixed support but not their competitors. The Bureau sought and received comment on the Joint Petition.

9. Upon review of the record received in response to the Joint Petition, earlier this year, the Commission released a notice of proposed rulemaking (*NPRM*), 83 FR 22923, May 17, 2018, proposing to allow A–CAM and other rate-of-return carriers that receive fixed universal service support to voluntarily migrate their lower speed TDM-based BDS offerings to incentive regulation. The Commission also sought comment on adopting a competitive market test to determine when the market for lower speed TDM-based BDS offerings offered by rate-of-return carriers that receive fixed support are sufficiently competitive to justify eliminating ex ante pricing regulation of such offerings. Additionally, the *NPRM* sought comment on eliminating ex ante pricing regulation for such carriers' packet-based and higher speed TDM-based BDS offerings nationwide, while maintaining oversight authority through sections 201, 202, and 208 of the Communications Act of 1934, as amended (the Communications Act or the Act) to ensure BDS rates and practices remain just and reasonable.

II. An Administrable Framework for Business Data Services Offered By Rate-of-Return Carriers That Receive Fixed Support

10. Upon review of the record, we allow rate-of-return carriers receiving fixed universal service support to choose to migrate their BDS offerings to a new, comprehensive, lighter-touch regulatory framework that is better aligned to the competitive realities of the BDS markets they serve. The framework we adopt includes voluntary incentive regulation with pricing flexibility for electing carriers' lower capacity (DS3 and below) TDM transport and end user channel termination services. We also adopt a competitive market test for such carriers' lower capacity TDM end user channel termination services to identify competition by study area. In electing carriers' study areas that the competitive market test deems competitive, we eliminate ex ante pricing regulation for lower capacity TDM end user channel termination services. We also remove ex ante pricing regulation from electing carriers' packet-based and higher capacity (above a DS3 bandwidth level) TDM services and grant forbearance from tariffing requirements for those services. To reduce the burden of legacy rate-of-return regulation on electing carriers, we also grant forbearance from cost assignment and separations rules and related reporting requirements, because we determine that such action is warranted by the non-cost-based regulation that will apply to electing carriers and the competitive circumstances of their BDS markets.

11. We find that adopting the lighter-touch incentive regulatory framework proposed by the Commission for electing carriers will remove unnecessary regulatory burdens and encourage competition. Based on the record before us, we decline at this time to relieve electing carriers' lower capacity TDM transport (at or below a DS3-level) of ex ante pricing regulation nationwide, as Petitioners sought. Instead we allow electing carriers to move their lower speed TDM transport services to incentive regulation. Additionally, we adopt a competitive market test tailored to rate-of-return carriers' study areas, which will allow us to properly evaluate competition in the areas served by electing carriers and remove ex ante pricing regulation for end user channel terminations in areas deemed competitive, instead of basing our decision on the competitive characteristics of areas served by price cap carriers.

12. We decline to adopt Petitioners' proposal to apply to electing carriers' BDS offerings the regulatory framework and the results of the price cap competitive market test adopted in the *BDS Order* for price cap carriers' BDS offerings. Petitioners argue that applying the price cap BDS rules to electing rate-of-return carriers would result in regulatory parity that ''would promote competition and make the rules less complex.'' TDS Telecom asserts that adopting a separate incentive regulatory framework is unnecessary. The price cap BDS rules, however, were based on an analysis of BDS competition in areas served by price cap carriers, consistent with our obligation to ensure that the rates charged by common carriers are just and reasonable. The Commission found sufficient evidence of competition in these areas to discipline pricing and therefore adopt a lighter touch regulatory framework for these carriers. That same history and record of competition for BDS services does not exist in the study areas served by rate-of-return carriers that Petitioners seek to have covered by price cap BDS regulation. Thus, we find that adopting a separate, albeit largely parallel, regulatory framework for rate-of-return carriers receiving fixed support will be better suited to their circumstances.

A. Transitioning to a New Framework

13. Consistent with the Commission's proposal and the Joint Petition, we allow all rate-of-return carriers receiving fixed universal service support to voluntarily elect to move their BDS offerings out of rate-of-return regulation to the new lighter touch framework we adopt today. Carriers eligible to make this election include A–CAM carriers, rate-of-return carriers receiving fixed support by virtue of being affiliated with price cap carriers, Alaska Plan carriers,

and rate-of-return carriers that accept future offers of A–CAM support or otherwise transition away from legacy support mechanisms. The first three types of carriers receive fixed or model-based universal service support, rather than receiving high-cost support based on their costs, and therefore are currently required to prepare cost studies only for their BDS offerings. Relieving these carriers of rate-of-return regulation for their BDS will save them the expense of preparing burdensome cost studies only for those offerings.

14. Similarly, to the extent the Commission provides future offers of A–CAM support or otherwise transitions carriers away from legacy support mechanisms, carriers that receive such support will only have to prepare cost studies for purposes of their BDS offerings. Therefore, if the Commission announces future offers of A–CAM support or otherwise transitions carriers away from legacy support mechanisms, the actions we take in this Order will allow carriers eligible for or subject to such transitions to elect the same lighter touch regulatory framework we provide for other rate-of-return carriers that receive fixed support, and may provide further incentives for rate-of-return carriers to elect to receive non-legacy, fixed or model-based support. This will further the Commission's longstanding objective of providing universal service support based on forward-looking efficient costs as opposed to actual costs that may be less efficient.

15. Consistent with Commission precedent, we do not require all rate-of-return carriers receiving fixed support to migrate their BDS offerings away from rate-of-return regulation to the new framework, but instead allow each carrier to voluntarily make that determination based on its circumstances. When the Commission adopted price cap regulation in 1990, it made price cap regulation voluntary for all but the largest incumbent LECs. At that time, the Commission expressed concern that assigning one productivity factor on a mandatory basis to all LECs, regardless of size, could prove unduly burdensome for smaller and mid-sized carriers that may have fewer opportunities than larger companies to achieve cost savings and efficiencies. Commenters echoed those concerns in this proceeding. By making the election voluntary, we ensure that only carriers that can achieve sufficient efficiencies are likely to elect incentive regulation; our new framework will not, therefore, impose additional burdens on smaller carriers that cannot achieve such efficiencies.

16. We also adopt the Commission's proposal to require electing carriers to elect incentive regulation at the holding company-level for study areas in all states where that carrier receives fixed support. Commenters do not oppose requiring holding company-level election. AT&T requests that the Commission ''require that any A–CAM carrier that elects incentive regulation have that election apply across all its study areas'' because this prevents ''internal cost shifting among study areas.'' Holding company-level election will maximize the regulatory efficiencies achieved by incentive regulation, including maximizing cost savings from the elimination of cost studies for all electing carriers. It is also consistent with the Commission's past practices. For example, the Commission gave rate-of-return carriers the opportunity to elect between A–CAM and legacy cost-based support at a state-wide level. Likewise, the Commission required Alaska Plan carriers to elect fixed, frozen support on a state-wide basis. Requiring rate-of-return carriers receiving fixed support to elect regulatory treatment at the holding company-level is also consistent with the underlying premise of price cap regulation, which assumed a broad representation of carrier operations to provide a basis for establishing an industry-wide productivity factor.

17. We provide eligible carriers with two opportunities to elect to move their BDS offerings out of rate-of-return regulation—one to be effective as of July 1, 2019 and a second effective as of July 1, 2020—to encourage them to take advantage without undue delay of the benefits that will be realized by electing carriers under the new framework and to discourage potential gaming opportunities. We provide two opportunities to elect this new regulatory framework, in recognition of the fact that some carriers may not have sufficient time to assess their options in time for the July 1, 2019 effective date. Providing a second opportunity to elect incentive regulation will facilitate carriers' ability to assess incentive regulation for their BDS and ultimately enhance participation in the new regulatory framework, which will further reduce unnecessary regulatory burdens and positively impact competition in electing carriers' BDS markets.

18. Some commenters recommend that we provide an ''annual opportunity to elect the new regime'' based on ''business strategy and compliance measures.'' Giving eligible carriers an annual opportunity to elect incentive regulation, however, would also give them an incentive to increase their operating costs and rate base under rate-of-return regulation in order to raise rates prior to electing incentive regulation, then realize additional profits by cutting costs under incentive regulation at the expense of ratepayers. By providing only two opportunities to elect to move to the new framework, we discourage such gaming opportunities.

19. We prohibit electing carriers from returning their study areas to rate-of-return regulation. One of the rationales for the Commission's ''all-or-nothing'' rules for price cap carriers is to prevent carriers from potentially switching back and forth between rate-of-return and price cap regulation to take advantage of uneven cycles of investment. We are likewise concerned with potential gaming opportunities for electing carriers if they are allowed to switch back and forth between rate-of-return and incentive regulation. Electing carriers could inflate their revenues by opting-out of incentive regulation, building a larger rate base under rate-of-return regulation in order to raise rates, and then, returning to incentive regulation or opting into price cap regulation, thus reducing costs back to an efficient level. These gaming opportunities would distort carriers' decisions to invest and frustrate the public interest because ratepayers would not see the benefit of capped and decreased rates in the manner intended under incentive regulation. Further, in the 1990 *Price Cap Order,* 55 FR 42375, October 19, 1990, the Commission determined that for price cap regulation to work effectively and for incentives to develop and influence carrier behavior and earnings, an electing carrier must make a permanent commitment. We similarly find, that for incentive regulation to work properly, the election must be permanent. Accordingly, a carrier's voluntary election of incentive regulation will be irrevocable.

20. AT&T requests that the ''Commission decline to waive the 'all-or-nothing' rule for these carriers and require that any A–CAM carrier that elects incentive regulation have that election apply across all its study areas and, even more critically, across all of its interstate services within a study area.'' The all-or-nothing rule AT&T cites, however, applies to price cap carriers, not to rate-of-return carriers that elect incentive regulation. While the incentive regulation rules we adopt for electing carriers impose price caps on some of the BDS services offered by electing carriers, electing carriers do not become price cap carriers by virtue of their election; therefore the all-or-

nothing rule is simply not applicable here.

21. We allow electing carriers' switched access services to remain subject to the multi-year transition provided for rate-of-return carriers in the *USF/ICC Transformation Order.* We therefore decline to adopt AT&T's recommendation that electing carriers be required to convert all their services to price cap regulation, including their switched access services, which—compared to price-cap carriers' switched access services—benefit from a longer transition to bill-and-keep and no phase-out of Connect America Fund Intercarrier Compensation replacement support.

22. According to AT&T ''[w]hile different transitions for price cap carriers and rate-of-return carriers may have made sense in 2011, those distinctions should not unfairly benefit carriers'' electing incentive regulation and could lead to cost-shifting between types of services. We disagree with AT&T's assertion that electing carriers will ''unfairly benefit'' from our decision not to convert all of their offerings to incentive regulation. The Commission adopted different intercarrier compensation transitions in the context of a complex rulemaking that were the result of a careful analysis of a variety of factors and policy considerations, including the differential impact of universal service and intercarrier compensation reform on price cap as compared to rate-of-return carriers. As TDS Telecom explains, in the intervening seven years, carriers have relied on those transitions to plan their businesses and make investments. Changing those transitions at this point would disrupt these settled expectations and potentially undermine, rather than encourage, investment and innovation in electing carriers' BDS markets. We also find AT&T's concerns about cost-shifting unfounded because switched access rates were capped and therefore removed from cost-based regulation in 2011 by the *USF/ICC Transformation Order,* eliminating the incentive for inappropriate cost shifting.

23. Following the same logic, we decline to adopt AT&T's proposal that we require electing carriers to exit the National Exchange Carrier Association (NECA) tariff pool for their ''switched and special access services to avoid additional complexities in the annual tariff review process and to avoid potential gaming.'' As Petitioners argue, AT&T ''fails to explain how any cost shifting would be useful given the switched access rules [that cap rates].'' Moreover, the scrutiny inherent in the part 61 tariff review process helps reduce the risk of cost-shifting or other gaming by pool participants. We do, however, require electing carriers currently participating in the NECA traffic-sensitive tariff pool for their BDS or special access service offerings to remove their BDS and special access offerings from the pool since those services will be subject to incentive regulation.

24. We find that the lighter touch regulatory framework we adopt provides electing carriers the right balance of relief from the burdensome aspects of rate-of-return regulation and pricing discipline. The efficiencies gained from reducing regulatory burdens on electing carriers, including the increased flexibility to compete in the market, will foster network investment and impose downward pressure on prices. We also find here, as we did in the *BDS Order,* that ''minimiz[ing] unnecessary government intervention . . . allows market forces to continue working to spur entry, innovation, and competition.''

B. Applying Voluntary Incentive Regulation to Electing Carriers' Lower Speed TDM Transport and End User Channel Termination Services

25. In this section, we provide direction on implementing the voluntary incentive regulation we adopt today for electing carriers' lower capacity (*i.e.,* at or below a DS3-level) TDM transport and end user channel termination services as part of our comprehensive lighter touch regulatory framework for electing carriers' BDS. We treat electing carriers' lower capacity TDM transport and end user channel terminations differently from packet-based and higher speed TDM-based BDS offerings because the record shows that packet-based offerings are subject to competition that will ensure just and reasonable rates for those services. By contrast, the record shows that demand for lower speed TDM-based transport and end user channel terminations services is shrinking as purchasers increasingly prefer higher speed and packet-based services. Recognizing that the market is transitioning to new technologies, we provide protections for lower speed TDM-based transport and end user channel termination services. Based on the current record, we preserve ex ante pricing regulation for lower speed TDM-based transport services and adopt a competitive market test that will preserve ex ante pricing regulation in those study areas where we predict there is a substantial likelihood that competition will fail to ensure just and reasonable rates for the lower capacity TDM-based end user channel termination services.

26. Rate-of-return carriers that make this election will convert to incentive regulation for their lower capacity TDM transport and end user channel termination services as well as other generally lower capacity non-packet-based services that are commonly considered special access services. Specifically, among other matters, we adopt a methodology for electing carriers to set their initial rates, allow an unfreeze of separations category relationships for carriers that elected to freeze them in 2001, adopt a productivity factor and measure of inflation to adjust rates, and grant pricing flexibility to electing carriers for their lower capacity TDM services.

1. Initial Rate Levels

27. First, we adopt the methodology electing carriers must use to establish rates for their lower capacity TDM transport and end user channel termination services pursuant to incentive regulation. For rate-of-return carriers that file their own tariffed rates, we adopt the approach proposed in the *NPRM* to set initial BDS rate levels based on rates in effect on January 1, 2019 for carriers converting to incentive regulation as of July 1, 2019 and on rates in effect on January 1, 2020 for carriers that elect incentive regulation effective as of July 1, 2020. For rate-of-return carriers participating in the NECA traffic-sensitive tariff pool that elect incentive regulation effective July 1, 2019, we adopt the approach proposed in the *NPRM* for members exiting the pool to set their initial BDS rate levels by adjusting NECA pool rates in effect on January 1, 2019 by a net contribution or net recipient factor. Carriers electing incentive regulation as of July 1, 2020 must set their initial BDS rate levels by adjusting NECA pool rates in effect on January 1, 2020. Electing carriers will then adjust their rates using a methodology that is consistent with the price cap formulas in §§ 61.45 to 61.47 of our rules, by applying the productivity factor (X-factor), inflation factor (Gross Domestic Product-Price Index (GDP–PI)), and any required exogenous cost changes. Carriers may adjust these rates to reflect the pricing flexibility permitted by the pricing bands in the Special Access category.

28. Under rate-of-return regulation, incumbent LECs are permitted to recover through tariffed rates their revenue requirement, which is equal to their regulated operating costs plus a prescribed rate of return on their regulated rate base. Rate-of-return carriers set rates at levels that when

multiplied by demand will yield revenues equal to their revenue requirement, and are targeted to earn the Commission's prescribed rate of return. Rate-of-return carriers establish rates for BDS offerings either by filing their own interstate access tariffs and cost support pursuant to § 61.38 or § 61.39 of our rules or, for most rate-of-return carriers, by participating in the NECA traffic-sensitive tariff and traffic-sensitive pool. NECA sets the BDS rates in the traffic-sensitive tariff based on projected aggregate costs (or average schedule settlements) and demand of all pool members, which are targeted to earn the authorized rate of return for NECA pool members.

29. When the Commission launched price cap regulation in 1990, it found that interstate access rates as they existed on July 1, 1990, six months prior to the date price caps went into effect on January 1, 1991, were the most reasonable basis from which to set initial rate levels under price cap regulation. In other words, those rates created the starting point for the indexing of rates under price cap regulation—setting their price cap index, actual price index and service band index at a value of 100. The price cap index is adjusted by the productivity offset (X-factor) and inflation (GDP–PI) for the first year, and each year thereafter. The Commission reasoned that interstate rates that existed on July 1, 1990 ''while perhaps not perfect, in general represent the best that rate-of-return regulation can produce.''

30. Beginning with the *Windstream Order,* the Commission granted several waivers allowing price cap carriers to convert their rate-of-return study areas to price cap regulation. Carriers were, among other things, required to establish initial price cap indexes using the rates in effect on January 1 of the conversion year, six months prior to the July 1 effective date of conversion, the demand from the preceding year, and required to target their rates using the X-factor in effect at that time. In the *2012 Average Schedule Conversion Order,* the Commission permitted several rate-of-return carriers to, among other things, withdraw their average schedule study areas from the NECA pool and convert them to price cap regulation. In that order, the Commission approved a methodology for establishing initial price cap rates using existing NECA pool tariffed rates adjusted to reflect the extent to which the exiting study areas were either a net contributor to, or a net recipient from, the NECA pool.

31. *Carriers Currently Filing Their Own Tariffs.* Consistent with past practice, we adopt the proposal in the *NPRM* for carriers that currently file their own tariffs to use existing tariffed rates to set their initial BDS rates under incentive regulation. Carriers first will set their price cap indexes based on their tariffed interstate special access rates in effect on January 1, 2019, or based on those rates in effect on January 1, 2020 for carriers electing to convert to incentive regulation effective July 1, 2020. The price cap indexes (*i.e.,* the price cap index, actual price index, and service band index) will be assigned values of 100 as starting points, which correspond to rate levels in effect on January 1, 2019 or on January 1, 2020, as applicable. Carriers then will adjust the price cap index and the pricing band limits for each service category or subcategory consistent with §§ 61.45 through 61.47 of our rules, by applying the X-factor (2.0%), inflation factor (GDP–PI), and any required exogenous cost changes. Carriers, next, will set rates so that the actual price index, calculated pursuant to § 61.46, does not exceed the price cap index, and the service band indexes for each service category or subcategory, calculated pursuant to § 61.47, do not exceed the pricing band limits for each category or subcategory, for the first year of incentive regulation and each year thereafter.

32. *Carriers Participating in NECA Pool.* We also adopt the approach proposed in the *NPRM* for electing carrier study areas exiting the NECA traffic-sensitive tariff pool to establish their initial BDS rates under incentive regulation by multiplying the NECA pool rate in effect on January 1, 2019 by a net contribution or net recipient factor or by doing so using the NECA pool rate in effect on January 1, 2020 for carriers electing conversion in 2020. No commenters opposed this proposal. Electing carriers exiting the NECA pool will adjust the NECA pool rate to reflect the extent they are either a net contributor or net recipient in order to ensure their rates are just and reasonable. Each NECA pool member receives a settlement from the pool based on its costs plus a pro rata share of the earnings, or based on its settlement pursuant to the average schedule formulas. NECA pool rates are lower than necessary for a net recipient to recover its revenue requirement, or higher than necessary for a net contributor to recover its revenue requirement and must be adjusted by the extent to which the existing study area is a net contributor to, or net recipient from, the NECA pool in order to satisfy the just and reasonable standard. Without an adjustment, electing carriers' BDS rates would be either artificially high or low going forward.

33. First, to determine the appropriate net contributor or net recipient factor, electing carriers exiting the pool effective July 1, 2019 will determine their interstate special access revenue for the period July 1 to December 31, 2018. An electing carrier exiting the NECA tariff shall determine its pool settlements to be used in developing the factor based on costs for the period July 1 through December 31, 2018, which reflects the first six months of tariff year 2018–19, the 12-month period for which the costs underlying the January 1, 2019 rates were projected. The pool settlements shall be adjusted to reflect the 10.5% rate of return which was used to establish the revenue requirement for the January 1, 2019 rates. Second, carriers will calculate the difference between the exiting pool member's interstate special access revenues for July 1 to December 31, 2018 and special access pool settlements reflecting the authorized rate of return for this same period. Third, this net contribution or net recipient amount will then be divided by interstate special access revenues for the same period to produce a percent net contribution or net recipient factor. Fourth, carriers shall proportionately adjust their special access NECA pool rates in effect on January 1, 2019 downward by the net contribution factor or upward by the net recipient factor. Finally, carriers will adjust these rates further consistent with §§ 61.45 through 61.47 of our rules, in the manner described above for carriers that file their own tariffs, to set their initial BDS rates for the first year of incentive regulation. Carriers electing to exit the NECA pool effective July 1, 2020 will use the same methodology to adjust their rates but using the corresponding dates that are one year later.

34. We agree with Petitioners that recommend that initial rates be based on the existing tariffed rates at the time of a carrier's election of incentive regulation. AT&T and Sprint disagree and argue that the Commission should adjust initial BDS rates to account for the rate-of-return transition that is currently underway. The Commission adopted a six-year transition in 2016 to reduce the then-11.25% rate of return by 25 basis points per year until the rate of return reaches 9.75% in 2021. AT&T and Sprint argue that the Commission should adjust electing carriers' initial BDS rates to reflect the fully-transitioned 9.75% rate of return or, at a minimum, Sprint argues that the

Commission should adjust the price capped rates each year during the rate-of-return transition until it ends in 2021. AT&T claims that ''[s]etting electing A–CAM carriers' initial rate-of-return at the 9.75% level immediately upon converting to price cap, while not completely correcting, would help alleviate any rate disparities and aligns with the Commission's finding that a 9.75% rate of return is more than reasonable.''

35. We find that existing tariffed rates targeting the transitional 10.5% rate of return in effect is the more appropriate rate from which to launch incentive regulation for carriers electing to convert to incentive regulation effective July 1, 2019. AT&T and Sprint fail to accord any significance to the Commission's decision to implement changes in the prescribed rate of return over six years and the reasons for such a measured and lengthy transition. In granting a six-year transition, the Commission acknowledged that ''for almost 25 years, rate-of-return carriers have made significant infrastructure investments . . . and that represcribing the rate of return will have a financial impact on these carriers.'' Rate-of-return carriers' business plans and long-term capital investments are typically based on an expected multi-year revenue stream. The Commission determined that an immediate transition to a 9.75% rate of return would disrupt these carriers' reasonable reliance on these expected revenues. The Commission also recognized that ''rate-of-return incumbent LECs have been subject to significant regulatory changes in recent years, and that such changes are occurring at a time when these carriers are attempting to transition their networks and service offerings to a broadband world.'' Reflecting the balance of the six-year transition whether through a one-time adjustment, or through a series of three adjustments, would abandon this careful transition and would likely disrupt electing carriers' ability to invest in upgrading and transitioning their networks to provide broadband in the rural communities they serve.

36. We also find that once a carrier elects incentive regulation, its rates should be based on that form of regulation and not effectively a hybrid or combination of rate-of-return and incentive regulation, which would be the result were we to adopt the annual adjustment the Commission has applied to carriers that are subject to cost-based rate-of-return regulation as proposed by Sprint. Capping BDS rates of an electing carrier that will be subject to incentive regulation and reducing them annually by the X-factor going forward will be sufficient to ensure these rates are just and reasonable while at the same time creating the right incentives to operate efficiently—a goal we cannot expect to achieve by continuing to overlay rate-of-return obligations on top of an incentive regulation scheme. An annual 25 basis point adjustment would also be more administratively burdensome to implement. Rather than perpetuating policies associated with an inefficient rate-of-return system, we look to the ongoing operation of incentive regulation to spur carriers to be more efficient and productive than they were under rate-of-return regulation using X-factor-based rate reductions.

37. Finally, as some commenters explain, reducing initial BDS rate levels to account for the rate-of-return transition would ''reduce the motivation of a carrier to opt into incentive regulation'' contrary to the goals of this Order and the Commission's preference for incentive-based regulation. If initial BDS rates were adjusted to the fully-transitioned rate of return of 9.75%, carriers would be able to earn a higher return and revenue during the rate-of-return regulation transition that ends in 2021 than by moving to incentive regulation. This outcome is contrary to the Commission's long-standing policy preferring incentive-based regulation over rate-of-return regulation and encouraging conversions to incentive-based regulation. Incentive regulation will encourage electing carriers to be more efficient than they were under rate-of-return regulation, and pass some of these efficiencies on to consumers through rate reductions (or rates that are lower than otherwise) through the application of a price cap formula that reflects a properly calculated X-factor. Accordingly, we seek to encourage carriers to adopt incentive regulation by allowing electing carriers to set their initial rates under incentive regulation based on rates reflecting the transitional rate of return currently in effect.

38. We agree with Petitioners that initial rates for lower capacity TDM transport and end user channel termination services should be based on existing tariffed deemed lawful rates—rates that target the effective transitional rate of return. We therefore set initial rates for carriers electing to convert to incentive regulation as of July 1, 2019 for lower capacity TDM transport and end user channel termination services based on electing carriers' tariffed rates in effect on January 1, 2019, six months prior to when incentive regulation goes into effect on July 1, 2019. Similarly, initial rates for carriers electing to convert to incentive regulation as of July 1, 2020 will be based on the tariffed rates in effect on January 1, 2020. Existing tariffed rates filed pursuant to section 204(a)(3) of the Act that take effect, without prior suspension and investigation, are deemed lawful and conclusively presumed to be just and reasonable. Setting initial rates based on existing tariffed rates, as noted by commenters, is ''consistent with the methodologies used in the past when rate-of-return carriers have converted to price cap regulation.'' Further, the selection of tariffed rates in effect on a date that precedes the effective date of incentive regulation helps prevent rapid aggregate price increases in the period leading up to the incentive regulation that would inflate price cap baseline rates. Accordingly, price cap indexes under incentive regulation will be initially set at a value of 100 based on rates in effect on January 1, 2019 for carriers electing incentive regulation as of July 1, 2019, and on rates in effect on January 1, 2020 for carriers electing incentive regulation as of July 1, 2020. Business data services rates for carriers accepting future offers of A–CAM support or otherwise transition away from legacy support mechanisms will be effective on July 1 in the year following their election.

2. Category Relationships Unfreeze

39. We give electing carriers subject to the category relationships freeze of our separations rules, including any such carriers that accept future offers of A–CAM support or otherwise transition away from legacy support mechanisms, the opportunity to opt out of that freeze. We agree with Petitioners and WTA that the category relationships freeze creates a cost recovery hardship for certain carriers and a distortion in rates that should not be incorporated into rates that electing carriers set for lower capacity circuit-based business data services under incentive regulation.

40. *Background.* Rate-of-return incumbent LECs use their networks and other resources to provide both interstate and intrastate services. The Commission's part 36 jurisdictional separations rules are designed to help prevent the recovery of the same costs from both the interstate and intrastate jurisdictions and require that rate-of-return incumbent LECs divide their costs and revenues between the respective jurisdictions. The jurisdictional separations analysis begins with categorizing the incumbent LEC's regulated costs and revenues, a process requiring that the incumbent LEC assign the regulated investments, expenses, and revenues recorded in its part 32 accounts to various part 36

categories. The incumbent LEC then directly assigns to the interstate or intrastate jurisdiction, or allocates between those jurisdictions, the costs or revenues in each part 36 category.

41. In 1997, the Commission initiated a proceeding to comprehensively reform its jurisdictional separations rules and referred that matter to the Federal-State Joint Board on Jurisdictional Separations (Joint Board) for preparation of a recommended decision. In the *2001 Separations Freeze Order,* 66 FR 33202, June 21, 2001, the Commission froze the jurisdictional separations rules to allow time for the Joint Board to develop recommendations on comprehensive separations reform. Also, in that Order, the Commission granted rate-of-return carriers a one-time option to freeze their category relationships, enabling each carrier to determine whether such a freeze would be beneficial ''based on its own circumstances and investment plans.'' Carriers that elected this freeze assign regulated costs to separations categories based on separations category relationships from 2001, rather than on current data. Presently, approximately 28 rate-of-return carriers that receive fixed high-cost universal service support operate under this category relationships freeze.

42. The Commission has repeatedly extended the separations freeze. The most recent extension is set to expire on December 31, 2018. In the 2018 Separations Freeze Extension proceeding, the Commission proposed to extend the separations freeze for 15 years, while providing a one-time opportunity for carriers that had elected to freeze their category relationships to opt out of that freeze and categorize their costs based on current data rather than separations category results from 2001. The Commission has not yet acted on that proposal.

43. *Category Relationships Unfreeze.* The category relationships freeze has now been in place for more than 17 years, and our rules prohibit carriers that elected that freeze from withdrawing from it. Rate-of-return carriers that chose to freeze their category relationships in 2001 assign costs within part 32 accounts to categories using their separations category relationships from 2000. This means that these companies are still separating their costs based on the technologies and services that were in place in 2000, instead of being able to adjust the amounts assigned to separations categories to reflect the current network costs and services that would allow these carriers to properly recover their costs. Investment by carriers is becoming more weighted toward BDS and away from switched access and common line categories. Thus, we agree with Petitioners that the result is that some, if not all, carriers with frozen category relationships are unable to recover their BDS costs from BDS customers or from NECA traffic sensitive pool settlements.

44. We therefore allow electing carriers to unfreeze and update their category relationships in conjunction with setting their initial rates, which will enable such carriers to more closely align their BDS rates with their underlying costs as they set initial incentive regulation rates. Once an electing carrier implements incentive regulation rates for its BDS, it will no longer need to comply with the separations rules by virtue of our action below forbearing from application of the separations and other cost assignment rules to electing carriers. This, in turn, will allow the carriers and their customers to benefit from the efficiencies of incentive regulation.

45. The Commission originally allowed rate-of-return carriers the flexibility to choose whether to freeze their category relationships because those carriers' size, cost structures, and investment patterns vary widely. For similar reasons, we conclude that the burden on electing carriers, were we to require all impacted carriers to unfreeze and update their category relationships, would outweigh any benefits, and thus grant these carriers the flexibility to choose. For example, some carriers may have based their current business plans and investment on a continuation of the freeze since it has been in effect for such a long period and compelling these carriers to unfreeze their categories now could be disruptive. Further, it would impose a disproportionate burden on companies with cost structures that have not changed significantly enough to warrant the administrative costs that these carriers would incur in updating their relationships. Moreover, the process of unfreezing and updating category relationships is resource-intensive, requiring carriers to develop detailed analyses for new categorization cost studies. As a result, we recognize that some electing carriers may choose not to unfreeze their category relationships in conjunction with setting initial incentive regulation rates for lower capacity circuit-based business data services because of the administrative costs they would incur in updating these relationships. We see no need to require that electing carriers incur these costs, particularly since one of the principal goals of this proceeding is to reduce unnecessary regulatory burdens.

46. In adopting this option, we reject NARUC's contention that we are violating section 410(c) of the Communications Act by failing to meaningfully consult with, and receive a recommendation from the Joint Board. Section 410(c) applies only to the extent the Commission engages in ''the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations.'' Here, we are not engaged in that process. Instead, we are determining which costs electing carriers should use to calculate their incentive regulation rates for lower capacity circuit-based BDS. In allowing electing carriers to set those rates using data from 2018, rather than 2000, we make no change to the jurisdictional separations rules.

47. As set forth more fully below, we direct each electing carrier that chooses to update its separations category relationships to conduct two cost studies for 2018 and to use those cost studies in determining its initial incentive regulation rates. In so doing, we are exercising our authority over interstate rates and are not in any way requiring state commissions to make similar intrastate adjustments. On the contrary, our forbearance from application of the separations rules to electing carriers will allow the states to adopt their own rules for determining the costs carriers incur in providing intrastate services to the extent they have authority under state law.

48. Moreover, even if we were to interpret 410(c) so broadly as to be applicable to the opportunity we provide electing carriers to unfreeze their category relationships, our actions are not in conflict with our obligations under section 410(c). In 2009, the Commission asked the Joint Board to consider whether the Commission should allow carriers a one-time opportunity to unfreeze their separations category relationships and requested that the Joint Board prepare a recommended decision on that matter. No recommendation has been forthcoming. Section 410(c) directs that, after a referral, the Joint Board ''shall prepare a recommended decision for prompt review and action by the Commission.'' Nothing in section 410(c) obligates the Commission to wait indefinitely for a recommended decision before acting. We conclude that the only reasonable interpretation of this statutory language allows the Commission to act unilaterally where, as here, an issue has been pending before the Joint Board for more than nine years without a recommended decision. Any contrary interpretation would allow the Joint Board to

indefinitely delay Commission action. Congress could not have intended that result while requiring that that the Commission act promptly once the Joint Board issues a recommended decision.

49. Section 410(c) also requires that the Commission ''afford the State members of the Joint Board an opportunity to participate in its deliberations'' on ''decisional action[s]'' regarding matters that have been referred to the Joint Board. To the extent this provision can be read as applying to this proceeding, the notice and comment periods and permit-but-disclose rules governing this proceeding have provided plenty of opportunity for the state members of the Joint Board to voice their opinions on allowing electing carriers to opt out of the category relationships freeze.

50. *Implementation.* To ensure that updated category relationships are properly reflected in incentive regulation rates, we require each electing carrier that chooses to update its frozen category relationships to conduct two 2018 cost studies—one based on frozen category relationships and one based on unfrozen relationships. To determine its incentive regulation rates for BDS, the carrier shall divide the BDS costs under the revised 2018 cost study by the BDS costs determined in the original 2018 cost study using frozen category relationships to develop a rate adjustment factor. The carrier shall apply this factor to the initial (prior to adjustments for the X-factor, inflation factor, and any exogenous cost changes) rates established in accordance with the procedures explained elsewhere in this Order to set the carrier's initial rates for lower capacity circuit-based BDS under incentive regulation. The carrier shall adjust these rates for the X-factor, inflation factor, and any exogenous cost changes and may adjust these rates to reflect any pricing flexibility allowed among services within the special access basket. Carriers that elect incentive regulation effective as of July 1, 2020 will follow these directions, except that if an electing carrier chooses to update its frozen category relationships it will conduct two 2019 cost studies and use the results of these cost studies to complete the steps described in this paragraph.

51. Unfreezing separations category relationships could result in a carrier recovering the same costs through higher BDS rates and unchanged switched access recovery. Incorporating updated category relationships into the 2018 cost study, or 2019 cost study for carriers electing the January 1, 2020 effective date, will change the costs assigned to the switched access category just as it will for BDS. The *USF/ICC Transformation Order* capped all interstate switched access rates at 2011 levels, subject to specified reductions over time. We do not permit electing carriers to increase their switched access rate caps. Unless cost reductions to interstate switched access are reflected in a carrier's revised base period revenue amount, a carrier will double-recover costs through its interstate switched access rates. To account for this effect, an electing carrier that unfreezes its separations category relationships must calculate the difference between the interstate switched access costs in the two 2018 cost studies. Each electing carrier must adjust its base period revenue by an amount equal to the interstate switched access cost difference between the two 2018 cost studies before applying the annual 5% reduction to the base period revenue. This is the process that the Commission employed in the Eastex proceeding. Carriers electing a January 1, 2020 effective date will do the same with 2019 cost studies.

52. An electing carrier that participates in the NECA interstate switched access tariff must report to NECA the interstate switched access cost difference between the two 2018, or, 2019, studies and its revised base period revenue amount. These procedures protect both carriers and customers from any unintended consequences of moving BDS from rate-of-return regulation to incentive regulation. Any electing carrier that opts out of the category relationships freeze shall include, in its 2019 or 2020, respectively, annual filing, workpapers showing how it implemented the measures set forth above. This does not eliminate the need for an electing carrier to adjust its Eligible Recovery for any other instances of double recovery. Finally, we require NECA to reflect these base period revenue changes in its settlement procedures.

53. We find that these measures provide a reasonable and not unduly burdensome method for ensuring that costs shifted from an electing carrier's unfreezing of its category relationships are carried forward into its incentive regulation rates for BDS without any double-recovery. Each electing carrier that chooses to update its category relationships will necessarily need to perform detailed calculations to implement that choice. We minimize the associated burdens by specifying that the electing carrier adjust its business data service rates to account for the changes in the category relationships using the 2018 cost study, or the 2019 cost study for carriers electing to convert effective July 1, 2020, that this Order requires of all electing carriers and therefore will impose only a minimal incremental burden on electing carriers.

3. Special Access Basket, Categories, and Subcategories

54. We retain the special access basket, categories and subcategories, and the attendant rules governing the allowed annual rate adjustments for price cap regulation for incentive regulation. Commenting parties support this approach. The category and sub-category requirements limit the degree to which a carrier can raise rates for particular groups of services in any given year. Each electing carrier that elects incentive regulation must set its initial price cap indexes for the special access basket and associated service band indices at 100 and use the rate adjustment rules for price cap carriers contained in §§ 61.45 to 61.48 of our rules, as appropriate, to reflect the prescribed productivity factor, the inflation factor, and any required exogenous cost adjustment in the price cap index. These steps will ensure that the carrier's actual price index does not exceed its price cap index, and that its service band indexes for each category or subcategory do not exceed their upper limits.

4. Productivity X-Factor and Measure of Inflation

55. Consistent with the price cap *BDS Order,* we adopt 2.0% as the productivity factor (X-factor) and the Gross Domestic Product-Price Index (GDP–PI) as the inflation factor used to adjust price cap indexes in the first year of incentive regulation, and each year thereafter. As proposed in the *NPRM,* we decline to incorporate a consumer productivity dividend adjustment into the X-factor.

56. *Background.* Under price cap regulation, the price cap index seeks to replicate the beneficial cost-reducing incentives of a competitive market by limiting the prices that a price cap LEC may charge for services. After price cap carriers set initial price cap indexes based on going-in rate levels, these indexes are adjusted annually based primarily on the productivity factor (X-factor) and inflation factor (GDP–PI) as well as any exogenous cost adjustments. The X-factor adjustment is intended to capture the amount by which incumbent LECs could be expected to outperform economy-wide productivity gains and to pass those gains on to consumers in the form of lower prices. In the past, the Commission has also

applied a consumer productivity dividend adjustment to the X-factor to capture for ratepayers a portion of the benefits from expected productivity gains exceeding those incumbent LECs had historically achieved under rate-of-return regulation. The inflation factor is intended to adjust prices to capture economy-wide rates of inflation. Historically, the Commission has used the U.S. Department of Commerce's Bureau of Economic Analysis's GDP–PI, a chain-weighted index of overall national prices, as the inflation factor.

57. In the *BDS Order,* the Commission adopted for price cap carriers a 2.0% productivity-based X-factor and retained GDP–PI as the inflation factor but declined to apply a consumer productivity dividend adjustment. The Commission found that 2.0% reflects its best estimate of the productivity growth that incumbent LECs will experience in the provision of BDS services relative to productivity growth in the overall economy. To determine the X-factor, the Commission applied a total factor productivity methodology, which measures the relationship between the output of goods and services to inputs. The Commission applied this methodology to the U.S. Bureau of Labor Statistics' Capital, Labor, Energy, Materials, and Services (KLEMS) dataset for the broadcasting and telecommunications industries for estimating incumbent LEC productivity and input prices. The Commission used these data to establish a zone of reasonable X-factor estimates based on four relevant time periods, and from this zone selected an X-factor of 2.0%. The Commission also retained GDP–PI as the measure of inflation. Accordingly, price cap LECs adjust their price cap indexes annually by the 2.0% X-factor and GDP–PI to ensure just and reasonable rates for these BDS services.

58. *Discussion.* Consistent with the *BDS Order,* we adopt 2.0% as the productivity factor electing carriers will use to adjust their price cap indexes. In so doing, we reaffirm the Commission's finding in the *BDS Order* that the 2.0% X-factor represents our best estimate of BDS productivity gains or losses relative to the general economy and is a reasonable productivity factor with which to adjust price cap indexes for purposes of incentive regulation.

59. WTA opposes adoption of the 2.0% productivity X-factor for incentive regulation, contending that ''given increasing broadband-related labor costs and the fact that the typical WTA member has only 10-to-20 employees, it does not appear possible for many small A–CAM and Alaska Plan companies to achieve productivity gains of two percent each year.'' We believe, however, that the 2.0% X-factor is the most reliable estimate of BDS productivity growth for carriers generally, including smaller carriers. The 2.0% X-factor was the product of an economically-sound total factor productivity methodology, consistent with past Commission practice, using the only reliable and internally consistent dataset in the record in the BDS proceeding, KLEMS, for measuring incumbent LEC productivity and input prices. WTA focuses on one type of input price—labor costs—for which KLEMS captures telecommunications industry trends, including broadband-related trends, for carriers of all sizes. WTA implicitly assumes that its members' labor costs will rise more quickly (or fall more slowly) than price cap carriers' labor costs. Even if we were to accept this assumption, WTA does not address whether other factors affecting BDS productivity growth, such as changes in BDS demand, offset any disparity in the rate of change in labor costs.

60. The Commission sought comment on alternative X-factors for electing carriers but received no data or other information that would allow us to calculate an alternative X-factor. And while WTA provides anecdotal data on a selected portion of its members' costs, it has ''not submitted the company-specific input price and output data that we would need to quantify'' the extent to which its members' productivity growth and ability to recover costs deviate from the industry average. In the *BDS Order,* the Commission declined to adjust the X-factor to account for conflicting and unquantifiable evidence in the record that the KLEMS dataset overstated or understated productivity growth. And the Eighth Circuit Court of Appeals upheld the Commission's decision not to adjust the KLEMS dataset ''in light of the conflicting evidence on what sort of adjustment was appropriate.'' In these circumstances, we see no valid basis on which to adopt an alternative X-factor.

61. Notwithstanding WTA's concerns, we believe that most electing carriers will be able to achieve the 2.0% X-factor. Petitioners support our use of a 2.0% X-factor, even though they state that rate-of-return carriers may generally achieve lower productivity growth than price cap carriers, and TDS Telecom endorses the regulatory framework adopted in the *BDS Order* that includes a 2.0% X-factor. Given that rate-of-return carriers receiving fixed support are not required to move to incentive regulation, carriers unable to achieve the 2.0% X-factor will avoid any harm by simply not electing incentive regulation. The voluntary nature of incentive regulation therefore renders moot any risk involved in attempting today to determine what an appropriate productivity factor would be for this group of carriers. Carriers themselves are in the best position to determine whether they will benefit from incentive regulation and we have afforded them that flexibility.

62. *Inflation Factor.* We adopt GDP–PI as the inflation factor as proposed in the *NPRM.* No commenter opposed this proposal. As we found in the *BDS Order,* there is no alternative measure of inflation presented in the record that is as accurate as GDP–PI in the medium- and long-term and that is not susceptible to carrier influence or manipulation. Accordingly, electing carriers will adjust their price cap indexes by GDP–PI during the first year of incentive regulation, and each year thereafter.

63. *Consumer Productivity Dividend.* We decline to incorporate a consumer productivity dividend adjustment into the X-factor adopted in this Order. No commenter opposed this proposal in the *NPRM.* In the *BDS Order,* the Commission found that the 2.0% X-factor reflected all anticipated future BDS productivity growth and declined to include a consumer productivity dividend adjustment in the X-factor. For similar reasons, and to avoid regulatory disparity with price cap regulation, we decline to include a consumer productivity dividend in the X-factor for incentive regulation.

5. Exogenous Costs

64. After reviewing the record, we adopt the proposal in the *NPRM* that exogenous costs be allocated based on a ratio of BDS revenues to total revenues from all regulated services and an electing carrier's universal service support payments. Exogenous costs are those costs that are beyond the control of the carrier, as determined by the Commission. We agree with Petitioners that allowing exogenous cost adjustments is appropriate. When costs are beyond the carrier's control, they are often of a nature that is not reflected in the measurement of productivity. It is therefore appropriate to allow adjustments to reflect exogenous events upon Commission approval.

65. We reject Sprint's proposal that any exogenous cost changes should be limited by applying the ratio of BDS revenues to total enterprise revenues. Sprint does not define ''total enterprise revenues'' or explain why it would result in a more relevant comparison to BDS revenues than using total regulated

revenues, and we find it too expansive for use here. The exogenous costs being allocated are those associated with regulated services as determined by the part 64 allocation rules for assigning costs associated with non-regulated activities. Thus, we find that regulated BDS revenues compared to all regulated revenues and related support receipts is the most relevant relationship to allocate a portion of exogenous costs related to regulated services to BDS.

66. Finally, we will not require electing carriers to incur the costs of filing a short form tariff review plan as price cap carriers are required to do. In recent years, the Bureau has waived the requirement that price cap LECs file the short form, finding that it would provide little value to the Commission, industry, and consumers. We find that the short form tariff review plan would also provide little value to the Commission, industry, and consumers in conjunction with incentive regulation for electing carriers. We accordingly do not require its filing.

6. Low-end Adjustment

67. We adopt the low-end adjustment mechanism proposed in the *NPRM* to provide an appropriate backstop to ensure that electing carriers are not subject to protracted periods of low earnings. A below-normal rate of return over a prolonged period could threaten a carrier's ability to raise the capital necessary to provide modern, efficient services to customers. The low-end adjustment mechanism will permit a one-time adjustment to a single year's BDS rates to avoid back-to-back annual earnings below a set benchmark. This course should allow electing carriers to meet their existing obligations to debtholders and attract sufficient capital while continuing to provide BDS.

68. We reject Sprint's argument that any low-end adjustment should be allowed only if a sharing mechanism is adopted for a carrier's earnings. A sharing mechanism is a process that allocates a portion of a carrier's excess earnings under price cap regulation to the consumer through a one-time reduction in a carrier's price cap index. The Commission eliminated the sharing mechanism for price cap carriers in 1997. There is no causal link between the low-end adjustment mechanism and earnings sharing, and the two have not previously been tied together in other incentive regulation programs. The *BDS Order* allowed a low-end adjustment without a sharing mechanism and Sprint provides no convincing basis for diverging from that approach.

69. We use 100 basis points below the authorized rate of return for rate-of-return carriers as the benchmark for establishing the low-end adjustment as we did in the *BDS Order.* This approach will approximate the transition to the authorized rate of return of 9.75%. A carrier asserting a claim for a low-end adjustment bears the burden of showing that its return is below the prescribed benchmark and that the revised rate(s) are consistent with the benchmark.

70. Finally, as the Commission proposed in the *NPRM,* electing carriers that exercise downward pricing flexibility (for example, by entering into a contract tariff with a customer), or use generally accepted accounting principles (GAAP) rather than the part 32 Uniform System of Accounts, will be ineligible for a low-end adjustment. No party has opposed this limitation to the availability of the low-end adjustment mechanism. This limitation is consistent with that imposed in the *BDS Order,* and we see no reason to diverge from that approach here.

7. Pricing Flexibility for Lower Capacity TDM Transport and End User Channel Termination Services

71. We adopt the proposal in the *NPRM* to grant pricing flexibility to electing carriers for their lower capacity TDM transport and end user channel termination services under incentive regulation similar to the pricing flexibility the Commission granted to price cap carriers' lower capacity TDM end user channel terminations in areas deemed non-competitive. We agree with commenters that permitting electing carriers to offer contract tariff pricing and volume and term discounts will benefit both carriers and customers and will promote competition in electing carriers' BDS markets. Requiring that electing carriers also maintain generally available tariff rates for their lower capacity TDM transport and end user channel termination services will ensure that the rates of customers that do not negotiate contract-based or term and volume discounted rates for such services will continue to be just and reasonable. Additionally, we condition this grant of pricing flexibility on the requirement that electing carriers remove contract tariff demand from the relevant incentive regulation basket for purposes of determining their price cap indexes and actual price indexes, which will ensure that those customers that do not negotiate contract tariffs will not cross-subsidize customers that do.

C. Removal of Ex Ante Pricing Regulation of Lower Capacity TDM End User Channel Termination Services in Areas Deemed Competitive

72. As part of our framework for moving electing carriers to less intrusive pricing regulation of their BDS offerings, we adopt a competitive market test to identify those areas served by electing carriers where competition or potential competition for lower speed (DS3 or less) TDM end user channel termination services justifies removing ex ante pricing regulation for those services. In adopting a competitive market test for electing carriers, we are guided by the Commission's previous work in developing a competitive market test for price cap carriers' BDS offerings. At the same time, we are persuaded by commenters that argue that the competitive market test should rely on evidence of competition in the study areas served by electing carriers.

73. We adopt a competitive market test for electing carriers that is based on a modified version of the second prong of the *BDS Order* competitive market test, which uses publicly available Form 477 data to measure whether a cable operator offers a minimum of 10/1 Mbps in 75% of census blocks in a study area served by a price cap provider. We will apply this test in electing carriers' study areas, and in those study areas deemed competitive by the competitive market test, we remove ex ante pricing regulation of lower capacity TDM end user channel terminations.

74. We are also constrained in the development of a competitive market test by the limited availability of data in the record regarding competition for BDS services in the study areas served by eligible rate-of-return carriers. We decline, however, to adopt any of the options we proposed in the *NPRM* for a competitive market test that would require a new data collection. Commenters strongly oppose a new information collection, arguing it would be burdensome and unnecessary. We agree. A new information collection for electing carriers would be especially burdensome given their relatively smaller size. The Commission similarly declined to require a new data collection even for larger price cap carriers in the *BDS Order,* as part of deciding to update the price cap competitive market test results, finding that the burdens would outweigh the benefits, and the burden of collecting the information would be considerable. Additionally, the burdens associated with an information collection could reduce incentives for eligible carriers to elect incentive regulation, counter to

our goals. A simple, administrable test will ensure more resources are available for competition and deployment in electing carriers' study areas.

75. In the *NPRM,* we sought comment on whether to include lower capacity TDM transport services in the competitive market test. Given the lack of data in our record, we find that including such transport services would be unworkable at this time. We therefore decline to adopt a competitive market test for lower capacity TDM transport in electing carriers' study areas.

1. Criteria for a Competitive Market Test

76. In this section, we address appropriate criteria for a competitive market test for electing carriers' lower speed TDM end user channel termination services, including the appropriate product market, number of competitors in a market, and geographic market.

77. *Product market.* When defining a product market, to ensure our action affects an appropriate group of services, we look to which services are sufficiently similar to reasonably be considered substitutes. We find the Commission's analysis of the relevant market in the *BDS Order* to be applicable to the current situation, and, therefore find the relevant product market includes circuit- and packet-based business data services, legacy hybrid-fiber-coaxial, and copper. For the same reason, we find that the product market also includes unbundled network elements, dark fiber, and fixed wireless services and facilities used to provision BDS. These services play competitive roles in BDS markets. While the Commission did not find best-efforts services to be close substitutes for all types of BDS in the *BDS Order,* we acknowledge here as the Commission did there that they nonetheless place a degree of competitive pressure on BDS suppliers, particularly for lower capacity services. Further, we believe a best-efforts supplier with its own ubiquitous wireline network has strong incentives to supply BDS to locations where it currently does not, and all the more so to the extent that an existing supplier is charging supra-competitive prices. We also continue to expect that suppliers exercising any short-term market power generally will be constrained by supply-side substitution over the medium term (3–5 years) in locations where other providers, such as cable companies, offer best-efforts or other telecommunications services over their own facilities. We therefore find that the product market analysis that the Commission conducted for price cap areas in the *BDS Order* applies equally to electing carrier areas.

78. *Competition Within a Study Area.* We must also determine the appropriate level of competition for any competitive market test. The Commission, in the *BDS Order* determined that a ''combination of either one competitive provider with a network within a half mile from a location served by an incumbent LEC or a cable operator's facilities in the same census block as a location with demand will provide competitive restraint'' more effectively than legacy regulation. The Commission decided that a ''nearby'' BDS competitor provides sufficient competition after analyzing three findings: (1) The geographic scope within which a likely BDS provider can realistically compete with an incumbent LEC; (2) a finding that one competitor in addition to the incumbent LEC provides a reasonable degree of competition; and, (3) the benefits of competition outweigh the potential unintended costs of regulation.

79. We do not have data showing where there is a competitive provider with a network half a mile from a location served by carriers eligible to elect the lighter touch regulatory framework we adopt today. We do, however, have Form 477 data which is organized on a census block-level. We can therefore identify the census blocks served by an electing carrier where cable broadband services are also deployed. We find it appropriate to use cable broadband in the census blocks that comprise the electing carrier's study area as a proxy for competition because, as the Commission previously determined, ''cable companies have focused investment on building fiber networks for higher-bandwidth Ethernet services, which is enabling them to overcome limitations of traditional coaxial-based cable systems that cannot meet higher bandwidth demand.'' Cable providers have shifted to offering ''higher (and more competitive) bandwidths. At the same time, cable operators' best efforts (and Ethernet over Hybrid Fiber-coaxial (EoHFC)) services continue to compete effectively against incumbent LECs' lower speed TDM services. The Commission also found that because cable operators have ''aggressive[ly] deploy[ed]'' it was ''highly likely the cable-only measure found in the Form 477 data will capture the vast bulk of additional deployments; it is likely that most non-cable competitive extension of business data services networks will occur where cable is also deploying or has already deployed.'' This rationale is equally applicable to electing carriers' provision of BDS in their study areas.

80. As the Commission found in the *BDS Order,* and as the Eighth Circuit Court affirmed, a single wireline competitor provides a substantial competitive effect by disciplining rates, terms, and conditions to just and reasonable levels. In industries with large sunk costs, such as wireline providers, the largest impact occurs with the entry of a second provider, with added benefits from additional competitors declining thereafter. This is because the presence of a nearby provider is likely to prevent or mitigate substantial abuse of market power, either through lack of innovation or high prices. This finding is not challenged in the record. Consistent with the analysis in the *BDS Order,* we find that the effect of a single BDS competitor is sufficient to limit anticompetitive behavior, and that the presence of a cable network offering a minimum of 10/1 Mbps broadband service in 75% of the census blocks in a study area is sufficient to deem a study area competitive for the purposes of the competitive market test for electing carriers.

81. *Geographic Market.* We find that an electing carrier's individual study area is the appropriate geographic market measure for the competitive market test because it is administratively feasible but is granular enough to capture reasonably similar competitive conditions. A study area is a geographic segment of a rate-of-return incumbent LEC's telephone operations that generally corresponds to the carrier's entire service territory within a state. Incumbent LECs determine eligibility for high-cost universal service support at the study area level, perform jurisdictional separations at the study area level and generally tariff their rates at the study area level. As a result, the Commission and the industry have substantial experience administering rules on a study area basis. What's more, a study area is granular enough to capture reasonably similar competitive conditions. Rate-of-return study areas vary in size but are significantly smaller than metropolitan statistical areas and generally smaller than counties and are therefore sufficiently granular to assess competitive conditions. Given their mostly rural nature, the average size of a rate-of-return study area is 992.82 square miles, compared to the average county, 1,180.40 square miles, and the average metropolitan statistical area, 2,720.95 square miles. Adopting study areas as the geographic market also avoids risk of competitive overlap by, for example, a rate-of-return study area

crossing county lines that are deemed competitive and noncompetitive.

82. We also reject other proposals in the record, including suggestions to build a competitive market test for electing carriers that uses counties or census blocks as the relevant geographic market. We agree with Smithville that the selection of counties for use in the price cap competitive market test was ''a well-documented effective approach for competitive area evaluation for larger price cap carriers that operate service areas dimensioned at statewide levels but does not work well for carriers that have sub-county service areas.'' To the extent such proposals seek to assess competition in electing carriers' study areas based on competition elsewhere within the county, we reject that proposition—any competitive market test must be based on the competitive conditions each carrier faces, not those another carrier faces somewhere else in a county. Additionally, some study areas cross county lines. Using counties would potentially require us to subdivide study areas along county boundaries, which would involve unreasonable administrative burdens and could lead to varying treatment of a single study area depending on the counties in which it is located.

83. In response to the *2017 Public Notice,* Smithville argues that using census blocks to assess competition in electing carriers' study areas would be a better approach. We decline to adopt census blocks as a geographic measure for our competitive market test. The Commission previously found that census blocks or census tracts are too numerous to efficiently administer. Additionally, they can be impacted by changes in demand as small as a single building and could lead to a patchwork of different regulations that vary from census block-to-census block, or even building-to-building. Study areas, on the other hand, are more administratively feasible because there are a limited number of study areas eligible to elect our BDS regulatory framework.

2. Competitive Market Test Methodology

84. In this section, we describe the specific structure of the electing carriers' competitive market test we adopt for electing carriers' lower capacity TDM end user channel termination services. In determining whether electing carriers with lower capacity TDM-based end user channel termination services (at a DS3 or below), face sufficient competition to allow competition, rather than ex ante pricing regulation, to ensure rates are just and reasonable, we adopt a competitive market test modeled on a modified version of the second prong of the existing price cap competitive market test using data from census blocks served by electing carriers. The second prong of the price cap competitive market test uses Form 477 data to measure whether a cable operator offers a minimum of 10/1 Mbps broadband service in 75% of the census blocks in the price-cap service areas within a county. Having decided that we will use only existing data to gauge competition in the study areas served by an electing carrier, for purposes of the electing carriers' competitive market test, if a cable operator or other competitive provider offers a minimum of 10/1 Mbps broadband service in 75% of the census blocks in an electing carrier's study area, we will deem the study area competitive.

85. We set 10 Mbps downstream and 1 Mbps upstream as minimum thresholds for a cable operator's service to be included in the competitive market test. Setting a minimum threshold ensures that the networks that supply these services are reasonable proxies for the type of network facilities needed to deliver BDS. As we observed in the *BDS Order,* ''when a cable provider is capable of providing internet broadband service within any census block, then generally they have the incentive to make the incremental investment necessary to serve locations with BDS demand in that census block, especially over the medium term.'' Cable operators are continuing to invest in and upgrade the capacities of their networks, which give us reasonable assurance that these networks will be capable of providing BDS competition over the short- to medium-term. Additionally, the 10/1 Mbps threshold is also the threshold that rate-of-return carriers accepting fixed A–CAM support are required to offer to funded locations.

86. Using Form 477 data for electing carriers' study areas is administratively simple for both the Commission and electing carriers. We already regularly require providers to update their Form 477 submissions, so we do not need to undertake a new data collection. Another benefit of the new electing carriers' competitive market test is the incorporation of the 78 rate-of-return-only counties that cannot be analyzed using the price cap competitive market test. Had we decided to allow electing carriers to opt-in to the price cap competitive market test, the competitive status of electing carriers serving any of those 78 rate-of-return-only counties would have been unresolved because they were not included in the original analysis.

87. We recognize that under the electing carriers' competitive market test, a relatively small percentage of electing carriers' study areas will be deemed competitive at this time. The current result of the competitive market test we adopt today for rate-of-return carriers receiving fixed support is consistent with the rural nature and the nascent deployment of cable in many eligible carriers' study areas. We expect the number of electing carriers' study areas deemed competitive by the competitive market test will increase as competition grows and cable companies expand their reach. This administratively simple competitive market test ensures that all carriers are included in the electing carriers' competitive market test and will have an opportunity to be deregulated as competition develops.

3. Declining To Use the Results of the Price Cap Competitive Market Test

88. Notwithstanding Petitioners' and some other commenters' request that we use the results of the price cap competitive market test adopted by the Commission in the *BDS Order* to determine where ex ante pricing regulation should be removed from electing carriers' lower capacity TDM end user channel termination services, we decline to do so. In arguing that the Commission should use the *BDS Order* price cap competitive market test for electing rate-of-return carriers, some commenters claim ''the same marketplace analyses the Commission undertook for price cap carriers apply equally to BDS provided by model-based rate-of-return carriers.'' While using the results of the existing competitive market test to determine whether an area served by an electing carrier is competitive would be fast, no data in the record support that approach. In fact, the result of the competitive market test we adopt for electing carriers, which results in very few study areas being deemed competitive, underscores our finding that application of the price cap competitive market test results to electing carriers—which would result in far more electing carriers' study areas being deemed competitive—would not accurately measure competition in the geographic areas served by rate-of-return carriers receiving fixed support.

89. The *BDS Order* relied upon the largest information collection in the history of the Commission to analyze and determine the competitive nature of price cap carrier study areas. Even if a county contained both price cap and rate-of-return study areas, the Commission's analysis only included

the price cap study area. The Commission created the price cap competitive market test after a thorough review of the *2015 Collection,* Form 477 data, and established the specific test metrics based upon an informed knowledge of the level of competition that existed and was necessary to protect consumers in the absence of regulation. Petitioners, however, offer no data showing the extent of BDS competition in areas served by rate-of-return carriers that receive fixed support. Instead, they argue that the level of competition on a county-by-county basis for price cap carriers' lower capacity TDM-based BDS offerings is comparable to the level of competition for lower capacity TDM-based BDS offerings of rate-of-return carriers that receive fixed support. The principal support Petitioners offer for this assertion is a study that purports to demonstrate that price cap rural areas immediately proximate to certain A–CAM study areas exhibit sufficiently similar characteristics that we should include A–CAM study areas in the same competitive market test that we used for price cap carriers. We find the Petitioners' study unpersuasive.

90. The study suffers from several methodological defects. First, the study is not based on a representative sample of electing carriers' study areas. Instead, it relies solely on Consolidated Communications' rate-of-return study areas. We are doubtful, for example, that the Consolidated study areas are a good proxy for the Alaska rate-of-return carriers that are eligible to elect our new regulatory framework. Second, two of the study's principal metrics (population and housing density) are unlikely to be the critical drivers of competitive BDS deployment.

91. Additionally, in some instances the study compares non-urbanized price cap areas with areas served by rate-of-return carriers that receive fixed support that include urbanized areas. These areas are not comparable. At least some of the counties included in the study's comparison were deemed non-competitive by the price cap competitive market test. Inclusion in the price cap competitive market test of A–CAM areas in these instances would have no effect on the regulatory status of these study areas. The study does not directly compare study areas with high cable presence with competitive counties and study areas with low cable presence with non-competitive counties, as would be expected if the study was trying to show similarities.

92. The study also compares the percentage of census blocks with cable broadband availability between price cap and nearby A–CAM areas and claims that, on average, ''the percentage of Census blocks in Consolidated tracts with cable service (21%) is similar to the surrounding rural price cap tracts (28%).'' But the study's use of average percentages obscures wide variations in percentage cable broadband deployment. For price cap study areas, cable broadband deployment was found to be 3.88% to 68.68%. For A–CAM study areas, broadband deployment in areas varied from 0.00% to 89.60%. The study further attempts to compare price cap areas with nearby A–CAM areas by claiming that the differences in the percentage of cable broadband deployment between the two sets of areas are small, ''only 15 percentage points.'' This is not small.

93. The study also does not state whether it limited its analysis of cable deployment in rate-of-return study areas to those deployments offering a minimum of 10/1 Mbps. The study may have included residential cable deployments at speeds lower than the threshold the Commission established for the price cap competitive market test. Any such deployments should not be included in a comparison of price cap and nearby A–CAM areas.

94. We are also unable to rely on the conclusions in the Petitioners' study since it is based on a misplaced reliance on inaccuracies inherent in the structure of the price cap competitive market test—inaccuracies the Commission acknowledged when it adopted the competitive market test in the *BDS Order.* In the *BDS Order,* the Commission conceded that its county-based competitive market test unavoidably included a relatively small number of areas that would be inappropriately regulated or inappropriately deregulated. It explained that the only competitive market test that would be free of such inaccuracies would be one that would be run at a building level—with over a million buildings with BDS demand, an administratively unworkable option. It adopted percentage thresholds for both prongs of the competitive market test and employed certain statistical tools to ensure those thresholds were set at levels that would minimize inaccuracies. It further reasoned that competitive options would become available for many of these areas in the short- to medium-term given the dynamic nature of the BDS marketplace.

95. The Petitioners' study attempts to compare A–CAM areas to some of the very price cap areas most likely to contain these inaccuracies and to argue that these inaccuracies justify inclusion of rural A–CAM areas in the price cap competitive market test. Extrapolating from the characterization of peripheral parts of price cap study areas to A–CAM areas is likely to exacerbate these inaccuracies. And unnecessarily so, since the competitive market test we adopt offers a simple way of estimating competition in A–CAM study areas. Further, these are areas the study concedes typically lack even the most basic evidence of BDS competition. Areas where there is little evidence of competition are also likely areas where there is little to no demand for BDS.

96. Given these methodological and conceptual flaws, we conclude that the Petitioners' study fails to establish the comparability of price cap and nearby A–CAM areas or provide a reasonable basis on which to include A–CAM areas in the price cap competitive market test. We therefore decline to apply the results of the price cap competitive market test to electing carriers' serving areas.

4. Updating Competitive Market Test Results

97. Consistent with the *BDS Order* competitive market test, we eliminate ex ante pricing regulation of circuit-based end user channel terminations at or below a DS3 level in study areas deemed competitive by the electing carriers' competitive market test. We direct the Bureau to release a Public Notice that lists the results of the competitive market test, and to provide the information on the Commission's website. We will re-run the electing carriers' competitive market test every three years to assess whether any additional electing carriers' study areas meet the 75% threshold. This will identify any additional electing carriers' study areas that should be deemed competitive. We believe a three-year timeframe balances the need to ensure the electing carriers' competitive market test remains accurate and the Commission's desire to avoid disrupting contracts and burdening carriers with overly frequent updates. The sunk and irreversible cost of providing business data services and deploying a network represents the biggest barrier to entry for providers. Once the barrier is overcome, the marginal cost of operating is low, so it is unlikely that competition will exit. Thus, electing carriers' study areas deemed competitive will not be reassessed.

98. To avoid confusion from both carriers and businesses stemming from updates from the price cap competitive market test and the electing carriers competitive market test, we direct the Wireline Competition Bureau to re-run the three-year updates for both the *BDS Order* price cap competitive market test,

and the electing carriers competitive market test concurrently. Thus, the electing carriers' competitive market test will initially be re-run in 2020, at the same time as the *BDS Order* price cap competitive market test, to align the tests' timing. The re-running of these tests will coincide with the initial running of the test for carriers electing to convert to incentive regulation as of July 1, 2020. After that, both tests will be re-run every three years. This approach will make it easier for stakeholders to determine the regulatory status of price cap and rate-of-return BDS providers since the results will be published all at once and ease the burden on Commission resources. The Bureau shall release a Public Notice that lists newly competitive counties (for price cap areas) and study areas (for electing carriers' study areas) and shall also provide this information on the Commission's website. As with the *BDS Order* competitive market test, parties may challenge the results of the electing carriers' competitive market test by filing petitions for reconsideration or by seeking full Commission review through an application for review.

5. Removal of Ex Ante Pricing Regulation of Electing Carriers' Lower Capacity TDM End User Channel Termination Services

99. We remove ex ante pricing regulation from electing carriers' lower capacity TDM end user channel termination services offered in study areas that are deemed competitive by the electing carriers' competitive market test. Such services are presumed to be subject to sufficient competitive pressure that removing this layer of regulation will not result in excessive rates. Removing this layer of regulation will reduce unnecessary regulatory burdens and will enable these carriers to contribute to BDS competition in their markets. Such services in such areas will be relieved of ex ante pricing regulation and detariffed in the same manner and with the same transition provisions as we adopt today for electing carriers' packet-based and higher capacity TDM BDS. As with packet-based and higher capacity TDM BDS, we continue to maintain our oversight over these TDM services pursuant to sections 201, 202, and 208 of the Act to ensure rates for these services remain just and reasonable. Lower capacity TDM transport and end user channel termination services in areas deemed noncompetitive by the competitive market test will continue to be subject to the incentive regulation and pricing flexibility we adopt today.

D. Ending Ex Ante Pricing Regulation for Electing Carriers' Packet-Based and Higher Capacity TDM BDS Offerings

100. We conclude that electing carriers' packet-based and higher capacity TDM-based BDS offerings above a DS3 bandwidth level (which includes both higher capacity TDM end user channel terminations and higher capacity TDM transport) should not be subject to ex ante pricing regulation and direct electing carriers to detariff these services following a transition period. Our decision to end ex ante pricing regulation for electing carriers' packet-based and higher capacity TDM BDS offerings will facilitate competition for and deployment of these packet-based and higher capacity TDM services and is consistent with the Commission's statutory obligation to ensure that rates are just and reasonable.

101. In the *BDS Order,* after reviewing an extensive record, the Commission found that in price cap markets nationwide there was no compelling evidence of incumbent LEC market power for packet-based and higher capacity circuit-based BDS. Specifically, the record demonstrated that demand for these services was increasing, prices were declining, and competitive investment was growing significantly. The Commission also determined that the price cap BDS market for packet-based and higher capacity TDM-based offerings had the characteristics of a bidding market such that even competitors that did not have pre-existing facilities to serve a potential customer were nonetheless capable and willing to bid on requests for proposals by customers, particularly those with higher bandwidth needs.

102. The record in this proceeding lacks the comprehensive and voluminous data collection available to the Commission in the price cap BDS proceeding. But, we recognize that re-creating such a similarly detailed data collection would have been more difficult for rate-of-return carriers that receive fixed support, because they have vastly fewer resources to produce such information and the benefits of such a data collection would likely be far outweighed by its costs. Instead, we draw parallels where we can from our conclusions in the *BDS Order* to inform our analysis of the record in this proceeding.

103. In the *BDS Order,* the fact that the Commission could not find compelling evidence to suggest market power in packet-based and higher capacity TDM BDS in price cap markets suggests that the same circumstances could exist in electing carriers' BDS markets. A variety of companies are investing in next generation networks, not legacy networks, to compete via different technologies, which is consistent with a lack of market power. Additionally, demand for high speed BDS exists nationwide. Customer requests for proposals (RFPs) are not restricted to price cap areas but seek proposals for service wherever they have demand. Thus, the characteristics of a bidding market that exist in price cap areas are also likely to be present in areas served by rate-of-return carriers that receive fixed support.

104. Relatedly, there is evidence that the deployment of fiber and sales of packet-based BDS such as Ethernet continue to grow substantially and pervasively. Analysts report that, for the first time, fiber-connected commercial building penetration exceeded 50% in 2017—the availability of optical fiber connectivity to large and medium size commercial buildings in the U.S. increased from 49.6% in 2016 to 54.8% in 2017. In 2018, 98% of our nation's elementary and secondary school districts are served by fiber optic or other high speed connections. An analyst's equipment revenue forecast for 2017 to 2022 projects that Ethernet access and aggregation will grow 9% annually. The record in this proceeding shows that these growth trends are also apparent in A–CAM carriers' served areas. For example, TDS Telecom, Great Plains, and Consolidated report a four-year average annual growth rate in Ethernet sales from December 2014 to 2017 of 10.7%, 15.4%, and 38.3%, respectively. Over the same periods, these carriers report declines in legacy BDS in study areas that were similar to declines in legacy BDS in price cap areas. At the same time, consistent with the Commission's findings in the *BDS Order,* analysts report actual and forecasted growth in cable revenues, deployment and market share for small to national enterprise customers that are significantly contributing to overall growth and competition in the BDS market.

105. There are other reasons to believe market power for packet-based and higher capacity TDM business data services is not present in areas served by rate-of-return carriers that receive fixed support. The record shows that large customers have significant bargaining leverage over relatively smaller rate-of-return carriers that receive fixed support, limiting what the carriers may negotiate when bidding on contracts. For example, ex ante pricing regulation is unnecessary to protect large and powerful entities, such as wireless

carriers, that purchase large quantities of BDS.

106. The Commission has repeatedly emphasized its preference for relying on competition instead of regulation. We seek to minimize the burdens of regulation while ensuring that rates and practices remain just and reasonable. The Commission previously identified packet-based services as the ''future of business data services'' that are also ''readily scalable.'' While legacy TDM BDS is declining, carriers, including rate-of-return carriers that receive fixed support, are generally investing aggressively to deploy high speed networks in their study areas. The record shows growing demand for packet-based and higher capacity TDM BDS consistent with the Commission's findings in the *BDS Order,* and we find the record persuasive.

107. Removing ex ante pricing regulation for packet-based and higher capacity TDM services, will also encourage innovation. As the Commission has previously found, the potential unintended costs of regulation are far greater for new services. The Commission has concluded that ex ante pricing regulation for these services should not be imposed even with ''insufficiently robust competition'' because it would be difficult to administer such complex regulations. We are keenly aware of the risk that heavy-handed regulation could discourage competitive investment which would have long-term negative consequences on competitive deployment over time.

108. These considerations also apply to the study areas of rate-of-return carriers that receive fixed support. Innovation does not stop at the borders of a price cap carrier's study areas. The record shows that all providers are accelerating their deployment of next generation packet-based services in response to customer demand. We find that the sensitivity of new and growing services to imprecise regulation, particularly rate regulation, is a factor in areas served by rate-of-return carriers receiving fixed support as well as areas served by price cap carriers. For that reason, consistent with our decision in the *BDS Order,* we find that the costs and potential risks of ex ante pricing regulation for packet-based and higher capacity TDM business data services exceed the benefits and we therefore eliminate such regulation. This result provides regulatory parity between electing carriers and price cap carriers in their provision of packet-based and higher capacity TDM business data services which will benefit consumers.

109. We eliminate ex ante pricing regulation on the provision of these services by electing carriers to hasten deployment of advanced services and because competition and the size of purchasers of these services is sufficient to protect consumers. We affirm, however, that the Commission retains authority under sections 201, 202, and 208 of the Act to ensure that packet-based and higher capacity TDM BDS rates and practices are just, reasonable, and not unreasonably discriminatory. The availability of the protections of sections 201 and 202, and the importance of the formal fast-track complaint process of section 208, will provide sufficient protection against unreasonable rates and practices in this increasingly competitive market.

E. Implementation Issues

110. We take a series of additional steps to ensure electing carriers will be able fully to implement the BDS regulatory framework we adopt today, including adopting deadlines for implementing incentive regulation, forbearing from cost assignment and jurisdictional separations rules, forbearing from § 54.1305 reporting requirements, forbearing from section 203 tariffing requirements, allowing electing carriers to elect to use GAAP accounting instead of part 32 accounting, and adopting certain transitional timeframes to facilitate the detariffing of electing carriers' packet-based and higher capacity TDM offerings.

1. Effective Date of Elections

111. We adopt the following requirements to implement voluntary incentive regulation for electing carriers. We adopt the proposal in the *NPRM* to make incentive regulation for electing carriers effective as of July 1, 2019 and add a second election date option for carriers that will be effective July 1, 2020. We agree with Petitioners that a January 1, 2019 effective date would be the least burdensome for carriers because cost studies are performed on a calendar year basis and ''would benefit customers and competition alike.'' However, a January 1, 2019 effective date is not practicable because the rules adopted in this Order contain new or modified information collection requirements triggering Paperwork Reduction Act review by the Office of Management and Budget (OMB), a process which takes approximately five months to complete. A January 1, 2019 effective date would also provide insufficient time for electing carriers in the traffic-sensitive NECA pool to remove their BDS offerings from the pool. Our rules require that annual access charge tariff filings be filed with a scheduled effective date of July 1. As such, a July 1 effective date is consistent with current tariffing procedures and will simplify the implementation of the changes adopted in this Order.

112. Similarly, we adopt July 1 as the effective date for any future election. July 1 is the most efficient effective date because allowing carriers accepting future offers of A–CAM support to set their initial rates on another date would add cost and complexity to the process. Petitioners suggest using a January 1 effective date but doing so would require an electing carrier to make an additional tariff filing beyond the required July 1 annual filing. NECA, and the Commission, would have to undertake their associated review of the tariff, and NECA would be required to conduct its mid-year cost studies for the remaining pool members, calculate support for existing members, reband, and undertake other steps it would not do otherwise. Additionally, a January 1 effective date would be based on the previous year's cost study. Relying on year-old data would undermine the validity of the tariff filings. It is possible that an electing carrier could prepare a cost study for only a portion of the current year and multiply the results of the study to estimate a year's data, but that approach creates additional burdens for carriers, complicates NECA's implementation, and would still not represent a fully accurate picture of the carrier's costs and demand. When considered together, we find that using July 1 as a deadline for setting initial rates in any future A–CAM offer is the most efficient and feasible approach.

113. Electing carriers currently in the NECA pool are required to notify NECA by March 1, 2019 that they will not participate in the upcoming NECA traffic-sensitive tariff for their BDS offerings consistent with § 69.3 of our rules. Similarly, NECA pool carriers that elect to convert to incentive regulation effective July 1, 2020, must notify NECA that they will not participate in the NECA traffic-sensitive pool for BDS offerings by March 1, 2020. NECA pool carriers that accept future offers of A–CAM support and elect the incentive regulation framework we adopt today or otherwise transition away from legacy support mechanisms must notify NECA by March 1 of their election year consistent with § 69.3. The Commission proposed requiring electing carriers to provide the Bureau with 120 days' notice of their election to facilitate implementation of the revised tariffs but we now agree with Petitioners that

opposed granting so much advanced notice. Accordingly, we require electing carriers electing to convert to incentive regulation effective July 1, 2019 to provide the Bureau with notice of their election by May 1, 2019. Carriers that elect our second incentive regulation option date, effective July 1, 2020, must notify the Bureau by May 1, 2020. Carriers that accept future offers of A–CAM support and carriers that otherwise transition away from legacy support mechanisms must provide notice of their election or transition to the Bureau by May 1 of the year of election or transition. Electing carriers that choose to update their separations category relationships pursuant to this Order shall include information to that effect in these notices to NECA and the Bureau.

2. Implementing Forbearance

114. As part of implementing our new regulatory framework for electing carriers' BDS, we grant forbearance from certain existing Commission rules and statutory requirements, including our tariffing obligations for electing carriers' packet-based and higher capacity (*i.e.,* above a DS3 bandwidth level) TDM business data services and lower capacity TDM end user channel termination services in study areas deemed competitive; our Cost Assignment Rules; and our § 54.1305 reporting requirements, for electing carriers' lower capacity (*i.e.,* at or below a DS3 bandwidth level) TDM transport and end user channel termination services. Forbearance will be effective July 1, 2019 for carriers electing incentive regulation of their business data services as of July 1, 2019, and July 1, 2020 for carrier's electing incentive regulation as of July 1, 2020. Section 10 of the Act requires that the Commission forbear from applying any provision of the Act, or any of the Commission's regulations, if the Commission determines that: (1) Enforcement of the provision or regulation is not necessary to ensure that a telecommunications carrier's ''charges, practices, classifications or regulations'' are ''just and reasonable and are not unjustly or unreasonably discriminatory,'' (2) enforcement of the provision or regulation is ''not necessary for the protection of consumers,'' and (3) forbearance is consistent with the public interest. In making the public interest determination, the Commission must also consider, pursuant to section 10(b), ''whether forbearance from enforcing the provision or regulation will promote competitive market conditions.'' We find that granting forbearance in these instances will meet the statutory forbearance requirements and will facilitate electing carriers' transition to incentive regulation, putting them on a footing similar to that of price cap carriers in their provision of BDS.

a. Forbearance from Tariffing Requirements for Packet-Based and Higher Capacity TDM Services and Lower Capacity TDM End User Channel Terminations in Study Areas Deemed Competitive

115. In order to effectuate our light-touch regulatory framework for packet-based and higher capacity TDM business data services above the DS3 bandwidth level, we grant forbearance, pursuant to section 10 of the Act, from section 203 tariffing requirements for these services offered by electing carriers. In addition, we grant forbearance for lower capacity TDM end user channel terminations offered in electing carriers' study areas deemed competitive by the competitive market test. Forbearance from section 203 tariffing obligations is warranted under section 10 of the Act, is consistent with our finding that electing carriers lack market power in packet-based and higher capacity TDM business data services, and end user channel terminations in study areas deemed competitive by the competitive market test, and will enhance competition and deployment of these next generation services.

116. Forbearance from section 203 tariffing requirements for packet-based and higher capacity TDM BDS offerings above the DS3 bandwidth level, and for lower capacity TDM end user channel terminations in study areas deemed competitive by the competitive market test, satisfies all three prongs of the forbearance analysis. First, pursuant to section 10(a)(1), we conclude in the context of growing demand for high speed services detariffing these services will promote competitive market conditions, which will result in lower prices and better services, thus ensuring that electing carriers' relevant charges, practices, classifications, and regulations are just and reasonable and not unreasonably discriminatory. Similarly, the existence of demonstrated competition for end user channel terminations in markets deemed competitive will restrain anticompetitive behavior, lower prices, increase innovation, and protect consumers from charges, practices, classifications, and regulations that are not just and reasonable and unreasonably discriminatory. Competition will serve to limit electing carriers' behavior. Absent forbearance, as commenters argue, Commission regulation could have the inverse effect and harm competition and network deployment.

117. We also conclude that, pursuant to section 10(a)(2), enforcement of our tariffing requirements for these services is ''not necessary for the protection of consumers.'' Indeed, by encouraging competition, granting forbearance from tariffing of these services will benefit consumers by increasing deployment and lowering cost. Competition among carriers and the roll-out of next generation packet-based and higher capacity TDM circuit-based BDS will lower prices and provide new services. In study areas deemed competitive, competition will also protect consumers. The Commission has previously found that tariffs were originally required to protect consumers but they are unnecessary if a provider faces competitive pressures. If an electing carrier harms a consumer the consumer can switch to other competitors present in the study area. This threat protects consumers. Of course, in the event that there is risk of consumer harm, sections 201, 202, and 208 remain applicable to enforce the Commission's rules and protect consumers' welfare. Based on competition in the market and our statutory mandate as a backstop, we find that section 203 is not necessary to protect consumers in electing carriers' packet-based and higher capacity TDM markets, and for lower capacity TDM end user channel termination in study areas deemed competitive by the electing carriers' competitive market test.

118. Third, we conclude that forbearance from these statutory and regulatory requirements is in the public interest. Forbearance from the tariffing requirement for these packet-based and higher capacity TDM services and for lower capacity TDM end user channel terminations in markets deemed competitive will promote competition, reduce compliance costs, increase investment and innovation, and facilitate the technology transitions. We therefore find that application of section 203 is not necessary under sections 10(a)(1) and 10(a)(2), and is in the public interest, consistent with sections 10(a)(3) and 10(b).

b. Cost Assignment Rules Forbearance

119. In light of our decision to relieve electing carriers of the obligation to conduct cost studies, we grant electing carriers forbearance, pursuant to section 10 of the Act, from the Commission's Cost Assignment Rules for their BDS services, although we grant forbearance for their lower capacity (*i.e.,* at or below

a DS3 bandwidth level) TDM transport and end user channel termination services after they have set initial rates for those offerings. Additionally, electing carriers that participate in the NECA pool must conduct cost studies for the calendar year prior to their election and the first half of the year of their election to comply with their pool settlement requirements.

120. *Background.* The Cost Assignment Rules generally require carriers to assign costs to build and maintain the network and revenues from services provided to specific categories. Categories include nonregulated or regulated service, the intrastate or interstate jurisdiction, and specific access services, such as local switching or common line. The Cost Assignment Rules also govern the accounting treatment of transactions between a carrier and its affiliate, such as the sale or transfer of assets between regulated and nonregulated affiliates. In addition, the rules include certain reporting requirements, which depend on the availability of data produced by the Cost Assignment Rules.

121. As part of the regulatory accounting process, carriers first record their costs, including investments and expenses, into various accounts in accordance with the Uniform System of Accounts (USOA) prescribed by part 32 of the Commission's rules. Next, using the Cost Assignment Rules in part 64, carriers directly assign, or allocate if direct assignment is not possible, the costs and revenues associated with their regulated and nonregulated activities. After costs and revenues are divided between those that are regulated and nonregulated, interstate and intrastate costs and revenues are separated as provided in part 36. Federal and state regulatory jurisdictions apply their own ratemaking processes to the amounts assigned to each jurisdiction. Finally, the access charge rules in part 69 require carriers to separate regulated interstate costs into interexchange costs and access costs, and then apportion the latter among access categories or elements.

122. The Commission adopted the Cost Assignment Rules to help ensure that carriers charge just and reasonable rates for the services they provide. The Commission adopted the Cost Assignment Rules prior to 1991 when all incumbent LECs were subject to rate-of-return regulation, so that it could set rates that allowed carriers to recover their costs and earn a specific return on their regulated investment. Subsequently, the Commission moved away from rate-of-return regulation for the larger incumbent LECs. In its place, it adopted price cap regulation, a form of incentive regulation that seeks to ''harness the profit-making incentives common to all businesses to produce a set of outcomes that advance the public interest goals of just, reasonable, and nondiscriminatory rates, as well as a communications system that offers innovative, high quality services.''

123. In 2008, the Commission granted AT&T conditional forbearance from the Cost Assignment Rules. The Commission conditioned the forbearance on, among other things, requiring AT&T to retain part 32 Uniform System of Accounts data and submit a compliance plan describing in detail how it would fulfill its statutory and regulatory requirements. The Commission granted similar conditional forbearance from the Cost Assignment Rules to Verizon and Qwest. Subsequently, Qwest, Verizon, and AT&T obtained conditional forbearance from certain financial reporting requirements that relied on the Cost Assignment Rules. In 2013, the Commission extended the conditional forbearance granted the three carriers to all price cap carriers.

124. In the *Part 32 Order,* 82 FR 20833, May 4, 2017, the Commission terminated the conditions that the Commission placed on a variety of carriers granted forbearance from our Cost Assignment Rules. The Commission noted that forbearance was expressly premised on the continued availability of part 32 accounting data and the filing of compliance plans consistent with that condition. The Commission determined that continuing to maintain these costly requirements on the speculation that at some point the Commission might do something with them failed any cost-benefit analysis.

125. *Discussion.* We find that applying the Cost Assignment Rules to electing carriers is no longer necessary to ensure that charges and practices are just, reasonable, and not unjustly or unreasonably discriminatory; to protect consumers; or to protect the public interest. Much of the reasoning in the Commission's earlier decisions to grant price cap LECs forbearance from the Cost Assignment Rules applies equally to rate-of-return carriers receiving fixed support that elect incentive regulation. With respect to ensuring charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory, as discussed above, the Cost Assignment Rules were developed when the incumbent LECs' interstate rates and many of their intrastate rates were set under rate-based, cost-of-service regulation. Because the incentive regulation we adopt severs for BDS the direct link between regulated costs and prices just as price cap regulation did, a carrier is not able automatically to recoup misallocated nonregulated costs by raising BDS rates, thus reducing incentives to shift nonregulated costs to regulated services. To the extent incentives remain, we find our positive experience with the waivers of the all-or-nothing rule provides confidence that the additional costs of maintaining the Cost Assignment Rules outweighs any possible benefit of maintaining them. There is no reason to impose on electing carriers cost assignment requirements that were ''designed to parallel the level of detail in the cost-of-service calculations that LECs performed to develop their rates for interstate access services.'' Moreover, if the need arises for cost data from electing carriers, we find there are less costly ways to meet that need.

126. With respect to the second prong of the forbearance test, protecting consumers, the Commission adopted the Cost Assignment Rules in part to help protect consumers from improper cross-subsidization of competitive services provided on an integrated basis with noncompetitive services by dominant providers with individual market power. Because the rates for regulated services and the determination of the level of universal service support are no longer tied to accounting costs, electing carriers will have no incentive to shift costs between regulated and nonregulated services, or to services receiving universal service support, thus the consumer protection issues that animate the Cost Assignment Rules are not relevant for electing carriers.

127. We also find that forbearing from the Cost Assignment Rules for electing carriers is in the public interest. Because neither rates nor universal service support will be cost-based for electing carriers, relieving electing carriers of the expense of compliance with the Cost Assignment Rules will allow electing carriers to offer more competitive rates and more innovative service, thus furthering the public interest.

128. Finally, section 10(b) requires us to consider, as part of our analysis of the public interest prong, whether forbearance will promote competitive market conditions. We agree with Petitioners, TDS Telecom and other commenters that contend that forbearance will enhance competition. Eliminating unnecessary regulation will generally reduce electing carriers' costs and, in turn, benefit consumers through lower rates and/or more vibrant

competitive offerings. Because other providers of similar services are not subject to the rules, it also promotes competition by providing a more level playing field. Moreover, as noted above, we find that sufficient protections remain in place to prevent anti-competitive cross-subsidization.

129. We note that there still may be instances in which an electing carrier seeks some other type of relief from the Commission that requires supporting cost assignment data. In such instances, the burden is on the carrier to retain data sufficient to make the required showing to the Commission in support of such a carrier-initiated request.

130. As part of our forbearance from the Cost Assignment Rules, we also forbear from the NECA data reporting requirement in § 54.1305 of our rules and, by extension, from the related requirement to update information shared with NECA. Under the Commission's rules, incumbent LECs are required to report unseparated loop cost data to NECA annually. Price cap carriers and their affiliates have been exempt from this obligation since the Commission adopted the *USF/ICC Transformation Order* and various price cap cost assignment forbearance orders. This reporting requirement depends on the availability of data produced by the Cost Assignment Rules. As part of the forbearance adopted in this Order, we cease to require data that would otherwise be reported as part of a cost study. Retaining this obligation is thus inconsistent with our grant of forbearance and is inconsistent with past price cap carrier forbearance grants. Retaining this obligation would also eliminate one of the core incentives for rate-of-return carriers to elect incentive regulation—cost savings from the elimination of the obligation to undertake cost studies.

131. Granting forbearance from NECA reporting requirements satisfies all three prongs of the forbearance analysis. The NECA data collection requirement is not necessary to ensure that carrier charges and practices are just and reasonable, as evidenced by the fact that price cap carriers have been operating without NECA reporting for nearly six years without issue. While no longer including electing carriers' data in the calculation of the national average cost per loop will affect that calculation, we do not think that any impact it may have outweighs the benefits of removing these reporting obligations. Since the very goal of incentive regulation is to disconnect cost and rates to promote competition in the marketplace, reporting cost data to NECA is also unnecessary to protect consumers. Additionally, because forbearance from enforcing these rules is necessary to obtain the benefit of reducing unnecessary regulatory compliance costs this Order seeks, forbearance is consistent with the public interest. Retaining the data collection and reporting requirements of §§ 54.1305 and 54.1306 would force electing carriers to continue to perform annual cost studies and would thus eliminate one of the chief sources of cost savings of this Order. Forbearing from these requirements will promote competition by allowing these resources to be redirected to increase network investment and to accelerate the technology transition from legacy circuit-based services to packet-based services such as Ethernet.

3. GAAP Accounting

132. We allow electing carriers the option of using generally accepted accounting principles (GAAP) for keeping their accounts. The only commenters that oppose allowing electing carriers to use GAAP accounting incorrectly argue that for electing carriers part 32, cost studies and other protections are necessary because ''these electing carriers would continue to have certain of their interstate services under rate-of-return.'' In fact, as explained by Petitioners, all of the interstate telecommunications services offered by electing carriers will either be (1) subject to incentive regulation, (2) not subject to ex ante pricing regulation, or (3) capped and transitioning downward by the terms of the rate-of-return intercarrier compensation rules. Thus, there is no significant reason to continue to maintain burdensome part 32 accounting for electing carriers.

133. The Commission recently revised its part 32 accounting rules to allow price cap LECs to elect to use GAAP in recording and reporting their financial data, subject to two targeted accounting requirements. We subject electing carriers that choose to use GAAP accounting to the same data provisioning requirements as price cap carriers, including the requirements relating to the calculation of pole attachment rates. Electing carriers may either (a) calculate an Implementation Rate Difference between the attachment rates calculated by the carrier under the Uniform System of Accounts (USOA) and under GAAP as of the last full year preceding the carrier's initial opting-out of part 32 USOA accounting requirements; or (b) comply with GAAP accounting for all purposes other than those associated with setting pole attachment rates while continuing to use the part 32 accounts and procedures necessary to establish and evaluate pole attachment rates. Electing carriers must adjust their annually computed GAAP-based rates by the Implementation Rate Difference for a period of 12 years after the election. This will free electing carriers from having to maintain two sets of books: one for financial reporting purposes consistent with GAAP and one for regulatory reporting purposes consistent with the accounting requirements of part 32.

4. Transitions

134. Consistent with our actions in the *BDS Order,* our detariffing actions in this Order for electing carriers' study areas will be mandatory after a transition that will provide electing carriers sufficient time to adapt their business data services operations to a detariffing regime.

135. The transition period will begin on the date incentive regulation becomes effective for electing carriers, either July 1, 2019 or July 1, 2020, and will end thirty-six (36) months thereafter, a period that we find sufficient for electing carriers to adapt to a detariffing regime. In addition, for six (6) months following the date incentive regulation becomes effective, we require electing carriers to freeze the tariffed rates for their business data services that are no longer subject to ex ante pricing regulation, including lower speed TDM end user channel terminations in newly deregulated study areas, provided those services remain tariffed. These transition mechanisms will ensure that small businesses and other purchasers have time to adjust to the new regulatory framework we adopt.

136. Similarly, carriers electing incentive regulation in connection with a subsequent offer of A–CAM support, or carriers that the Commission otherwise transitions away from legacy support mechanisms must detariff the relevant business data services within thirty-six (36) months of the date on which their incentive-based rates take effect or their transition away from legacy support mechanisms becomes effective. Further, for six (6) months following such dates, such carriers will be required to freeze their tariffed rates for BDS that are no longer subject to ex ante pricing regulation, provided those rates remain tariffed.

137. Tariffing for these services will be permissive during the transition—we will accept new tariffs and revisions to existing tariffs for the affected services during this time period. Electing carriers may also detariff during the transition. Apart from the rate freeze noted above, carriers will no longer be required to

comply with ex ante pricing regulation for these services. Once the rules adopted in this Order are effective, carriers that wish to continue filing tariffs under the permissive detariffing regime are free to modify such tariffs to reflect the new regulatory structure outlined in this Order for the affected services. This will allow carriers to be more competitive and introduce new business data services as they adapt to detariffing.

138. Electing carriers may remove the relevant portions of their tariffs for the affected services at any time during the transition, and the rate freeze does not apply to services that are no longer tariffed. Electing carriers may not file or maintain any interstate tariffs for affected business data services once the transition ends. This will prevent electing carriers from obtaining ''deemed lawful'' status for tariff filings that are not accompanied by cost support and invoking the filed-rate doctrine in contractual disputes with customers. Business data service providers will also be prevented from picking and choosing when they are able to invoke the protections of tariffs.

139. We do not intend our actions to disturb existing contractual or other long-term arrangements—a contract tariff remains a contract even if it is no longer tariffed. As we stated in the *BDS Order,* contract tariffs, term and volume discount plans, and individual circuit plans do not become void upon detariffing. All carriers are to act in good faith to develop solutions to ensure rates remain just and reasonable.

III. Other Rule Changes

140. We adopt several other rule changes which can be found set out below. These rule changes include changes arising from this Order as well as corrections to inaccuracies in our current rules. Thus, we change (1) the cross reference to § 61.3(aa) in § 51.903(g) to § 61.3(bb), (2) the cross reference to § 61.3(ee) in § 61.41(d) to § 61.3(ff), (3) the cross reference § 61.3(x) in § 69.114 to § 61.3(ff), and (4) the cross reference to § 69.801(g) in § 69.805(a) to § 69.801(h). These cross references have been rendered inaccurate because of changes in the definitions contained in § 61.3.

IV. Final Regulatory Flexibility Analysis

141. As required by the Regulatory by the Regulatory Flexibility Act of 1980, as amended (RFA) an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the Notice of Proposed Rulemaking (*NPRM*) for the rate-of-return business data services (BDS) proceeding. The Commission sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. The Commission received no comments on the IRFA. Because the Commission amends its rules in this Report and Order, the Commission has included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.

A. Need for, and Objectives of, the Rules

142. In the *NPRM,* the Commission proposed to adopt a form of incentive regulation for the provision of business data services by rate-of-return carriers receiving fixed universal service support, conduct a market analysis to evaluate the characteristics of BDS markets served by rate-of-return carriers receiving fixed support, and adopt a new lighter touch regulatory framework for these carriers' BDS that in most respects parallels the framework recently adopted for price cap carriers in the *BDS Order.* This Order provides a new framework for BDS offered by rate-of-return carriers that receive fixed support that minimizes unnecessary regulatory burdens on certain rate-of-return carriers and allows market forces to foster appropriate incentives for these carriers to be efficient, to innovate and to compete.

143. In this Order, the Commission takes the next step in a series of steps to encourage carriers to move from rate-of-return to incentive regulation, and to remove ex ante pricing regulation where competitive conditions justify doing so. This Order focuses on allowing rate-of-return carriers that currently receive fixed high-cost universal service support to voluntarily elect to transition out of rate-of-return regulation for their BDS offerings. In so doing, the Commission amends its rules to allow such carriers to move their lower capacity time division multiplexing (TDM) circuit-based transport and end user channel termination offerings to incentive regulation while providing a path for those carriers that elect our new framework (electing carriers) to demonstrate that their lower capacity circuit-based end user channel termination offerings are competitive, and therefore should not be subject to ex ante pricing regulation. We also remove ex ante pricing regulation from electing carriers' higher capacity circuit-based and their packet-based BDS offerings.

144. Allowing rate-of-return carriers that receive fixed support to move their BDS offerings away from rate-of-return regulation will help drive competition for BDS offerings in the communities served by those carriers. It will also reduce unnecessary regulatory burdens faced by electing carriers. They will no longer be required to provide cost-based justification for their BDS rates and will therefore no longer need to conduct annual cost studies to justify those rates. They will also no longer be required to file tariffs for their packed-based and higher capacity TDM-based end user channel terminations offerings in areas deemed competitive. The regulatory burdens on electing carriers, most of which are small entities, will be vastly reduced.

145. We take these steps while affirming our core statutory obligations pursuant to sections 201, 202, and 208 of the Communications Act to ensure that the rates and practices of these carriers' BDS remain just, reasonable and not unreasonably discriminatory. Collectively, these actions will streamline regulation, and spur entry, investment, innovation, and competition in the affected BDS markets to the benefit of businesses and other institutional users that rely on these services.

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

146. The Commission did not receive comments specifically addressing the rules and policies proposed in the IRFA.

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

147. The Chief Counsel did not file any comments in response to this proceeding.

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

148. 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. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small-business concern'' under the Small Business Act. A small-business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

1. Total Small Entities

149. Our proposed action, if implemented, may, over time, affect

small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards. First, as of 2013, the SBA estimates there are an estimated 28.8 million small businesses nationwide—comprising some 99.9% of all businesses. In addition, a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of 2007, there were approximately 1,621,315 small organizations. Finally, the term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' Census Bureau data for 2012 indicate that there were 90,056 local governmental jurisdictions in the United States. We estimate that, of this total, as many as 89,195 entities may qualify as ''small governmental jurisdictions.'' Thus, we estimate that most governmental jurisdictions are small.

2. Broadband internet Access Service Providers

150. *internet Service Providers (Broadband).* Broadband internet service providers include wired (*e.g.,* cable, DSL) and VoIP service providers using their own operated wired telecommunications infrastructure fall in the category of Wired Telecommunication Carriers. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. The SBA size standard for this category classifies a business as small if it has 1,500 or fewer employees. U.S. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, under this size standard the majority of firms in this industry can be considered small.

3. Wireline Providers

151. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as ''establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.'' The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

152. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent LEC services. The closest applicable size standard under SBA rules is for the category Wired Telecommunications Carriers as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted. A total of 1,307 firms reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees.

153. Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on this data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

154. We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, *inter alia,* meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

155. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined above. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicates that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our rules.

156. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities.

157. *Toll Resellers.* The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of this total, an estimated 857 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of toll resellers are small entities.

158. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees. Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by rules adopted pursuant to the *Order.*

159. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities.

4. Wireless Providers—Fixed and Mobile

160. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

161. The Commission's own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service, and Specialized Mobile Radio Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

162. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions.

163. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Commission data, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, a little less than one third of these entities can be considered small.

5. Cable Service Providers

164. Because section 706 requires us to monitor the deployment of broadband using any technology, we anticipate that

some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

165. *Cable and Other Subscription Programming.* This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (*e.g.* limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA has established a size standard for this industry stating that a business in this industry is small if it has 1,500 or fewer employees. The 2012 Economic Census indicates that 367 firms were operational for that entire year. Of this total, 357 operated with less than 1,000 employees. Accordingly, we conclude that a substantial majority of firms in this industry are small under the applicable SBA size standard.

166. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide. Industry data indicate that there are currently 4,600 active cable systems in the United States. Of this total, all but eleven cable operators nationwide are small under the 400,000-subscriber size standard. In addition, under the Commission's rate regulation rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,600 cable systems nationwide. Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records. Thus, under this standard as well, we estimate that most cable systems are small entities.

167. *Cable System Operators (Telecom Act Standard).* The Communications Act also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' There are approximately 52,403,705 cable video subscribers in the United States today. Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

168. *All Other Telecommunications.* ''All Other Telecommunications'' is defined as follows: This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for ''All Other Telecommunications,'' which consists of all such firms with gross annual receipts of $32.5 million or less. For this category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than $25 million. Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

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

169. *Recordkeeping and Reporting.* The rule revisions adopted in the Order include changes that will require electing rate-of-return carriers receiving fixed universal service support to make various revisions to their business data service tariffs. For example, rate-of-return carriers receiving fixed support that elect incentive regulation will be required to file Tariff Review Plans and incentive regulation tariffs for their lower capacity TDM BDS. Packet-based BDS and higher capacity TDM BDS end user channel termination and lower capacity TDM BDS end user channel terminations offered by electing carriers in study areas deemed competitive by a competitive market test will be relieved of ex ante pricing regulation and will be subject to permissive detariffing for a period of 36 months at which time they will be subject to mandatory detariffing.

170. The Commission also incorporates a productivity factor (X-factor) of 2.0% and GDP–PI as the inflation factor used to adjust price cap indexes in the first year of incentive regulation, and each year thereafter for electing carriers. Electing carriers will be required to revise their rates and tariff review plans for business data services in filings with the Commission to reflect the new X-factor. Finally, the Commission grants forbearance from the requirement in § 54.1305 of our rules annually to report unseparated loop costs and other accounting data to NECA.

F. Steps Taken To Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Considered

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

172. *Incentive Regulation.* In the Order, the Commission sheds burdensome rate-of-return regulation in favor of lighter touch incentive regulation for electing carriers' lower capacity TDM transport and end user channel termination services. Additionally, the Commission adopted the proposal in the *NPRM* to grant pricing flexibility to electing carriers' lower capacity TDM transport and end user channel termination services under

incentive regulation similar to the pricing flexibility the Commission granted to price cap carriers' lower capacity TDM end user channel terminations in areas deemed non-competitive in the *BDS Order.* The pricing flexibility available to electing carriers, most of which are small entities, will enable them to sell their BDS using contract tariffs and term and volume discounts, enhancing their ability to respond to competition.

173. *Competitive Market Test.* The Commission sought comment on four options for a competitive market test for electing rate-of-return carriers that receive fixed support. The option we selected is one of the least burdensome options and relies on existing Form 477 data, avoiding any additional burdensome data collection. We did not adopt the proposal to use both prongs of the *BDS Order* competitive market test to assess the competitiveness of study areas served by rate-of-return carriers that receive fixed support despite its apparent simplicity because we found methodological and conceptual flaws in the proposal and in the study submitted by Petitioners to support the proposal. Among the flaws the Commission identified is that the study does not claim to be based on a representative sample of model-based rate-of-return carriers that receive fixed support, the study compares non-urbanized price cap areas with model-based rate-of-return areas that in some instances include urbanized areas, and some of the relevant counties included in the study were deemed non-competitive by the price cap competitive market test. Further, the Commission declined to adopt the other two options from the *NPRM* which would have required costly, time consuming, burdensome data collections. Instead, the Order found that the record supports adopting the second option from the *NPRM* which uses the second prong of the *BDS Order* competitive market test that is based on Form 477 data. As a result, ex ante pricing regulation of lower capacity TDM end user channel terminations will no longer apply in study areas served by rate-of-return carriers that receive fixed support that are deemed competitive.

174. *Packet-based and Higher Capacity TDM Business Data Services.* The Commission removed ex ante pricing regulation for electing rate-of-return carriers' packet-based and higher capacity TDM business data services and directed electing carriers to detariff these services following a transition period. This action is consistent with the Commission's preference to minimize the burdens of regulation.

175. *X-factor.* Rate-of-return carriers that receive fixed support that elect incentive regulation are required to file revised annual access charge tariffs every year, which become effective on July 1. The annual filings include submission of tariff review plans that are used to support revisions to the rates, including revisions that pertain to the X-factor. To ease the burden on the industry in connection with this filing, and because base period demand and the value of GDP–PI reflected in the price cap indices typically are not updated during a tariff year, the Commission permits electing carriers to use, in their filings implementing the 2.0% X-factor, the same base period demand and value of GDP–PI as in the prior year's annual filing.

176. *Periodic Revision to Competitive Market Test.* Related to the competitive market test proposal, the Commission also proposed future periodic data collections to allow for market test updates for determining competitive and non-competitive areas. The periodic collections could have resulted in a significant reporting burden on small entities. Instead, the Commission adopted a process for updating the competitive market test every three years using the data from Form 477 that is already routinely filed by providers and thus entails no additional recordkeeping or reporting burden.

177. *Forbearance.* The Commission granted forbearance, pursuant to section 10 of the Act, from the Cost Assignment Rules for electing carriers, subject to the requirement relating to the calculation of pole attachment rates. The Commission found that the Cost Assignment Rules are no longer necessary to ensure that charges and practices are just, reasonable, and not unjustly or unreasonably discriminatory; to protect consumers; and to protect the public interest. The Commission found that the rules were no longer necessary for carriers converting to incentive regulation and that eliminating unnecessary regulation will generally reduce providers' costs and provide a more level playing field because other providers of similar services are not subject to these requirements.

178. *Detariffing.* To minimize economic impact, the Commission provides a transition period to provide electing rate-of-return carriers that receive fixed support with sufficient time to detariff their business data services. The Commission does not intend its actions to disturb existing contractual or other long-term arrangements, which it grandfathered and which continue to remain in effect for the length of the contract.

G. Report to Congress

179. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

V. Procedural Matters

180. *Paperwork Reduction Act Analysis.* It was determined that the final rule makes only non-substantive changes to currently approved information collections and therefore does not require separate Paperwork Reduction Act approval. The rules are effective 60 days after publication in the **Federal Register**. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. We describe impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the Final Regulatory Flexibility Analysis in Section IV above.

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

182. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *NPRM.* The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *NPRM,* including comments on the IRFA. Pursuant to the RFA, a Final Regulatory Flexibility Analysis is set forth in Section IV above.

183. *Contact Person.* For further information about this proceeding, please contact Justin Faulb, FCC Wireline Competition Bureau, Pricing Policy Division, 445 12th Street SW, Washington, DC 20554, (202) 418–1589, *Justin.Faulb@fcc.gov.*

VI. Ordering Clauses

184. Accordingly, it is ordered that, pursuant to sections 1, 2, 4(i)–(j), 10, 201(b), 202(a), 214, 303(r), 403, of the

Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 151, 152, 154(i)–(j), 160, 201(b), 202(a), 214, 303(r), 403, 1302, this Report and Order IS ADOPTED and shall be effective sixty (60) days after publication in the **Federal Register**, except to the extent expressly addressed below.

185. It is further ordered that parts 1, 32, 51, 61, and 69 of the Commission's rules, 47 CFR parts 1, 32, 51, 61, and 69, are amended as set forth below, and that such rule amendments shall be effective sixty (60) days after publication of this Report and Order in the **Federal Register**.

186. It is further ordered that pursuant to sections 201(b) and 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. 201(b), 202(a), rate-of-return carriers electing to offer business data services shall freeze the tariffed rates for packet-based and higher capacity TDM services and for TDM end-user channel terminations at or below a DS3 in study areas deemed competitive that the rate-of-return carrier continues to tariff for six (6) months following the applicable effective date of the carrier's election.

187. It is further ordered that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

188. It is further ordered, that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Report and Order to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 1

Communications common carriers, Reporting and recordkeeping, Telecommunications.

47 CFR Part 32

Communications, Reporting and recordkeeping requirements, Telephone, Uniform System of Accounts.

47 CFR Part 51

Communications common carriers, Telecommunications.

47 CFR Part 61

Communications common carriers, Radio, Reporting and recordkeeping requirements, Telegraph, Telephone.

47 CFR Part 69

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Federal Communications Commission

Marlene Dortch,

Secretary.

RULES

The Federal Communications Commission amends 47 CFR parts 1, 32, 51, 61, and 69 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i) and (j), 155, 157, 160, 201, 224, 225, 227, 303, 309, 310, 332, 1403, 1404, 1451, 1452, and 1455.

■ 2. Section 1.1406 is amended by adding paragraph (e) to read as follows:

§ 1.1406 Commission consideration of the complaint.

* * * * *

(e) A price cap company, or a rate-of-return carrier electing to provide service pursuant to § 61.50 of this chapter, that opts-out of part 32 of this chapter may calculate attachment rates for its poles, ducts, conduits, and rights of way using either part 32 accounting data or GAAP accounting data. A company using GAAP accounting data to compute rates to attach to its poles, ducts, conduits, and rights of way in any of the first twelve years after opting-out must adjust (increase or decrease) its annually computed GAAP-based rates by an Implementation Rate Difference for each of the remaining years in the period. The Implementation Rate Difference means the difference between attachment rates calculated by the carrier under part 32 and under GAAP as of the last full year preceding the carrier's initial opting-out of part 32 USOA accounting requirements.

PART 32—UNIFORM SYSTEM OF ACCOUNTS FOR TELECOMMUNICATIONS COMPANIES

■ 3. The authority citation for part 32 continues to read as follows:

Authority: 47 U.S.C. 219, 220 as amended, unless otherwise noted.

■ 4. Section 32.1 is revised to read as follows:

§ 32.1 Background.

The revised Uniform System of Accounts (USOA) is a historical financial accounting system which reports the results of operational and financial events in a manner which enables both management and regulators to assess these results within a specified accounting period. The USOA also provides the financial community and others with financial performance results. In order for an accounting system to fulfill these purposes, it must exhibit consistency and stability in financial reporting (including the results published for regulatory purposes). Accordingly, the USOA has been designed to reflect stable, recurring financial data based to the extent regulatory considerations permit upon the consistency of the well-established body of accounting theories and principles commonly referred to as generally accepted accounting principles (GAAP). The rules of this part, and any other rules or orders that are derivative of or dependent on the rules in this part, do not apply to price cap companies, and rate-of-return telephone companies offering business data services pursuant to § 61.50 of this chapter, that have opted-out of USOA requirements pursuant to the conditions specified by the Commission in § 32.11(g).

■ 5. Section 32.11 is amended by revising paragraph (g) to read as follows:

§ 32.11 Companies subject to this part.

* * * * *

(g) Notwithstanding paragraph (a) of this section, a price cap company, or a rate-of-return telephone company offering business data services pursuant to § 61.50 of this chapter, that elects to calculate its pole attachment rates pursuant to § 1.1406(e) of this chapter will not be subject to this Uniform System of Accounts.

PART 51—INTERCONNECTION

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

Authority: 47 U.S.C. 151–55, 201–05, 207–09, 218, 225–27, 251–52, 271, 332 unless otherwise noted.

■ 7. Section 51.903 is amended by revising paragraph (g) to read as follows:

§ 51.903 Definitions.

* * * * *

(g) *Rate-of-Return Carrier* is any incumbent local exchange carrier not subject to price cap regulation as that term is defined in § 61.3(bb) of this chapter, but only with respect to the territory in which it operates as an incumbent local exchange carrier.

* * * * *

PART 61—TARIFFS

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 201–05 and 403, unless otherwise noted.

■ 9. Section 61.41 is amended by revising paragraph (d) and adding paragraph (f) to read as follows:

§ 61.41 Price cap requirements generally.

* * * * *

(d) Except as provided in paragraph (e) of this section, local exchange carriers that become subject to price cap regulation as that term is defined in § 61.3(ff) shall not be eligible to withdraw from such regulation.

* * * * *

(f) Notwithstanding the requirements of paragraphs (c) and (d) of this section, a telephone company subject to rate-of-return regulation that is affiliated with a price cap local exchange carrier may provide business data services pursuant to § 61.50 without converting other services to price cap regulation.

■ 10. Section 61.50 is added to read as follows:

§ 61.50 Regulation of business data services offered by rate-of-return carriers electing incentive regulation.

(a) A rate-of-return carrier, as defined in § 51.903(g) of this chapter, may elect to offer its business data services subject to incentive regulation pursuant to this section. A rate-of-return carrier may elect to offer business data services subject to incentive regulation pursuant to this section only if all affiliated rate-of-return carriers meeting the requirements of paragraph (b) of this section make the election. A carrier's election under this section is irrevocable.

(b) A rate-of-return carrier is eligible to elect incentive regulation for its business data services if the carrier:

(1) Receives universal service payments pursuant to the Alternative-Connect America Cost Model pursuant to § 54.311 of this chapter;

(2) Is an affiliate of a price cap local exchange carrier operating pursuant to a waiver of § 61.41;

(3) Receives universal service payments pursuant to § 54.306 of this chapter; or

(4) Transitions away from legacy support mechanisms in the future.

(c) A rate-of-return carrier electing to offer business data services pursuant to this section shall employ the procedures outlined in §§ 61.42 through 61.49 to calculate rates for its business data services and adjust its indexes for those rates to the extent those sections are applicable to business data services, except that:

(1) Exogenous costs associated with regulated services shall be allocated to business data services based on relative regulated business data services revenues, compared to regulated revenues and related support receipts; and

(2) An electing carrier is not required to file a short form tariff review plan as required by § 61.49(k).

(d) A rate-of-return carrier electing to offer business data services pursuant to this section must remove its business data services from the NECA Traffic Sensitive Pool. Such a carrier may continue to participate in the NECA Traffic Sensitive Pool and tariff for access services other than business data services.

(e) A rate-of-return carrier offering business data services pursuant to this section may offer those business data services at different rates in different study areas.

(f) A rate-of-return carrier offering business data services pursuant to this section may make a low-end adjustment pursuant to § 61.45(d)(1)(vii) unless it:

(1) Exercises the regulatory relief pursuant to paragraph (g) of this section in any part of its service region; or

(2) Exercises the option to use Generally Accepted Accounting Principles rather than the part 32 Uniform System of Accounts pursuant to § 32.11(g) of this chapter.

(g) A rate-of-return carrier electing to offer business data services pursuant to this section may offer time division multiplexed transport and end user channel termination services at or below a DS3 bandwidth that include:

(1) Volume and term discounts;

(2) Contract-based tariffs, provided that:

(i) Contract-based tariff services are made generally available to all similarly situated customers; and

(ii) The rate-of-return carrier excludes all contract-based tariff offerings from incentive regulation; and

(3) The ability to file tariff revisions on at least one day's notice, notwithstanding the notice requirements for tariff filings specified in § 61.58.

(h) A rate-of-return carrier electing to offer business data services pursuant to this section shall comply with the requirements of § 69.805 of this chapter in its study areas deemed non-competitive pursuant to this section.

(i) The regulation of other services offered by a carrier that offers business data services pursuant to this section shall not be modified as a result of the requirements of this section.

(j)(1) The Wireline Competition Bureau will conduct an initial competitive market test for rate-of-return carriers eligible to elect incentive regulation pursuant to this section. Study areas of such carriers will be deemed competitive if 75 percent of the census blocks within the study area are reported to have a minimum of 10 Mbps download and 1 Mbps upload broadband service offered by a cable operator based on the most current publicly available Form 477 data. A list of study areas deemed competitive by the competitive market test will be published on the Commission's website.

(2) The Wireline Competition Bureau will conduct subsequent competitive market tests for rate-of-return carriers electing incentive regulation pursuant to this section contemporaneously with the subsequent tests mandated by § 69.803 of this chapter for price cap carriers.

(3) A study area of an electing carrier deemed competitive by the competitive market test will retain its status in subsequent tests.

(k)(1) Packet-based and time division multiplexed business data services above a DS3 bandwidth offered by a rate-of-return carrier pursuant to this section shall not be subject to ex ante pricing regulation.

(2) Time division multiplexed end user channel termination business data services at or below a DS3 bandwidth offered by a rate-of-return carrier pursuant to this section in study areas deemed competitive by the competitive market test shall not be subject to ex ante pricing regulation.

(3) A rate-of-return carrier electing incentive regulation for its business data services must detariff:

(i) All packet-based and time division multiplexed business data services above a DS3 bandwidth within thirty-six months after the effective date of its election of incentive regulation; and

(ii) All time division multiplexed end user channel termination business data services at or below a DS3 bandwidth in any study area deemed competitive by the competitive market test within thirty-six months after such services shall be deemed competitive in a study area.

(l)(1) A rate-of-return carrier electing incentive regulation for its business data services effective July 1, 2019 must notify the Chief of the Wireline Competition Bureau of its election by May 1, 2019 for it to become effective concurrent with the annual access tariff filing in 2019.

(2) A rate-of-return carrier electing incentive regulation for its business data services effective July 1, 2020 must notify the Chief of the Wireline Competition Bureau of its election by May 1, 2020 for it to become effective concurrent with the annual access tariff filing in 2020.

(3) A rate-of-return carrier accepting future offers of Alternative-Connect America Cost Model support or otherwise transitioning away from legacy support mechanisms and electing incentive regulation for its business data services must notify the Chief of the Wireline Competition Bureau of its election by May 1 following its acceptance of the offer for it to become effective concurrent with that year's annual access tariff filing.

■ 11. Section 61.55 is amended by revising paragraph (a) to read as follows:

§ 61.55 Contract-based tariffs.

(a) This section shall apply to price cap local exchange carriers permitted to offer contract-based tariffs under § 1.776 or § 69.805 of this chapter, as well as to the offering of business data services by rate-of-return carriers pursuant to § 61.50.

* * * * *

PART 69—ACCESS CHARGES

■ 12. The authority citation for part 69 continues to read as follows:

Authority: 47 U.S.C. 154, 201, 202, 203, 205, 218, 220, 254, 403.

■ 13. Section 69.114 is amended by revising paragraph (a) to read as follows:

§ 69.114 Special access.

(a) Appropriate subelements shall be established for the use of equipment or facilities that are assigned to the Special Access element for purposes of apportioning net investment, or that are equivalent to such equipment or facilities for companies subject to price cap regulation as that term is defined in § 61.3(ff) of this chapter.

* * * * *

[FR Doc. 2018–27528 Filed 12–27–18; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HOMELAND SECURITY

48 CFR Parts 3019 and 3052

[Docket No. DHS–2018–0024]

RIN 1601–AA83

Rescinding Department of Homeland Security Acquisition Regulation (HSAR) Clause Regarding Small Business Subcontracting Plan Reporting (HSAR Case 2017–001)

AGENCY: Office of the Chief Procurement Officer, Department of Homeland Security (DHS).

ACTION: Final rule.

SUMMARY: This final rule amends the HSAR by removing the HSAR clause regarding small business subcontracting plan reporting because the requirements of this clause duplicate the requirements in a Federal Acquisition Regulation (FAR) clause. The HSAR clause is no longer needed to provide guidance to contractors and DHS proposes to remove the clause from the HSAR.

DATES: *Effective Date:* January 28, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Candace Lightfoot, Procurement Analyst, DHS, Office of the Chief Procurement Officer, Acquisition Policy and Legislation at (202) 447–0882 or email *HSAR@hq.dhs.gov* for clarification of content. When using email, include HSAR Case 2017–001 in the ''Subject'' line.

SUPPLEMENTARY INFORMATION:

I. Background

In a Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** (83 FR 25638) on June 4, 2018, the Department of Homeland Security, Office of the Chief Procurement Officer, proposed to remove HSAR clause 3052.219–70 and the cross-reference to it found in paragraph (a) of 48 CFR 3019.708–70.

As explained in the NPRM, on December 4, 2003, DHS published an interim final rule to establish the Department of Homeland Security Acquisition Regulation (HSAR). 68 FR 67867 (Dec. 4, 2003). On May 2, 2006, DHS published a final rule, which adopted the interim rule with some changes in response to public comment (HSAR final rule). 71 FR 25759 (May 2, 2006). The HSAR final rule finalized, among other things, HSAR clause 3052.219–70, Small Business Subcontracting Reporting Plan (48 CFR 3052.219–70). HSAR clause 3052.219–70 requires contractors to: (a) Enter the information for the Subcontracting Report for Individual Contracts (formally the Standard Form 294 (SF–294)) and the Summary Subcontract Report (formally the Standard Form 295 (SF–295)) into the Electronic Subcontracting Reporting System (eSRS) at *www.esrs.gov;* and (b) include HSAR clause 3052.219.70 in all subcontracts that include the clause at (FAR) 48 CFR 52.219–9. The eSRS is a web-based system, which replaces the Standard Forms 294 and 295 as the mechanism for submitting reports required by the small business subcontracting program. On June 16, 2010, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a final rule amending the Federal Acquisition Regulation (FAR) to require contractors' small business subcontract reports be submitted using the eSRS, rather than Standard Forms 294 and 295. 75 FR 34260; FAR Case 2005–040 (June 16, 2010). This change to the FAR was issued under Federal Acquisition Circular 2005–42 of June 16, 2010. 75 FR 34291 (June 16, 2010). As a result of the FAR revision HSAR clause 3052.219–70 is no longer needed to provide guidance to contractors on the eSRS requirements. Therefore, DHS is amending the HSAR to remove HSAR clause 3052.219–70 and the cross-reference to it found in paragraph (a) of 48 CFR 3019.708–70.

In addition, DHS is also to amending the authority citation for part 3019 to conform with the authority of the Positive Law Codification of Title 41, United States code, ''Public Contracts''. The new codification of Title 41 was enacted on January 4, 2011.[1]

II. Discussion and Analysis

Interested parties were given until July 5, 2018, to comment on the proposed changes. No public comments were submitted in response to the proposed rule. Accordingly, DHS will adopt the proposal as set forth in the NPRM without change.

III. 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, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (''Reducing Regulation and Controlling Regulatory Costs'') directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.''

The Office of Management and Budget (OMB) has not designated this rule a ''significant regulatory action,'' under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it.

[1] *See* Public Law 111–350, (Jan. 4, 2011).

DHS considers this rule to be an Executive Order 13771 deregulatory action. See OMB's Memorandum ''Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs' '' (April 5, 2017). This rule is not a major rule under 5 U.S.C. 804.

There are no quantified costs or cost savings to this rule as it simply rescinds requirements that have already been shifted to the FAR. DHS believes there are non-monetized efficiency and streamlining benefits to this rule as it removes outdated provisions of the HSAR.

IV. Regulatory Flexibility Act

This action rescinds HSAR clause 3052.219–70 and, as such, DHS certifies that this final rule will not result in 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.*

V. Paperwork Reduction Act

The final 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).

The total hours and costs associated with existing HSAR clause 3052.219–70, as set forth in HSAR OMB Control Number, 1600–0003, Post-award Contract Information, are as follows:

Estimated Respondents: 11,885.
Average Responses Annually: 3.
Total Annual Responses: 35,655.
Estimated Hours: 12.
Total Hours: 427,860.
Hourly Rate: $67.86.
Total Costs: $29,034,579.60.

List of Subjects in 48 CFR Parts 3019 and 3052.

Government procurement.

For the reasons set forth above, DHS amends 48 CFR parts 3019 and 3052 as follows:

PART 3019—SMALL BUSINESS PROGRAMS

■ 1. The authority citation for 48 CFR part 3019 is revised to read as follows:

Authority: 5 U.S.C. 301–302, 41 U.S.C. 1702, 41 U.S.C. 1707, and 48 CFR part 1 and subpart 1.3.

3019.708–70 [Amended]

■ 2. Section 3019.708–70 is amended by:

■ a. Removing paragraph (a); and

■ b. Redesignating paragraphs (b) and (c) as paragraphs (a) and (b).

PART 3052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. The authority citation for 48 CFR part 3052 continues to read as follows:

Authority: 5 U.S.C. 301–302, 41 U.S.C. 1702, 41 U.S.C. 1707, and 48 CFR part 1 and subpart 1.3.

3052.219–70 [Removed]

■ 4. Remove section 3052.219–70.

Soraya Correa,

Chief Procurement Officer, Department of Homeland Security.

[FR Doc. 2018–28142 Filed 12–27–18; 8:45 am]

BILLING CODE 4410–9B–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 367

[Docket No. FMCSA–2018–0068]

RIN 2126–AC12

Fees for the Unified Carrier Registration Plan and Agreement

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes reductions in the annual registration fees collected from motor carriers, motor private carriers of property, brokers, freight forwarders, and leasing companies for the Unified Carrier Registration (UCR) Plan and Agreement for the registration years 2019, 2020 and thereafter. For the 2019 registration year, the fees will be reduced below the 2017 registration fee level that was in effect by 18.62 percent to ensure that fee revenues collected do not exceed the statutory maximum, and to account for the excess funds held in the depository. The fees beginning with the 2020 registration year will be reduced below the 2017 level by approximately 9.9 percent. The reduction of the current 2019 registration year fees (finalized on January 5, 2018) range from approximately $11 to $10,282 per entity, depending on the number of vehicles owned or operated by the affected entities. The reduction in fees for 2020 and subsequent registration years range from approximately $5 to $3,899 per entity.

DATES: This final rule is effective December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Mr. Gerald Folsom, Office of Registration and Safety Information, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590–0001 or by telephone at 202–385–2405.

SUPPLEMENTARY INFORMATION:

I. Rulemaking Documents

A. Availability of Rulemaking Documents

For access to docket FMCSA–2018–0068 to read background documents, go to *https://www.regulations.gov* at any time, or to Docket Services at U.S. Department of Transportation, 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.

B. Privacy Act

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

II. Abbreviations and Acronyms

The following is a list of abbreviations used in this document:

CE Categorical Exclusion
DOT U.S. Department of Transportation
E.O. Executive Order
FMCSA Federal Motor Carrier Safety Administration
NPRM Notice of proposed rulemaking
OMB Office of Management and Budget
PRA Paperwork Reduction Act
RFA Regulatory Flexibility Act
SBREFA Small Business Regulatory Enforcement Fairness Act
SBTC Small Business in Transportation Coalition
SSRS Single State Registration System
UCR Unified Carrier Registration
UCR Agreement Unified Carrier Registration Agreement
UCR Board Unified Carrier Registration Board of Directors
UCR Plan Unified Carrier Registration Plan

III. Executive Summary

A. Purpose and Summary of the Major Provisions

The UCR Plan and the 41 States participating in the UCR Agreement establish and collect fees from motor carriers, motor private carriers of property, brokers, freight forwarders, and leasing companies. The UCR Plan and Agreement are administered by a 15-member board of directors (UCR Board); 14 appointed from the participating States and the industry,

plus the Deputy Administrator of FMCSA. Revenues collected are allocated to the participating States and the UCR Plan. A maximum amount that the UCR Plan may collect is established by statute. If annual revenue collections will exceed the statutory maximum allowed, then the UCR Plan must request adjustments to the fees. 49 U.S.C. 14504a(f)(1)(E). In addition, any excess funds held by the UCR Plan after payments are made to the States and for administrative costs are retained in the UCR depository, and subsequent fees charged must be adjusted further in order to return the excess revenues held in the depository as required by 49 U.S.C. 14504a(h)(4). Adjustments in the fees are requested by the UCR Plan and approved by FMCSA. These two provisions are the reasons for the two-stage adjustment adopted in this final rule. The final rule provides for a reduction for at least the next two registration years to the annual registration fees established for the UCR Agreement.

For the 2019 registration year, the fees will be reduced below the 2017 registration fee level that was in effect by 18.62 percent to ensure that fee revenues do not exceed the statutory maximum, and to account for the excess funds held in the depository. The fees beginning with the 2020 registration year will be reduced below the 2017 level by approximately 9.9 percent. The reduction of the current 2019 registration year fees (finalized on January 5, 2018) ranges from approximately $11 to $10,282 per entity, depending on the number of vehicles owned or operated by the affected entities. The reduction in fees for 2020 and subsequent registration years ranges from approximately $5 to $3,899 per entity.

B. Benefits and Costs

The changes imposed by this final rule reduce the fees paid by motor carriers, motor private carriers of property, brokers, freight forwarders, and leasing companies to the participating States. While each motor carrier will realize a reduced burden, fees are considered by the Office of Management and Budget (OMB) Circular A–4, Regulatory Analysis, as transfer payments, not costs. Transfer payments are payments from one group to another that do not affect total resources available to society. Therefore, transfers are not considered in the monetization of societal costs and benefits of rulemakings.

IV. Legal Basis for the Rulemaking

This rule adjusts the annual registration fees for the UCR Agreement established by 49 U.S.C. 14504a. The requested fee adjustments are required by 49 U.S.C. 14504a because, for the registration year 2017, the total revenues collected were expected to exceed the total revenue entitlements of $107.78 million distributed to the 41 participating States plus the $5 million established for the administrative costs associated with the UCR Plan and Agreement.[1] The requested adjustments have been submitted by the UCR Plan in accordance with 49 U.S.C. 14504a(f)(1)(E)(ii), which requires the UCR Board to request an adjustment by the Secretary of Transportation (Secretary) when the annual revenues collected exceed the maximum allowed. In addition, 49 U.S.C. 14504a(h)(4) states that any excess funds held by the UCR Plan in its depository, after payments to the States and for administrative costs, shall be retained ''and the fees charged . . . shall be reduced by the Secretary accordingly.''

The UCR Plan also requested approval of a revised total revenue target to be collected because of a reduction in the amount for costs of administering the UCR Agreement. No changes in the revenue entitlements to the participating States were recommended by the UCR Plan. The revised total revenue target must be approved in accordance with 49 U.S.C. 14504a(d)(7) and (g)(4).

The Secretary also has broad rulemaking authority in 49 U.S.C. 13301(a) to carry out 49 U.S.C. 14504a, which is part of 49 U.S.C. subtitle IV, part B. Authority to administer these statutory provisions has been delegated to the FMCSA Administrator by 49 CFR 1.87(a)(2) and (7).[2]

The Administrative Procedure Act allows agencies to make rules effective immediately with good cause, instead of requiring publication 30 days prior to the effective date. 5 U.S.C. 553(d)(3). FMCSA finds there is good cause for this rule to be effective upon publication so that the UCR Plan and the participating States may begin collection of fees immediately for the registration year that will begin on January 1, 2019. The immediate commencement of fee collection will avoid further delay in distributing revenues to the participating States.

V. Statutory Requirements for the UCR Fees

A. Legislative History

The legislative history of 49 U.S.C. 14504a indicates that the purpose of the UCR Plan and Agreement is both to replace the Single State Registration System (SSRS) for registration of interstate motor carrier entities with the States and to ''ensure that States don't lose current revenues derived from SSRS.'' Sen. Rep. 109–120, at 2 (2005). The statute provides for a 15-member board of directors for the UCR Plan to be appointed by the Secretary. The statute specifies that the UCR Board should consist of one director (either the FMCSA Deputy Administrator or another Presidential appointee) from DOT; four directors from among the chief administrative officers of the State agencies responsible for administering the UCR Agreement (one from each of the four FMCSA service areas); five directors from among the professional staffs of State agencies responsible for administering the UCR Agreement, to be nominated by the National Conference of State Transportation Specialists; and five directors from the motor carrier industry, of whom at least one must be from a national trade association representing the general motor carrier of property industry and one from a motor carrier that falls within the smallest fleet fee bracket. 49 U.S.C. 14504a(d)(1)(B).

The UCR Plan and the participating States are authorized by 49 U.S.C. 14504a(f) to establish and collect fees from motor carriers, motor private carriers of property, brokers, freight forwarders, and leasing companies. The annual fees charged for registration year 2018 are set out in 49 CFR 367.40.

For carriers and freight forwarders, the fees vary according to the size of the vehicle fleets, as required by 49 U.S.C. 14504a(f). The fees collected are allocated to the States and the UCR Plan in accordance with 49 U.S.C. 14504a(h). Participating States submit a plan demonstrating that an amount equivalent to the revenues received are used for motor carrier safety programs, enforcement, or the administration of the UCR Plan and Agreement. 49 U.S.C. 14504a(e)(1)(B).

The UCR Plan and the participating States collect registration fees for each

[1] The UCR Plan is ''the organization . . . responsible for developing, implementing, and administering the unified carrier registration agreement.'' 49 U.S.C. 14504a(a)(9). The UCR Agreement developed by the UCR Plan is the ''interstate agreement . . . governing the collection and distribution of registration and financial responsibility information provided and fees paid by motor carriers, motor private carriers, brokers, freight forwarders, and leasing companies. . . .'' 49 U.S.C. 14504a(a)(8).

[2] For the purpose of this rulemaking, the term ''FMCSA'' will frequently be used in place of ''Secretary'' due to the delegated authority provided by the Secretary. The term ''Secretary'' will be used in quoted material and as otherwise appropriate.

registration year, which is the same period as the calendar year. Generally, collection begins on October 1 of the previous year, and continues until December 31 of the year following the registration year. All of the revenues collected are distributed to the participating States or to the UCR Plan for administration of the UCR Agreement. No funds are distributed to the Federal government.

B. Fee Requirements

The statute specifies that fees are to be based on the recommendation of the UCR Board. 49 U.S.C. 14504a(d)(7)(A). In recommending the level of fees to be assessed in any registration year, and in setting the fee level, the statute states that both the UCR Board and FMCSA ''shall consider'' the following factors:

- Administrative costs associated with the UCR Plan and Agreement;
- Whether the revenues generated in the previous year and any surplus or shortage from that or prior years enable the participating States to achieve the revenue levels set by the UCR Board; and
- Provisions governing fees in 49 U.S.C. 14504a(f)(1).

FMCSA, if asked by the UCR Board, may also adjust the fees within a reasonable range on an annual basis if the revenues collected from the fees are either insufficient to provide the participating States with the revenues they are entitled to receive or exceed those revenues. 49 U.S.C. 14504a(f)(1)(E).

Overall, the fees assessed under the UCR Agreement must produce the level of revenue established by statute. Section 14504a(g) establishes the revenue entitlements for States that choose to participate in the UCR Plan. That section provides that a State, participating in SSRS in the registration year prior to the enactment of the Unified Carrier Registration Act of 2005, is entitled to receive revenues under the UCR Agreement equivalent to the revenues it received in the year before that enactment. Participating States that also collected intrastate registration fees from interstate motor carrier entities (whether or not they participated in SSRS) are also entitled to receive revenues of this type under the UCR Agreement, in an amount equivalent to the amount received in the year before the Act's enactment. Section 14504a(g) also requires that States that did not participate in SSRS previously, but that choose to participate in the UCR Plan, may receive revenues not to exceed $500,000 per year. The UCR Board calculates the amount of revenue to which each participating State is entitled under the UCR Agreement, which is then approved by FMCSA.

FMCSA's interpretation of its responsibilities under 49 U.S.C. 14504a in setting fees for the UCR Plan and Agreement are guided by the primacy the statute places on the need both to set and to adjust the fees so they ''provide the revenues to which the States are entitled.'' 49 U.S.C. 14504a(f)(1)(E)(i). The statute links the requirement that the fees be adjusted ''within a reasonable range'' by both the UCR Plan and FMCSA to the provision of sufficient revenues to meet the entitlements of the participating States. 49 U.S.C. 14504a(f)(1)(E); see also 49 U.S.C. 14504a(d)(7)(A)(ii).

Section 14504a(h)(4) provides additional support for this interpretation. The provision explicitly requires FMCSA to reduce the fees for all motor carrier entities in the year following any year in which the depository retains any funds in excess of the amount necessary to satisfy the revenue entitlements of the participating States and the UCR Plan's administrative costs.

VI. Recommendation from the UCR Plan

On December 14, 2017, the UCR Board voted unanimously to submit a recommendation to the FMCSA to reduce the fees collected by the UCR Plan for registration years 2019 and thereafter. The recommendation was submitted to the FMCSA on January 11, 2018.[3] The requested fee adjustments are required by 49 U.S.C. 14504a because, for registration year 2017, the total revenues collected were expected to exceed the total revenue entitlements of $107.78 million distributed to the 41 participating States plus the $5 million established for ''the administrative costs associated with the unified carrier registration plan and agreement.'' 49 U.S.C. 14504a(d)(7)(A)(i). The maximum revenue entitlements for each of the 41 participating States, established in accordance with 49 U.S.C. 14504a(g), were set out in a table attached to the January 11, 2018, recommendation.

As indicated in the analysis attached to the January 11, 2018, recommendation letter, as of the end of November 2017, the UCR Plan had already collected $7.30 million more than the statutory maximum of $112.78 million for registration year 2017. The UCR Plan estimated that by the end of 2018, total revenues would exceed the statutory maximum by $9.17 million, or approximately 8.13 percent. The excess revenues collected would be held in a depository maintained by the UCR Plan as required by 49 U.S.C. 14504a(h)(4).

The UCR Plan's recommendation estimated the minimum projection of revenue collections for December 2017 through December 2018 by summing the collections within each of the registration years 2013 through 2015[4] and then comparing across years to find the minimum total amount. This is the same methodology used to project collections and estimate fees in the previous fee adjustment rulemaking. 83 FR 605 (January 5, 2018).

Under 49 U.S.C. 14504a(d)(7), the costs incurred by the UCR Plan to administer the UCR Agreement are eligible for inclusion in the total revenue target, in addition to the revenue entitlements for the participating States. The total revenue target for registration years 2010 to 2018, as approved in the 2010 final rule (75 FR 21993 (April 27, 2010)), has been $112,777,059.81, including $5,000,000 for administrative costs. The UCR Plan's latest recommendation included a reduction in the amount of the administrative costs to $3,500,000 for the 2019 and 2020 registration years. The reduction of $1,500,000 recommended by the UCR Plan was based on estimates of future administrative costs needed to operate the UCR Plan and Agreement. No changes in the State revenue entitlements were recommended, and the entitlement figures for 2019 and 2020 for the 41 participating States are the same as those previously approved for the years 2010 through 2018. Therefore, for registration years 2019 and 2020, the UCR Plan recommended a total revenue target of $111,277,060.

A notice of proposed rulemaking (NPRM) reflecting the recommendation from the UCR Board was published by FMCSA. 83 FR 42244 (August 21, 2018). Comments addressing both the proposed adjustment in the fees and the separate new total revenue target recommendation were due on August 31, 2018.

VII. Discussion of the Comments

FMCSA received six comments on the NPRM. The commenters were: (1) Avelino Gutierrez, UCR Board Chairman, and G. Scott Morris, Board Member; (2) National Motor Freight Traffic Association, Inc.; (3) Small Business in Transportation Coalition

[3] The January 11, 2018, recommendation from the UCR Plan and all related tables are available in the docket for this rulemaking. (See I.A. above.)

[4] Collections for registration year 2016 are not available for use for this purpose because registration and fee collection for that year was not finalized at the time of the UCR Plan recommendation.

(SBTC); (4) National School Transportation Association; (5) Kevin Johnson; and (6) ''Anonymous.''

Avelino Gutierrez and G. Scott Morris

The comment was submitted by the two UCR Board members in their individual capacities and provided updated information on the actual and estimated revenue collections for the 2017 registration year.

Based on the updated information provided about actual and estimated collections, and as required by the statutory provisions involved, the fees established in this final rule have been adjusted and are slightly lower than the fees proposed in the NPRM but are still expected to enable the total revenue target to be met.

National Motor Freight Traffic Association, Inc. and Kevin Johnson

The National Motor Freight Traffic Association and Kevin Johnson both support the proposed fee adjustment.

Small Business in Transportation Coalition

The comment from the Small Business in Transportation Coalition (SBTC) raises several issues, not all of which are relevant to the proposed fee adjustment.[5] SBTC first asserts that the current provisions of 49 CFR 367.50 setting the fees for 2019 and subsequent years, as adopted in the final rule in Fees for Unified Carrier Registration Plan and Agreement (83 FR 605 (January 5, 2018)), are ''unlawful and unenforceable.'' SBTC bases that contention on the notion that the final rule was not adopted within 90 days after the submission of the fee recommendation from the UCR Plan for the adjustment made in the January 5 final rule. 49 U.S.C. 14504a(d)(7).

FMCSA notes that SBTC made the same contention regarding the effect of this statutory provision in its comments in the previous rulemaking. FMCSA rejected that contention in the January 5, 2018 final rule (see 83 FR 608) because it is now a well-established principle of administrative law that a statutory deadline for agency action cannot, in the ordinary course, bar action after the deadline unless that consequence is stated explicitly in the statute. In the leading case, Justice Marshall, in an opinion expressing the views of a unanimous Supreme Court, stated:

> We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

Brock v. *Pierce County,* 476 U.S. 253, 260 (1976) (footnotes omitted). *In U.S.* v. *James Daniel Good Real Prop,* 510 U.S. 43, 63 (1993), the Court stated that ''if a statute does not specify a consequence for noncompliance with statutory timing provisions, the Federal courts will not in the ordinary course impose their own coercive sanction.'' See also *Gottlieb* v. *Pena,* 41 F.3d 730, 733–35 (D.C. Cir. 1994).

SBTC cannot point to any explicit statement in the provisions of 49 U.S.C. 14504a that bars action by FMCSA if the 90-day period is not met, because there is none. Thus, as explained by the Supreme Court's decisions, the appropriate remedy for SBTC or any other interest allegedly aggrieved by the Agency's failure to meet the statutory time limit is to commence an action under the Administrative Procedure Act ''to compel agency action unlawfully withheld or unreasonably delayed.'' 5 U.S.C. 706(1) and *Brock* v. *Pierce County,* 476 U.S. at 260, n. 7. SBTC has not sought such a remedy, and, of course, its availability is now removed by the issuance of this final rule. *Cf. Telecommunications Research & Action Center* v. *F.C.C.,* 750 F.2d 70, 80 (D.C. Cir. 1984).

In addition, there are important public rights at stake that would be affected if FMCSA lost its power to act on the UCR Plan's recommendation, as contended by SBTC. The fee reduction recommended by the UCR Plan, proposed for implementation in the NPRM and now adopted in this final rule (with a minor adjustment), is necessary under the terms of two important provisions in the statute that require compliance with the statutory maximum amount of revenues to be collected by the UCR Plan and the participating States. 49 U.S.C. 14504a(f)(1)(E)(ii) and (h)(4).

SBTC renews its contention in its comment in this rulemaking that FMCSA has lost the power to act on the new proposed adjustment based on the 90-day provision in the statute. For the same reasons that this contention was rejected in the previous rulemaking, it is rejected again, and FMCSA and the Secretary have full power to act on the proposed fee recommendation.

SBTC's further contention that the fees in current section 367.50 are unenforceable for the 2019 registration year because, it alleges, proper procedures were not followed in setting the current fees for 2019, overlooks the fact that in this rulemaking the UCR Plan is recommending, and FMCSA has properly considered, proposed, and is now adopting, an adjustment in the fees for the 2019 registration year by revising 49 CFR 367.50. 83 FR 42250–51. In any event, FMCSA notes that the delay setting the fees for the 2019 registration year has not prejudiced entities subject to the registration fees. The UCR Plan has amended the UCR Agreement to provide that when an adjustment in fees is pending before FMCSA and DOT, registration and collection of fees will not begin until the effective date of the adjusted fees. Therefore, the fees established for registration year 2019 by either current 49 CFR 367.50 or its proposed amendment will not be collected by the UCR Plan and the participating States until this final rule and any adjustment in the fees for 2019 becomes effective.

Another contention by SBTC is that the UCR Plan should not be recommending, nor should FMCSA be acting on, a fee change for the 2020 registration year (see proposed 49 CFR 367.60, 83 FR 42251), claiming that it should not be done until information is available about the prior year's revenues. SBTC fails to recognize that the proposed two-step adjustment in the fees is required by the statute. As indicated in the NPRM, 49 U.S.C. 14504a(f)(1)(E)(ii) requires the fees to be reduced so that the revenues collected meet the total revenue target, and 49 U.S.C. 14504(a)(h)(4) requires a further one-year reduction in order to return to the industry excess revenues held in the depository established by the UCR Plan. Such a process necessarily relies on initial estimates and projections of revenue collections, with fee adjustments based on actual revenue collections as appropriate.

SBTC also states that the Agency would not be informed about the increase in the total actual and estimated revenues collected for the 2017 registration year. But as explained in the discussion above, the increase of $1,578,968 in the total collections available is public information and has been provided for the record in this rulemaking, and has been taken into account in setting the fees in this final rule.

National School Transportation Association

The National School Transportation Association supports the proposed fee reduction. But it also requests that

[5] The SBTC comment incorporates the text of a letter dated August 8, 2018, addressed to the Secretary. The disposition of SBTC's comments in this final rule also disposes of the contentions in the August 8 letter.

FMCSA and the UCR Plan reconsider recent determinations by the UCR Plan regarding the treatment of school buses for purposes of the UCR Agreement.

FMCSA does not have authority to reconsider the determination on this issue by the UCR Plan. The UCR Board has sole authority to administer the UCR Agreement in accordance with the statute. 49 U.S.C. 14504a(d)(2), (f)(2) and (f)(3). This issue is beyond the scope of this rulemaking. Therefore, the request for reconsideration cannot and will not be acted upon by FMCSA.

Anonymous

One anonymous comment was submitted and supported the Agency's determination in the NPRM that Executive Order (E.O.) 13771, Reducing Regulation and Controlling Regulatory Costs, was not applicable to this rulemaking. The comment was otherwise not relevant to this rulemaking.

VIII. Approval of Total Revenue Target

No comments to the NPRM addressed the proposed adjustment in the total revenue target to $111,277,060.00, which reflects a reduction in the amount of the administrative costs from $5,000,000 to $3,500,000. Therefore, in accordance with 49 U.S.C. 14504a(d)(7) and (g)(4), the following table of State revenue entitlements, administrative costs, and the total revenue target under the UCR Agreement, as proposed in the NPRM, is approved. These State revenue entitlements, the administrative costs, and the total revenue target will remain in effect for 2019 and subsequent years unless and until approval of a revision occurs.

STATE UCR REVENUE ENTITLEMENTS AND FINAL 2019 TOTAL REVENUE TARGET

State	Total 2019 UCR revenue entitlements
Alabama	$2,939,964.00
Arkansas	1,817,360.00
California	2,131,710.00
Colorado	1,801,615.00
Connecticut	3,129,840.00
Georgia	2,660,060.00
Idaho	547,696.68
Illinois	3,516,993.00
Indiana	2,364,879.00
Iowa	474,742.00
Kansas	4,344,290.00
Kentucky	5,365,980.00
Louisiana	4,063,836.00
Maine	1,555,672.00
Massachusetts	2,282,887.00
Michigan	7,520,717.00
Minnesota	1,137,132.30
Missouri	2,342,000.00
Mississippi	4,322,100.00
Montana	1,049,063.00
Nebraska	741,974.00
New Hampshire	2,273,299.00
New Mexico	3,292,233.00
New York	4,414,538.00
North Carolina	372,007.00
North Dakota	2,010,434.00
Ohio	4,813,877.74
Oklahoma	2,457,796.00
Pennsylvania	4,945,527.00
Rhode Island	2,285,486.00
South Carolina	2,420,120.00
South Dakota	855,623.00
Tennessee	4,759,329.00
Texas	2,718,628.06
Utah	2,098,408.00
Virginia	4,852,865.00
Washington	2,467,971.00
West Virginia	1,431,727.03
Wisconsin	2,196,680.00
Sub-Total	106,777,059.81
Alaska	500,000.00
Delaware	500,000.00
Total State Revenue Entitlement	107,777,060.00
Administrative Costs	3,500,000.00
Total Revenue Target	111,277,060.00

IX. International Impacts

Motor carriers and other entities involved in interstate and foreign transportation in the United States that do not have a principal office in the United States are nonetheless subject to the fees for the UCR Plan. They are required to designate a participating State as a base State and pay the appropriate fees to that State. 49 U.S.C. 14504a(a)(2)(B)(ii) and (f)(4).

X. Section-by-Section Analysis

Under this final rule, provisions of 49 CFR 367.50 (which were adopted in the January 5, 2018, final rule) are revised to establish new reduced fees applicable only to registration year 2019. A new 49 CFR 367.60 establishes the fees for registration year 2020, which will remain in effect for subsequent registration years unless revised in the future.

XI. Regulatory Analyses

A. E.O. 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

FMCSA determined that this final rule is not a significant regulatory action under section 3(f) of E.O. 12866, 58 FR 51735 (October 4, 1993), Regulatory Planning and Review, as supplemented by E.O. 13563, 76 FR 3821 (January 21, 2011), Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. Accordingly, OMB has not reviewed it under that Order. It is also not significant within the meaning of DOT regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034 (February 26, 1979)).

The changes imposed by this final rule adjust the registration fees paid by motor carriers, motor private carriers of property, brokers, freight forwarders, and leasing companies to the UCR Plan and the participating States. Fees are considered by OMB Circular A–4, Regulatory Analysis, as transfer payments, not costs. Transfer payments are payments from one group to another that do not affect total resources available to society. By definition, transfers are not considered in the monetization of societal costs and benefits of rulemakings.

This rule establishes reductions in the annual registration fees for the UCR Plan and Agreement. The entities affected by this rule are the participating States, motor carriers, motor private carriers of property, brokers, freight forwarders, and leasing companies. Because the State UCR revenue entitlements will remain unchanged, the participating States will not be impacted by this rule. The primary impact of this rule will be a reduction in fees paid by individual motor carriers, motor private carriers of property, brokers, freight forwarders, and leasing companies. The reduction of the current 2019 registration year fees (finalized on January 5, 2018) ranges from approximately $11 to $10,282 per entity, depending on the number of vehicles owned or operated by the affected entities. The reductions in fees for subsequent registration years range from approximately $5 to $3,899 per entity.

B. E.O. 13771 Reducing Regulation and Controlling Regulatory Costs

This final rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.[6]

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996

[6] Executive Office of the President, Office of Management and Budget. Guidance Implementing Executive Order 13771, Titled ''Reducing Regulation and Controlling Regulatory Costs.'' Memorandum M–17–21. April 5, 2017.

(SBREFA) (Pub. L. 104–121, 110 Stat. 857), requires Federal 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. The term ''small entities'' means small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000.[7] Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these entities. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This rule will directly affect the participating States, motor carriers, motor private carriers of property, brokers, freight forwarders, and leasing companies. Under the standards of the RFA, as amended by the SBREFA, the participating States are not small entities. States are not considered small entities because they do not meet the definition of a small entity in section 601 of the RFA. Specifically, States are not considered small governmental jurisdictions under section 601(5) of the RFA, both because State government is not included among the various levels of government listed in section 601(5), and because, even if this were the case, no State nor the District of Columbia has a population of less than 50,000, which is the criterion by which a governmental jurisdiction is considered small under section 601(5) of the RFA.

The Small Business Administration (SBA) size standard for a small entity (13 CFR 121.201) differs by industry code. The entities affected by this rule fall into many different industry codes. In order to determine if this rule would have an impact on a significant number of small entities, FMCSA examined the 2012 Economic Census [8] data for two different industries; truck transportation (Subsector 484) and transit and ground transportation (Subsector 485). According to the 2012 Economic Census, approximately 99 percent of truck transportation firms, and approximately 97 percent of transit and ground transportation firms, had annual revenue less than the SBA revenue threshold of $27.5 million and $15 million, respectively. Therefore, FMCSA has determined that this rule will impact a substantial number of small entities.

However, FMCSA has determined that this rule will not have a significant impact on the affected entities. The effect of this rule will be to reduce the registration fee motor carriers, motor private carriers of property, brokers, freight forwarders, and leasing companies are currently required to pay. The reduction will range from approximately $11 to $10,282 per entity, in the first year, and from approximately $5 to $3,899 per entity in subsequent years, depending on the number of vehicles owned and/or operated by the affected entities. FMCSA asserts that the reduction in fees will not have a significant impact on the affected small entities. Accordingly, I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Assistance for Small Entities

In accordance with section 213(a) of the SBREFA, FMCSA wants to assist small entities in understanding this final rule so that they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the final rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the FMCSA point of contact, Gerald Folsom, listed in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's 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 FMCSA, call 1–888–REG–FAIR (1–888–734–3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

E. Unfunded Mandates Reform Act of 1995

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 $161 million (which is the value equivalent of $100 million in 1995, adjusted for inflation to 2017 levels) or more in any one year. Though this final rule will not result in any such expenditure, the Agency discusses the effects of this rule elsewhere in this preamble.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. FMCSA determined that no information collection requirements are associated with this final rule. Therefore, the PRA does not apply to this final rule.

G. E.O. 13132 (Federalism)

A rule has implications for federalism under section 1(a) of E.O. 13132 if it has ''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.'' FMCSA has determined that this rule would not have substantial direct costs on or for States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation, imposes substantial direct unreimbursed compliance costs on any State, or diminishes the power of any State to enforce its own laws. As detailed above, the UCR Board includes substantial State representation. The States have already had opportunity for input through their representatives. Accordingly, this rulemaking does not have federalism implications warranting the application of E.O. 13132.

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

This final rule meets applicable standards in sections 3(a) and 3(b) (2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminates ambiguity, and reduce burden.

I. E.O. 13045 (Protection of Children)

E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks, 62 FR 19885 (April 23, 1997), requires agencies issuing ''economically significant'' rules, if the regulation also concerns an environmental health or safety risk that an agency has reason to believe may disproportionately affect children, to

[7] Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

[8] U.S. Census Bureau, *2012 US Economic Census.* Available at: *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_48SSSZ4&prodType=table* (accessed October 24, 2018).

include an evaluation of the regulation's environmental health and safety effects on children. The Agency determined this final rule is not economically significant. Therefore, no analysis of the impacts on children is required. In any event, the Agency does not anticipate that this regulatory action could in any respect present an environmental or safety risk that could disproportionately affect children.

J. E.O. 12630 (Taking of Private Property)

FMCSA reviewed this final rule in accordance with E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and has determined it will not effect a taking of private property or otherwise have taking implications.

K. Privacy Impact Assessment

Section 522 of title I of division H of the Consolidated Appropriations Act, 2005, enacted December 8, 2004 (Pub. L. 108–447, 118 Stat. 2809, 3268, 5 U.S.C. 552a note), requires the Agency to conduct a privacy impact assessment of a regulation that will affect the privacy of individuals. This rule does not require the collection of personally identifiable information.

L. E.O. 12372 (Intergovernmental Review)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

M. E.O. 13211 (Energy Supply, Distribution, or Use)

FMCSA has analyzed this final rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Agency has determined that this rule is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, it does not require a Statement of Energy Effects under E.O. 13211.

N. E.O. 13175 (Indian Tribal Governments)

This rule does not have Tribal implications under E.O. 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.

O. National Technology Transfer and Advancement Act (Technical Standards)

The National Technology Transfer and Advancement Act (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) are standards that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, FMCSA did not consider the use of voluntary consensus standards.

P. National Environmental Policy Act

FMCSA analyzed this rule for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1, 69 FR 9680 (March 1, 2004), Appendix 2, paragraph 6.h. The Categorical Exclusion (CE) in paragraph 6.h. covers regulations and actions taken pursuant to the regulations implementing procedures to collect fees that will be charged for motor carrier registrations. The content in this rule is covered by this CE and the final action does not have any effect on the quality of the environment. The CE determination is available in the docket.

List of Subjects in 49 CFR Part 367

Insurance, Intergovernmental relations, Motor carriers, Surety bonds.

For the reasons discussed in the preamble, FMCSA is amending title 49 CFR chapter III, part 367 as follows:

PART 367—STANDARDS FOR REGISTRATION WITH STATES

■ 1. The authority citation for part 367 continues to read as follows:

Authority: 49 U.S.C. 13301, 14504a; and 49 CFR 1.87.

■ 2. Revise § 367.50 to read as follows:

§ 367.50 Fees under the Unified Carrier Registration Plan and Agreement for registration year 2019.

TABLE 1 TO § 367.50—FEES UNDER THE UNIFIED CARRIER REGISTRATION PLAN AND AGREEMENT FOR REGISTRATION YEAR 2019

Bracket	Number of commercial motor vehicles owned or operated by exempt or non-exempt motor carrier, motor private carrier, or freight forwarder	Fee per entity for exempt or non-exempt motor carrier, motor private carrier, or freight forwarder	Fee per entity for broker or leasing company
B1	0–2	$62	$62
B2	3–5	185	
B3	6–20	368	
B4	21–100	1,283	
B5	101–1,000	6,112	
B6	1,001 and above	59,689	

■ 3. Add § 367.60 to subpart B to read as follows:

§ 367.60 Fees under the Unified Carrier Registration Plan and Agreement for registration years beginning in 2020.

TABLE 1 TO § 367.60—FEES UNDER THE UNIFIED CARRIER REGISTRATION PLAN AND AGREEMENT FOR REGISTRATION YEAR 2020 AND EACH SUBSEQUENT REGISTRATION YEAR THEREAFTER

Bracket	Number of commercial motor vehicles owned or operated by exempt or non-exempt motor carrier, motor private carrier, or freight forwarder	Fee per entity for exempt or non-exempt motor carrier, motor private carrier, or freight forwarder	Fee per entity for broker or leasing company
B1	0–2	$68	$68
B2	3–5	204	
B3	6–20	407	
B4	21–100	1,420	
B5	101–1,000	6,766	
B6	1,001 and above	66,072	

Issued under authority delegated in 49 CFR 1.87 on: December 20, 2018.

Raymond P. Martinez,

Administrator.

[FR Doc. 2018–28170 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2017–0063; 4500030113]

RIN 1018–BC16

Endangered and Threatened Wildlife and Plants; Threatened Species Status for Trispot Darter

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine threatened species status under the Endangered Species Act of 1973 (Act), as amended, for trispot darter (*Etheostoma trisella*), a fish species found in the Coosa River system in Alabama, Georgia, and Tennessee. This rule adds this species to the List of Endangered and Threatened Wildlife.

DATES: This rule is effective January 28, 2019.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2017–0063, and at the U.S. Fish and Wildlife Service, Alabama Ecological Services Field Office, 1208 Main Street, Daphne, AL 36526; telephone 251–441–5181. Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2017–0063, and by appointment, during normal business hours at the Alabama Ecological Services Field Office.

FOR FURTHER INFORMATION CONTACT: Bill Pearson, Field Supervisor, U.S. Fish and Wildlife Service, Alabama Ecological Services Field Office (see **ADDRESSES**). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Previous Federal Actions

On October 4, 2017, we published a proposed rule in the **Federal Register** (82 FR 46183) to list the trispot darter as a threatened species under the Act (16 U.S.C. 1531 *et seq.*). Please refer to that proposed rule for a detailed description of previous Federal actions concerning this species.

Elsewhere in today's **Federal Register**, we propose to (1) designate critical habitat for the trispot darter under the Act; and (2) issue a rule under section 4(d) of the Act that provides measures necessary and advisable for the conservation of the trispot darter.

Background

Please refer to the October 4, 2017, proposed rule (82 FR 46183) and the Species Status Assessment (SSA) Report for a full summary of species information. Both documents are available *at http://www.regulations.gov* under Docket No. FWS–R4–ES–2017–0063, and on the Service's Southeast Region website at *https://www.fws.gov/southeast/*.

The trispot darter is a freshwater fish found in the Coosa River System in the Ridge and Valley ecoregion of Alabama, Georgia, and Tennessee. This fish has a historical range from the middle to upper Coosa River Basin with collections in the mainstem Coosa, Oostanaula, Conasauga, and Coosawattee Rivers, and their tributaries. Currently, the trispot darter is known to occur in four populations in the Little Canoe Creek and tributaries (Coosa River), Ballplay Creek tributaries (Coosa River), Conasauga River and tributaries, and Coosawattee River and one tributary.

The trispot darter is a migratory species that utilizes distinct breeding and non-breeding habitats. From approximately April to October, the species inhabits its non-breeding habitat, which consists of small to medium river margins and lower reaches of tributaries with slower velocities. It is associated with detritus, logs, and stands of water willow, and the substrate consists of small cobbles, pebbles, gravel, and often a fine layer of silt. During low flow periods, the darters move away from the peripheral zones and toward the main channel; edges of water willow beds, riffles, and pools; and mouths of tributaries. In late fall, this migratory species shifts its habitat preference and begins movement toward spawning areas; this is most likely stimulated by precipitation, but temperature changes and decreasing daylight hours may also provide cues to begin migration. Migration into spawning areas begins approximately late November or early December with fish moving from the main channels into tributaries and eventually reaching adjacent seepage areas where they will congregate and remain for the duration of spawning, approximately until late April. Breeding sites are intermittent seepage areas and ditches with little to no flow; shallow depths (12 inches (30 centimeters) or less); moderate leaf litter covering mixed cobble, gravel, sand, and clay; a deep layer of soft silt over clay; and emergent vegetation. Trispot darters predominantly feed on mayfly nymphs and midge larvae and pupae.

The trispot darter was first described in 1963 from a single specimen collected in Cowans Creek in Cherokee County, Alabama. This species was originally described as a member of the

subgenus *Psychromaster* and was later moved to the subgenus *Ozarka* in 1980 where it remains today. Currently, the trispot darter is considered a valid taxon (Service 2017, p. 6).

Summary of Comments and Recommendations

In our October 4, 2017, proposed rule to list the trispot darter as a threatened species (82 FR 46183), we requested that all interested parties submit written comments on the proposal by December 4, 2017. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties, and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in the St. Clair News-Aegis, St. Clair Times, Chattanooga Times Free Press, Atlanta Journal Constitution, and The Daily Home. We did not receive any requests for a public hearing. All substantive information provided during the comment period has either been incorporated directly into this final determination or is addressed, by topic, below.

Peer Reviewer Comments

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review actions under the Act, we solicited expert opinion from four knowledgeable individuals with scientific expertise that included familiarity with trispot darter and its habitat, biological needs, and threats. We received responses from two of the peer reviewers.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the information contained in the SSA Report. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final SSA Report. Peer reviewer comments are addressed in the following summary and were incorporated into the final SSA Report as appropriate.

(1) Comment: One peer reviewer expressed doubt that hurricanes or other large storms can negatively affect stream fish communities.

Our Response: Large storms have been found to disturb aquatic habitats to the extent that stream fish assemblages have been observed to be altered as a result (Service 2017, p. 25; Service 2011, p. 9). Recovery of stream fish communities to assemblages seen before disturbances from large storms depends on adjacent source populations and the dispersal ability of specific species. In the case of rare species with isolated populations such as the trispot darter, large storms that are capable of causing a level of disturbance that alters fish communities can pose a substantial threat. A more thorough discussion of this threat can be found in the SSA Report (Service 2017, p. 25).

(2) Comment: One peer reviewer suggested that not enough information was available on the trispot darter to infer its historical range.

Our Response: We are required to use the best available commercial and scientific information available at the time we make our determination. Available resources at the time of rulemaking have described the range of the trispot darter as the upper Coosa River system. Based on recorded occurrences of the trispot darter in the mainstem of the Coosa River and tributaries to the Coosa River in Alabama, Georgia, and Tennessee, we conclude that the historical range described as the upper Coosa River system is reasonably supported.

Public Comments

(3) Comment: One commenter expressed concern about the presence of the Conasauga Shale Field, a natural gas-bearing formation, within portions of the trispot darter's range. The commenter provided current research that demonstrated negative associations between hydraulic fracturing (fracking) and fish recruitment, and recommended the Service evaluate oil and gas exploration in the Conasauga Shale Field and its influence on trispot darter.

Our Response: We contacted the Alabama State Oil and Gas Board to assess the current and future status of natural gas exploration and exploitation of the Conasauga Shale Field in Alabama. Based on our correspondence, we find that fracking within the Conasauga Shale Field is unlikely to be a threat to the trispot darter within the foreseeable future. Currently, no new drilling permits have been approved, and all existing wells have been plugged and abandoned. Wells were abandoned due to low productivity and low gas prices. For these reasons, and because of low permeability of the rock formation, the Alabama State Oil and Gas Board expects that oil and gas extraction is unlikely to occur there within the foreseeable future.

(4) Comment: One commenter provided additional information on the effects of hypolimnetic releases from dams on riverine ecosystems and fish species present in tailwaters. Hypolimnetic refers to the part of a lake below the thermocline made up of water that is stagnant and of essentially uniform temperature except during the period of overturn. The commenter also noted that dams can create many kilometers of unsuitable habitat because of changes in the temperature regime from hypolimnetic flow releases. Decreases in streamflow temperature as a result of hypolimnetic releases have been shown to adversely affect darter species by increasing the probability of local extinction in cold waters downstream of dams.

Our Response: We incorporated the information from the additional studies clarifying the effects of hydropower projects on aquatic species and have added them to the appropriate sections of the SSA Report. We also recognize that currently the trispot darter is exposed to releases from the Carters Reregulation Dam. However, past research has found that operation of the reregulation dam does not affect the system's ability to provide adequate dissolved oxygen for the trispot darter (Freeman 2011, p. 10); this system also still meets State water quality and temperature standards (USACE 2015, p. 4–13). Therefore, temperature and dissolved oxygen alterations are not viewed as stressors to the trispot darter in the Coosawattee River below the Carters Reregulation Dam.

(5) Comment: One commenter noted that the overall condition of the Little Canoe Creek Management Unit (MU) is ranked as moderate even though six of the seven factors considered in the ranking scored as ''low'' in the October 4, 2017, proposed rule to list the trispot darter as a threatened species (82 FR 46183).

Our Response: The overall condition for the Little Canoe Creek MU presented in the proposed rule (see 82 FR 46187) and the SSA Report (version 1.0) was in error. We have corrected the condition rank in this rule and the updated SSA Report (version 1.2). However, this correction does not change our assessment of future conditions in the SSA Report, nor our conclusions presented in the October 4, 2017, proposed rule.

Summary of Changes From the Proposed Rule

In preparing this final rule, we reviewed and fully considered comments from the public on the proposed rule. We did not make any substantive changes to this final rule after consideration of the comments we received. We did update the SSA Report (to version 1.2) based on comments and some additional information provided, as follows: (1) We made many small, nonsubstantive clarifications and

corrections throughout the SSA Report, including ensuring consistency of colors on maps, providing details about data sources used, updating references, and making minor clarifications; and (2) we included in the updated version of the SSA Report the additional information we received regarding observations of the trispot darter, hypothesized historical range of the trispot darter, and more detailed life-history data for the species. However, the information we received during the comment period for the proposed rule did not change our determination that the trispot darter is a threatened species.

Summary of Biological Status and Threats

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations in title 50 of the Code of Federal Regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself. However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species—such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

Our assessment evaluated the biological status of the species and threats affecting its continued existence. It was based upon the best available scientific and commercial data, including the SSA Report (Service 2018, entire), and the expert opinion of the SSA team members. Please refer to chapter 3 of the SSA Report (Service 2018, pp. 17–25) for a more detailed discussion of the factors affecting the trispot darter.

Risk Factors Influencing Viability of Trispot Darter

As discussed above, we considered the five factors set forth in section 4(a)(1) of the Act in assessing whether the species meets the definition of an endangered or a threatened species. A multitude of natural and anthropogenic factors may impact the status of species within aquatic systems. The largest threats to the future viability of the trispot darter involve habitat degradation from factors influencing four habitat elements: Water quality, water quantity, instream habitat, and habitat connectivity (Factor A). All of these factors are exacerbated by the effects of climate change (Factor E). A brief summary of these primary stressors is presented below; for a full description of the factors, refer to chapter 4 of the SSA Report.

Hydrologic Alteration

Activities that lead to hydrologic alteration include reservoir construction and operation, excessive water withdrawals, and an increase in impervious surfaces.

Hydrologic alteration in the system occupied by the trispot darter has two components: Increases in storm flow frequency and intensity, and a decrease in base flows, which together create a ''flashy'' hydrologic regime. In a natural forested system, most rainfall soaks into the soil and is carried into nearby streams via subsurface flow. Some evaporates or transpires, and a relatively small amount becomes surface runoff. In the trispot darter's system, which is urbanized with large amounts of impervious cover such as roads, parking lots, and rooftops, this cycle is altered; most stormwater hits impervious surfaces and becomes runoff, which then is channeled quickly to streams via stormwater drain pipes or ditches. Relatively little infiltrates into the soil. As a result, storm flows in the receiving stream are higher and more frequent, although briefer in duration, and base flows are lower, than in natural systems. The storm discharge of urban streams can be twice that of rural streams draining a watershed of similar size, and the frequency of channel-forming events can be 10 times that of pre-development conditions. These ''flashy'' stream flows and frequent, smaller high-flow events negatively affect structural habitat on which the trispot darter depends. Increases in flow frequency or intensity can result in channel widening through bank erosion or deepening to accommodate the additional discharge. This results in increased downstream sedimentation and unstable beds, both of which degrade channel complexity and feeding and refugia habitat for fish species. Increased storm flows, in addition, can cause physical washout of eggs and larval fishes, stress on adults, and negatively alter the stream's food web, affecting many fish species. There is also a decrease in channel complexity and a reduction in instream cover and natural substrates like boulders, cobble, and gravel.

Reservoirs can substantially alter hydrology downstream, especially when operated for hydroelectric power generation. Hydropeaking dams produce high flows only when power generation is needed. Hydropeaking dams, Carters Dam and Reregulation Dam, exist on the Coosawattee River. Rapid flow increases and decreases from hydropeaking can reduce stream insect abundance, potentially decreasing food availability for darters. Furthermore, managed rivers can exhibit substantially altered and novel food webs that affect native communities and their ability to withstand perturbations. Non-hydropeaking reservoirs, farm ponds, amenity lakes, and other impoundments may also substantially alter hydrologic regimes by storing water during low flow periods, effectively dampening moderate to high flows and in some cases augmenting flows. Fish are adapted to the natural seasonal

variations of flow, and alterations to this regime affect their life-history strategies.

Hydrologic alteration can also lead to other stressors, such as sedimentation and a loss of connected suitable habitat.

Sedimentation

Sedimentation can affect fish species by degrading physical habitat used for foraging, sheltering, and spawning; altering food webs and decreasing stream productivity; forcing fish to change their behaviors; and even injuring or killing individual fish. Chronic exposure to sediment has been shown to have negative impacts to fish gills, which in addition to causing gill damage can possibly reduce growth rates. Sedimentation causes reduced visibility, impacting fishes' abilities to feed and interact.

A wide range of activities (including agricultural activities, construction activities, some forestry activities if certified best management practices are not used, and dredging), as well as stormwater runoff, unpaved roads, and utility crossings, can lead to sedimentation within streams. Historical land use practices have substantially altered hydrological and geological processes such that sediments continue to be input into streams for several decades after those activities cease. Examples of these activities occurring within the range of the trispot darter include urban impacts in the Springville, Alabama, and Dalton, Georgia, areas; agricultural practices in the Conasauga River basin; and livestock access to streams in the Little Canoe Creek watershed.

Reduced Connectivity

Connectivity relates to a species' ability to disperse to and from habitat patches. Excess groundwater withdrawal, causing sections of streams to become dry for parts of the year, can reduce connectivity. Dams and reservoirs reduce connectivity by creating a physical barrier between fish populations and by changing habitat from flowing streams to standing water, which is not suitable habitat for this darter. Road crossings, some of which have impassible culverts that reduce connectivity, are also more prevalent in highly populated urban areas. All of these factors have occurred or are occurring in the range of the trispot darter.

Loss of Riparian Vegetation

This fish has adapted to occupy habitats that are surrounded by vegetation, which moderates temperature by blocking solar radiation; provides a source for terrestrial plant material that forms the base of the food web and provides shelter and foraging habitat for this fish; and helps to maintain clear, clean water and substrate through filtration. Removal of riparian vegetation can destabilize stream banks, increasing sedimentation and turbidity; increase the contaminants and nutrients that enter the water from runoff; increase water temperatures and light penetration, which also increases algae production; and alter available habitat by reducing woody plant debris and leaf litter, which in turn decreases overall stream productivity. All of these events decrease habitat suitability for the trispot darter. Removal of riparian vegetation has occurred where urban and agricultural practices are prevalent, such as increased development in Dalton, Chatsworth, and Ellijay, and occurrences of row crops and pastures in the Conasauga River basin generally.

Contaminants

Contaminants, including metals, hydrocarbons, pesticides, and other potentially harmful organic and inorganic compounds, can be toxic to fish and are common in urban streams, including those within the range of the trispot darter. Exposure to contaminants may cause physiological stress to the trispot darter as seen in other members of the genus *Etheostoma,* and streams affected by multiple sources of contaminants may induce higher levels of stress on the fish (Diamond *et al.* 2016; p. 133).

Contamination in the mainstem of the Coosa River by polychlorinated biphenyl (PCBs) has been attributed to past industrial activity adjacent to the river. In the Coosawattee River, PCBs caused by nonpoint sources are also identified as a source of impairment. PCBs have toxic effects to the endocrine system, nervous system, reproductive system, blood, skin, and liver of animals, and have likely impacted the trispot darter in both basins.

Pesticides and herbicides are frequently found in streams draining agricultural land uses, with herbicides being the most commonly detected. Many agricultural streams still contain dichlorodiphenyltrichloroethan (DDT) and its degradation products. Pesticides also are heavily used in urban and suburban areas, and many of these find their way into streams and groundwater. Glyphosates and other inert ingredients found in herbicides can be toxic to fish and other aquatic organisms, causing stress and reduced fitness; herbicide use where the trispot darter occurs in the Conasauaga River is prevalent and increasing.

Agriculture

Agriculture is a predominant land use within the range of the trispot darter. Livestock grazing is prevalent in some areas, and poultry farming is also common.

Poultry Litter: Poultry litter is a mixture of chicken manure, feathers, spilled food, and bedding material that frequently is used to fertilize pastureland or row crops. Each poultry house has an estimated ability to produce up to 100 tons of litter a year. Surface-spreading of litter results in runoff from heavy rains carrying the poultry litter into waterways, bringing phosphorus and nitrogen from manure into nearby streams. Additionally, repeated or over application of poultry litter can result in phosphorus buildup in the soil, which then runs off into streams. Excess phosphorus and nitrogen in streams increases algae and undesirable aquatic plants that rob water of oxygen, causing fish kills. Poultry litter also contains endocrine disruptors, such as estrogen, which have been identified as a significant stressor within the Conasauga River basin. Estrogens have been found in water and sediment samples within the watershed at concentrations high enough to be disruptive to the endocrine system in fish. Increased levels of estrogens affect reproductive biology and result in reduced breeding success. In a recent study of endocrine disruptors on fishes in the Conasauga River, approximately 7.5 percent of male fishes surveyed were found to have female reproductive cells in male reproductive organs.

Livestock Access to Streams: On many farms, livestock is grazed on pastures adjacent to streams and rivers, and is allowed free access to the water. Livestock accessing riparian buffers and, subsequently, the stream proper leads to habitat destruction and decreased water quality. Livestock can destabilize stream banks, which, as discussed above, creates increased sediment loads within small systems.

Urbanization

In addition to contributing to individual stressors such as changes in flow regime and contamination, urbanization is anticipated to increase the magnitude of nearly all other stressors, and thus is expected to affect the trispot darter across its range, which is close to the growing Atlanta metropolitan area, the expanding Chattanooga and Birmingham areas, and intervening areas with growing human populations and increasing development.

Weather Events

Weather events that affect stream flows are considered to be most relevant to the species. Broadly, these events include extreme storms and droughts. Increased flows can cause physical washout of eggs and larval fishes, cause stress on adults, and alter the production in a stream. Within the range of the trispot darter, extreme flows associated with hurricanes have been reported to have negative effects on stream fish populations. On the other hand, reduced baseflows due to droughts can also cause population declines, habitat loss, reduced water quality (decreased dissolved oxygen and temperature alteration) leading to death, crowding of individuals leading to stress, and decreased reproduction in stream fish populations.

Climate models for the southeastern United States project that average annual temperatures will increase, cold days will become less frequent, the freeze-free season will lengthen, temperatures exceeding 95 degrees Fahrenheit will increase, heat waves will become longer, and the number of major hurricanes will increase. While these climate models predict wide variability in weather patterns into the future, overall they suggest that the region will be subjected to more frequent large storms (hurricanes) as well as low flows from droughts.

Other Stressors

In our analysis of the factors affecting these species, we found no evidence of population- or species-level impacts from overutilization for commercial, recreational, scientific, or educational purposes (Factor B). Also, there was no evidence of any impacts due to disease or predation (Factor C). No existing regulatory mechanisms adequately address the threats to the trispot darter such that it does not warrant listing under the Act (Factor D).

Conservation Actions

The trispot darter is recognized by Alabama, Georgia, and Tennessee as a species of concern. This species is listed as Priority 2/High Conservation Concern by the State of Alabama, endangered by the State of Georgia, and threatened by the State of Tennessee. Priority watersheds within the range of the trispot darter have been designated as Strategic Habitat Units by the Alabama Rivers and Streams Network (ARSN). ARSN is an organized partnership of state and federal entities as well as NGOs and corporations. Currently, the trispot darter is found in the Big Canoe Creek SHU and the Upper Coosa River tributaries SHU. The Strategic Habitat Unit project was developed for species restoration and enhancement. To work towards these goals, a thorough threats analysis is conducted in each SHU by partners to the ARSN, and the results of the threats analyses guide State and Federal agencies in prioritizing projects that reduce and remove the identified threats and ultimately improve habitat and water quality for listed and at risk species. The Atlantic Coast Conservancy holds a tract of land within Ballplay Creek that could offer some protection in the watershed. The U.S. Department of Agriculture's Natural Resources Conservation Service's Working Lands for Wildlife partnership within the basin will help farmers develop and implement strategies to improve water quality.

Current Condition of Trispot Darter

To assess viability for the trispot darter, we used the three conservation biology principles of resiliency, representation, and redundancy (together, the 3Rs). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years); representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes); and redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, hurricanes). In general, the more redundant and resilient a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we used the 3Rs to evaluate individual life-history needs of all three darters. In the next stage, we assessed the historical and current condition of each species' demographics and habitat characteristics, including an explanation of how the species arrived at their current conditions. In the final stage of the SSA we made predictions about the species' responses to positive and negative environmental and anthropogenic influences. This process used the best available information to characterize viability as the ability of each species to sustain populations in the wild over time.

To qualitatively assess resiliency, we considered seven components that broadly relate to either the physical environment (''Habitat Elements'') or characteristics about the population specifically (''Population Elements''). Habitat elements consisted of an evaluation of physical habitat, connectivity, water quality, and hydrologic regime. Population elements consisted of an estimation of approximate abundance, the extent of occurrence (total length of occupied streams), and an assessment of occurrence complexity. Representation describes the ability of a species to adapt to changing environmental conditions over time. For trispot darters to exhibit high representation, resilient populations should occur in all ecoregions to which they are native, and maintain some level of connectivity between populations. These occupied physiographic provinces represent the ecological setting in which the darters have evolved. Redundancy is characterized by having multiple resilient and representative populations distributed throughout its range. Furthermore, these populations should maintain natural levels of connectivity between them. Connectivity allows for immigration and emigration between populations and increases the likelihood of recolonization should a population become extirpated. An overall resiliency condition was estimated by combining habitat and population elements. Population elements were weighted two times higher than habitat elements because they are considered direct indicators of population condition. Conditions were classified as ''Low'', ''Moderate'', or ''High''.

After analyzing current conditions for the species, we described how current viability of the three darters may change over a period of 50 years. As with current conditions, we evaluated species viability in terms of resiliency at the population scale, and representation and redundancy at the species scale. In the SSA report, we described three plausible future scenarios and whether there will be a change, from current conditions, to resiliency, representation, or redundancy under each scenario. These scenarios capture the range of likely viability outcomes that the trispot darter is predicted to exhibit by the end of 2070. The future scenarios differ in two main elements of predicted change: Urbanization and climate. To forecast future urbanization, we considered future scenarios that incorporate the SLEUTH (Slope, Land use, Excluded area, Urban area, Transportation,

Hillside area) model. This model simulates patterns of urban expansion that are consistent with spatial observations of past urban growth and transportation networks. Regarding climate, the Intergovernmental Panel on Climate Change utilized a suite of alternative scenarios in the Fifth Assessment Report to make near-term and long-term climate projections. In our assessments, we used these projections to help understand how climate may change in the future and what effects may be observed that impact the trispot darter.

Collection records used in the analysis were compiled and provided to the Service by State partners. These records did not exhibit standardization: The numbers of individuals collected was inconsistently recorded and sampling methods varied among records. Therefore, we were unable to analyze exact numbers collected for each record. Instead, abundance was estimated for each record categorically.

According to our analysis, all of the current management units (MUs) have resiliency ranked as ''low'' in the analysis (see Table 1, below). Ballplay Creek MU has a low resiliency because of reduced genetic diversity, the abundance is qualitatively low, reservoirs and poor water quality remove connectivity to other MUs, the impairment of the Coosa River within the watershed, and the extent of the occupied habitat is small. The Little Canoe Creek MU has a low resiliency to stochastic events because water quality and abundance are low (although the occurrence complexity is high), Coosa River reservoirs remove connectivity to other MUs, and the extent of the occupied habitat is small. Because of the PCBs known in the area, the Coosawattee River has low resiliency due to hydrologic alteration from the hydroelectric dam, PCBs in the river contributing to low water quality, lower abundance of fish per collection record, a small and reduced distribution, and overall simple occurrence spatial arrangement. The Conasauga River MU has low resiliency due to low water quality in the middle and lower river, low abundance of fish per collection record, a reduced population, and overall simple occurrence spatial arrangement. For aquatic species that inhabit rivers, complex spatial occurrence relates to a species occupying multiple tributaries and the main-stem river as opposed to only inhabiting the main-stem river. A more complex and dendritic (tree-like) spatial arrangement of occupied habitat will be more resilient (Service 2017, p. 27).

Historically, the trispot darter was found from the confluence of Holly Creek to Chatsworth, Georgia and is now only known from just upstream of Chatsworth. Currently, the trispot darter occupies approximately 20 percent of its historically known range. While it is clear the species has lost some of its historical range, the best available data do not indicate a declining trend in abundance in the remaining areas from historical to the present. This species is rare and difficult to detect. Combined with the inconsistent survey methodology and lack of standard collection records, this creates uncertainty in any analysis of trends or the ability to compare data across years.

A full analysis for each unit's current condition can be found in the SSA Report and the proposed rule.

TABLE 1—CURRENT SPECIES RESILIENCY SUMMARY OF THE TRISPOT DARTER

	Approximate abundance	Occurrence extent	Occurrence complexity	Physical habitat	Connectivity	Water quality	Hydrologic regime	Overall condition
Little Canoe Creek	Low	Low	High	Low	Low	Low	Low	Low.
Ballplay Creek	Low	Low	Low	Low	Low	Low	Low	Low.
Conasauga River	Low	Low	Low	Low	Moderate	Low	Low	Low.
Coosawattee River	Low	Low	Low	Moderate	Moderate	Low	Low	Low.

Future Conditions of Trispot Darter

For the purpose of this assessment, we define viability as the ability of the species to sustain populations in the wild over time. To address uncertainty associated with the degree and extent of potential future stressors and their impacts on species' requisites, we assessed the 3Rs using three plausible future scenarios. These scenarios were based, in part, on the results of urbanization and climate models that predict changes in habitat used by the trispot darter. The models that were used to forecast both urbanization and climate change projected 50 years into the future (the year 2070).

For example, in one scenario, current environmental regulations and policy, land use management techniques, and conservations measures remain the same over the next 50 years. We anticipate the current trend in greenhouse gas emissions to continue and moderate impacts from extreme weather events including intense drought, floods, and storm events to occur. Rapid urbanization will continue at the current estimated rate for the Piedmont region of the southeastern United States, which will increase demand for water resources and introduce multiple additional stressors into local streams and rivers. Despite an overall growth in population and increases in developed areas, some regions will remain predominantly in agriculture and experience associated water quality declines. In pace with current trends, we anticipate declines in habitat and water quantity and quality as a result of rapid urbanization, climate change, agricultural practices, and an overall lack of voluntary conservation measures being implemented. Under this scenario, two populations, Ballplay Creek and Conasauga River, are expected to become extirpated, while the remaining two, Little Canoe Creek and Coosawattee River, are projected to persist but in low resiliency condition. Because of the expected future extirpation of trispot darters predicted for Salacoa Creek (Coosawattee population) in this scenario, the fish would then be found only in the Coosawattee River mainstem (no longer in any tributaries), making it more vulnerable to catastrophic events. Redundancy decreases to two populations (Little Canoe Creek and Conasauga), which are completely isolated from one another due to the Weiss Dam. This means that genetic material will not be exchanged, reducing adaptive potential of the species. In the SSA Report, we describe conditions and results for all three scenarios that represent the likely range of plausible future outcomes for development, possible climate changes, and the species' expected response to threats. Results for our full future condition analysis for the future projections are provided in table 2, below and are discussed more fully in the SSA Report and the proposed rule.

TABLE 2—FUTURE CONDITION OF THE TRISPOT DARTER BY THE YEAR 2070 UNDER THREE FUTURE SCENARIOS

Management unit	Status quo	Best case	Worst case
Little Canoe	Low	Moderate	Likely Extirpated.
Ballplay	Likely Extirpated	Low	Likely Extirpated.
Conasauga	Likely Extirpated	Moderate	Likely Extirpated.
Coosawattee	Low	Moderate	Likely Extirpated.

Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the trispot darter. Our analysis of the trispot darter's current and future conditions, as well as the conservation efforts discussed above, show that the population and habitat factors used to determine the resiliency, representation, and redundancy for trispot darter will continue to decline such that it is likely to become in danger of extinction within the foreseeable future.

We considered whether the trispot darter is presently in danger of extinction throughout its range. The current conditions as assessed in the SSA Report show extant populations in four river systems (MUs) across its range, including 65 river miles (105 river kilometers) of occupied habitat in the Conasauga River. The best available data do not indicate a declining trend in abundance, and it is likely that the low abundance (and, therefore, low resiliency) indicated in our analysis is due to the species being naturally rare and difficult to detect. The inconsistent survey methodology and lack of standard collection records also creates uncertainty in any analysis of trends or the ability to compare data across years. While threats are currently acting on the species and many of those threats are expected to continue into the future, we did not find that the species is currently in danger of extinction throughout its range.

Based on our analysis of plausible future conditions of the trispot darter, we concluded that the resiliency, redundancy, and representation will be impacted by threats and the species will have reduced viability in the foreseeable future. While our future scenarios were developed using models that predicted out 50 years, the short lifespan of the species (2 to 3 years) and the lack of data and research specific to trispot darters regarding evidence of threats directly impacting the species creates uncertainty when predicting the species' response to threats into the future. Forecasting beyond 8 to 10 generations (*i.e.,* 16 to 24 years) would be speculative, and we do not have robust population data to support a foreseeable future that could accurately predict how the trispot darter may respond to threats beyond a 20-year timeframe. Accordingly, we have concluded that approximately 20 years is the appropriate foreseeable future for the trispot darter.

Our analysis concludes that 30 years beyond our foreseeable future timeframe, our range of plausible future scenarios predicts the trispot darter may continue to persist in as many as all four of the populations; however, the entire risk profile indicates that all four populations could also possibly be extirpated in 50 years. It is reasonable to assume that at an intermediate timeframe of 16 to 24 years, these scenarios will not have been realized completely; however, many populations that persist are likely to have low resiliency and continue to face threats. Considering this species' vulnerability to a loss of connectivity between breeding and nonbreeding habitats, and the effect that situation has on reproductive success, we expect negative impacts to the resiliency, redundancy, and representation of the species in the foreseeable future. The trispot darter's unique reproductive strategy of utilizing distinct areas of rivers and streams for breeding and nonbreeding habitats makes the loss of connectivity especially detrimental to viability. A lack of protected lands within the current range of the trispot darter creates more uncertainty regarding land use, threats, and the ability of these four populations to withstand the expected loss of one or two populations. This expected reduction in both the number and distribution of resilient populations is likely to make the species vulnerable to catastrophic disturbance. Therefore, on the basis of the best available scientific and commercial information, we find that the species is likely to become in danger of extinction within the foreseeable future throughout its range.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Because we have determined that the trispot darter is likely to become an endangered species within the foreseeable future throughout its range, we find it unnecessary to proceed to an evaluation of potentially significant portions of the range. Where the best available information allows the Services to determine a status for the species rangewide, that determination should be given conclusive weight because a rangewide determination of status more accurately reflects the species' degree of imperilment and better promotes the purposes of the statute. In this way, assigning the rangewide status to the species (rather than potentially assigning a different status based on a review of only a portion of the range) best implements the statutory distinction between threatened and endangered species. Maintaining this fundamental distinction is important for ensuring that conservation resources are allocated toward species according to their actual level of risk.

We also note that Congress placed the ''all'' language before the ''significant portion of its range'' phrase in the definitions of ''endangered species'' and ''threatened species.'' This suggests that Congress intended that an analysis based on consideration of the entire range should receive primary focus, and thus that the agencies should do a ''significant portion of its range'' analysis as an alternative to a rangewide analysis only if necessary. Under this reading, we should first consider whether listing is appropriate based on a rangewide analysis and proceed to conduct a ''significant portion of its range'' analysis if, and only if, a species does not qualify for listing as either endangered or threatened according to the ''all'' language. We note that this interpretation is also consistent with the 2014 Final Policy on Interpretation of the Phrase ''Significant Portion of its Range'' (SPR Policy) (79 FR 37578; July 1, 2014). That policy is the subject of ongoing litigation, including litigation against the Service in the United States District Court for the Northern District of California, which has vacated the ''significant portion'' part of the Services' SPR Policy (*Desert Survivors* v. *Department of the Interior,* No. 16–cv–01165–JCS (N.D. Cal. Aug. 24, 2018)). However, our approach in this rule, explained above, has been reached and

applied independently of the SPR Policy, and is not inconsistent with the court's holding in *Desert Survivors.*

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies; private organizations; and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

Recovery Actions

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species remains endangered or may be reclassified from endangered to threatened (''downlisted'') or removed from listing (''delisted''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and other stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our website (*http://www.fws.gov/endangered*) or from our Alabama Ecological Services field office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Following publication of this final listing rule, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of Alabama, Georgia, and Tennessee will be eligible for Federal funds to implement management actions that promote the protection or recovery of the trispot darter. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Please let us know if you are interested in participating in recovery efforts for the trispot darter. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Critical Habitat

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Elsewhere in today's **Federal Register**, we propose to designate critical habitat for the trispot darter under the Act.

Regulatory Provisions

Under section 4(d) of the Act, the Service has discretion to issue regulations that we find necessary and advisable to provide for the conservation of threatened species. The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to threatened wildlife. The prohibitions of section 9(a)(1) of the Act, as applied to threatened wildlife and codified at 50 CFR 17.31, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) threatened wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: For scientific purposes, for the enhancement of propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

Section 4(d) of the Act specifies that, for threatened species, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of the species. This

discretion includes authority to prohibit by regulation with respect to a threatened species any act prohibited by section 9(a)(1) of the Act. At 50 CFR 17.31(a), the Service, by delegation from the Secretary, exercised this discretion to extend the take and other prohibitions set forth in section 9(a)(1) of the Act to all threatened species. The provisions at 50 CFR 17.31(c), however, also provide that the prohibitions included at 50 CFR 17.31(a) do not apply if the Service promulgates a rule under section 4(d) of the Act tailored to provide for the conservation needs of a specific threatened species. Elsewhere in today's **Federal Register**, we propose to issue a rule under section 4(d) of the Act (''4(d) rule'') that is tailored to the specific threats to and conservation needs of the trispot darter. Until a 4(d) rule is made final for this species, all prohibitions included at 50 CFR 17.31(a) apply to the trispot darter.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a final listing on proposed and ongoing activities within the range of a listed species. Activities that the Service believes could potentially harm the trispot darter and result in ''take'' include, but are not limited to:

(1) Unauthorized handling or collecting of the species;

(2) Destruction or alteration of the species' habitat by discharge of fill material, dredging, snagging, impounding, channelization, or modification of natural or artificial wet weather conveyances or ephemeral, intermittent, or perennial stream channels or banks;

(3) Destruction of riparian habitat directly adjacent to natural or artificial wet weather conveyances or ephemeral, intermittent, or perennial stream channels that causes significant increases in sedimentation and destruction of natural stream banks or channels;

(4) Discharge of pollutants into a natural or artificial wet weather conveyances or ephemeral, intermittent, or perennial stream channels, or into areas hydrologically connected to a natural or artificial wet weather conveyances or ephemeral, intermittent, or perennial stream channel occupied by the species;

(5) Diversion or alteration of surface or ground water flow; and

(6) Pesticide/herbicide applications in violation of label restrictions.

Questions regarding whether specific activities constitute a violation of section 9 of the Act should be directed to the Alabama Ecological Services Field Office (see **ADDRESSES**).

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act, need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. There are no tribal interests affected by this rule.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *http://www.regulations.gov* and upon request from the Alabama Ecological Services Field Office (see **ADDRESSES**).

Authors

The primary authors of this final rule are the staff members of the Alabama Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11(h) by adding an entry for ''Darter, trispot'' to the List of Endangered and Threatened Wildlife in alphabetical order under FISHES to read as set forth below:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
FISHES				
*	*	*	*	*
Darter, trispot	*Etheostoma trisella*	Wherever found	T	83 FR [insert **Federal Register** page where the document begins], 12/28/2018.
*	*	*	*	*

Dated: October 25, 2018.

James W. Kurth,

Deputy Director, U.S. Fish and Wildlife Service, Exercising the Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2018–27971 Filed 12–27–18; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 180117042–8884–02]

RIN 0648–XG695

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

ACTION: Temporary rule; inseason General category quota transfer.

SUMMARY: NMFS is transferring 19.5 metric tons (mt) of Atlantic bluefin tuna (BFT) quota from the 28.9-mt General category December 2019 subquota to the January 2019 subquota period (from January 1 through March 31, 2019, or until the available subquota for this period is reached, whichever comes first). This action is based on consideration of the regulatory determination criteria regarding inseason adjustments and applies to Atlantic tunas General category (commercial) permitted vessels and Highly Migratory Species (HMS) Charter/Headboat category permitted vessels with a commercial sale endorsement when fishing commercially for BFT.

DATES: Effective January 1, 2019, through March 31, 2019.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin, 978–281–9260, or Larry Redd, 301–427–8503.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and as implemented by the United States among the various domestic fishing categories, per the allocations established in the 2006 Consolidated Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006), as amended by Amendment 7 to the 2006 Consolidated HMS FMP (Amendment 7) (79 FR 71510, December 2, 2014). NMFS is required under ATCA and the Magnuson-Stevens Act to provide U.S. fishing vessels with a reasonable opportunity to harvest the ICCAT-recommended quota.

The base quota for the General category is 555.7 mt. See § 635.27(a). Each of the General category time periods (January, June through August, September, October through November, and December) is allocated a ''subquota'' or portion of the annual General category quota. Although it is called the ''January'' subquota, the regulations allow the General category fishery under this quota to continue until the subquota is reached or March 31, whichever comes first. The baseline subquotas for each time period are as follows: 29.5 mt for January; 277.9 mt for June through August; 147.3 mt for September; 72.2 mt for October through November; and 28.9 mt for December. Any unused General category quota rolls forward within the fishing year, which coincides with the calendar year, from one time period to the next, and is available for use in subsequent time periods.

Transfer of 19.5 mt From the December 2019 Subquota to the January 2019 Subquota

Under § 635.27(a)(9), NMFS has the authority to transfer quota among fishing categories or subcategories, after considering regulatory determination criteria provided under § 635.27(a)(8). NMFS has considered all of the relevant determination criteria and their applicability to this inseason quota. These considerations include, but are not limited to, the following:

Regarding the usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock (§ 635.27(a)(8)(i)), biological samples collected from BFT landed by General category fishermen and provided by tuna dealers provide NMFS with valuable parts and data for ongoing scientific studies of BFT age and growth, migration, and reproductive status. Additional opportunity to land BFT, and potentially over a greater portion of the January time period, would support the collection of a broad range of data for these studies and for stock monitoring purposes.

NMFS also considered the catches of the General category quota to date (including in December 2018 and during the winter fishery in the last several years), and the likelihood of closure of that segment of the fishery if no adjustment is made (§ 635.27(a)(8)(ii)). Without a quota transfer from December 2019 to January 2019 for the General category at this time, the quota available for the January period would be 29.5 mt (5.3 percent of the General category quota), and participants would have to stop BFT fishing activities once that amount is met, while commercial-sized BFT may remain available in the areas where General category permitted vessels operate. Transferring 19.5 mt of the 28.9-mt quota available for December 2019 (with 28.9 mt representing 5.2 percent of the General category quota) would result in 49 mt (8.8 percent of the General category quota) being available for the January subquota period. This quota transfer would provide additional opportunities to harvest the U.S. BFT quota without exceeding it, while preserving the opportunity for General category fishermen to participate in the winter BFT fishery at both the beginning and end of the calendar year.

Regarding the projected ability of the vessels fishing under the particular category quota (here, the General category) to harvest the additional amount of BFT before the end of the fishing year (§ 635.27(a)(8)(iii)), NMFS considered General category landings over the last several years. General category landings in the winter BFT fishery tend to straddle the calendar year as BFT may be available in late November/December and into January of the following year or later. Landings are highly variable and depend on access to commercial-sized BFT and fishing conditions, among other factors. Any unused General category quota from the January subperiod that remains as of March 31 will roll forward to the next subperiod within the calendar year (*i.e.,* the June-August time period). In 2018, NMFS transferred 14.3 mt of quota from the December 2018 subquota to the January 2018 subquota period, resulting in a subquota of 39 mt for the January 2018 period and a subquota of 10 mt for the December 2018 period (82 FR 60680, December 22, 2017). NMFS also transferred 10 mt from the Reserve to the General category effective February 28, resulting in an adjusted subquota of 49 mt for the January 2018 period (83 FR 9232, March 5, 2018), and closed the General category fishery for the January subquota period effective March 2, 2018. Under a one-fish General

category daily retention limit (*i.e.,* of large medium or giant BFT, measuring 73 inches (185 cm) curved fork length (CFL) or greater) effective January 1 through March 2, a total of 59.3 mt were landed.

NMFS also considered the estimated amounts by which quotas for other gear categories of the fishery might be exceeded (§ 635.27(a)(8)(iv)) and the ability to account for all 2019 landings and dead discards. In the last several years, total U.S. BFT landings have been below the available U.S. quota such that the United States has carried forward the maximum amount of underharvest allowed by ICCAT from one year to the next. NMFS will need to account for 2018 landings and dead discards within the adjusted U.S. quota, consistent with ICCAT recommendations, and anticipates having sufficient quota to do that.

This transfer would be consistent with the current quotas, which were established and analyzed in the 2018 BFT quota final rule (83 FR 53191, October 11, 2018), and with objectives of the 2006 Consolidated HMS FMP and amendments. (§ 635.27(a)(8)(v) and (vi)). Another principal consideration is the objective of providing opportunities to harvest the full annual U.S. BFT quota without exceeding it based on the goals of the 2006 Consolidated HMS FMP and amendments, including to achieve optimum yield on a continuing basis and to optimize the ability of all permit categories to harvest their full BFT quota allocations (related to § 635.27(a)(8)(x)).

NMFS also anticipates that some underharvest of the 2018 adjusted U.S. BFT quota will be carried forward to 2019 and placed in the Reserve category, in accordance with the regulations. This, in addition to the fact that any unused General category quota will roll forward to the next subperiod within the calendar year, as well as NMFS' plan to actively manage the subquotas to avoid any exceedances, makes it likely that General category quota will remain available through the end of 2019 for December fishery participants, even with the quota transfer. NMFS also may choose to transfer unused quota from the Reserve or other categories, inseason, based on consideration of the determination criteria, as NMFS did for late 2018. NMFS anticipates that General category participants in all areas and time periods will have opportunities to harvest the General category quota in 2019, through active inseason management such as retention limit adjustments and/or the timing of quota transfers, as practicable. Thus, this quota transfer would allow fishermen to take advantage of the availability of fish on the fishing grounds, consider the expected increases in available 2019 quota later in the year, and provide a reasonable opportunity to harvest the full U.S. BFT quota.

Based on the considerations above, NMFS is transferring 19.5 mt of the 28.9-mt General category quota allocated for the December 2019 period to the January 2019 period, resulting in a subquota of 49 mt for the January 2019 period and a subquota of 9.4 mt for the December 2019 period. NMFS will close the General category fishery when the adjusted January period subquota of 49 mt has been reached, or it will close automatically on March 31, 2019, whichever comes first, and it will remain closed until the General category fishery reopens on June 1, 2019.

Monitoring and Reporting

NMFS will continue to monitor the BFT fishery closely. Dealers are required to submit landing reports within 24 hours of a dealer receiving BFT. Late reporting by dealers compromises NMFS' ability to timely implement actions such as quota and retention limit adjustment, as well as closures, and may result in enforcement actions. Additionally, and separate from the dealer reporting requirement, General and HMS Charter/Headboat category vessel owners are required to report the catch of all BFT retained or discarded dead within 24 hours of the landing(s) or end of each trip, by accessing *hmspermits.noaa.gov* or by using the HMS Catch Reporting app, or calling (888) 872–8862 (Monday through Friday from 8 a.m. until 4:30 p.m.).

Under § 635.23(a)(4), NMFS may increase or decrease the daily retention limit of large medium and giant bluefin tuna over a range of zero to a maximum of five per vessel based on consideration of the relevant criteria provided under § 635.27(a)(8). However, at this time, NMFS is maintaining the default daily retention limit of one large medium or giant BFT per vessel per day/trip (§ 635.23(a)(2)) for the January 2019 General category fishery. Regardless of the duration of a fishing trip, no more than a single day's retention limit may be possessed, retained, or landed. For example (and specific to the limit that will apply beginning January 1, 2019), whether a vessel fishing under the General category limit takes a two-day trip or makes two trips in one day, the daily limit of one fish may not be exceeded upon landing. This General category retention limit is effective in all areas, except for the Gulf of Mexico, where NMFS prohibits targeting fishing for BFT, and applies to those vessels permitted in the General category, as well as to those HMS Charter/Headboat permitted vessels with a commercial sale endorsement when fishing commercially for BFT fishing commercially for BFT.

Depending on the level of fishing effort and catch rates of BFT including catches of the General category quota during the winter fishery, NMFS may determine that additional action (*e.g.,* quota adjustment, daily retention limit adjustment, or closure) is necessary to enhance scientific data collection from, and fishing opportunities in, all geographic areas, and to ensure available subquotas are not exceeded. If needed, subsequent adjustments will be published in the **Federal Register**. In addition, fishermen may call the Atlantic Tunas Information Line at (978) 281–9260, or access *hmspermits.noaa.gov,* for updates on quota monitoring and inseason adjustments.

Classification

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the 2006 Consolidated HMS FMP and amendments provide for inseason retention limit adjustments to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. Affording prior notice and opportunity for public comment to implement the quota transfer for the January 2019 subquota period at this time is impracticable and contrary to the public interest as NMFS could not have proposed this action earlier, as it needed to consider and respond to updated data and information from the 2018 General category fishery, including the recently-available December 2018 data, in deciding to transfer a portion of the December 2019 quota to the January 2019 subquota. If NMFS was to offer a public comment period now, after having appropriately considered that data, it could preclude fishermen from harvesting BFT that are legally available consistent with all of the regulatory criteria, and/or could result in selection of a retention limit inappropriately high for the amount of quota available for the period. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For these reasons, there also is good cause under 5 U.S.C.

553(d) to waive the 30-day delay in effectiveness.

This action is being taken under § 635.27(a)(9) (Inseason adjustments), and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: December 21, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–28336 Filed 12–21–18; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 180202111–8353–02]

RIN 0648–XG690

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Closure of the Mid-Atlantic Scallop Access Area to General Category Individual Fishing Quota Scallop Vessels

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that the Mid-Atlantic Scallop Access Area is closed to Limited Access General Category Individual Fishing Quota scallop vessels for the remainder of the 2018 fishing year. No vessel issued a Limited Access General Category Individual Fishing Quota permit may fish for, possess, or land scallops from the Mid-Atlantic Scallop Access Area. Regulations require this action once it is projected that 100 percent of trips allocated to the Limited Access General Category Individual Fishing Quota scallop vessels for the Mid-Atlantic Scallop Access Area will be taken.

DATES: Effective 0001 hr local time, December 24, 2018, through March 31, 2019.

FOR FURTHER INFORMATION CONTACT: Shannah Jaburek, Fishery Management Specialist, (978) 282–8456.

SUPPLEMENTARY INFORMATION: Regulations governing fishing activity in the Sea Scallop Access Areas can be found in 50 CFR 648.59 and 648.60. These regulations authorize vessels issued a valid Limited Access General Category (LAGC) Individual Fishing Quota (IFQ) scallop permit to fish in the Mid-Atlantic Scallop Access Area under specific conditions, including a total of 1,142 trips that may be taken during the 2018 fishing year. Section 648.59(g)(3)(iii) requires the Mid-Atlantic Scallop Access Area to be closed to LAGC IFQ permitted vessels for the remainder of the fishing year once the NMFS Greater Atlantic Regional Administrator determines that the allocated number of trips for fishing year 2018 are projected to be taken.

Based on trip declarations by LAGC IFQ scallop vessels fishing in the Mid-Atlantic Scallop Access Area, analysis of fishing effort, and other information, NMFS projects that 1,142 trips will be taken as of December 24, 2018. Therefore, in accordance with § 648.59(g)(3)(iii), NMFS is closing the Mid-Atlantic Scallop Access Area to all LAGC IFQ scallop vessels as of December 24, 2018. No vessel issued an LAGC IFQ permit may fish for, possess, or land scallops in or from the Mid-Atlantic Scallop Access Area after 0001 local time, December 24, 2018. Any LAGC IFQ vessel that has declared into the Mid-Atlantic Access Area scallop fishery, complied with all trip notification and observer requirements, and crossed the VMS demarcation line on the way to the area before 0001, December 24, 2018, may complete its trip without being subject to this closure. This closure is in effect for the remainder of the 2018 scallop fishing year, through March 31, 2019.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866. NMFS finds good cause under 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. The Mid-Atlantic Scallop Access Area opened for the 2018 fishing year on April 19, 2018. The regulations at § 648.59(g)(3)(iii) require this closure to ensure that LAGC IFQ scallop vessels do not take more than their allocated number of trips in the area. The projected date on which the LAGC IFQ fleet will have taken all of its allocated trips in an Access Area becomes apparent only as trips into the area occur on a real-time basis and as activity trends begin to appear. As a result, NMFS can only make an accurate projection very close in time to when the fleet has taken all of its trips. To allow LAGC IFQ scallop vessels to continue to take trips in the Mid-Atlantic Scallop Access Area during the period necessary to publish and receive comments on a proposed rule would likely result in the vessels taking much more than the allowed number of trips in the Mid-Atlantic Scallop Access Area. Excessive trips and harvest from the Mid-Atlantic Scallop Access Area would result in excessive fishing effort in the area, where effort controls are critical, thereby undermining conservation objectives of the Atlantic Sea Scallop Fishery Management Plan and requiring more restrictive future management measures. Also, the public had prior notice and full opportunity to comment on this closure process when it was enacted For these same reasons, NMFS further finds, under to 5 U.S.C 553(d)(3), good cause to waive the 30-day delayed effectiveness period.

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

Dated: December 21, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–28247 Filed 12–21–18; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 170828822–70999–02]

RIN 0648–XG692

Fisheries of the Northeastern United States; Summer Flounder Fishery; 2018 Commercial Quota Harvested for the State of Rhode Island

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that the 2018 summer flounder commercial quota allocated to the state of Rhode Island has been harvested. Vessels issued a commercial Federal permit for the summer flounder fishery may not land summer flounder in Rhode Island for the remainder of calendar year 2018, unless additional quota becomes available through a transfer from another state. Regulations governing the summer flounder fishery require publication of this notice to advise Rhode Island that the quota has been harvested, and to advise vessel and dealer permit holders that no Federal commercial quota is available to land summer flounder in Rhode Island.

DATES: Effective 0001 hours, December 29, 2018, through December 31, 2018.

FOR FURTHER INFORMATION CONTACT: Cynthia Ferrio, (978) 281–9180, or *Cynthia.Ferrio@noaa.gov.*

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found at 50 CFR part 648, subpart G. The regulations require annual specification of a commercial quota that is apportioned on a percentage basis among the coastal states from Maine through North Carolina. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.102.

The overall 2018 summer flounder commercial quota is 6,436,120 lb (2,919,375 kg) (83 FR 4165, January 30, 2018). The percent allocated to vessels landing summer flounder in Rhode Island is 15.68 percent, resulting in an initial state commercial quota of 1,009,375 lb (457,845 kg). Rhode Island's initial 2018 commercial quota was reduced to 996,373 lb (451,947 kg) due to a 2017 quota overage of 13,002 lb (5,898 kg). Rhode Island has received one quota transfer of 5,008 lb (2,272 kg) from North Carolina on February 6, 2018 (83 FR 5735), bringing its 2018 commercial quota to 1,001,381 lb (454,219 kg).

The NMFS Administrator for the Greater Atlantic Region (Regional Administrator), monitors the state commercial landings and determines when a state's commercial quota has been harvested. NMFS is required to publish notification in the **Federal Register** advising and notifying Federally permitted commercial vessels and dealers that, effective upon a specific date, the state's commercial quota has been harvested and no commercial quota is available for landing summer flounder in that state. The Regional Administrator has determined, based upon dealer reports and other available information, that the 2018 Rhode Island commercial summer flounder quota will be harvested by December 29, 2018.

Section 648.4(b) provides that Federal permit holders agree, as a condition of the permit, not to land summer flounder in any state that the Regional Administrator has determined no longer has commercial quota available. Therefore, effective 0001 hours, December 29, 2018, landings of summer flounder are prohibited in Rhode Island by vessels holding Federal summer flounder commercial fisheries permits for the remainder of the 2018 calendar year, unless additional quota becomes available through a transfer and is announced in the **Federal Register**. Effective 0001 hours, December 29, 2018, federally permitted dealers are also notified that they may not purchase summer flounder from federally permitted vessels that land in Rhode Island for the remainder of the calendar year.

Classification

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

The Assistant Administrator for Fisheries, NOAA, finds good cause under 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. This action closes the commercial summer flounder fishery for Rhode Island until January 1, 2019. The regulations at § 648.103(b) require such action to ensure that summer flounder vessels do not exceed quotas allocated to the states. If implementation of this closure was delayed to solicit prior public comment, the quota for this fishing year would be exceeded, thereby undermining the conservation objectives of the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan. The Assistant Administrator further finds, pursuant to 5 U.S.C. 553(d)(3), good cause to waive the 30-day delayed effectiveness period for the reason stated above.

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

Dated: December 21, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–28215 Filed 12–21–18; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 170816769–8162–02]

RIN 0648–XG675

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Central Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amounts of Pacific cod total allowable catch (TAC) from vessels using jig gear, catcher/processors using hook-and-line gear, and catcher vessels using trawl gear to catcher vessels less than 50 feet length overall (LOA) using hook-and-line gear, catcher vessels greater than or equal to 50 feet LOA using hook-and-line gear, vessels using pot gear, and catcher/processors using trawl gear in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to allow the 2018 TAC of Pacific cod in the Central Regulatory Area of the GOA to be harvested.

DATES: Effective December 21, 2018 through 2400 hours, Alaska local time (A.l.t.), December 31, 2018.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2018 Pacific cod TAC apportioned to vessels using jig gear in the Central Regulatory Area of the GOA is 61 metric tons (mt), as established by the final 2018 and 2019 harvest specifications for groundfish of the GOA (83 FR 8768, March 1, 2018). The Administrator, Alaska Region, NMFS, (Regional Administrator) has determined that vessels using jig gear will not be able to harvest 60 mt of the 2018 Pacific cod TAC allocated to those vessels under § 679.20(a)(12)(i)(B).

The 2018 Pacific cod TAC apportioned to catcher/processors using hook-and-line gear in the Central Regulatory Area of the GOA is 308 mt, as established by the final 2018 and 2019 harvest specifications for groundfish of the GOA (83 FR 8768, March 1, 2018). The Regional Administrator has determined that catcher/processors using hook-and-line gear will not be able to harvest 40 mt of the 2018 Pacific cod TAC allocated to those vessels under § 679.20(a)(12)(i)(B)(*3*).

The 2018 Pacific cod TAC apportioned to catcher vessels using trawl gear in the Central Regulatory Area of the GOA is 2,275 mt, as established by the final 2018 and 2019 harvest specifications for groundfish of the GOA (83 FR 8768, March 1, 2018). The Regional Administrator has determined that catcher vessels using trawl gear will not be able to harvest 580

mt of the 2018 Pacific cod TAC allocated to those vessels under § 679.20(a)(12)(i)(B)(*4*).

In accordance with § 679.20(a)(12)(ii)(B), the Regional Administrator has also determined that catcher vessels less than 50 feet LOA using hook-and-line gear, catcher vessels greater than or equal to 50 feet LOA using hook-and-line gear, vessels using pot gear, and catcher/processors using trawl gear currently have the capacity to harvest this excess allocation. Therefore, NMFS apportions 60 mt of Pacific cod from the jig vessel apportionment, 40 mt of Pacific cod from the hook-and-line catcher/processor apportionment, and 580 mt of Pacific cod from the trawl catcher vessel apportionment to catcher vessels less than 50 feet LOA using hook-and-line gear, catcher vessels greater than or equal to 50 feet LOA using hook-and-line gear, vessels using pot gear, and catcher/processors using trawl gear in the Central Regulatory Area of the GOA.

The harvest specifications for Pacific cod in the Central Regulatory Area of the GOA included in the final 2018 and 2019 harvest specifications for groundfish of the GOA (83 FR 8768, March 1, 2018) are revised as follows: 268 mt to catcher/processors using hook-and-line gear, 990 mt to catcher vessels less than 50 feet LOA using hook-and-line gear, 416 mt to catcher vessels greater than or equal to 50 feet LOA using hook-and-line gear, 1 mt to vessels using jig gear, 1,787 mt to vessels using pot gear, 700 mt to catcher/processors using trawl gear, and 1,695 mt to catcher vessels using trawl gear.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocations of Pacific cod in the Central Regulatory Area of the GOA. Since the fishery is currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 20, 2018.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: December 21, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–28367 Filed 12–21–18; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 170817779–8161–02]

RIN 0648–XG684

Fisheries of the Exclusive Economic Zone Off Alaska; Inseason Adjustment to the 2019 Bering Sea and Aleutian Islands Pollock, Atka Mackerel, and Pacific Cod Total Allowable Catch Amounts

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

ACTION: Temporary rule; inseason adjustment; request for comments.

SUMMARY: NMFS is adjusting the 2019 total allowable catch (TAC) amounts for the Bering Sea and Aleutian Islands (BSAI) pollock, Atka mackerel, and Pacific cod fisheries. This action is necessary because NMFS has determined these TACs are incorrectly specified, and will ensure the BSAI pollock, Atka mackerel, and Pacific cod TACs are the appropriate amounts based on the best available scientific information. Also, NMFS is announcing the Aleutian Islands Catcher Vessel (CV) Harvest Set-Aside and Bering Sea Trawl CV A-Season Sector Limitation will be in effect for 2019, and TACs in this inseason adjustment will apply for 2019. This action is consistent with the goals and objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), December 21, 2018, until the effective date of the final 2019 and 2020 harvest specifications for BSAI groundfish, unless otherwise modified or superseded through publication of a notification in the **Federal Register**.

Comments must be received at the following address no later than 4:30 p.m., A.l.t., January 14, 2019.

ADDRESSES: Submit your comments, identified by NOAA–NMFS–2018–0801, by either of the following methods:

- *Federal e-Rulemaking Portal:* Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2018-0801,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

Instructions: NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the comment period ends. All comments received are a part of the public record, and NMFS will post the comments for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), 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).

FOR FURTHER INFORMATION CONTACT: Mary Furuness, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The final 2018 and 2019 harvest specifications for groundfish in the BSAI (83 FR 8365, February 27, 2018) set the 2019 Aleutian Islands (AI) pollock TAC at 19,000 metric tons (mt), the 2019 Bering Sea (BS) pollock TAC at 1,383,000 mt, the 2019 BSAI Atka

mackerel TAC at 72,500 mt, the 2019 BS Pacific cod TAC at 159,120 mt, and the 2019 AI Pacific cod TAC at 15,695 mt. Also set was a 2019 AI pollock ABC of 30,803 mt and a Western Aleutian Islands limit for Pacific cod at 25.6 percent of the AI Pacific cod TAC. In December 2018, the North Pacific Fishery Management Council (Council) recommended a 2019 BS pollock TAC of 1,397,000 mt, which is more than the 1,383,000 mt TAC established by the final 2018 and 2019 harvest specifications for groundfish in the BSAI. The Council also recommended increasing the AI pollock ABC to 52,887 mt from 30,803 mt. This increases some 2019 area and seasonal limits for AI pollock. The Council also recommended a 2019 BSAI Atka mackerel TAC of 57,951 mt, which is less than the 72,500 mt TAC established by the final 2018 and 2019 harvest specifications for groundfish in the BSAI. Furthermore, the Council recommended a 2019 BS Pacific cod TAC of 166,475 mt, and an AI Pacific cod TAC of 14,214 mt, which is more than the BS Pacific cod TAC of 159,120 mt, and less than the AI Pacific cod TAC of 15,695 mt established by the final 2018 and 2019 harvest specifications for groundfish in the BSAI. In addition to changes in TACs, the Council recommended changing the percentage limit of Western Aleutian Islands Pacific cod to 15.7 percent of the AI Pacific cod ABC, from the 25.6 percent of the AI Pacific cod TAC. The Council's recommended 2019 TACs, and the area and seasonal apportionments, are based on the Stock Assessment and Fishery Evaluation report (SAFE), dated November 2018, which NMFS has determined is the best available scientific information for these fisheries.

Regulations at § 679.20(a)(7)(viii) require NMFS to announce whether the AI incidental catch allowance, directed fishing allowance, CV Harvest Set-Aside, and Unrestricted Fishery, as well as the Bering Sea Trawl CV A-Season Sector Limitation will be in effect for 2019. NMFS received notification from Adak that a shoreplant will be processing AI Pacific cod in 2019. Therefore, the Pacific cod TACs in Table 9 of this inseason adjustment will be effective for 2019 and the harvest limits in Table 9B (83 FR 8365, February 27, 2018) will apply in 2019.

Steller sea lions occur in the same location as the pollock, Atka mackerel, and Pacific cod fisheries and are listed as endangered under the Endangered Species Act (ESA). Pollock, Atka mackerel, and Pacific cod are a principal prey species for Steller sea lions in the BSAI. The seasonal apportionment of pollock, Atka mackerel, and Pacific cod harvest is necessary to ensure the groundfish fisheries are not likely to cause jeopardy of extinction or adverse modification of critical habitat for Steller sea lions. NMFS published regulations and the revised harvest limit amounts for pollock, Atka mackerel, and Pacific cod fisheries to implement Steller sea lion protection measures to insure that groundfish fisheries of the BSAI are not likely to jeopardize the continued existence of the western distinct population segment of Steller sea lions or destroy or adversely modify their designated critical habitat (79 FR 70286, November 25, 2014). The regulations at § 679.20(a)(5)(i) and (ii) specify how the BS and AI pollock TAC will be apportioned. The regulations at § 679.20(a)(7) specify how the BSAI Pacific cod TAC will be apportioned. The regulations at § 679.20(a)(8) specify how the BSAI Atka mackerel TAC will be apportioned.

In accordance with § 679.25(a)(1)(iii), (a)(2)(i)(B), and (a)(2)(iv), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that, based on the November 2018 SAFE report for this fishery, the current BSAI pollock, Atka mackerel, and Pacific cod TACs are incorrectly specified. Pursuant to § 679.25(a)(1)(iii), the Regional Administrator is adjusting the 2019 BS pollock TAC to 1,397,000 mt, the 2019 BSAI Atka mackerel TAC to 57,951 mt, the 2019 BS Pacific cod TAC to 166,475 mt, and the AI Pacific cod TAC to 14,214 mt. Therefore, Table 2 of the final 2018 and 2019 harvest specifications for groundfish in the BSAI (83 FR 8365, February 27, 2018) is revised consistent with this adjustment.

Pursuant to § 679.20(a)(5)(i) and (ii), Table 5 of the final 2018 and 2019 harvest specifications for groundfish in the BSAI (83 FR 8365, February 27, 2018) is revised for the 2019 BS and AI allocations of pollock TAC to the directed pollock fisheries and to the Community Development Quota (CDQ) directed fishing allowances consistent with this adjustment. For AI pollock, the Steller sea lion protection measure final rule (79 FR 70286, November 25, 2014), sets harvest limits for pollock in the A season (January 20 to June 10) in Areas 543, 542, and 541, see § 679.20(a)(5)(iii)(B)(*6*). In Area 541, the 2019 A season pollock harvest limit is no more than 30 percent, or 15,866 mt, of the AI ABC of 52,887 mt. In Area 542, the 2019 A season pollock harvest limit is no more than 15 percent, or 7,933 mt, of the AI ABC of 52,887 mt. In Area 543, the 2019 A season pollock harvest limit is no more than 5 percent, or 2,644 mt, of the AI pollock ABC of 52,887 mt.

TABLE 5—FINAL 2019 ALLOCATIONS OF POLLOCK TACS TO THE DIRECTED POLLOCK FISHERIES AND TO THE CDQ DIRECTED FISHING ALLOWANCES (DFA) [1]

[Amounts are in metric tons]

Area and sector	2019 Allocations	2019 A season [1]		2019 B season [1]
		A season DFA	SCA harvest limit [2]	B season DFA
Bering Sea subarea TAC [1]	1,397,000	n/a	n/a	n/a
CDQ DFA	139,700	62,865	39,116	76,835
ICA [1]	49,035	n/a	n/a	n/a
Total Bering Sea non-CDQ DFA	1,208,265	543,719	338,314	664,546
AFA Inshore	604,133	271,860	169,157	332,273
AFA Catcher/Processors [3]	483,306	217,488	135,326	265,818
Catch by C/Ps	442,225	199,001	n/a	243,224
Catch by CVs [3]	41,081	18,486	n/a	22,595
Unlisted C/P Limit [4]	2,417	1,087	n/a	1,329
AFA Motherships	120,827	54,372	33,831	66,455
Excessive Harvesting Limit [5]	211,446	n/a	n/a	n/a
Excessive Processing Limit [6]	362,480	n/a	n/a	n/a
Aleutian Islands subarea ABC	52,887	n/a	n/a	n/a
Aleutian Islands subarea TAC [1]	19,000	n/a	n/a	n/a

TABLE 5—FINAL 2019 ALLOCATIONS OF POLLOCK TACS TO THE DIRECTED POLLOCK FISHERIES AND TO THE CDQ DIRECTED FISHING ALLOWANCES (DFA) [1]—Continued

[Amounts are in metric tons]

Area and sector	2019 Allocations	2019 A season [1]		2019 B season [1]
		A season DFA	SCA harvest limit [2]	B season DFA
CDQ DFA	1,900	760	n/a	1,140
ICA	2,400	1,200	n/a	1,200
Aleut Corporation	14,700	14,700	n/a	0
Area harvest limit [7] 541	15,866	n/a	n/a	n/a
542	7,933	n/a	n/a	n/a
543	2,644	n/a	n/a	n/a
Bogoslof District ICA [8]	500	n/a	n/a	n/a

[1] Pursuant to § 679.20(a)(5)(i)(A), the Bering Sea subarea pollock, after subtracting the CDQ DFA (10 percent) and the ICA (3.9 percent), is allocated as a DFA as follows: Inshore sector—50 percent, catcher/processor sector (C/P)—40 percent, and mothership sector—10 percent. In the Bering Sea subarea, 45 percent of the DFA is allocated to the A season (January 20–June 10) and 55 percent of the DFA is allocated to the B season (June 10–November 1). Pursuant to § 679.20(a)(5)(iii)(B)(*2*)(*i*) through (*iii*), the annual Aleutian Islands pollock TAC, after subtracting first for the CDQ DFA (10 percent) and second for the ICA (2,400 mt), is allocated to the Aleut Corporation for a pollock directed fishery. In the Aleutian Islands subarea, the A season is allocated up to 40 percent of the ABC, and the B season is allocated the remainder of the pollock directed fishery.

[2] In the Bering Sea subarea, pursuant to § 679.20(a)(5)(i)(C), no more than 28 percent of each sector's annual DFA may be taken from the SCA before noon, April 1.

[3] Pursuant to § 679.20(a)(5)(i)(A)(*4*), 8.5 percent of the DFA allocated to listed catcher/processors shall be available for harvest only by eligible catcher vessels delivering to listed catcher/processors.

[4] Pursuant to § 679.20(a)(5)(i)(A)(*4*)(*iii*), the AFA unlisted catcher/processors are limited to harvesting not more than 0.5 percent of the catcher/processors sector's allocation of pollock.

[5] Pursuant to § 679.20(a)(5)(i)(A)(*6*), NMFS establishes an excessive harvesting share limit equal to 17.5 percent of the sum of the non-CDQ pollock DFAs.

[6] Pursuant to § 679.20(a)(5)(i)(A)(*7*), NMFS establishes an excessive processing share limit equal to 30.0 percent of the sum of the non-CDQ pollock DFAs.

[7] Pursuant to § 679.20(a)(5)(iii)(B)(*6*), NMFS establishes harvest limits for pollock in the A season in Area 541 of no more than 30 percent, in Area 542 of no more than 15 percent, and in Area 543 of no more than 5 percent of the Aleutian Islands pollock ABC.

[8] The Bogoslof District is closed by the final harvest specifications to directed fishing for pollock. The amounts specified are for ICA only and are not apportioned by season or sector.

Note: Seasonal or sector apportionments may not total precisely due to rounding.

Pursuant to § 679.20(a)(8), Table 7 of the final 2018 and 2019 harvest specifications for groundfish in the BSAI (83 FR 8365, February 27, 2018) is revised for the 2019 seasonal and spatial allowances, gear shares, CDQ reserve, incidental catch allowance, and Amendment 80 allocation of the BSAI Atka mackerel TAC consistent with this adjustment.

TABLE 7—FINAL 2019 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, CDQ RESERVE, INCIDENTAL CATCH ALLOWANCE, AND AMENDMENT 80 ALLOCATION OF THE BSAI ATKA MACKEREL TAC

[Amounts are in metric tons]

Sector [1]	Season [2 3 4]	2019 Allocation by area		
		Eastern Aleutian District/Bering Sea [5]	Central Aleutian District [5]	Western Aleutian District [5]
TAC	n/a	23,970	14,390	19,591
CDQ reserve	Total	2,565	1,540	2,096
	A	1,282	770	1,048
	Critical Habitat	n/a	462	629
	B	1,282	770	1,048
	Critical Habitat	n/a	462	629
non-CDQ TAC	n/a	21,405	12,850	17,495
ICA	Total	800	75	20
Jig [7]	Total	103	0	0
BSAI trawl limited access	Total	2,050	1,278	0
	A	1,025	639	0
	Critical Habitat	n/a	383	0
	B	1,025	639	0
	Critical Habitat	n/a	383	0
Amendment 80 sectors [7]	Total	18,452	11,498	17,475
	A	9,226	5,749	8,737
	Critical Habitat	n/a	3,449	5,242
	B	9,226	5,749	8,737

TABLE 7—FINAL 2019 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, CDQ RESERVE, INCIDENTAL CATCH ALLOWANCE, AND AMENDMENT 80 ALLOCATION OF THE BSAI ATKA MACKEREL TAC—Continued

[Amounts are in metric tons]

Sector [1]	Season [2 3 4]	2019 Allocation by area		
		Eastern Aleutian District/Bering Sea [5]	Central Aleutian District [5]	Western Aleutian District [5]
	Critical Habitat	n/a	3,449	5,242

[1] Section 679.20(a)(8)(ii) allocates the Atka mackerel TACs, after subtracting the CDQ reserves, jig gear allocation, and ICAs, to the Amendment 80 and BSAI trawl limited access sectors. The allocation of the ITAC for Atka mackerel to the Amendment 80 and BSAI trawl limited access sectors is established in Table 33 to 50 CFR part 679 and § 679.91. The CDQ reserve is 10.7 percent of the TAC for use by CDQ participants (see §§ 679.20(b)(1)(ii)(C) and 679.31).

[2] Sections 679.20(a)(8)(ii)(A) and 679.22(a) establish temporal and spatial limitations for the Atka mackerel fishery.

[3] The seasonal allowances of Atka mackerel are 50 percent in the A season and 50 percent in the B season.

[4] Section 679.23(e)(3) authorizes directed fishing for Atka mackerel with trawl gear during the A season from January 20 to June 10 and the B season from June 10 to December 31.

[5] Section 679.20(a)(8)(ii)(C)(*1*)(*i*) limits no more than 60 percent of the annual TACs in Areas 542 and 543 to be caught inside of Steller sea lion critical habitat; section 679.20(a)(8)(ii)(C)(*1*)(*ii*) equally divides the annual TACs between the A and B seasons as defined at § 679.23(e)(3); and section 679.20 (a)(8)(ii)(C)(*2*) requires the TAC in Area 543 shall be no more than 65 percent of ABC in Area 543.

[6] Section 679.20(a)(8)(i) requires that up to 2 percent of the Eastern Aleutian District and the Bering Sea subarea TAC be allocated to jig gear after subtracting the CDQ reserve and the ICA. NMFS set the amount of this allocation for 2019 at 0.5 percent. The jig gear allocation is not apportioned by season.

[7] The 2019 allocations for Atka mackerel between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2018. NMFS will post 2019 Amendment 80 allocations when they become available in December 2018.

Note: Seasonal or sector apportionments may not total precisely due to rounding.

Pursuant to § 679.20(a)(7), Table 9 of the final 2018 and 2019 harvest specifications for groundfish in the BSAI (83 FR 8365, February 27, 2018) is revised for the 2019 gear shares and seasonal allowances of the BSAI Pacific cod TAC consistent with this adjustment.

TABLE 9–FINAL 2019 GEAR SHARES AND SEASONAL ALLOWANCES OF THE BSAI PACIFIC COD TAC

[Amounts are in metric tons]

Gear sector	Percent	2019 Share of gear sector total	2019 Share of sector total	2019 Seasonal apportionment	
				Seasons	Amount
BS TAC	n/a	166,475	n/a	n/a	n/a
BS CDQ	n/a	17,813	n/a	see § 679.20(a)(7)(i)(B)	n/a
BS non-CDQ TAC	n/a	148,662	n/a	n/a	n/a
AI TAC	n/a	14,214	n/a	n/a	n/a
AI CDQ	n/a	1,521	n/a	see § 679.20(a)(7)(i)(B)	n/a
AI non-CDQ TAC	n/a	12,693	n/a	n/a	n/a
Western Aleutian Island Limit	n/a	2,232	n/a	n/a	n/a
Total BSAI non-CDQ TAC [1]	n/a	161,355	n/a	n/a	n/a
Total hook-and-line/pot gear	60.8	98,104	n/a	n/a	n/a
Hook-and-line/pot ICA [2]	n/a	400	n/a	see § 679.20(a)(7)(ii)(B)	n/a
Hook-and-line/pot sub-total	n/a	97,704	n/a	n/a	n/a
Hook-and-line catcher/processor	48.7	n/a	78,260	Jan 1–Jun 10	39,912
				Jun 10–Dec 31	38,347
Hook-and-line catcher vessel ≥60 ft LOA.	0.2	n/a	321	Jan 1–Jun 10	164
				Jun 10–Dec 31	157
Pot catcher/processor	1.5	n/a	2,410	Jan 1–Jun 10	1,229
				Sept 1–Dec 31	1,181
Pot catcher vessel ≥60 ft LOA	8.4	n/a	13,499	Jan 1–Jun 10	6,884
				Sept 1–Dec 31	6,614
Catcher vessel <60 ft LOA using hook-and-line or pot gear.	2	n/a	3,214	n/a	n/a
Trawl catcher vessel	22.1	35,660	n/a	Jan 20–Apr 1	26,388
				Apr 1–Jun 10	3,923
				Jun 10–Nov 1	5,349
AFA trawl catcher/processor	2.3	3,711	n/a	Jan 20–Apr 1	2,783
				Apr 1–Jun 10	928
				Jun 10–Nov 1	0
Amendment 80	13.4	21,622	n/a	Jan 20–Apr 1	16,216
				Apr 1–Jun 10	5,405
				Jun 10–Dec 31	0

TABLE 9–FINAL 2019 GEAR SHARES AND SEASONAL ALLOWANCES OF THE BSAI PACIFIC COD TAC—Continued

[Amounts are in metric tons]

Gear sector	Percent	2019 Share of gear sector total	2019 Share of sector total	2019 Seasonal apportionment	
				Seasons	Amount
Jig	1.4	2,259	n/a	Jan 1–Apr 30	1,355
				Apr 30–Aug 31	452
				Aug 31–Dec 31	452

[1] The gear shares and seasonal allowances for BSAI Pacific cod TAC are based on the sum of the BS and AI Pacific cod TACs, after the subtraction of CDQ. If the TAC for Pacific cod in either the AI or BS is reached, then directed fishing for Pacific cod in that subarea may be prohibited, even if a BSAI allowance remains.

[2] The ICA for the hook-and-line and pot sectors will be deducted from the aggregate portion of Pacific cod TAC allocated to the hook-and-line and pot sectors. The Regional Administrator approves an ICA of 400 mt for 2019 based on anticipated incidental catch in these fisheries.

Note: Seasonal or sector apportionments may not total precisely due to rounding.

TABLE 9B—2019 BSAI A-SEASON PACIFIC COD LIMITS IF ALEUTIAN ISLANDS SHOREPLANTS INTEND TO PROCESS PACIFIC COD

2019 Allocations under Aleutian Islands CV Harvest Set-Aside	Amount (mt)
AI non-CDQ TAC	14,214
AI ICA	2,500
AI DFA	11,714
BS non-CDQ TAC	148,662
BSAI Trawl CV A-Season Allocation	26,388
BSAI Trawl CV A-Season Allocation minus Sector Limitation [1]	21,388
BS Trawl CV A-Season Sector Limitation	5,000
AI CV Harvest Set-Aside [2]	5,000
AI Unrestricted Fishery [3]	6,714

[1] This is the amount of the BSAI trawl CV A-season allocation that may be harvested in the Bering Sea prior to March 21, 2019, unless the BS Trawl CV A-Season Sector Limitation is suspended for the remainder of the fishing year because the performance requirements pursuant to § 679.20(a)(7)(viii)(E) were not met.

[2] Prior to March 15, 2019, only catcher vessels that deliver their catch of AI Pacific cod to AI shoreplants for processing may directed fish for that portion of the AI Pacific cod non–CDQ DFA that is specified as the AI CV Harvest Set-Aside, unless lifted because the performance requirements pursuant to § 679.20(a)(7)(viii)(E) were not met.

[3] Prior to March 15, 2019, vessels otherwise authorized to directed fish for Pacific cod in the AI may directed fish for that portion of the AI Pacific cod non–CDQ DFA that is specified as the AI Unrestricted Fishery.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would allow for harvests that exceed the appropriate allocations for pollock, Atka mackerel, and Pacific cod in the BSAI based on the best scientific information available. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December xx, 2018, and additional time for prior public comment would result in conservation concerns for the ESA-listed Steller sea lions.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until January 14, 2019.

This action is required by § 679.20 and § 679.25 and is exempt from review under Executive Order 12866.

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

Dated: December 21, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–28214 Filed 12–21–18; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 83, No. 248
Friday, December 28, 2018

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

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064–AE84

Company-Run Stress Testing Requirements for FDIC-Supervised State Nonmember Banks and State Savings Associations

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking with request for public comment.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is requesting comment on a proposed rule (proposed rule or NPR) that would revise the FDIC's requirements for stress testing by FDIC-supervised institutions, consistent with changes made by Section 401 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA). Specifically, the proposed rule would amend the FDIC's existing stress testing regulations to change the minimum threshold for applicability from $10 billion to $250 billion, revise the frequency of required stress tests by FDIC-supervised institutions, and reduce the number of required stress testing scenarios from three to two. The NPR also proposes to make certain conforming and technical changes, including changes that were previously proposed in an April 2018 notice of proposed rulemaking that was superseded, in part, by the enactment of EGRRCPA.

DATES: Comments on the notice of proposed rulemaking must be received by February 19, 2019.

ADDRESSES: Interested parties are encouraged to submit written comments. Commenters are encouraged to use the title ''Company-Run Stress Testing Requirements for FDIC-supervised State Nonmember Banks and State Savings Associations'' to facilitate the organization and distribution of comments among the Agencies. You may submit comments, identified by RIN number, by any of the following methods:

- *Agency website: https://www.FDIC.gov/regulations/laws/federal/.* Follow instructions for submitting comments on the Agency website.
- *Email: Comments@FDIC.gov.* Include RIN 3064–AE84 on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivered/Courier:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.
- *Public Inspection:* All comments received must include the agency name and RIN 3064–AE84 for this rulemaking. All comments received will be posted without change to *https://www.fdic.gov/regulations/laws/federal/,* including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–1002, Arlington, VA 22226 by telephone at 1 (877) 275–3342 or 1 (703) 562–2200.

FOR FURTHER INFORMATION CONTACT: Ryan Sheller, Section Chief, (202) 412–4861, *RSheller@FDIC.gov,* Large Bank Supervision, Division of Risk Management Supervision; Annmarie Boyd, Counsel, (202) 898–3714, *aboyd@FDIC.gov;* or Benjamin Klein, Counsel, (202) 898–7027, *bklein@FDIC.gov;* Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC, 20429.

SUPPLEMENTARY INFORMATION:

I. Background

Prior to the enactment of EGRRCPA, section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act [1] (Dodd-Frank Act) required a financial company, including an insured depository institution, with total consolidated assets of more than $10 billion and regulated by a primary Federal regulatory agency to conduct annual stress tests and submit a report to the Board of Governors of the Federal Reserve System (Board) and to its primary federal regulatory agency. Section 165(i)(2)(C) required each primary Federal regulator to issue consistent and comparable regulations to: (1) Implement the stress testing requirements, including establishing methodologies for conducting stress tests that provided for at least three different sets of conditions, including baseline, adverse, and severely adverse; (2) establish the form and content of the required reports, and (3) require companies to publish a summary of the stress test results.

In October 2012, the FDIC published in the **Federal Register** its rule implementing the Dodd-Frank Act stress testing requirement.[2] The FDIC regulation at 12 CFR part 325 implements the company-run stress test requirements of section 165(i)(2) of the Dodd-Frank Act with respect to state nonmember banks and state savings associations with more than $10 billion in assets (covered banks). Although 12 CFR part 325 applies to all covered banks that exceed $10 billion in assets, the regulation differentiates between ''$10 billion to $50 billion covered banks'' and ''over $50 billion covered banks.''

EGRRCPA, enacted on May 24, 2018,[3] amended certain aspects of the company-run stress-testing requirements in section 165(i)(2) of the Dodd-Frank Act. Specifically, section 401 of EGRRCPA raises the minimum asset threshold for the company-run stress testing requirement from $10 billion to $250 billion; replaces the requirement for banks to conduct stress tests ''annually'' with the requirement to conduct stress tests ''periodically;'' and no longer requires the ''adverse'' stress testing scenario, thus reducing the number of required stress testing scenarios from three to two. The EGRRCPA amendments to the section 165(i)(2) stress testing requirements are effective eighteen months after enactment.

Prior to the enactment of EGRRCPA, on April 2, 2018, the FDIC issued a notice of proposed rulemaking that also proposed certain revisions to the FDIC

[1] 12 U.S.C. 5365(i).

[2] 77 FR 62417 (October 15, 2012). The Board and the Office of the Comptroller of the Currency contemporaneously issued comparable regulations. *See* 77 FR 62380 (October 12, 2012) (Board); 77 FR 61238 (October 9, 2012) (OCC).

[3] Public Law 115–174, 132 Stat. 1296–1368 (2018).

stress testing regulations (April NPR).[4] Certain changes proposed in the April NPR, particularly those establishing a stress testing transition process for ''over $50 billion covered banks'' are no longer relevant as a result of EGRRCPA's increase in the stress testing asset threshold to $250 billion. However, other revisions originally proposed in the April NPR remain necessary to ensure the FDIC's stress testing regulations remain consistent with those of the Board and the Office of the Comptroller of the Currency (OCC).

II. Description of the Proposed Rule

A. Covered Banks

As described above, section 401 of EGRRCPA amended section 165 of the Dodd-Frank Act by raising the minimum asset threshold for banks required to conduct stress tests from $10 billion to $250 billion. The proposed rule would implement this change by eliminating the two existing subcategories of ''covered bank''—''$10 to $50 billion covered bank'' and ''over $50 billion covered bank''—and revising the term ''covered bank'' to mean a State nonmember bank or State savings association with average total consolidated assets that are greater than $250 billion. In addition, the proposal would make certain technical and conforming changes to 12 CFR part 325 in order to consolidate requirements, such as those related to reporting and publication, that are currently referenced separately with respect to $10 billion to $50 billion covered banks and over $50 billion covered banks.

B. Frequency of Stress Testing

Section 401 of EGRRCPA also changed the requirement under section 165 of the Dodd-Frank Act to conduct stress tests from ''annual'' to ''periodic.'' Consistent with proposals by the Board and the OCC, the NPR proposes that, in general, an FDIC-supervised institution that is a covered bank as of December 31, 2019, would be required to conduct, report, and publish a stress test once every two years, beginning on January 1, 2020, and continuing every even-numbered year thereafter (*i.e.,* 2022, 2024, 2026, etc.). The proposed rule would also add a new defined term, ''reporting year,'' to the definitions at 12 CFR 325.2. A covered bank's reporting year would be the year in which a covered bank must conduct, report, and publish its stress test. As noted above, the ''reporting year'' for most covered banks would generally be every even-numbered year. However, under the NPR, covered banks that are subsidiaries of global systemically important bank holding companies or bank holding companies that have $700 billion or more in total assets or cross-jurisdictional activity of $75 billion or more would be required to conduct, report, and publish stress test results on the same schedule as their bank holding companies, which would be annually under rules proposed by the Board.

Subsequent to these changes, some covered banks would have a biennial reporting year (biennial stress testing covered banks) while others would have an annual reporting year (annual stress testing covered banks). In either case, under the NPR, the dates and deadlines in the FDIC's stress testing rule would apply for each reporting year for a covered bank. For example, a biennial stress testing covered bank preparing its 2022 stress test would rely on financial data available as of December 31, 2021; use stress test scenarios that would be provided by the FDIC no later than February 15, 2022; provide its report of the stress test to the FDIC by April 5, 2022; and publish a summary of the results of its stress test in the period starting June 15 and ending July 15 of 2022.

Based on the FDIC's experience overseeing and reviewing the results of company-run stress testing, the FDIC believes that a biennial stress testing cycle would be appropriate for most covered banks. For covered banks that would stress test on a biennial cycle, the FDIC nonetheless expects this level of frequency to provide the FDIC and the covered bank with information that is sufficient to satisfy the purposes of stress testing. In addition, the FDIC would continue to review the covered bank's stress testing processes and procedures. Under the proposed rule, all covered banks that would conduct stress tests on a biennial basis would be required to conduct stress tests in the same reporting year (*i.e.,* the reporting years for biennial stress testing covered banks would be synchronized). By requiring these covered banks to conduct their stress tests in the same reporting year, the proposal would continue to allow the FDIC to make comparisons across banks for supervisory purposes and assess macroeconomic trends and risks to the banking industry.

As discussed above, under the proposed rule, only certain covered banks would be required to conduct annual stress tests. This subset would be limited to covered banks that are consolidated under holding companies that are required to conduct stress tests more frequently than once every other year. This requirement reflects the FDIC's expectation that covered banks that would be required to stress test on an annual basis would be subsidiaries of the largest and most systemically important banking organizations, (*i.e.,* subsidiaries of global systemically important bank holding companies or bank holding companies that have $700 billion or more in total assets or cross-jurisdictional activity of $75 billion). This treatment aligns with the agencies' long-standing policy of applying similar standards to holding companies and their subsidiary banks.

C. Removal of ''Adverse'' Scenario

As enacted by the Dodd-Frank Act, section 165(i)(2)(C) required the FDIC to establish methodologies for conducting stress tests and further required the inclusion of at least three different stress-testing scenarios: ''baseline,'' ''adverse,'' and ''severely adverse.'' EGRRCPA amended section 165(i) to no longer require the FDIC to include an ''adverse'' stress-testing scenario and to reduce the minimum number of required stress test scenarios from three to two. Given that the ''adverse'' stress-testing scenario has provided limited incremental information to the FDIC and market participants beyond what the ''baseline'' and ''severely adverse'' stress testing scenarios provide, the NPR proposes to remove the ''adverse'' scenario in the FDIC's stress testing rule and to maintain the requirement to conduct stress tests under the ''baseline'' and ''severely adverse'' stress testing scenarios. The NPR would also amend the definition of ''severely adverse scenario'' so that the term is defined relative to the ''baseline scenario,'' rather than relative to the ''adverse scenario.''

D. Transition Process for Covered Banks

Currently, 12 CFR 325.3 provides for a transition period between when a bank becomes a covered bank and when the bank must report its first stress test. The NPR proposes to revise the transition period in 12 CFR 325.3 to conform to the other changes in this proposal. Accordingly, proposed paragraph (a)(2) would generally require a state nonmember bank or state savings association that becomes a covered bank after December 31, 2019, to conduct its first stress test under this part in the first reporting year that begins more than three calendar quarters after the date the state nonmember bank or state savings association becomes a covered bank. For example, if a covered bank that conducts stress tests on a biennial basis becomes a covered bank on March 31 of a non-reporting year (*e.g.,* 2023), the

[4] 83 FR 13880 (April 2, 2018).

bank would report its first stress test in the subsequent calendar year (*i.e.,* 2024), which is its first reporting year. If the same bank becomes a covered bank on April 1 of a non-reporting year (*e.g.,* 2023), it would skip the subsequent reporting calendar year and the following, non-reporting calendar year, and would report its first stress test in the next reporting year (*i.e.,* 2026). As with other aspects of the stress test rule, the rule reserves to the FDIC the authority to change the transition period for a particular covered bank, as appropriate in light of the nature and level of the activities, complexity, risks, operations, and regulatory capital of the covered bank, in addition to any other relevant factors.[5]

The NPR would not establish a transition period for covered banks that move from a biennial stress testing requirement to an annual stress testing requirement. Accordingly, a covered bank that becomes subject to annual stress testing would be required to begin stress testing annually as of the next reporting year. The FDIC expects that covered banks would anticipate and make arrangements for this development. To the extent that particular circumstances warrant the extension of a transition period, the FDIC would do so based on its reservation of authority and supervisory discretion.

E. Review by Board of Directors

Currently, 12 CFR 325.5(a)(2) requires a covered bank's board of directors, or a committee thereof, to approve and review the policies and procedures of the stress testing processes as frequently as economic conditions or the bank's condition may warrant, but no less than annually. The NPR would revise the frequency of this requirement from ''annual'' to ''once every reporting year'' in order to make review by the board of directors consistent with the covered bank's stress testing cycle.

F. Reservation of Authority

12 CFR 325.1(c) currently includes a reservation of authority, pursuant to which the FDIC may revise the frequency and methodology of the stress testing requirement as appropriate for a particular covered bank. The NPR proposes to amend the reservation of authority by clarifying the FDIC's authority to exempt a covered bank from the requirement to conduct a stress test in a particular reporting year.

G. New Range of As-of Dates for Trading Scenario Component

Under 12 CFR 325.4(c), the FDIC may require a covered bank with significant trading activities to include trading and counterparty components in its adverse and severely adverse scenarios. The trading data to be used in this component is as of a date between January 1 and March 1 of a calendar year.[6] On February 3, 2017 the Board published a final rule that extended this range to run from October 1 of the calendar year preceding the year of the stress test to March 1 of the calendar year of the stress test.[7] On February 23, 2018, the OCC published a final rule making the same change to its stress testing regulation.[8] The proposed rule would make the same change to the FDIC's stress testing regulation (as was originally proposed in the April NPR). Extending the as-of date range would ensure consistency with the Board and OCC rules and increase the FDIC's flexibility to choose an appropriate as-of date.

H. Other Changes

As originally proposed in the April NPR, the proposed rule would also remove certain obsolete transitional language in 12 CFR 325.3 that was included to facilitate a 2014 shift in the dates of the annual stress testing cycle.[9] That transition is now complete and the regulatory transition language is no longer necessary.

Additionally, in order to update and standardize the language used in part 325, references to ''this subpart'' would be changed to ''this part'' following the redesignation of the FDIC's stress test rule from subpart C of 12 CFR part 325 to occupy all of part 325.[10] Finally, the proposed rule would eliminate the reference to supervisory guidance in 12 CFR 325.5(b)(1).[11]

III. Request for Comment

The FDIC invites comment on all aspects of this proposed rule, including the following questions:

1. The proposal would require a covered bank that is consolidated under a holding company that is required to conduct a stress test at least once every calendar year to treat every calendar year as a reporting year, unless otherwise determined by the FDIC. Is this the appropriate frequency for this group of banks? What are the advantages and disadvantages of requiring a covered bank to conduct a stress test at the same frequency as, or at a different frequency than, its holding company?

2. As an alternative to the requirement that a covered bank be required to stress test annually based on the stress testing requirements of its holding company, should the FDIC establish separate criteria to capture certain large banks (*e.g.,* banks above a specified asset threshold), regardless of whether they are consolidated under a holding company?

3. All other covered banks that are not required to stress test annually would be required to stress test biennially. Is this the appropriate frequency for this category of banks? Should the FDIC further subdivide covered banks into additional categories that would be subject to different frequency requirements?

4. Is the length of the transition period for new covered banks appropriate? Should the proposal establish a transition period for covered banks that are already required to stress test and that move from a biennial stress testing requirement to an annual stress testing requirement?

IV. Regulatory Analysis

A. Riegle Community Development and Regulatory Improvement Act of 1994

The RCDRIA requires that the FDIC, in determining the effective date and administrative compliance requirements of new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations.[12] In addition, in order to provide an adequate transition period, new regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.

[5] 12 CFR 325.1(c).

[6] 12 CFR 325.4(c).

[7] 82 FR 9308 (Feb 3, 2017).

[8] 83 FR 7951 (Feb. 23, 2018).

[9] 79 FR 69365 (Nov. 21, 2014).

[10] 83 FR 17737 (Apr. 24, 2018). Additional technical amendments to part 325 were recently proposed in a notice of proposed rulemaking to implement the current expected credit losses methodology for allowances. 83 FR 22312 (May 14, 2018).

[11] *See* Interagency Statement Clarifying the Role of Supervisory Guidance, Financial Institution Letter 49–2018 (Sep. 11, 2018).

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

The proposed rule imposes no additional reporting, disclosure, or other requirements on IDIs, including small depository institutions, nor on the customers of depository institutions. The proposed rule would reduce the frequency of company-run stress tests for a subset of banks, raise the threshold for covered banks from $10 billion to $250 billion, and reduce the number of required stress test scenarios from three to two for all covered banks. The requirement to conduct, report, and publish a company-run stress testing is a previously existing requirement imposed by section 165(i) of the Dodd-Frank Act. Nonetheless, in connection with determining an effective date for the proposed rule, the FDIC invites comment on any administrative burdens that the proposed rule would place on depository institutions, including small depository institutions, and customers of depository institutions.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* generally requires an agency, in connection with a proposed rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities.[13] However, a regulatory flexibility analysis is not required if the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets of less than or equal to $550 million that are independently owned and operated or owned by a holding company with less than $550 million in total assets.[14] For the reasons described below and under section 605(b) of the RFA, the FDIC certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

The FDIC has considered the potential impact of the proposed rule on small entities in accordance with the RFA. The FDIC supervises 3,533 depository institutions,[15] of which, 2,726 are defined as small banking entities by the terms of the RFA.[16] As discussed in the Background Section, 12 CFR part 325 implements company-run stress test requirements for all state nonmember banks and state savings associations with more than $10 billion in assets (covered banks). The proposed rule would raise the threshold for covered banks required to conduct company-run stress testing from $10 billion to $250 billion. No FDIC-supervised institutions with total consolidated assets of $550 million or less are or would, as a result of the proposed rule, be subject to 12 CFR part 325. Therefore, the proposed rule would not affect any small, FDIC-supervised institutions.

The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this rule have any significant effects on small entities that the FDIC has not identified?

C. The Paperwork Reduction Act

The FDIC has determined that this proposed rule involves a collection of information pursuant to the provisions of the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501 *et seq.*).

A Federal agency may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid Office of Management and Budget (OMB) control number. The FDIC has obtained an OMB control number for this information collection (3064–0189) and will make a submission to OMB in connection with the proposed rule.

Revised Information Collection Title: Stress Test Reporting Templates and Documentation for Covered Banks with Total Consolidated Assets of $250 Billion or More.

OMB Number: 3064–0189.

Form Number: FDIC DFAST 14A Summary; FDIC DFAST 14A Scenario.

Affected Public: Insured state nonmember banks.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response (hours)	Estimated annual burden (hours)
Methodologies and Practices	Recordkeeping	Mandatory	1*	Annually	640	640
Stress Test Reporting	Reporting	Mandatory	1*	Annually	240	240
Publications	Disclosure	Mandatory	1*	Annually	160	160
Estimated Total Annual Burden.						1,040

* **Note:** FDIC estimates that none of the existing FDIC-supervised institutions are currently subject to the recordkeeping, reporting or disclosure requirements in the proposed rule. However, FDIC is reporting one respondent as a placeholder to preserve the burden estimate in case an institution becomes subject to these requirements in the future.

Comments are invited on:

1. Whether the information collections are necessary for the proper performance of the Agencies' functions, including whether the information has practical utility;

2. The accuracy of the Agencies' estimates of the burden of the information collections, 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 information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

5. Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

[13] 5 U.S.C. 601 *et seq.*

[14] The SBA defines a small banking organization as having $550 million or less in assets, where ''a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' See 13 CFR 121.201 (as amended, effective December 2, 2014). ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is ''small'' for the purposes of RFA.

[15] FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

[16] FDIC Call Report, September 30, 2018.

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the FDIC to use plain language in all proposed and final rules published after January 1, 2000. The FDIC invites comment on how to make this proposed rule easier to understand.

For example:

- Has the FDIC organized the material to inform your needs? If not, how could it present the proposed rule more clearly?
- Are the requirements in the proposed rule clearly stated? If not, how could the proposal be more clearly stated?
- Does the proposed regulation contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the proposed regulation easier to understand? If so, what changes would achieve that?
- Is this section format adequate? If not, which of the sections should be changed and how?
- What other changes can the FDIC incorporate to make the proposed regulation easier to understand?

List of Subjects in 12 CFR Part 325

Administrative practice and procedure, Banks, banking, Reporting and recordkeeping requirements, State savings associations, Stress tests.

Authority and Issuance

For the reasons stated in the preamble, the FDIC proposes to amend 12 CFR part 325 as follows:

PART 325—STRESS TESTING

■ 1. The authority citation for part 325 continues to read as follows:

Authority: 12 U.S.C. 5365(i)(2), 12 U.S.C. 5412(b)(2)(C), 12 U.S.C. 1818, 12 U.S.C. 1819(a)(Tenth), 12 U.S.C. 1831o, and 12 U.S.C. 1831p–1.

■ 2. The heading for part 325 is revised to read as set forth above.

■ 3. In part 325, revise all references to ''subpart'' to read ''part''.

■ 4. Amend § 325.1 by:

■ a. Revising paragraph (b); and

■ b. Redesignating current paragraphs (c)(4), (5), and (6) as (c)(5), (6), and (7), and adding new paragraph (c)(4).

The revisions read as follows:

§ 325.1 Authority, purpose, and reservation of authority.

* * * * *

(b) *Purpose.* This part implements 12 U.S.C. 5365(i)(2), which requires the Corporation (in coordination with the Board of Governors of the Federal Reserve System (Board) and the Federal Insurance Office) to issue regulations that require each covered bank to conduct periodic stress tests, and establishes a definition of stress test, methodologies for conducting stress tests, and reporting and disclosure requirements.

(c) * * *

* * * * *

(4) The Corporation may also exempt a covered bank from the requirement to conduct a stress test in a particular reporting year.

* * * * *

■ 4. Amend § 325.2 by:

■ a. Removing paragraph (a) and redesignating current paragraphs (b) through (h) as paragraphs (a) through (g);

■ b. Revising the definitions of ''*covered bank*'' in paragraph (c),

■ c. Adding the definition of ''*reporting year*'' as paragraph (h);

■ d. Revising the definitions of ''scenarios'' in paragraph (i),

■ e. Revising the definitions of ''*severely adverse scenario*'' in paragraph (j), and

■ f. Revising the definitions of ''*stress testing cycle*'' in paragraph (m).

The revisions and additions read as follows:

§ 325.2 Definitions.

For purposes of this part—

* * * * *

(c) *Covered bank* means any state nonmember bank or state savings association with average total consolidated assets calculated as required under this part that are greater than $250 billion.

* * * * *

(h) *Reporting year* means the calendar year in which a covered institution must conduct, report, and publish its stress test, as required under 12 CFR 325.4(d).

(i) *Scenarios* are those sets of conditions that affect the U.S. economy or the financial condition of a covered bank that the Corporation determines are appropriate for use in the company-run stress tests, including, but not limited to, baseline and severely adverse scenarios.

(j) *Severely adverse scenario* means a set of conditions that affect the U.S. economy or the financial condition of a covered bank and that overall are significantly more severe than those associated with the baseline scenario and may include trading or other additional components.

* * * * *

(m) *Stress test cycle* means the period beginning January 1 of a reporting year and ending on December 31 of that reporting year.

■ 5. Revise § 325.3 to read as follows:

§ 325.3 Applicability.

(a) *Covered banks subject to stress testing.* (1) A state nonmember bank or state savings association that is a covered bank as of December 31, 2019, is subject to the requirements of this subpart for the 2020 reporting year.

(2) A state nonmember bank or state savings association that becomes a covered bank after December 31, 2019, shall conduct its first stress test under this part in the first reporting year that begins more than three calendar quarters after the date the state nonmember bank or state savings association becomes a covered bank, unless otherwise determined by the Corporation in writing.

(b) *Ceasing to be a covered bank.* A covered bank shall remain subject to the stress test requirements of this part unless and until total consolidated assets of the covered bank falls to $250 billion or less for each of four consecutive quarters as reported on the covered bank's most recent Call Reports. The calculation will be effective on the as-of date of the fourth consecutive Call Report.

(c) *Covered bank subsidiaries of a bank holding company or savings and loan holding company subject to periodic stress test requirements.* (1) Notwithstanding the requirements applicable to covered banks under this section, a covered bank that is a consolidated subsidiary of a bank holding company or savings and loan holding company that is required to conduct a periodic company-run stress test under applicable regulations of the Board of Governors of the Federal Reserve System may elect to conduct its stress test and report to the FDIC on the same timeline as its parent bank holding company or savings and loan holding company.

(2) A covered bank that elects to conduct its stress test under paragraph (c)(1) of this section will remain subject to the same timeline requirements of its parent company until otherwise approved by the FDIC.

■ 6. Revise § 325.4 to read as follows:

§ 325.4 Periodic stress tests required.

Each covered bank must conduct the periodic stress test under this part subject to the following requirements:

(a) *Financial data*—A covered bank must use financial data as of December 31 of the calendar year prior to the reporting year.

(b) *Scenarios provided by the Corporation.* In conducting the stress test under this part, each covered bank must use the scenarios provided by the

Corporation. The scenarios provided by the Corporation will reflect a minimum of two sets of economic and financial conditions, including baseline and severely adverse scenarios. The Corporation will provide a description of the scenarios required to be used by each covered bank no later than February 15 of the reporting year.

(c) *Significant trading activities.* The Corporation may require a covered bank with significant trading activities, as determined by the Corporation, to include trading and counterparty components in its severely adverse scenarios. The trading and counterparty position data used in this component will be as of a date between October 1 of the year preceding the reporting year and March 1 of the reporting year, and the Corporation will communicate a description of the component to the covered bank no later than March 1 of the reporting year.

(d) *Frequency.* A covered bank that is consolidated under a holding company that is required, pursuant to applicable regulations of the Board of Governors of the Federal Reserve System, to conduct a stress test at least once every calendar year must treat every calendar year as a reporting year, unless otherwise determined by the Corporation. All other covered banks must treat every even-numbered calendar year beginning January 1, 2020 (*i.e.,* 2022, 2024, 2026, etc.), as a reporting year, unless otherwise determined by the Corporation.

■ 7. Amend § 325.5 by revising paragraph (b) to read as follows:

§ 325.5 Methodologies and practices.

* * * * *

(b) *Controls and oversight of stress testing processes.* (1) The senior management of a covered bank must establish and maintain a system of controls, oversight, and documentation, including policies and procedures, that are designed to ensure that its stress test processes satisfy the requirements in this part. These policies and procedures must, at a minimum, describe the covered bank's stress test practices and methodologies, and processes for validating and updating the covered bank's stress test practices and methodologies consistent with applicable laws and regulations.

(2) The board of directors, or a committee thereof, of a covered bank must approve and review the policies and procedures of the stress testing processes as frequently as economic conditions or the condition of the covered bank may warrant, but no less than once every reporting year. The board of directors and senior management of the covered bank must receive a summary of the results of the stress test.

(3) The board of directors and senior management of each covered bank must consider the results of the stress tests in the normal course of business, including but not limited to, the covered bank's capital planning, assessment of capital adequacy, and risk management practices.

■ 8. Revise § 325.6 to read as follows:

§ 325.6 Required reports of stress test results to the FDIC and the Board of Governors of the Federal Reserve System.

(a) *Report required for periodic stress test results.* A covered bank must report to the FDIC and to the Board of Governors of the Federal Reserve System, on or before April 5 of the reporting year, the results of the stress test in the manner and form specified by the FDIC.

(b) *Content of reports.* (1) The reports required under paragraph (a) of this section must include under the baseline scenario, severely adverse scenario, and any other scenario required by the Corporation under this part, a description of the types of risks being included in the stress test, a summary description of the methodologies used in the stress test, and, for each quarter of the planning horizon, estimates of aggregate losses, pre-provision net revenue, provision for loan and lease losses, net income, and pro forma capital ratios (including regulatory and any other capital ratios specified by the FDIC). In addition, the report must include an explanation of the most significant causes for the changes in regulatory capital ratios and any other information required by the Corporation.

(2) The description of aggregate losses and net income must include the cumulative losses and cumulative net income over the planning horizon, and the description of each regulatory capital ratio must include the beginning value, ending value, and minimum value of each ratio over the planning horizon.

(c) *Confidential treatment of information submitted.* The confidentiality of information submitted to the Corporation under this part and related materials will be determined in accordance with applicable law including any available exemptions under the Freedom of Information Act (5 U.S.C. 552(b)) and the FDIC's Rules and Regulations regarding the Disclosure of Information (12 CFR part 309).

■ 9. Revise § 325.7 to read as follows:

§ 325.7 Publication of stress test results.

(a) *Publication date*—(1) A covered bank must publish a summary of the results of its stress tests in the period starting June 15 and ending July 15 of the reporting year, provided:

(A) Unless the Corporation determines otherwise, if the covered bank is a consolidated subsidiary of a bank holding company or savings and loan holding company subject to supervisory stress tests conducted by the Board of Governors of the Federal Reserve System under 12 CFR part 252, then, within the June 15 to July 15 period, such covered bank may not publish the required summary of its periodic stress test earlier than the date that the Board of Governors of the Federal Reserve System publishes the supervisory stress test results of the covered bank's parent holding company.

(B) If the Board of Governors of the Federal Reserve System publishes the supervisory stress test results of the covered bank's parent holding company prior to June 15, then such covered bank may publish its stress test results prior to June 15, but no later than July 15, through actual publication by the covered bank or through publication by the parent holding company under paragraph (b) of this section.

(b) *Publication method.* The summary required under this section may be published on the covered bank's website or in any other forum that is reasonably accessible to the public. A covered bank that is a consolidated subsidiary of a bank holding company or savings and loan holding company that is required to conduct a company-run stress test under applicable regulations of the Board of Governors of the Federal Reserve System will be deemed to have satisfied the public disclosure requirements under this subpart if it publishes a summary of its stress test results with its parent bank holding company's or savings and loan holding company's summary of stress test results. Subsidiary covered banks electing to satisfy their public disclosure requirement in this manner must include a summary of changes in regulatory capital ratios of such covered bank over the planning horizon, and an explanation of the most significant causes for the changes in regulatory capital ratios.

(c) *Information to be disclosed in the summary.* A covered bank must disclose the following information regarding the severely adverse scenario if it is not a consolidated subsidiary of a parent bank holding company or savings and loan holding company that has elected to

make its disclosure under 12 CFR 325.3(d):

* * * * *

Dated at Washington, DC, on December 18, 2018.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Valerie Best,

Assistant Executive Secretary.

[FR Doc. 2018–27824 Filed 12–27–18; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–1010; Product Identifier 2018–NM–148–AD]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to remove Airworthiness Directive (AD) 2012–02–18, which applies to all Dassault Aviation Model MYSTERE–FALCON 50 airplanes. AD 2012–02–18 requires revising the maintenance program to include revised airworthiness limitations. AD 2012–02–18 is no longer necessary because we have since issued AD 2017–09–03 to address the unsafe condition. Accordingly, we propose to remove AD 2012–02–18.

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.

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–2018–1010; 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 (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226.

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–2018–1010; Product Identifier 2018–NM–148–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://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 issued AD 2012–02–18, Amendment 39–16941 (77 FR 12175, February 29, 2012) (''AD 2012–02–18''), for all Dassault Aviation Model MYSTERE–FALCON 50 airplanes. AD 2012–02–18 requires revising the maintenance program to include revised airworthiness limitations. AD 2012–02–18 was prompted by reports of cracking of the flap tracks. We issued AD 2012–02–18 to address cracking of the flap tracks, which could lead to flap asymmetry and loss of control of the airplane.

Actions Since AD 2012–02–18 Was Issued

Since we issued AD 2012–02–18, we have issued AD 2017–09–03, Amendment 39–18865 (82 FR 21467, May 9, 2017) (''AD 2017–09–03''), which addresses the unsafe condition. AD 2017–09–03 requires revising the maintenance or inspection program, as applicable, to incorporate new and more restrictive maintenance requirements and airworthiness limitations, which include an eddy current inspection of flap tracks 2 and 5 to address cracking.

FAA's Conclusions

Upon further consideration, we have determined that AD 2012–02–18 is no longer necessary. Accordingly, this proposed AD would remove AD 2012–02–18. Removal of AD 2012–02–18 would not preclude the FAA from issuing another related action or commit the FAA to any course of action in the future.

Costs of Compliance

This proposed AD would add no cost. This proposed AD would remove AD 2012–02–18 from 14 CFR part 39; therefore, operators would no longer be required to show compliance with that 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.

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 removing Airworthiness Directive (AD) 2012–02–18, Amendment 39–16941 (77 FR 12175, February 29, 2012), and adding the following new AD:

Dassault Aviation: Docket No. FAA–2018–1010; Product Identifier 2018–NM–148–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by February 11, 2019.

(b) Affected ADs

This AD removes AD 2012–02–18, Amendment 39–16941 (77 FR 12175, February 29, 2012).

(c) Applicability

This AD applies to Dassault Aviation Model MYSTERE-FALCON 50 airplanes, all serial numbers, certificated in any category.

(d) Related Information

For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226.

Issued in Des Moines, Washington, on December 7, 2018.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–27430 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–1009; Product Identifier 2018–NM–147–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to remove Airworthiness Directive (AD) 2007–22–05 and AD 2013–13–13 (referred to after this as ''the affected ADs''), which apply to Airbus SAS Model A300–600 and A310 series airplanes. The affected ADs require certain actions to address various unsafe conditions. The affected ADs are no longer necessary because we have since issued other ADs that address these unsafe conditions. Accordingly, we propose to remove the affected ADs.

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.

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–2018–1009; 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 proposal, 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: Dan Rodina, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3225.

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–2018–1009; Product Identifier 2018–NM–147–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://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

Since we issued the affected ADs, we have issued other ADs to address the various unsafe conditions. Therefore the affected ADs are no longer necessary.

Affected ADs and the AD(s) that Terminates the Affected ADs

Affected AD	Affected Models	AD(s) that Terminates the Affected AD
AD 2007-22-05, Amendment 39-15241 (72 FR 60236, October 24, 2007)	A300–600 series airplanes	AD 2018-01-07, Amendment 39-19148 (83 FR 2042, January 16, 2018) ("AD 2018-01-07")
AD 2013-13-13, Amendment 39-17501 (79 FR 48957, August 19, 2014)	A300–600 and A310 series airplanes	AD 2017-21-08, Amendment 39-19079 (82 FR 48904, October 23, 2017); and AD 2018-01-07

FAA's Conclusions

We have determined that the affected ADs are no longer necessary. Accordingly, this proposed AD would remove the affected ADs. Removal of the affected ADs would not preclude the FAA from issuing other related actions or commit the FAA to any course of action in the future.

Costs of Compliance

This proposed AD would add no cost. This proposed AD would remove the affected ADs from 14 CFR part 39; therefore, operators would no longer be required to show compliance with the affected ADs.

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.

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 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 removing AD 2007–22–05, Amendment 39–15241 (72 FR 60236, October 24, 2007) and AD 2013–13–13, Amendment 39–17501 (79 FR 48957, August 19, 2014); and adding the following new AD:

Airbus SAS: Docket No. FAA–2018–1009; Product Identifier 2018–NM–147–AD.

(a) Comments Due Date

We must receive comments by February 11, 2019.

(b) Affected ADs

This AD removes AD 2007–22–05, Amendment 39–15241 (72 FR 60236, October 24, 2007) and AD 2013–13–13, Amendment 39–17501 (79 FR 48957, August 19, 2014)

(c) Applicability

This AD applies to Model A300–600 and A310 series airplanes.

(d) Related Information

For more information about this AD, contact Dan Rodina, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3225.

Issued in Des Moines, Washington, on December 7, 2018.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–27428 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–1063; Product Identifier 2018–NM–160–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS 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 Airbus SAS Model A330–223, A330–223F, A330–321, A330–322, and A330–323 airplanes. This proposed AD was prompted by a report of fatigue cracking in the latch beam gussets on a certain thrust reverser (T/R). This proposed AD would require a one-time special detailed inspection of certain latch beam gussets of certain T/Rs for cracks, and modifying the latch beam gussets of the T/Rs, if necessary. 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 the incorporation by reference (IBR) material described in the ''Related IBR material under 1 CFR part 51'' section in **SUPPLEMENTARY INFORMATION**, contact European Aviation Safety Agency (EASA), Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 1000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material 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 in the AD docket on the internet at *http://www.regulations.gov.*

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–2018–1063; 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 (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229.

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–2018–1063; Product Identifier 2018–NM–160–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 based on those comments.

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

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2018–0227, dated October 22, 2018 (''EASA AD 2018–0227'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus SAS Model A330–223, A330–223F, A330–321, A330–322, A330–323 airplanes. The MCAI states:

> A report was received of an in-service occurrence where an operator found a crack in the latch beam gussets of an affected TR [thrust reverser], between the forward (L2) and middle (L3) latches, adjacent to the aft cascade frame attachment bracket in the 6 o'clock beam. Subsequent investigation revealed that the crack surface of the latch beam gusset showed indication of high fatigue cycle, leading to development of a design modification, reinforcing the latch beam gussets. This was introduced through Airbus production mod 48539 (improvement of 6 o'clock latch beam) and Airbus issued the modification SB [Airbus Service Bulletin A330–78–3014, dated May 9, 2001] as a recommendation for in-service aeroplanes. Since these measures were introduced, a new case was reported of finding a crack beyond prediction at the latch beam gusset of an affected TR, on which the recommended modification SB had not been accomplished. This condition, if not detected and corrected, could lead to crack propagation until part failure and potentially departure of TR cascade during TR operation, which could create runway hazards for other aeroplanes [which could result in damage to the airplane and hazards to persons or property on the ground].
>
> To address this potential unsafe condition, Airbus issued the inspection SB [Airbus Service Bulletin A330–78–3024, dated June 28, 2018] to provide instructions for special detailed inspection (SDI) of the latch beam gussets.
>
> For the reasons described above, this [EASA] AD requires a one-time SDI of the latch beam gussets between the forward and middle latches of the affected TR [for cracks] and, depending on findings, replacement with improved (reinforced, modified) TR latch beam gussets.

Related IBR Material Under 1 CFR Part 51

EASA AD 2018–0227 describes procedures for a one-time special detailed inspection of the latch beam gussets between the forward and middle latches of the affected T/R for cracks and modifying the latch beam gussets. This material 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 and it is publicly available through the EASA website.

FAA's Determination and Requirements of This 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 the State of Design Authority, we have been notified of the unsafe condition described in the

MCAI referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. As a result, EASA AD 2018–0227 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with the provisions specified in EASA AD 2018–0227, except for any differences identified as exceptions in the regulatory text of this proposed AD. Service information specified in EASA AD 2018–0227 that is required for compliance with EASA AD 2018–0227 will be available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1063 after the FAA final rule is published.

Costs of Compliance

We estimate that this proposed AD affects 9 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
12 work-hours × $85 per hour = $1,020	$0	$1,020	$9,180

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
26 work-hours × $85 per hour = $2,210	$0	$2,210

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

Authority for This Rulemaking

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

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

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

Airbus SAS: Docket No. FAA–2018–1063; Product Identifier 2018–NM–160–AD.

(a) Comments Due Date

We must receive comments by February 11, 2019.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus SAS Model A330–223, A330–223F, A330–321, A330–

322, and A330–323 airplanes, certificated in any category, all manufacturer serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 78, Engine exhaust.

(e) Reason

This AD was prompted by a report of fatigue cracking in the latch beam gussets on a certain thrust reverser (T/R). We are issuing this AD to address this condition, which, if not detected and corrected, could lead to crack propagation until part failure and potential departure of the T/R cascade during T/R operation, which could result in damage to the airplane and hazards to persons or property on the ground.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, the European Aviation Safety Agency (EASA) AD 2018–0227, dated October 22, 2018 (''EASA AD 2018–0227'').

(h) Exceptions to EASA AD 2018–0227

(1) For purposes of determining compliance with the requirements of this AD: Where EASA AD 2018–0227 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2018–0227 does not apply to this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards 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 International Section, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* For any service information referenced in EASA AD 2018–0227 that contain RC procedures and tests: Except as required by paragraph (i)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified 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 procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Related Information

(1) For information about EASA AD 2018–0227, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 6017; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this EASA AD 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. EASA AD 2018–0227 may be found in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1063.

(2) For more information about this AD, contact Vladimir Ulyanov, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229.

Issued in Des Moines, Washington, on December 18, 2018.

Michael Kasychi,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–28079 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–1025; Airspace Docket No. 18–AEA–7]

RIN 2120–AA66

Proposed Amendment of Area Navigation (RNAV) Route T–299, and Establishment of T–318 and T–360; Eastern United States.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify low altitude RNAV route T–299, and establish routes T–318 and T–360 in the eastern United States. The proposal would expand the availability of RNAV routing in support of transitioning the National Airspace System (NAS) from ground-based to satellite-based navigation.

DATES: Comments must be received on or before February 11, 2019.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1 (800) 647–5527 or (202) 366–9826. You must identify FAA Docket No. FAA–2018–1025; Airspace Docket No. 18–AEA–7 at the beginning of your comments. You may also submit comments through the internet at *http://www.regulations.gov.*

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

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

efficiency of the NAS by lessening the dependency on ground-based navigation.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2018–1025; Airspace Docket No. 18–AEA–7 and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2018–1025; Airspace Docket No. 18–AEA–7''. The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Ave, College Park, GA 30337.

Availability and Summary of Documents for Incorporation by Reference

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

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to amend RNAV route T–299 and establish T–318 and T–360. The proposed route changes are described below.

T–299: T–299 currently extends between the UCREK, VA, waypoint (WP), (located south of Staunton, VA), and the SCAPE, PA, fix (located east of Chambersburg, PA). The proposed change would extend the route to the OBEPE, VA, fix (approximately 11 NM southwest of the UCREK WP) providing connectivity to VOR Federal airway V–290.

T–318: T–318 is a proposed new route that would extend between the JARLO, WV, WP and the SHERL, NY, WP. This would provide RNAV routing from the Charleston, WV, area, eastward to Virginia, then northeastward to the New York City area.

T–360: T–360 is a proposed new route that would extend between West Virginia and the Richmond, VA, area. It would also provide connectivity to routes T–299 and T–318.

United States Area Navigation Routes are published in paragraph 6011 of FAA Order 7400.11C, dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR 71.1. The RNAV routes listed in this document would be subsequently published in the Order.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 6011 United States Area Navigation Routes.

* * * * *

T299 OBEPE, VA to SCAPE, PA [Amended]

OBEPE, VA Fix (Lat. 37°54′23.03″ N, long. 079°13′21.04″ W)
UCREK, VA WP (Lat. 38°01′33.17″ N, long. 079°02′56.23″ W)
KAIJE, VA WP (Lat. 38°44′34.79″ N, long. 078°42′48.47″ W)
BAMMY, WV WP (Lat. 39°24′33.13″ N, long. 078°25′45.64″ W)
REEES, PA WP (Lat. 39°47′51.75″ N, long. 077°45′56.31″ W)
SCAPE, PA Fix (Lat. 39°56′41.76″ N, long. 077°32′12.33″ W)

T318 JARLO, WV to SHERL, NY [New]

JARLO, WV WP (Lat. 38°20′58.85″ N, long. 081°46′11.68″ W)
MONTS, WV Fix (Lat. 38°12′48.00″ N, long. 081°24′55.89″ W)

GAULE, WV Fix (Lat. 38°07′09.92″ N, long. 081°10′25.77″ W)
LAFOR, WV Fix (Lat. 38°04′53.03″ N, long. 081°04′33.56″ W)
SPACY, WV WP (Lat. 37°58′31.15″ N, long. 080°48′24.34″ W)
VUTCU, WV Fix (Lat. 37°48′09.19″ N, long. 080°36′12.45″ W)
TILFO, WV Fix (Lat. 37°43′53.59″ N, long. 080°31′13.46″ W)
PEEBE, WV Fix (Lat. 37°43′05.10″ N, long. 080°30′16.97″ W)
CASTE, VA Fix (Lat. 37°32′49.25″ N, long. 080°18′20.31″ W)
DBRAH, VA WP (Lat. 37°20′34.14″ N, long. 080°04′10.75″ W)
SPNKS, VA WP (Lat. 37°17′21.31″ N, long. 079°33′17.14″ W)
KONRD, VA WP (Lat. 37°20′39.83″ N, long. 079°01′33.27″ W)
MATTO, VA WP (Lat. 37°24′44.36″ N, long. 078°33′03.77″ W)
STAFD, VA WP (Lat. 37°26′26.91″ N, long. 078°20′50.17″ W)
CRUMB, VA Fix (Lat. 37°28′09.44″ N, long. 078°08′27.69″ W)
WAVES, VA WP (Lat. 37°35′13.54″ N, long. 077°26′52.03″ W)
TAPPA, VA Fix (Lat. 37°58′12.66″ N, long. 076°50′40.62″ W)
COLIN, VA Fix (Lat. 38°05′59.23″ N, long. 076°39′50.85″ W)
SHLBK, MD WP (Lat. 38°20′16.21″ N, long. 076°26′10.51″ W)
QUENS, MD WP (Lat. 38°26′04.59″ N, long. 076°19′10.06″ W)
PRNCZ, MD WP (Lat. 38°37′38.10″ N, long. 076°05′08.20″ W)
GARED, MD Fix (Lat. 38°41′40.41″ N, long. 076°01′21.96″ W)
CHOPS, MD Fix (Lat. 38°45′41.81″ N, long. 075°57′36.18″ W)
EGGRS, DE WP (Lat. 38°53′30.52″ N, long. 075°30′49.95″ W)
JILLI, NJ WP (Lat. 39°00′42.22″ N, long. 075°05′46.21″ W)
WNSTN, NJ WP (Lat. 39°05′43.81″ N, long. 074°48′01.20″ W)
AVALO, NJ Fix (Lat. 39°16′54.52″ N, long. 074°30′50.75″ W)
BRIGS, NJ Fix (Lat. 39°31′24.72″ N, long. 074°08′19.67″ W)
HARBO, NJ Fix (Lat. 39°36′27.04″ N, long. 074°00′26.56″ W)
DRIFT, NJ Fix (Lat. 39°48′53.56″ N, long. 073°40′49.53″ W)
MANTA, NJ Fix (Lat. 39°54′07.01″ N, long. 073°32′31.63″ W)
PLUME, NJ Fix (Lat. 40°07′06.67″ N, long. 073°17′08.03″ W)
SHERL, NY Fix (Lat. 40°15′20.55″ N, long. 073°07′18.26″ W)

T360 SPACY, WV to WAVES, VA [New]

SPACY, WV WP (Lat. 37°58′31.15″ N, long. 080°48′24.34″ W)
FRETT, WV Fix (Lat. 37°57′38.23″ N, long. 080°25′25.03″ W)
NATTS, WV Fix (Lat. 37°56′47.15″ N, long. 080°04′52.86″ W)
BOOME, VA Fix (Lat. 37°54′59.80″ N, long. 079°25′46.25″ W)
OBEPE, VA Fix (Lat. 37°54′23.03″ N, long. 079°13′21.04″ W)
ROMAN, VA Fix (Lat. 37°48′12.67″ N, long. 078°46′03.24″ W)
BRAIL, VA Fix (Lat. 37°44′24.08″ N, long. 078°32′52.00″ W)
ARVON, VA Fix (Lat. 37°41′13.95″ N, long. 078°21′58.75″ W)
WAVES, VA WP (Lat. 37°35′13.54″ N, long. 077°26′52.03″ W)

* * * * *

Issued in Washington, DC, on December 17, 2018.

Scott M. Rosenbloom,

Acting Manager, Airspace Policy Group.

[FR Doc. 2018–28105 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–1026; Airspace Docket No. 18–AEA–20]

RIN 2120–AA66

Proposed Removal of Jet Route J–147; Eastern United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to remove jet route J–147 which currently extends between Beckley, WV, and Casanova, VA. This action is necessary due to the planned decommissioning of the Greenbrier, WV, VOR/DME navigation aid which provides navigation guidance for segments of the route. The Greenbrier VOR/DME is being decommissioned as part of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Comments must be received on or before February 11, 2019.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1 (800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2018–1026; Airspace Docket No. 18–AEA–20 at the beginning of your comments. You may also submit comments through the internet at *http://www.regulations.gov.*

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

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2018–1026; Airspace Docket No. 18–AEA–20) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments

on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2018–1026; Airspace Docket No. 18–AEA–20.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Ave., College Park, GA 30337.

Availability and Summary of Documents for Incorporation by Reference

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

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to remove jet route J–174 due to the planned decommissioning of the Greenbrier, WV, VOR/DME which provides navigation guidance for segments of the route. J–147 currently extends between the Beckley, WV, VOR/DME and the Casanova, VA, VORTAC. Alternative routing through the area is available by using the adjacent jet routes J–42 or J–213.

Jet routes are published in paragraph 2004 of FAA Order 7400.11C dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR 71.1. The jet route listed in this document would be subsequently removed from the Order.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 2004 Jet Routes.

J–174 [Remove]

Issued in Washington, DC, on December 17, 2018.

Scott M. Rosenbloom,

Acting Manager, Airspace Policy Group.

[FR Doc. 2018–28154 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–1022; Airspace Docket No. 18–ANE–8]

RIN 2120–AA66

Proposed Amendment of VOR Federal Airways V–115, V–184, V–188, and V–542 in the Vicinity of Tidioute, PA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify VHF Omnidirectional Range (VOR) Federal airways V–115, V–184, V–188, and V–542 due to planned decommissioning of the Tidioute, PA, VORTAC navigation aid which provides navigation guidance for segments of the routes.

DATES: Comments must be received on or before February 11, 2019.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1 (800) 647–5527 or (202) 366–9826. You must identify FAA Docket No. FAA–2018–1022; Airspace Docket No. 18–ANE–8 at the beginning of your comments. You may also submit comments through the internet at *http://www.regulations.gov.*

FAA Order 7400.11C, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence

Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11C at NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

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

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

SUPPLEMENTARY INFORMATION:

Authority for this Rulemaking

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

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2018–1022; Airspace Docket No. 18–ANE–8 and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2018–1022; Airspace Docket No. 18–ANE–8'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Ave., College Park, GA, 30337.

Availability and Summary of Documents for Incorporation by Reference

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

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to modify the descriptions of VOR Federal airways V–115, V–184, V–188 and V–542, due to the planned decommissioning of the Tidioute, PA, VORTAC. The proposed route changes are described below.

V–115: V–115 currently extends between the Crestview, FL, VORTAC and the Buffalo, NY, VOR/DME. The proposed change would remove the segments between the Franklin, PA, VOR and the Buffalo VORTAC. The amended route would extend between Crestview, FL and Franklin, PA.

V–184: V–184 currently extends between the Erie, PA, VORTAC and the intersection of radials from the Kennedy, NY, VOR/DME and the Robbinsville, NJ, VORTAC. The proposed change would remove the segments between the Erie, PA, VORTAC and the Philipsburg, PA, VORTAC. The amended route would extend between Philipsburg, PA, and the intersection of radials from the Kennedy, NY, VOR/DME and the Robbinsville, NJ, VORTAC.

V–188: V–188 currently extends between the Tidioute, PA, VORTAC and the Groton, CT, VOR/DME. The proposed change would remove the segment between the Tidioute VORTAC and the Slate Run, PA, VORTAC. The amended route would extend between Slate Run, PA, and Groton, CT, as currently charted.

V–542: V–542 currently extends between the Tidioute, PA, VORTAC and the Lebanon, NH, VOR/DME. The proposed change would remove the segments between the Tidioute VORTAC and the Elmira, NY, VOR/DME. The amended route would extend between Elmira, NY, and Lebanon, NH, as currently charted.

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

Regulatory Notices and Analyses

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

number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–115 [Amended]

From Crestview, FL; INT Crestview 001° and Montgomery, AL, 204° radials; Montgomery; INT Montgomery 323° and Vulcan, AL, 177° radials; Vulcan; Choo Choo, GA; Volunteer, TN; Hazard, KY; Charleston, WV; Parkersburg, WV; Newcomerstown, OH; INT Newcomerstown 038° and Franklin, PA, 239° radials; to Franklin.

V–184 [Amended]

From Philipsburg, PA; Harrisburg, PA; INT Harrisburg 135° and Modena, PA, 274° radials; Modena; INT Modena 120° and Woodstown, NJ, 326° radials; Woodstown; Cedar Lake, NJ; Atlantic City, NJ; INT Atlantic City 055° and Kennedy, NY, 198° radials; to INT Kennedy 198° and Robbinsville, NJ, 112° radials.

V–188 [Amended]

From Slate Run, PA; Williamsport, PA; Wilkes-Barre, PA; INT Wilkes-Barre 084° and Sparta, NJ, 300° radials; Sparta; INT Sparta 082° and Carmel, NY, 243° radials; Carmel; INT Carmel 078° and Groton, CT, 276° radials; to Groton.

V–542 [Amended]

From Elmira, NY; Binghamton, NY; Rockdale, NY; Albany, NY; Cambridge, NY; INT Cambridge 063° and Lebanon, NH, 214° radials; to Lebanon.

* * * * *

Issued in Washington, DC, on December 17, 2018.

Scott M. Rosenbloom,

Acting Manager, Airspace Policy Group.

[FR Doc. 2018–28104 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–1028; Airspace Docket No. 17–ASO–6]

RIN 2120–AA66

Proposed Amendment of VOR Federal Airway V–18 in the Vicinity of Talladega, AL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify VHF Omnidirectional Range (VOR) Federal airway V–18, in the Vicinity of Talladega, AL. This action is necessary due to the planned decommissioning of the Talladega, AL, VOR/DME navigation aid which provides navigation guidance for segments of the route.

DATES: Comments must be received on or before February 11, 2019.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1 (800) 647–5527 or (202) 366–9826. You must identify FAA Docket No. FAA–2018–1028; Airspace Docket No. 17–ASO–6 at the beginning of your comments. You may also submit comments through the internet at *http://www.regulations.gov.*

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

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2018–1028; Airspace Docket No. 17–ASO–6 and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following

statement is made: ''Comments to FAA Docket No. FAA–2018–1028; Airspace Docket No. 17–ASO–6.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Ave., College Park, GA 30337.

Availability and Summary of Documents for Incorporation by Reference

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

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to modify the description of VOR Federal airway V–18, in the vicinity of Talladega, AL, due to the planned decommissioning of the Talladega, AL, VOR/DME. The proposed route change is described below.

V–18: V–18 currently extends between the Guthrie, TX, VORTAC and the Charleston, SC, VORTAC. The FAA proposes to remove the airway segments between the Vulcan, AL, VORTAC and the Colliers, SC, VORTAC. This would result in a gap in the airway between Vulcan, AL, and Colliers, SC. Therefore, proposed amended V–18 route would consist of two separate sections: First, between the Guthrie, TX, VORTAC and the Vulcan, AL, VORTAC; and second, after the gap, the airway would resume between the Colliers, SC, VORTAC and the Charleston, SC, VORTAC.

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

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–18 [Amended]

From Guthrie, TX, via INT Guthrie 156° and Millsap, TX, 274° radials; Millsap; Glen Rose, TX; Cedar Creek, TX; Quitman, TX; Belcher, LA; Monroe, LA; Magnolia, MS; Meridian, MS; Crimson, AL; to Vulcan, AL. From Colliers, SC; to Charleston, SC.

* * * * *

Issued in Washington, DC, on December 17, 2018.

Scott M. Rosenbloom,

Acting Manager, Airspace Policy Group.

[FR Doc. 2018–28107 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–491]

Schedules of Controlled Substances: Temporary Placement of 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, and FUB-144 in Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Proposed amendment; notice of intent.

SUMMARY: The Acting Administrator of the Drug Enforcement Administration is issuing this notice of intent to publish a temporary order to schedule the synthetic cannabinoids (SCs), ethyl 2-(1-(5-fluoropentyl)-1*H*-indazole-3-carboxamido)-3,3-dimethylbutanoate (trivial name: 5F-EDMB-PINACA); methyl 2-(1-(5-fluoropentyl)-1*H*-indole-3-carboxamido)-3,3-dimethylbutanoate (trivial name: 5F-MDMB-PICA); *N*-(adamantan-1-yl)-1-(4-fluorobenzyl)-1*H*-indazole-3-carboxamide (trivial name: FUB-AKB48; FUB-APINACA; AKB48 N-(4-FLUOROBENZYL)); 1-(5-fluoropentyl)-*N*-(2-phenylpropan-2-yl)-1*H*-indazole-3-carboxamide (trivial names: 5F-CUMYL-PINACA; SGT-25); and (1-(4-fluorobenzyl)-1*H*-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)

methanone (trivial name: FUB-144), in schedule I. This action is based on a finding by the Acting Administrator that the placement of these SCs in schedule I of the Controlled Substances Act (CSA) is necessary to avoid an imminent hazard to the public safety. When it is issued, the temporary scheduling order will impose regulatory requirements under the CSA on the manufacture, distribution, reverse distribution, possession, importation, exportation, research, and conduct of instructional activities, and chemical analysis of these SCs, as well as administrative, civil, and criminal remedies with respect to persons who fail to comply with such requirements or otherwise violate the CSA with respect to these substances.

DATES: December 28, 2018.

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

SUPPLEMENTARY INFORMATION: This notice of intent contained in this document is issued pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h). The Drug Enforcement Administration (DEA) intends to issue a temporary scheduling order (in the form of a temporary amendment) placing 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 in schedule I of the Controlled Substances Act (CSA).[1] The temporary scheduling order will be published in the **Federal Register** on or after January 28, 2019.

Legal Authority

Section 201 of the CSA provides the Attorney General with the authority to temporarily place a substance in schedule I of the CSA for two years without regard to the requirements of 21 U.S.C. 811(b) if he finds that such action is necessary to avoid an imminent hazard to the public safety.[2] In addition, if proceedings to control a substance permanently are initiated under 21 U.S.C. 811(a)(1) while the substance is temporarily controlled under section 811(h), the Attorney General may extend the temporary scheduling for up to one year.[3]

Where the necessary findings are made, a substance may be temporarily scheduled if it is not listed in any other schedule under section 202 of the CSA,[4] or if there is no exemption or approval in effect for the substance under section 505 of the Federal Food, Drug, and Cosmetic Act (FDCA).[5] The Attorney General has delegated scheduling authority under 21 U.S.C. 811 to the Administrator of the DEA.[6]

Background

Section 201(h)(4) of the CSA requires the Administrator to notify the Secretary of the Department of Health and Human Services (HHS) of his intention to temporarily place a substance in schedule I of the CSA.[7] The Acting Administrator transmitted notice of his intent to place 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 in schedule I on a temporary basis to the Assistant Secretary for Health of HHS by letter dated August 24, 2018. The Assistant Secretary responded to this notice of intent by letter dated September 6, 2018, and advised that based on a review by the Food and Drug Administration (FDA), there are currently no approved new drug applications or investigational new drug applications for 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144. The Assistant Secretary also stated that HHS has no objection to the temporary placement of 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA or FUB-144 in schedule I of the CSA. 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA or FUB-144 are not currently listed in any schedule under the CSA, and no exemptions or approvals are in effect for 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 under section 505 of the FDCA.[8]

In order to place a substance temporarily in schedule I of the CSA to avoid an imminent hazard to the public safety, the Administrator is required to consider three of the eight factors set forth in 21 U.S.C. 811(c): (1) The substance's history and current pattern of abuse; (2) the scope, duration and significance of abuse; and (3) what, if any, risk there is to the public health.[9] Consideration of these factors includes actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution.[10]

A substance meeting the statutory requirements for temporary scheduling may only be placed in schedule I.[11] Substances in schedule I are those that have a high potential for abuse, no currently accepted medical use for treatment in the United States, and a lack of accepted safety for use under medical supervision.[12]

Synthetic Cannabinoids

The illicit use of SCs continues to cause severe adverse effects, overdoses and deaths in the United States. SCs are substances synthesized in laboratories that mimic the biological effects of delta-9-tetrahydrocannabinol (THC), the main psychoactive ingredient in marijuana. SCs were introduced to the designer drug market in several European countries as ''herbal incense'' before the initial encounter in the United States by U.S. Customs and Border Protection (CBP) in November 2008. From 2009, misuse of SCs has escalated in the United States as evidenced by large numbers of law enforcement encounters of SCs applied onto plant material and in other designer drug products intended for human consumption. Recent hospital reports, scientific publications, and/or law enforcement reports demonstrate that 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, FUB-144, and their associated designer drug products are being abused for their psychoactive properties (*see* DEA 3-Factor Analysis). As with many generations of SCs encountered since 2009, the abuse of 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 is negatively impacting communities in the United States.

As noted by the DEA and CBP, SCs originate from foreign sources, such as China. Bulk powder substances are smuggled via common carrier into the United States and find their way to clandestine designer drug product manufacturing operations located in residential neighborhoods, garages,

[1] Though DEA has used the term ''final order'' with respect to temporary scheduling orders in the past, this notice of intent adheres to the statutory language of 21 U.S.C. 811(h), which refers to a ''temporary scheduling order.'' No substantive change is intended.

[2] 21 U.S.C. 811(h)(1).

[3] *Id.* at 811(h)(2).

[4] 21 U.S.C. 812.

[5] 21 U.S.C. 811(h)(1); 21 CFR part 1308(h).

[6] 28 CFR 0.100.

[7] 21 U.S.C. 811(h)(4); As discussed in a memorandum of understanding entered into by the FDA and the National Institute on Drug Abuse (NIDA), the FDA acts as the lead agency within the HHS in carrying out the Secretary's scheduling responsibilities under the CSA, with the concurrence of NIDA. 50 FR 9518 (Mar. 8, 1985). The Secretary of the HHS has delegated to the Assistant Secretary for Health of the HHS the authority to make domestic drug scheduling recommendations. 58 FR 35460 (July 1, 1993).

[8] 21 U.S.C. 355.

[9] 21 U.S.C. 811(h)(3).

[10] *Id.*

[11] 21 U.S.C. 811(h)(1).

[12] 21 U.S.C. 812(b)(1).

warehouses, and other similar destinations throughout the country. According to online discussion boards and law enforcement encounters, spraying or mixing the SCs with plant material provides a vehicle for the most common route of administration—smoking (using a pipe, a water pipe, or rolling the drug-laced plant material in cigarette papers).

5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 have no accepted medical use in the United States. Use of 5F-MDMB-PICA, 5F-EDMB-PINACA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 has been reported to result in adverse effects in humans in the United States (*see* DEA 3-Factor Analysis). In addition, there have been multiple law enforcement seizures of 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 in the United States. Use of other SCs has resulted in signs of addiction and withdrawal. Based on the pharmacological similarities between 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 and other SCs, these five SCs are likely to produce signs of addiction and withdrawal similar to those produced by other SCs.

5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 are SCs that have pharmacological effects similar to the schedule I hallucinogen THC, and other temporarily and permanently controlled schedule I SCs. In addition, the misuse of 5F-CUMYL-PINACA, 5F-EDMB-PINACA and FUB-144 has been associated with multiple overdoses requiring emergency medical intervention (*see* DEA 3-Factor Analysis) while deaths have been reported that involved FUB-AKB48. With no approved medical use and limited safety or toxicological information, 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 have emerged in the designer drug market, and the abuse of these substances for their psychoactive properties is concerning.

Factor 4. History and Current Pattern of Abuse

SCs have been developed by researchers over the last 30 years as tools for investigating the endocannabinoid system (*e.g.,* determining CB1 and CB2 receptor activity). The first encounter of SCs intended for illicit use within the United States occurred in November 2008 by CBP. Since then, the popularity of SCs as product adulterants and objects of abuse has increased as evidenced by law enforcement seizures, public health information, and media reports.

Numerous SCs have been identified as product adulterants, and law enforcement has seized bulk amounts of these substances. As successive generations of SCs have been identified and controlled as schedule I substances, illicit distributors have developed new SC substances that vary only by slight modifications to their chemical structure while retaining pharmacological effects related to their abuse potential. These substances, and products laced with these substances, are marketed under the guise of ''herbal incense'' and promoted as a ''legal high'' with a disclaimer that they are ''not for human consumption.'' Thus, after section 1152 of the Food and Drug Administration Safety and Innovation Act (FDASIA), Public Law 112-144, placed cannabimimetic agents and 26 specific substances (15 of these are SCs) into schedule I, law enforcement documented the emergence of new SCs including UR-144, XLR11, AKB48, PB-22, 5F-PB-22, AB-FUBINACA, and ADB-PINACA. After these substances were temporarily scheduled (78 FR 28735, May 16, 2013; 79 FR 7577, February 10, 2014) other generations of SCs appeared and were temporarily controlled, including AB-CHMINACA, AB-PINACA, THJ-2201 (80 FR 5042, January 30, 2015), MAB-CHMINACA (81 FR 6171, February 5, 2016), 5F-ADB, 5F-AMB, 5F-ABK48, ADB-FUBINACA, MDMB-CHMICA, MDMB-FUBINACA (82 FR 17119, April 10, 2017), FUB-AMB (82 FR 51154, November 3, 2017) NM2201, 5F-AB-PINACA, 4-CN-CUMYL-BUTINACA, MMB-CHMICA and 5F-CUMYL-P7AICA (83 FR 31877, July 10, 2018).

FUB-AKB48 was first identified in seized drug evidence in October 2013, followed by FUB-144 (January 2014), 5F-MDMB-PICA (October 2016), 5F-EDMB-PINACA (October 2017) and 5F-CUMYL-PINACA (February 2018). Following their manufacture in China, SCs are often encountered in countries including New Zealand, Australia, and Russia before appearing throughout Europe, and eventually in the United States. 5F-CUMYL-PINACA was first reported in the German and Swiss illicit drug market in 2015 but didn't show up in the United States until February 2018; 5F-EDMB-PINACA was reported in China in 2016 but didn't appear in the United States until October 2017; and 5F-MDMB-PICA was reported in Germany in August 2016 and November 2016 in Belgium, a few months before showing up in the United States. These data further support that based upon trends, SCs appear in the illicit drug markets of other countries including those in Europe, often before being trafficked in the United States. The misuse of 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 has been associated with law enforcement seizures, overdoses requiring emergency medical intervention, or both (*see* DEA 3-Factor Analysis).

The powder form of SCs is typically dissolved in solvents (*e.g.,* acetone) before being applied to plant material, or dissolved in a propellant intended for use in electronic cigarette devices. In addition, 5F-EDMB-PINACA was identified as an adulterant on pieces of paper that were smuggled into a detention facility and later found partially burned (*see* DEA 3- Factor Analysis). Law enforcement personnel have encountered various application methods including buckets or cement mixers in which plant material and one or more SCs are mixed together, or in large areas where the plant material is spread out so that a dissolved SC mixture can be applied directly. Once mixed, the SC plant material is then allowed to dry before manufacturers package the product for distribution, ignoring any control mechanisms to prevent contamination or to ensure a uniform concentration of the substance in each package. Adverse health consequences may also occur from directly ingesting the drug during the manufacturing process. The failure to adhere to any manufacturing standards with regard to amounts, the substance(s) included, purity, or contamination may increase the risk of adverse events. However, it is important to note that adherence to manufacturing standards would not eliminate their potential to produce adverse effects because the toxicity and safety profile of these SCs have not been studied.

5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144, similar to other SCs, have been found in powder form or mixed with dried leaves or herbal blends that were marketed for human use. Presentations at emergency departments directly linked to the abuse of 5F-EDMB-PINACA and FUB-144 have included seizures, agitation, vomiting, tachycardia and elevated blood pressure (*see* DEA 3-Factor Analysis).

Factor 5. Scope, Duration and Significance of Abuse

SCs continue to be encountered in the illicit market despite scheduling actions that attempt to safeguard the public from the adverse effects and safety issues associated with these substances

(*see* DEA 3-Factor Analysis). Novel substances continue to be encountered, differing only by small chemical structural modifications intended to avoid prosecution while maintaining the pharmacological effects. Law enforcement and health care professionals continue to report the abuse of these substances and their associated products.

As described by NIDA, many substances being encountered in the illicit market, specifically SCs, have been available for years but have reentered the marketplace due to a renewed popularity. The threat of serious injury to the individual and the imminent threat to public safety following the ingestion of 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 and other SCs persist.

Full reports of information obtained through STARLiMS,[13] STRIDE,[14] and NFLIS [15] for the past five years may be found in the DEA 3-Factor Analysis. According to NFLIS data, state and local forensic laboratories have detected the following information about the SCs in question:

- 5F-EDMB-PINACA was identified in 205 different NFLIS reports from five states since 2017,[16] and 16 STRIDE/STARLiMS reports from one state since 2017.
- 5F-MDMB–PICA was identified in 115 NFLIS reports from 18 states since 2016.
- FUB-AKB48 was identified in 342 NFLIS reports from 20 states since 2014, and 36 STRIDE/STARLiMS reports from eight states since 2013.
- 5F-CUMYL-PINACA was identified in three NFLIS reports from two states since 2018.
- FUB-144 was identified in 346 NFLIS reports from 26 states since 2014, 71 STARLiMS reports from 13 states plus Washington, DC since 2014.

[13] STARLiMS is a laboratory information management system that systematically collects results from drug chemistry analyses conducted by DEA laboratories. On October 1, 2014, STARLiMS replaced System to Retrieve Information from Drug Evidence (STRIDE) as the DEA laboratory drug evidence data system of record.

[14] STRIDE is a database of drug exhibits sent to DEA laboratories for analysis. Exhibits from the database are from the DEA, other federal agencies, and some local law enforcement agencies.

[15] The National Forensic Laboratory Information System (NFLIS) is a national forensic laboratory reporting system that systematically collects results from drug chemistry analyses conducted by State and local forensic laboratories in the United States.

[16] At the time of query, 2017 data were still reporting.

Factor 6. What, if Any, Risk There Is to the Public Health

Since first being identified in the United States in 2008, the ingestion of SCs continues to result in serious adverse effects. Details of these events involving 5F-CUMYL-PINACA, 5F-EDMB-PINACA, FUB-144, FUB-AKB48, and 5F-MDMB-PICA are summarized below.

1. In 2015, in London (United Kingdom), a 34 year-old male was hospitalized after ingesting a synthetic cannabinoid product. Toxicological analysis identified 5F-AKB48 and 5F-CUMYL-PINACA in biological samples.

2. In September 2018, law enforcement in Georgia seized multiple electronic cigarettes with various colored viscous liquids following the reports of overdoses. Laboratory analysis on the seized evidence determined the substance to be 5F-CUMYL-PINACA.

3. In late November and early December 2015, in Jackson, MS, five individuals presented at local emergency facilities following ingestion of a synthetic cannabinoid-containing product. Evidence collected from the individuals tested positive for THC, MAB-CHMINACA and FUB-144. Toxicological analysis of biological samples in all five patients identified THC, MAB-CHMINACA, and FUB-144.

4. In March 2017, in Chaves, NM, a 14 year-old female was found in the bathroom of her home with seizure-like activity. Following transport to a local hospital by family members, she was pronounced dead approximately 20 minutes later. Toxicological analysis upon autopsy identified three SCs: FUB-AKB48, AB-CHMINACA, and ADB-CHMINACA (MAB-CHMINACA). The cause of death was determined to be toxic effects of synthetic cannabinoids (FUB-AKB48, AB-CHMINACA, and ADB-CHMINACA).

5. In January 2018, in Pittsburgh, PA, 13 correctional facility workers were treated for overdose symptoms including diaphoresis, hypertension and tachycardia following ingestion of an airborne substance while conducting cell searches for contraband. In response to the overdose events, evidence retrieved from the searches tested positive for the synthetic cannabinoids 5F-ADB, 5F-EDMB-PINACA, and 4-CN-CUMYL-BUTINACA.

6. In March 2018, in Chicago, IL, a 22 year-old male expired at a local hospital. Toxicological analysis confirmed buprenorphine, brodifacoum, bromadiolone, FUB-AMB and FUB-AKB48 in biological samples of this decedent.

7. In April 2018, in Harrisburg, PA, a 38-year old male presented at a local hospital due to repeated nosebleeds, gastrointestinal bleeding with anemia and bruising on his arms. Toxicological analysis confirmed brodifacoum, FUB-AMB, and FUB-AKB48 in biological samples.

8. In April 2018, in Harrisburg, PA, another patient presented at a local hospital due to significant bleeding and anemia requiring a transfusion. Toxicological analysis confirmed brodifacoum, FUB-AMB, and FUB-AKB48 in biological samples.

9. In June 2018, in Chicago, IL, a 25-year old male expired at a local hospital. Toxicological analysis confirmed brodifacoum, bromadiolone, FUB-AMB and FUB-AKB48 in biological samples of this decedent.

10. In July 2018, in Washington, DC, in excess of 260 overdoses and four deaths were reported following use of a synthetic cannabinoid product. Analysis of drug evidence from the overdose event confirmed the presence of the synthetic cannabinoids FUB-AMB, EMB-FUBINACA and FUB-144.

11. In August 2018, in New Haven, CT, in excess of 47 overdoses were reported following the use of a synthetic cannabinoid product. Analysis of drug evidence from the overdose event confirmed the presence of the synthetic cannabinoids 5F-ADB, FUB-AMB and 5F-MDMB-PICA.

12. From September 10–16, 2018, in Washington, DC, at least 244 overdoses were reported following use of a synthetic cannabinoid product. Analysis of drug evidence from the overdose event confirmed the presence of the synthetic cannabinoids FUB-AMB and 5F-MDMB-PICA.

Because they share pharmacological similarities with schedule I substances (Δ^9-THC, JWH-018 and other temporarily and permanently controlled schedule I SCs), 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, and FUB-144 pose serious risks to an abuser. Tolerance to SCs may develop fairly rapidly with larger doses being required to achieve the desired effect. Acute and chronic abuse of SCs in general have been linked to adverse health effects including signs of addiction and withdrawal, numerous reports of emergency department admissions, and overall toxicity and deaths. Psychiatric case reports have been reported in the scientific literature detailing the SC abuse and associated psychoses. As abusers obtain these drugs through unknown sources, the identity and purity of these substances is uncertain and inconsistent, thus

posing significant adverse health risks to users.

5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, and FUB-144 are being encountered on the illicit drug market and have no accepted medical use in the United States. Regardless, these products continue to be easily available and abused by diverse populations.

Finding of Necessity of Schedule I Placement To Avoid Imminent Hazard to Public Safety

In accordance with 21 U.S.C. 811(h)(3) and based on the data and information summarized above, the continued uncontrolled manufacture, distribution, reverse distribution, importation, exportation, conduct of research and chemical analysis, possession, and/or abuse of 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, and FUB-144, resulting from the lack of control of these substances, pose an imminent hazard to the public safety. The DEA is not aware of any currently accepted medical uses for 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, and FUB-144 in the United States. A substance meeting the statutory requirements for temporary scheduling may only be placed in schedule I.[17] Substances in schedule I are those that have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision.[18] Available data and information for 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, and FUB-144 indicate that these SCs have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. As required by section 201(h)(4) of the CSA,[19] the Acting Administrator, through a letter dated August 24, 2018, notified the Assistant Secretary for Health of the DEA's intention to temporarily place 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, and FUB-144 in schedule I and considered the Assistant Secretary's response.

Conclusion

This notice of intent provides the 30-day notice, pursuant to section 201(h) of the CSA,[20] of the DEA's intent to issue a temporary scheduling order. In accordance with the provisions of section 201(h) of the CSA, the Acting Administrator considered available data and information, and herein sets forth the grounds for his determination that it is necessary to temporarily schedule ethyl 2-(1-(5-fluoropentyl)-1*H*-indazole-3-carboxamido)-3,3-dimethylbutanoate (trivial name: 5F-EDMB-PINACA); methyl 2-(1-(5-fluoropentyl)-1*H*-indole-3-carboxamido)-3,3-dimethylbutanoate (trivial name: 5F-MDMB-PICA); *N*-(adamantan-1-yl)-1-(4-fluorobenzyl)-1*H*-indazole-3-carboxamide (trivial name: FUB-AKB48; FUB-APINACA; AKB48 N-(4-FLUOROBENZYL)); 1-(5-fluoropentyl)-*N*-(2-phenylpropan-2-yl)-1*H*-indazole-3-carboxamide (trivial names: 5F-CUMYL-PINACA; SGT-25); and (1-(4-fluorobenzyl)-1*H*-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl) methanone (trivial name: FUB-144) in schedule I of the CSA and finds that placement of 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, and FUB-144 in schedule I of the CSA on a temporary basis is necessary to avoid an imminent hazard to the public safety.

The temporary placement of 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, and FUB-144 in schedule I of the CSA will take effect pursuant to a temporary scheduling order, which will not be issued before January 28, 2019. Because the Acting Administrator hereby finds that it is necessary to temporarily place 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA, and FUB-144 in schedule I to avoid an imminent hazard to the public safety, the temporary order scheduling these substances will be effective on the date that order is published in the **Federal Register** and will be in effect for a period of two years, with a possible extension of one additional year, pending completion of the regular (permanent) scheduling process.[21] It is the intention of the Acting Administrator to issue a temporary scheduling order as soon as possible after the expiration of 30 days from the date of publication of this document. Upon publication of the temporary order, 5F-EDMB-PINACA, 5F-MDMB-PICA, FUB-AKB48, 5F-CUMYL-PINACA and FUB-144 will be subject to the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, reverse distribution, importation, exportation, research, conduct of instructional activities and chemical analysis, and possession of a schedule I controlled substance.

The CSA sets forth specific criteria for scheduling a drug or other substance. Regular scheduling actions, in accordance with 21 U.S.C. 811(a), are subject to formal rulemaking procedures done ''on the record after opportunity for a hearing'' conducted pursuant to the provisions of 5 U.S.C. 556 and 557.[22] The regular scheduling process of formal rulemaking affords interested parties with appropriate process and the government with any additional relevant information needed to make a determination. Final decisions that conclude the regular scheduling process of formal rulemaking are subject to judicial review.[23] Temporary scheduling orders are not subject to judicial review.[24]

Regulatory Matters

Section 201(h) of the CSA provides for a temporary scheduling action where such action is necessary to avoid an imminent hazard to the public safety. As provided in this subsection, the Attorney General may, by order, schedule a substance in schedule I on a temporary basis. Such an order may not be issued before the expiration of 30 days from (1) the publication of a notice in the **Federal Register** of the intention to issue such order and the grounds upon which such order is to be issued, and (2) the date that notice of the proposed temporary scheduling order is transmitted to the Assistant Secretary of HHS.[25]

Inasmuch as section 201(h) of the CSA directs that temporary scheduling actions be issued by order and sets forth the procedures by which such orders are to be issued, the DEA believes that the notice and comment requirements of section 553 of the Administrative Procedure Act (APA)[26] do not apply to this notice of intent. In the alternative, even assuming that this notice of intent might be subject to section 553 of the APA, the Acting Administrator finds that there is good cause to forgo the notice and comment requirements of section 553, as any further delays in the process for issuance of temporary scheduling orders would be impracticable and contrary to the public interest in view of the manifest urgency to avoid an imminent hazard to the public safety.

Although the DEA believes this notice of intent to issue a temporary

[17] 21 U.S.C. 811(h)(1).

[18] 21 U.S.C. 812(b)(1).

[19] 21 U.S.C. 811(h)(4).

[20] 21 U.S.C. 811(h).

[21] 21 U.S.C. 811(h)(1) and (2).

[22] 21 U.S.C. 811.

[23] 21 U.S.C. 877.

[24] 21 U.S.C. 811(h)(6).

[25] 21 U.S.C. 811(h)(1).

[26] 5 U.S.C. 553.

scheduling order is not subject to the notice and comment requirements of section 553 of the APA, the DEA notes that in accordance with 21 U.S.C. 811(h)(4), the Acting Administrator took into consideration comments submitted by the Assistant Secretary in response to the notice that DEA transmitted to the Assistant Secretary pursuant to section 811(h)(4).

Further, the DEA believes that this temporary scheduling action is not a ''rule'' as defined by 5 U.S.C. 601(2), and, accordingly, is not subject to the requirements of the Regulatory Flexibility Act (RFA). The requirements for the preparation of an initial regulatory flexibility analysis in 5 U.S.C. 603(a) are not applicable where, as here, the DEA is not required by section 553 of the APA or any other law to publish a general notice of proposed rulemaking.

Additionally, this action is not a significant regulatory action as defined by Executive Order 12866 (Regulatory Planning and Review), section 3(f), and, accordingly, this action has not been reviewed by the Office of Management and Budget.

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

List of Subjects in 21 CFR Part 1308

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

For the reasons set out above, the DEA proposes to amend 21 CFR part 1308 as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

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

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

■ 2. In § 1308.11, add paragraphs (h)(37) through (41) to read as follows:

§ 1308.11 Schedule I

* * * * *

(h) * * *

(37) thyl 2-(1-(5-fluoropentyl)-1*H*-indazole-3-carboxamido)-3,3-dimethylbutanoate, its optical, positional, and geometric isomers, salts and salts of isomers (trivial name: 5F-EDMB-PINACA)-(7036)

(38) methyl 2-(1-(5-fluoropentyl)-1*H*-indole-3-carboxamido)-3,3-dimethylbutanoate, its optical, positional, and geometric isomers, salts and salts of isomers (trivial name: 5F-MDMB-PICA)-(7041)

(39) *N*-(adamantan-1-yl)-1-(4-fluorobenzyl)-1*H*-indazole-3-carboxamide, its optical, positional, and geometric isomers, salts and salts of isomers (trivial name: FUB-AKB48; FUB-APINACA; AKB48 N-(4-FLUOROBENZYL))-(7047)

(40) 1-(5-fluoropentyl)-*N*-(2-phenylpropan-2-yl)-1*H*-indazole-3-carboxamide, its optical, positional, and geometric isomers, salts and salts of isomers (trivial names: 5F-CUMYL-PINACA; SGT-25)-(7083)

(41) (1-(4-fluorobenzyl)-1*H*-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone, its optical, positional, and geometric isomers, salts and salts of isomers (trivial name: FUB-144)-(7014)

Dated: December 20, 2018.

Uttam Dhillon,

Acting Administrator.

[FR Doc. 2018–28110 Filed 12–27–18; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–115420–18]

RIN 1545–BP03

Investing in Qualified Opportunity Funds; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to a notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains a correction to notice of proposed rulemaking and notice of public hearing (REG–115420–18) that was published in the **Federal Register** on Monday, October 29, 2018. The proposed regulations are providing guidance under new section 1400Z–2 of the Internal Revenue Code relating to gains that may be deferred as a result of a taxpayer's investment in a qualified opportunity fund.

DATES: Written or electronic comments and request for a public hearing for the notice of proposed rulemaking at 83 FR 54279, October 29, 2018, are still being accepted and must be received by December 28, 2018.

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

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking and notice of public hearing that is subject of this document is under section 1400Z–2 of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking and notice of public hearing (REG–115420–18) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the notice of proposed rulemaking and notice of public hearing, FR Doc. 2018–23382, published at 83 FR 54279, October 29, 2018, is corrected as follows:

1. On page 54285, second column, in the preamble, the twelfth line of the first full paragraph, the language ''1400Z–2(d)](2)(D)). is corrected to read ''1400Z–2(d)(2)(D)).''.

2. On page 54285, second column, in the preamble, the last line of the first full paragraph, the language ''section 1400Z–2(d)(2)(B)(ii)(III).'' is corrected to read ''section 1400Z–2(d)(2)(B)(i)(III) and section 1400Z–2(d)(2)(C)(iii).''.

§ 1.400Z2(e)–1 [Corrected]

3. On page 54296, third column, the eleventh line of paragraph (a)(3)(i), the language ''§ 1.752–3(a)'' is corrected to read ''section 752 and the regulations thereunder,''

Martin V. Franks,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2018–28207 Filed 12–27–18; 8:45 am]

BILLING CODE 4830–01–P

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

32 CFR Part 1701

Privacy Act of 1974: System of Records

AGENCY: Office of the Director of National Intelligence.

ACTION: Proposed rulemaking.

SUMMARY: The Office of the Director of National Intelligence (ODNI) proposes to: Exempt a new system of records (Continuous Evaluation System) as well as systems of records of the Intelligence Community Office of Inspector General (ICIG) from the requirements of the Privacy Act to the extent that information in each system is subject to the Privacy Act's exemption provisions. The ODNI also proposes to add a new section which restores a list of all ODNI systems of records that are subject to Privacy Act exemption.

DATES: Submit comments on or before January 28, 2019.

ADDRESSES: You may submit comments by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov.

Mail: Director, Information Management Division, Office of the Director of National Intelligence, Washington, DC 20511.

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Gaviria, Director, Information Management Division, (301–243–1054).

SUPPLEMENTARY INFORMATION: In compliance with the Privacy Act, 5 U.S.C. 552a(e)(4), ODNI has already described in the notice section of the **Federal Register** (83 FR 61395, document 18–25970), published on November 29, 2018, the following new system of records: Continuous Evaluation Records (ODNI/NCSC–003). This new system of records facilitates implementation of the National Counterintelligence and Security Center (NCSC) Continuous Evaluation System, which conducts ongoing automated checks of security-relevant databases to ensure that individuals who have been determined to be eligible for access to classified information or to hold a sensitive position remain eligible, as required by Executive Orders 12968 as amended (Access to Classified Information), and 13467 as amended (Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information). The system of records will contain biographic and personnel security-relevant records pertaining to current Executive Branch employees, detailees, contractors, and other sponsored individuals (enrollees).

In its proposed rule, the ODNI intends to exempt the above new system of records, Continuous Evaluation Records (ODNI/NCSC–003), from certain provisions of the Privacy Act to prevent the compromise of classified information and to ensure the integrity of any law enforcement, counterintelligence, or administrative investigation that may be undertaken with respect to the subject of the record.

In addition, this ODNI proposed rule intends to restore the list of ODNI exempt systems of records to Part 32 of the CFR at § 1701.22, as redesignated. This list had been deleted by final action published at 80 FR 63427 (October 20, 2015). The restored list reflects the break-down of exempt systems of records by ODNI component.

Regulatory Flexibility Act

This proposed rule affects the manner in which ODNI collects and maintains information about individuals. ODNI certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities. Accordingly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601–612, no regulatory flexibility analysis is required for this rule.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires ODNI to comply with small entity requests for information and advice about compliance with statutes and regulations within ODNI jurisdiction. Any small entity that has a question regarding this document may address it to the information contact listed above. Further information regarding SBREFA is available on the Small Business Administration's web page at *http://www.sga.gov/advo/law/law_lib.html.*

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that ODNI consider the impact of paperwork and other burdens imposed on the public associated with the collection of information. There are no information collection requirements associated with this proposed rule and therefore no analysis of burden is required.

Executive Order 12866, Regulatory Planning and Review

This proposed rule is not a ''significant regulatory action'' within the meaning of Executive Order 12866. This rule will not have an annual effect on the economy of $100 million or more or otherwise adversely affect the economy or sector of the economy in a material way; will not create inconsistency with, or interfere with, other agency action; will not materially alter the budgetary impact of entitlements, grants, fees, or loans or the rights and obligations of recipients thereof; and will not raise legal or policy issues arising out of legal mandates, the President's priorities or the principles set forth in the Executive Order. Accordingly, further regulatory evaluation is not required.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995), requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. This proposed rule imposes no Federal mandate on any State, local, or tribal government or on the private sector. Accordingly, no UMRA analysis of economic and regulatory alternatives is required.

Executive Order 13132, Federalism

Executive Order 13132 requires ODNI to examine the implications for the distribution of power and responsibilities among the various levels of government resulting from this proposed rule. ODNI concludes that the proposed rule does not affect the rights, roles and responsibilities of the States, involves no preemption of State law, and does not limit State policymaking discretion. This rule has no federalism implications as defined by the Executive Order.

Environmental Impact

ODNI has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321–4347, and has determined that this action will not have a significant effect on the human environment.

Energy Impact

The energy impact of this action has been assessed in accordance with the Energy Policy and Conservation Act (EPCA), Public Law 94–163, as amended, 42 U.S.C. 6362. This rulemaking is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 32 CFR Part 1701

Records and Privacy Act.

For the reasons set forth above, ODNI proposes to amend 32 CFR part 1701 as follows:

PART 1701—ADMINISTRATION OF RECORDS UNDER THE PRIVACY ACT OF 1974

■ 1. The authority citation for part 1701 continues to read as follows:

Authority: 50 U.S.C. 3002–3231; 5 U.S.C. 552a.

Subpart B—[Amended]

■ 2. Revise subpart B by:
■ (a) Removing §§ 1701.21 through 1701.23
■ (b) Redesignating § 1701.24 as § 1701.21 and revising it to read as follows:

§ 1701.21 Exemption of the Office of the Director of National Intelligence (ODNI) Systems of Records

(a) ODNI exempts the systems of records listed in § 1701.22 from the requirements of paragraphs (c)(3); (d)(1), (2), (3) and (4); (e)(1), and (e)(4)(G), (H) and (I); and (f) of the Privacy Act to the extent that information in the system is subject to exemption pursuant to paragraphs (k)(1), (k)(2) or (k)(5) of the Act as noted in the individual systems notices. ODNI also may derivatively preserve the exempt status of records it receives from source agencies when the reason for the exemption remains valid, as set forth in 32 CFR 1701.20.

(b) Systems of records utilized by the Office of the Intelligence Community Inspector General (ICIG) are additionally exempted from the requirements of paragraphs (c)(4); (e)(2); (e)(3); (e)(5); (e)(8); (e)(12) and (g) of the Privacy Act to the extent that information in the system is subject to exemption pursuant to paragraphs (j)(2) of the Privacy Act.

(c) Exemption of records in these systems from any or all of the enumerated requirements may be necessary for the following reasons:

(1) From paragraphs (c)(3) (accounting of disclosures) because an accounting of disclosures from records concerning the record subject would specifically reveal an intelligence or investigative interest on the part of ODNI or the recipient agency and could result in release of properly classified national security or foreign policy information.

(2) From paragraphs (c)(4) (notice of amendment to record recipients) because the system is exempted from the access and amendment provisions of paragraphs (d).

(3) From paragraphs (d)(1), (2), (3) and (4) (record subject's right to access and amend records) because affording access and amendment rights could alert the record subject to the investigative interest of intelligence or law enforcement agencies or compromise sensitive information classified in the interest of national security. In the absence of a national security basis for exemption, records in this system may be exempted from access and amendment to the extent necessary to honor promises of confidentiality to persons providing information concerning a candidate for position. Inability to maintain such confidentiality would restrict the free flow of information vital to a determination of a candidate's qualifications and suitability.

(4) From paragraphs (e)(1) (maintain only relevant and necessary records) because it is not always possible to establish relevance and necessity before all information is considered and evaluated in relation to an intelligence concern. In the absence of a national security basis for exemption under paragraphs (k)(1), records in this system may be exempted from the relevance requirement pursuant to paragraphs (k)(2) and (k)(5) because it is not possible to determine in advance what exact information may assist in determining the qualifications and suitability of a candidate for position. Seemingly irrelevant details, when combined with other data, can provide a useful composite for determining whether a candidate should be appointed.

(5) From paragraphs (e)(2) (collection directly from the individual) because application of this provision would alert the subject of a counterterrorism investigation, study, or analysis to that fact, permitting the subject to frustrate or impede the activity. Counterterrorism investigations necessarily rely on information obtained from third parties rather than information furnished by subjects themselves.

(6) From paragraphs (e)(3) (provide Privacy Act Statement to subjects furnishing information) because the system if exempted from paragraphs (e)(2) requirement to collect information directly from the subject.

(7) From paragraphs (e)(4)(G) and (H) (publication of procedures for notifying subjects of the existence of records about them and how they may access records and contest contents) because the system is exempted from paragraphs (d) provisions regarding access and amendment, and from the paragraphs (f) requirement to promulgate agency rules for notification, access, and amendment. Nevertheless, ODNI has published notice concerning notification, access, and contest procedures because it may in certain circumstances determine it appropriate to provide subjects access to all or a portion of the records about them in a system of records.

(8) From paragraphs (e)(4)(I) (identifying sources of records in the system of records) because identifying sources could result in disclosure of properly classified national defense or foreign policy information, intelligence sources and methods, and investigatory techniques and procedures. Notwithstanding its proposed exemption from this requirement, ODNI identifies record sources in broad categories sufficient to provide general notice of the origins of the information it maintains in its systems of records.

(9) From paragraphs (e)(5) (maintain timely, accurate, complete and up-to-date records) because many of the records in the system are derived from other domestic and foreign agency record systems over which ODNI exercises no control. In addition, in collecting information for counterterrorism, intelligence, and law enforcement purposes, it is not possible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time and the development of additional facts and circumstances, seemingly irrelevant or dated information may acquire significance. The restrictions imposed by paragraphs (e)(5) would limit the ability of intelligence analysts to exercise judgment in conducting investigations and impede development of intelligence necessary for effective counterterrorism and law enforcement efforts.

(10) From paragraphs (e)(8) (notice of compelled disclosures) because requiring individual notice of legally compelled disclosure poses an impossible administrative burden and could alert subjects of counterterrorism, law enforcement, or intelligence investigations to the previously unknown fact of those investigations.

(11) From paragraphs (e)(12) (public notice of matching activity) because, to the extent such activities are not otherwise excluded from the matching requirements of the Privacy Act, publishing advance notice in the **Federal Register** would frustrate the ability of intelligence analysts to act quickly in furtherance of analytical efforts.

(12) From paragraphs (f) (agency rules for notifying subjects to the existence of records about them, for accessing and amending records, and for assessing fees) because the system is exempt from paragraphs (d) provisions regarding access and amendment of records by record subjects. Nevertheless, ODNI has published agency rules concerning notification of a subject in response to his request if any system of records named by the subject contains a record

pertaining to him and procedures by which the subject may access or amend the records. Notwithstanding exemption, ODNI may determine it appropriate to satisfy a record subject's access request.

(13) From paragraphs (g) (civil remedies) to the extent that the civil remedies relate to provisions of 5 U.S.C. 552a from which this rule exempts the system.

(c) inserting a new § 1701.22 entitled ''List of ODNI Systems of Records That Are Subject to Exemption''

ODNI Systems of Records Subject to Exemption

Manuscript, Presentation, and Resume Review Records (ODNI–01) (k)(1)
Executive Secretary Action Management System Records (ODNI–02) (k)(1)
Public Affairs Office Records (ODNI–03) (k)(1)
Office of Legislative Affairs Records (ODNI–04) (k)(1)
ODNI Guest Speaker Records (ODNI–05) (k)(1)
Office of General Counsel Records (ODNI–06) (k)(1), (2), (5)
Intelligence Community Customer Registry (ODNI–09) (k)(1)
Office of Intelligence Community Equal Employment Opportunity and Diversity Records (ODNI–10) (k)(1), (2), (5)
Office of Protocol Records (ODNI–11) (k)(1)
Intelligence Community Security Clearance and Access Approval Repository (ODNI–12) (k)(1), (2), (5)
Security Clearance Reform Research and Oversight Records (ODNI–13) (k)(1), (2), (5)
Civil Liberties and Privacy Office Complaint Records (ODNI–14) (k)(1), (2), (5)
Mission Outreach and Collaboration Records (ODNI–15) (k)(1)
ODNI Human Resource Records (ODNI–16) (k)(1)
ODNI Personnel Security Records (ODNI–17) (k)(1), (2), (5)
ODNI Freedom of Information Act, Privacy Act, and Mandatory Declassification Review Request Records (ODNI–18) (k)(1), (2), (5)
ODNI Information Technology Systems Activity and Access Records (ODNI–19) (k)(1), (2), (5)
ODNI Security Clearance Reciprocity Hotline Records (ODNI–20) (k)(1), (5)
ODNI Information Technology Network Support, Administration and Analysis Records (ODNI–21) (k)(1)
Insider Threat Program Records (ODNI–22) (k)(1), (2), (5)

ODNI/National Counterintelligence and Security Center (NCSC) Systems of Records

Damage Assessment Records (ODNI/NCIX–001) (k)(1), (2)
Counterintelligence Trends Analyses Records (ODNI/NCSC–002) (k)(1), (2)
Continuous Evaluation Records (ODNI/NCSC–003) (k)(1), (2), (5)

ODNI/National Counterterrorism Center (NCTC) Systems of Records

NCTC Access Authorization Records (ODNI/NCTC–002) (k)(1)
NCTC Telephone Directory (ODNI/NCTC–003) (k)(1)
NCTC Knowledge Repository (ODNI/NCTC–004) (k)(1), (2)
NCTC Current (ODNI/NCTC–005) (k)(1), (2)
NCTC Partnership Management Records (ODNI/NCTC–006) (k)(1)
NCTC Tacit Knowledge Management Records (ODNI/NCTC–007)
NCTC Terrorism Analysis Records (ODNI/NCTC–008) (k)(1), (2)
Terrorist Identities Records (ODNI/NCTC–009) (k)(1), (2)

ODNI/Office of the Intelligence Community Inspector General (ICIG) Systems of Records

OIG Human Resources Records (ODNI/OIG–001) (k)(1), (5)
OIG Experts Contact Records (ODNI/OIG–002) (k)(1), (5)
OIG Investigation and Interview Records (ODNI/OIG–003) (j)(2); (k)(1), (2), (5)

Deirdre M. Walsh,

Chief Operating Officer, Office of the Director of National Intelligence.

[FR Doc. 2018–26048 Filed 12–27–18; 8:45 am]

BILLING CODE 3910–79–P–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 232, 300, 302, and 401

[EPA–HQ–OW–2018–0149; FRL–9988–72–OW]

RIN 2040–AF75

Revised Definition of ''Waters of the United States''

AGENCIES: Department of the Army; and Environmental Protection Agency (EPA).

ACTION: Notice of public hearing.

SUMMARY: On December 11, 2018, the Environmental Protection Agency and the U.S. Department of the Army (the agencies) signed a proposed rule revising the definition of ''waters of the United States'' to clarify the scope of waters federally regulated under the Clean Water Act. The agencies are announcing that a public hearing will be held in Kansas City, Kansas on January 23, 2019, to provide interested parties the opportunity to present data, views, or information concerning the proposed rule. The pre-publication version of this proposal can be found at *https://www.epa.gov/wotus-rule/step-two-revise.*

DATES: The agencies will hold a public hearing on Wednesday, January 23, 2019, in Kansas City, Kansas. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearing.

ADDRESSES: The hearing will be held in the Wyandotte Ballroom of the Reardon Convention Center, 520 Minnesota Avenue, Kansas City, Kansas 66101. The hearing will convene at 1:00 p.m. (local time) and will conclude no later than 8:00 p.m. There will be a break from 5:00 p.m. to 6:00 p.m.

A complete set of documents related to the proposal will be available for public inspection through the Federal eRulemaking Portal: *http://www.regulations.gov,* Docket ID No. EPA–HQ–OW–2018–0149 once the notice of proposed rulemaking publishes in the **Federal Register**. Documents can also be viewed at the Environmental Protection Agency Docket Center, located at 1301 Constitution Avenue NW, Room 3334, Washington, DC between 8:30 a.m. and 4:30 p.m., Monday through Friday, excluding legal holidays. In addition, the pre-publication version of the notice of proposed rule, the economic analysis for the proposed rule, and the resource and programmatic assessment for the proposed rule are available at *https://www.epa.gov/wotus-rule/step-two-revise.*

If you are unable to attend the public hearing you will be able to submit your comments, identified by Docket ID No. EPA–HQ–OW–2018–0149, to the *Federal eRulemaking Portal: http://www.regulations.gov (our preferred method).* Follow the online instructions for submitting comments. All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any

personal information provided. For additional information on the public hearing, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Ms. Damaris Christensen, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–2428; email address*: WOTUS-outreach@epa.gov;* or Ms. Cindy Barger, Office of the Assistant Secretary of the Army for Civil Works, 441 G Street NW, Washington, DC 20014; telephone number: (202) 761–0038.

SUPPLEMENTARY INFORMATION:

I. Background

On December 11, 2018, the agencies signed a proposed rule defining the scope of waters federally regulated under the Clean Water Act, in light of the U.S. Supreme Court cases in *United States* v. *Riverside Bayview Homes, Solid Waste Agency of Northern Cook County* v. *United States,* and *Rapanos* v. *United States,* and consistent with Executive Order 13778, signed on February 28, 2017, entitled ''Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.'' The agencies are holding a public hearing in Kansas City, Kansas on January 23, 2019, to provide interested parties the opportunity to present data, views, or information concerning the proposed rule. The agencies have submitted the proposed rule to the Office of the Federal Register, and it will be published separately in the **Federal Register**. The comment period on the proposed action will end 60 days after the notice of proposed rulemaking publishes in the **Federal Register**. The pre-publication version of the proposed rule can be found at *https://www.epa.gov/wotus-rule/step-two-revise* and will be replaced with the official version of the notice after it publishes.

II. Public Participation

A. Participation in Public Hearing

The public is invited to speak during the public hearing on January 23, 2019. The agencies will begin pre-registering speakers for the hearing upon signature of this document. Those interested in speaking at the hearing can sign up for a three-minute speaking slot within an identified 45-minute timeframe. To register to speak at the hearing, please use the online registration form available at *https://www.epa.gov/wotus-rule/proposed-revised-definition-wotus-public-hearing.* The last day to pre-register to speak at the hearing will be January 17, 2019. On January 22, 2019, the agencies will post a general agenda for the hearing that will list pre-registered speakers in approximate order at: *https://www.epa.gov/wotus-rule/proposed-revised-definition-wotus-public-hearing.*

The agencies will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule. Additionally, requests to speak will be taken the day of the hearing at the hearing registration desk. The agencies will make every effort to accommodate all speakers who arrive and register, although preferences on speaking times may not be available.

Each commenter will have three minutes to provide oral testimony. The agencies encourage commenters to provide the agencies with a copy of their oral testimony electronically (via email) or in hard copy form.

The agencies may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. Written comments must be received by the last day of the comment period, as specified in the notice of proposed rulemaking. Verbatim transcripts of the hearing and written statements will be included in the docket for the rulemaking.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/wotus-rule/proposed-revised-definition-wotus-public-hearing.* While the agencies expect the hearing to go forward as set forth above, please monitor our website for any updates. The agencies do not intend to publish a document in the **Federal Register** announcing updates.

The agencies will not provide audiovisual equipment for presentations. Any media presentations should be submitted to the public docket *at https://www.regulations.gov/,* identified by Docket ID No. EPA–HQ–OW–2018–0149. If you require the service of a translator or special accommodations such as audio description, please pre-register for the hearing and describe your needs by January 17, 2019. We may not be able to arrange accommodations without advanced notice.

Dated: December 20, 2018.

John T. Goodin,

Director, Office of Wetlands, Oceans and Watersheds, Office of Water, Environmental Protection Agency.

Dated: December 20, 2018.

Ryan A. Fisher,

Principal Deputy Assistant Secretary of the Army (Civil Works), Department of the Army.

[FR Doc. 2018–28296 Filed 12–27–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 2

[Docket No. DOI–2018–0017]

RIN 1093–AA26

Freedom of Information Act Regulations

AGENCY: Office of the Secretary, Interior.

ACTION: Proposed rule.

SUMMARY: This rule would revise the regulations that the Department of the Interior (Department) follows in processing records under the Freedom of Information Act. The revisions clarify and update procedures for requesting information from the Department and procedures that the Department follows in responding to requests from the public.

DATES: Comments on the rulemaking must be submitted on or before January 28, 2019.

ADDRESSES: You may submit comments on the rulemaking by either of the methods listed below. Please use Docket No. DOI–2018–0017 in your message.

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

2. *U.S. mail, courier, or hand delivery:* Executive Secretariat—FOIA regulations, Department of the Interior, 1849 C Street NW, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Cindy Cafaro, Office of Executive Secretariat and Regulatory Affairs, 202–208–5342.

SUPPLEMENTARY INFORMATION:

I. Why We Are Publishing This Rule and What it Does

In late 2012, the Department published a final rule updating and replacing the Department's previous Freedom of Information Act (FOIA) regulations. In early 2016, the Department updated that final rule,

primarily to authorize the Office of Inspector General (OIG) to process its own FOIA appeals. In late 2016, the Department updated that final rule again, primarily in response to the mid-year enactment of the FOIA Improvement Act of 2016. The Department is fully committed to an equitable FOIA program that ensures compliance with the statutory requirements of transparency, accountability, and prompt production. In light of the unprecedented surge in FOIA requests and litigation (discussed further below), the Department has determined the following changes are necessary to best serve our customers and comply with the FOIA as efficiently, equitably, and completely as possible.

Exponential increases in requests and litigation have made updates to these regulations a priority. From Fiscal Year (FY) 2016 to FY 2018, incoming FOIA requests to the Department increased 30 percent (from 6,428 to over 8,350). Some bureaus and offices have been hit especially hard. The Office of the Secretary (OS) FOIA Office, for example, has received a 210 percent increase from FY 2016. The Department's attempts to respond accurately, completely, and in a timely manner to every request have been further hindered by the dramatic increase in litigation, particularly over agency non-response to initial FOIA requests. For example, at the close of FY 2018 the Department had 129 active FOIA cases in litigation (39 in OS alone) compared to just 6 cases in litigation in total at the close of FY 2015 and 30 cases in litigation in total at the end of FY 2016. The Department processed over 6,900 requests in FY 2018, compared to 6,437 in FY 2016. Despite the increased production, the Department's backlog of requests without at least a partial response has also increased. The Department's FOIA processing therefore must be more efficient if the Department is to meet its statutory obligations.

Because of this background, the structure of the Department's FOIA program and FOIA Public Liaison function is changing. Additionally, FOIA case law continues to evolve and the Department of Justice has recently issued guidance on The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons. In light of these factors, the Department is proposing to make the following changes to its FOIA regulations:

- Section 2.2 would be amended to reflect the changing structure of the Department's FOIA program.
- Section 2.3 would be amended to streamline the FOIA submission process in order to help the Department inform requesters and/or focus on meeting its statutory obligations.
- Section 2.3, 2.5, 2.19, 2.21, 2.37, 2.49, and 2.66 would be amended to reflect the changed structure of the Department's Public Liaison function and/or clarify the role of FOIA Requester Centers.
- Section 2.4 and 2.17 would be amended to eliminate the obligation to forward requests to another bureau or component in order to help the Department focus on meeting its statutory obligations. Instead, the bureau will respond to the request as appropriate and inform the requester of the availability of the FOIA Requester Centers for further assistance.
- Section 2.5, and 2.70 would be amended to streamline and/or clarify what the requester may receive and how they may ask for it in order to help the Department inform requesters and/or focus on meeting its statutory obligations.
- Section 2.6, 2.45, 2.48, 2.49, 2.54, and 2.70 would be amended to streamline and/or clarify issues involving fees in order to help the Department inform requesters and/or focus on meeting its statutory obligations.
- Section 2.12 and 2.13 would be amended to streamline and/or clarify the Department's consultation and referral process in order to help the Department inform requesters and focus on meeting its statutory obligations.
- Section 2.14, 2.15, and 2.20 would be amended to streamline and/or clarify the Department's multitrack processing provisions in order to help the Department inform requesters and focus on meeting its statutory obligations. Section 2.27 and 2.29 would be amended to streamline and/or clarify the Department's submitter notification provisions in order to help the Department inform submitters and requesters and focus on meeting its statutory obligations.
- Section 2.16, 2.18, 2.19, 2.28, 2.37, 2.51, 2.57, 2.58, 2.59, and 2.62 would be amended to replace a single word.
- Section 2.18 and 2.47 would be amended for technical clarifications.
- Section 2.20, 2.23 and 2.24 would be amended to adjust the role of the Department's Office of the Solicitor in order to ensure legal input is required when it is most equitable and effective.

II. Compliance With Laws and Executive Orders

1. Regulatory Planning and Review (Executive Orders 12866 and 13563)

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

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

2. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

3. Small Business Regulatory Enforcement Fairness Act

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

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

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

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

4. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. This rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information

required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. Takings (E.O. 12630)

In accordance with E.O. 12630, this rule does not have significant takings implications. A takings implication assessment is not required.

6. Federalism (E.O. 13132)

In accordance with E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. It would not substantially and directly affect the relationship between the Federal and state governments. A federalism summary impact statement is not required.

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

In accordance with E.O. 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

8. Consultation With Indian Tribes (E.O. 13175)

Under the criteria in E.O. 13175, we have evaluated this rule and determined that it has no potential effects on federally recognized Indian tribes. This rule does not have tribal implications that impose substantial direct compliance costs on Indian Tribal governments.

9. Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the Paperwork Reduction Act is not required.

10. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required. Pursuant to Department Manual 516 DM 2.3A(2), Section 1.10 of 516 DM 2, Appendix 1 excludes from documentation in an environmental assessment or impact statement ''policies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature; or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject late to the NEPA process, either collectively or case-by-case.''

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

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required. This rule will not have a significant effect on the nation's energy supply, distribution, or use.

12. Clarity of This Regulation

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

13. 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.

List of Subjects in 43 CFR Part 2

Freedom of information.

For the reasons stated in the preamble, the Department of the Interior proposes to amend part 2 of title 43 of the Code of Federal Regulations as follows:

PART 2—FREEDOM OF INFORMATION ACT; RECORDS AND TESTIMONY

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

Authority: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 3717; 43 U.S.C. 1460, 1461.

Subpart A—Introduction

§ 2.2 [Amended]

■ 2. In § 2.2, remove the words ''Office of the Solicitor'' and adding in its place ''Deputy Chief FOIA Officer''.

Subpart B—How To Make a Request

§ 2.3 [Amended]

■ 3. Amend § 2.3 by:

■ a. Adding in paragraph (b), to the end of the sentence the words: ''by utilizing the electronic portals listed on the Department's FOIA website, *https://www.doi.gov/foia,* or utilizing physical addresses of the appropriate bureau FOIA Officer or other appropriate FOIA contact, located at *http://www.doi.gov/foia/contacts*''

■ b. Removing paragraph (c).

■ c. Redesignating paragraph (d), as paragraph (c), and removing the words ''FOIA Public Liaison'' and adding in its place ''FOIA Requester Center''.

§ 2.4 [Amended]

■ 4. Amend § 2.4 by:

■ a. In paragraph (a), after the words ''a particular'' adding the words ''bureau or a particular''; after the words ''that particular'' adding the words ''bureau or particular''. At the end of the paragraph adding the words ''and will not be forwarded to another bureau or component''.

■ b. Removing paragraphs (e) and (f).

§ 2.5 [Amended]

■ 5. In § 2.5:

■ a. In paragraph (a), after the word ''effort'', add the following phrase ''and identify the discrete, identifiable agency activity, operation, or program in which you are interested''.

■ b. In paragraph (c), remove the phrase ''FOIA Public Liaison'' and add in its place ''FOIA Requester Center''.

■ c. Revise paragraph (d).

■ d. Add paragraph (e).

The revision and addition read as follows:

§ 2.5 How should you describe the records you seek?

* * * * *

(d) You must describe the records you seek sufficiently to enable a professional employee familiar with the subject to locate the documents with a reasonable effort. Extremely broad or vague requests or requests requiring research do not satisfy this requirement. The bureau will not honor a request that requires an unreasonably burdensome search or requires the bureau to locate, review, redact, or arrange for inspection of a vast quantity of material.

(e) If the bureau determines that your request does not reasonably describe the

records sought, the bureau will return the request to you; notify you that it will not be able to comply with your request unless you sufficiently clarify your request, in writing, within 20 workdays; notify you that you may appeal its determination that your request does not reasonably describe the records sought; and inform you, when practicable, what additional information you need to provide in order to reasonably describe the records that you seek so the requested records can be located with a reasonable amount of effort. If you receive this type of notification, you may wish to discuss it with the bureau's designated FOIA contact or FOIA Requester Center (see § 2.66 of this part). If the bureau does not receive your written response containing the additional information within 20 workdays after the bureau has requested it, the bureau will presume that you are no longer interested in the records and will close the file on the request

§ 2.6 [Amended]

■ 6. In § 2.6 paragraph (f) add the wording ''or a different fee category placement'' after ''partial fee waiver''.

Subpart C—Processing Requests

§ 2.12 [Amended]

■ 7. Revise § 2.12 paragraph (b) to read as follows:

* * * * *

(d) If a bureau receives a request for records in its possession that primarily concern another bureau or a Federal Government agency that is subject to FOIA, it may undertake consultations and/or referrals as described in § 2.13.

* * * * *

§ 2.13 [Amended]

■ 8. Revise § 2.13 to read as follows:

§ 2.13 How do consultations and referrals work?

(a) When a bureau (other than the Office of Inspector General) locates responsive records that primarily concern another bureau or Federal Government agency that is subject to FOIA, the bureau will determine whether that bureau or agency would be better able to determine whether the record is exempt from disclosure.

(b) If the bureau processing the request believes that another bureau or agency would be better able to determine whether the record is exempt from disclosure, the bureau will contact that bureau or agency to determine whether it should refer the record to that bureau or agency or consult with that bureau or agency.

(1) If the bureau processing the request refers a record to another bureau or agency, that other bureau or agency will respond to you directly about that record. If the bureau processing the request consults with another bureau or agency, the bureau processing the request will respond to you directly.

(2) If the bureau receives a request for records that another agency has classified under any applicable executive order concerning record classification, it must refer the request to that agency for response.

(3) Whenever a bureau refers any part of the responsibility for responding to a request to another bureau or agency, it will document the referral; maintain a copy of the referred record; and notify you of the referral, including the name of the bureau or agency to which the record was referred and that bureau or agency's FOIA contact information.

(4) If the disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemption that protects ongoing law enforcement investigations, a referral would be inappropriate and the bureau will consult with the agency instead.

(c) When a bureau receives a referral, the bureau will assign the referral to the appropriate processing track (see § 2.15 of this part) and process it according to the date that the consulting or referring bureau or agency received your request (see § 2.14 of this part).

(d) Bureaus may establish written agreements with other bureaus or agencies to eliminate the need for consultations or referrals for particular types of records.

Subpart D—Timing of Responses to Requests

§ 2.14 [Amended]

■ 9. In § 2.14, add the following sentence at the end ''The bureau may impose a monthly limit for processing records in response to your request in order to treat FOIA requesters equitably by responding to a greater number of FOIA requests each month.''

§ 2.15 [Amended]

■ 10. In § 2.15 paragraph (c)(1), (2), (3), and (4) remove the word ''will'' adding in its place the words ''would generally''; removing in paragraph (c)(4) the words ''Exceptional/Voluminous'' and adding in their place the word ''Extraordinary''.

§ 2.16 [Amended]

■ 11. In § 2.16:

■ a. Revise the section heading

■ b. In paragraph (b) remove the word ''limit'' and add in place the word ''frame''.

The revision reads as follows:

§ 2.16 What is the basic time frame for responding to a request?

§ 2.17 [Removed and Reserved]

■ 12. Section 2.17 is [Removed and Reserved]''.

§ 2.18 [Amended]

■ 13. In § 2.18:

■ a. Revise the section heading,

■ b. In paragraph (a) and (b) remove the word ''limit'' adding in its place the word ''frame''.

■ c. In In paragraph (b) add the words ''of this part'' after the words ''in § 2.16''.

The revision reads as follows:

§ 2.18 When can the bureau suspend the basic time frame?

§ 2.19 [Amended]

■ 14. In § 2.19:

■ a. Revise the heading to read as set out below;

■ b In paragraph (a) and (c) remove the word ''limit'', adding in its place ''frame''.

■ c. In paragraph (b)(2), remove the wording ''its FOIA Public Liaison'' and adding in its place the wording ''the FOIA Public Liaison''.

The revision reads as follows:

§ 2.19 When may the bureau extend the basic time limit?

§ 2.20 [Amended]

■ 15. In § 2.20:

■ a. In paragraph, (a)(1) and (2), remove the word ''Where'' and capitalize ''Failure'' and ''There'', respectively.

■ b. In § 2.20(a)(2)(iii), remove the wording ''; this ordinarily refers to a breaking news story of general public interest''.

■ c. In § 2.20(b)(1), after the word ''how'', add the wording ''all elements and subcomponents of'' and after the word ''meets'', add the wording ''each element of''.

■ d. In § 2.20(c), add a new second sentence between ''request.'' and ''When'' that reads as follows: ''Bureaus will consult with the Office of the Solicitor before granting expedited processing requests and will include in its response to you the name and title of the Office of the Solicitor or Office of General Counsel attorney consulted.''

Subpart E—Responses to Requests

§ 2.21 [Amended]

■ 16. In § 2.21 paragraph (a), remove the wording ''its FOIA Public Liaison'',

adding in its place ''the FOIA Public Liaison''.

§ 2.23 [Amended]

■ 17. In § 2.23 paragraph (c), removing the word ''record.'' adding in its place the wording ''record unless the Office of the Solicitor has expressly preapproved such a withholding''.

§ 2.24 [Amended]

■ 18. In § 2.24 paragraph (b)(4), removing the wording ''unless including'' adding in its place the wording ''unless the bureau notes that it does not have or could not locate responsive records or that including'' in paragraph (b)(5), removing the word ''record'', adding in its place the wording ''record unless the Office of the Solicitor has expressly preapproved such a withholding''.

Subpart F—Handling Confidential Information

§ 2.27 [Amended]

■ 19. In § 2.27 paragraph (a), adding the wording ''exercise due diligence to'' following the wording ''must''.

§ 2.28 [Amended]

■ 20. In § 2.28 paragraph (d), removing the wording ''limit'' adding in its place ''frame''.

§ 2.29 [Amended]

■ 21. In § 2.29:
■ a. In paragraph (a), remove the second ''or''.
■ b. In paragraph (b), add the wording ''or prohibited'' after the word ''required'' and change the existing period to a semicolon and add the word ''or'' after the semicolon.
■ c. Add a new paragraph (c).

The revision and addition read as follows:

§ 2.29 When will the bureau not notify a submitter of a request for their possibly confidential information?

* * * * *

(c) The bureau has excised due diligence to notify the submitter, but its efforts were unsuccessful.''

Subpart G—Fees

§ 2.37 [Amended]

■ 22. In § 2.37 paragraph (f) and (f)(2)(i), removing the wording ''limit'' adding in its place ''frame''; in paragraph (i), removing the wording ''FOIA Public Liaison'' adding in its place ''FOIA Requester Center''.

§ 2.45 [Amended]

■ 23. In § 2.45:
■ a. In paragraph (a), removing the wording ''based on all available information'' adding in its place the wording ''considering the information you have provided and verifying it as appropriate''.
■ b. Removing paragraph (f).

§ 2.47 [Amended]

■ 24. In § 2.47 paragraph (d), removing the number ''30'' adding in its place the number ''90''.

§ 2.48 [Amended]

■ 25. In § 2.48:
■ a. Adding in paragraph (a)(1), the following as new sentence two ''The subject of the request must concern discrete, identifiable agency activities, operations, or programs with a connection that is direct and clear, not remote or attenuated.''.
■ b. Adding in paragraph (a)(2), after the word ''contribute'', the word ''significantly''.
■ c. In paragraphs (a)(2)(i), after the word ''informative'', add the wording ''—the disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding''.
■ d. In paragraphs (a)(2)(iv), removing the word ''Your'' adding in its place the word ''Your expertise in the subject area as well as your'', replace the words ''expertise regarding the requested information and information that explains how you'' with the word ''your'', and replace the wording ''to your'' with the wording ''to furthering your''.
■ e. Removing paragraphs (a)(3), (a)(3)(i), (a)(3)(iii), and (a)(3)(iv) and redesignate current paragraphs (a)(3)(ii) as paragraph (a)(2)(vi) and adding the word ''and'' after the semicolon. Redesignate current paragraphs (a)(4) to paragraphs (a)(2)(vii).
■ f. Adding a new second sentence to introductory paragraph (b) to read as follows, ''To determine whether disclosure of the requested information is primarily in your commercial interest, the bureau will consider:'', and add new paragraphs (1) and (2) to read as set out below.
■ g. Redesignate paragraphs (b)(1), (2) and (3) as (3), (4), and (5).
■ h. Redesignated paragraph (b)(5)(ii), adding the word ''ordinarily'' before the word ''presume'' and add the following sentence to the end ''Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.''

The revisions and additions read as follows:

§ 2.48 How will the bureau evaluate your fee waiver request?

* * * * *

(b) * * *

(1) Whether the requested disclosure would further any commercial interest of yours.

(2) If you have a commercial interest, the bureau must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraph (a) are satisfied and any commercial interest is not the primary interest furthered by the request. Bureaus ordinarily will presume that, when a news media requester has satisfied paragraph (a) above, the request is not primarily in the commercial interest of the requester.

* * * * *

§ 2.49 [Amended]

■ 26. Amend § 2.49 by,
■ a. Adding a new paragraph (a)(3) and redesignate paragraph (a)(3) as (4).
■ b. In the newly redesignated (a)(4), replacing the word ''previously'' with ''already''.
■ c. In paragraph (e), replace the wording ''FOIA Public Liaison'' with the wording ''FOIA Requester Center''.

The additions read as follows:

§ 2.49 When will you be notified of anticipated fees?

(a) * * *

* * * * *

(3) Your request does not reasonably describe the records sought and/or does not resolve all issues regarding the payment of processing fees; or

* * * * *

§ 2.51 [Amended]

■ 27. In § 2.51 paragraph (b), (b)(1), and (b)(3), removing the word ''limit'' adding in its place the word ''frame''.

§ 2.54 [Amended]

■ 28. In § 2.54 paragraph (a), removing the words ''charge accordingly'' adding in its place the words ''charge fees accordingly'' and removing the words ''attempting to avoid fees by''.

Subpart H—Administrative Appeals

§ 2.57 [Amended]

■ 29. In § 2.57 paragraph (a)(7) and paragraph (c), removing the word ''limit'' adding in its place the word ''frames''.

§ 2.58 [Amended]

■ 30. In § 2.58 paragraph (c), removing the word ''limit'' adding in its place ''frame''.

§ 2.59 [Amended]

■ 31. In § 2.59 paragraph (f), removing the word ''limit'' adding in its place ''frames''.

§ 2.62 [Amended]

■ 32. In § 2.62 paragraphs (a) and (b), removing the word ''limit'' adding in its place ''frame''.

Subpart I—General Information

§ 2.66 [Amended]

■ 33. Revise § 2.66 with the following:

§ 2.66 What are FOIA Requester Centers and the FOIA Public Liaison?

(a) Employees at FOIA Requester Centers typically serve as your first point of contact for questions about how the FOIA works. Even before you make a request, employees at FOIA Requester Centers can assist you by: Identifying information that is already posted and available; informing you about the types of records maintained by the bureau; providing suggestions for formulating requests; describing the Department's various processing tracks and the average processing times for the various tracks; and answering questions about expedited processing standards and the FOIA's fee provisions. After you make a request, questions about its status can also be answered by employees at the applicable FOIA Requester Center.

(b) If you need further information or assistance after contacting the applicable FOIA Requester Center, the FOIA Public Liaison reports to the Department's Chief FOIA Officer and is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and resolving disputes between you and the agency (including notifying you of your right to seek dispute resolution services from OGIS).

(c) If you need further information or assistance after contacting the applicable FOIA Requester Center and the FOIA Public Liaison, you may wish to seek dispute resolution services from OGIS.

(d) Contact information for the FOIA Requester Centers and the FOIA Public Liaison is available at *https://www.doi.gov/foia/foiacenters.*

§ 2.70 [Amended]

■ 34. In § 2.70:

■ a. In the definition of ''Educational institution'', add the following sentence after the words ''further scholarly research.'' ''Teachers (if they demonstrate how the requested records will further their teaching, scholarly research, or production of scholarly works) and students (if they demonstrate how the requested records will further their coursework or other school-sponsored activities) may also qualify as an educational institution for the purposes of this definition.''

■ b. In the definition of ''Multitrack processing'': after ''first-in/first-out basis'' add the words '', but other factors, such as litigation, may affect the sequence and/or timing of processing''.

■ c. In the definition of ''Record'' remove ''means an agency record'' and add in its place ''is any item, collection, or grouping of information that already is recorded, is reasonably encompassed by your request, and''.

■ d. In the definition of ''Representative of the news media'', add the following new sentence two after the phrase ''work to an audience.'': ''Distributing copies of released records, electronically or otherwise, does not qualify as using editorial skills to turn the raw materials into a distinct work.''

Dated: December 14, 2018.

Daniel Jorjani,

Principal Deputy Solicitor, Exercising the Authority of the Solicitor.

[FR Doc. 2018–27561 Filed 12–27–18; 8:45 am]

BILLING CODE 4310–10–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 25

[IB Docket No. 18–315; FCC 18–160]

Earth Stations in Motion To Include NGSO Satellite Systems

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission proposes to amend its rules to establish a regulatory framework for earth stations in motion (ESIMs) communications with non-geostationary-satellite orbit (NGSO), fixed-satellite service (FSS) satellite systems that would be analogous to that which currently exists for ESIMs communicating with geostationary-satellite orbit (GSO) FSS systems.

DATES: Comments are due on or before February 11, 2019. Reply comments are due on or before March 13, 2019.

ADDRESSES: You may submit comments, identified by IB Docket No. 18–160, by any of the following methods:

• *Federal Communications Commission's Website: http://apps.fcc.gov/ecfs.* Follow the instructions for submitting comments.

• *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Cindy Spiers, 202–418–1593.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (NPRM), FCC 18–160, adopted November 15, 2018, and released November 16, 2018. The full text of the NPRM is available at *https://apps.fcc.gov/edocs_public/attachmatch/FCC-18-160A1.pdf.* The NPRM is also available for inspection and copying during business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY–A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities, send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Comment Filing Requirements

Interested parties may file comments and reply comments on or before the dates indicated in the **DATES** section above. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).

• *Electronic Filers.* Comments may be filed electronically using the internet by accessing the ECFS, *http://apps.fcc.gov/ecfs.*

• *Paper Filers.* Parties who file by paper must include an original and four copies of each filing. Filings may be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW, Room TW–A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail must be

addressed to 445 12th Street SW, Washington DC 20554.

• *Persons with Disabilities.* To request materials in accessible formats for persons with disabilities (braille, large print, electronic files, audio format), or to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.), send an email to *fcc504@fcc.gov* or call 202–418–0530 (voice) or 202–418–0432 (TTY).

Ex Parte Presentations

The Commission will treat this proceeding as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Paperwork Reduction Act

This document contains proposed new and modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, the Commission seeks specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Synopsis

In this Notice of Proposed Rulemaking (NPRM), the Commission seeks comment on whether to establish a regulatory framework for ESIMs communications with NGSO FSS systems that would be analogous to that which currently exists for ESIMs communicating with GSO FSS systems. First, the Commission seeks comment on allowing ESIMs to communicate with NGSO FSS systems in many of the same conventional Ku-band, extended Ku-band, and Ka-band frequencies that were discussed in the ESIMS Report and Order and Further Notice, with the exception of the frequency bands 18.6–18.8 GHz and 29.25–29.5 GHz. Second, the Commission seeks comment on extending blanket earth station licensing, which is available to ESIMs communicating with GSO FSS systems, to ESIMs communicating with NGSO FSS systems. Finally, the Commission seeks comment on revisions to specific provisions in our rules to implement these changes.

Proposal Overview

The Commission believes that now is the appropriate time to seek comment on rules governing ESIMs communicating with NGSO FSS systems. Currently, there is only one NGSO FSS system—O3b Limited (O3b)—communicating with earth stations in the United States, and communications between O3b and ESVs have already been authorized, although on a non-protected non-interference basis given that no rules allowing such communications exist. However, given the large number of applications for NGSO FSS systems that intend to provide service to earth stations at fixed locations as well as to ESIMs, it is important that the possibility of having rules for NGSO FSS ESIMs operations be considered. A regulatory framework covering such communications would provide certainty for both NGSO FSS operators and their customers. In addition, comments in response to the ESIMs NPRM expressed concern that delaying consideration and adoption of rules governing communications between ESIMs and NGSO FSS systems could place U.S. customers at a disadvantage when other countries are moving ahead on these matters. Commenters in response to the ESIMs NPRM state that antenna manufacturers, ESIM operators, and ultimately U.S. consumers would all benefit from development of Commission rules that define operating parameters for communications between ESIMs and both NGSO and GSO satellites. In addition, commenters note the advantages of allowing communications between ESIMs and NGSO FSS systems, such as robust and uninterrupted coverage of polar regions where international air traffic is increasingly concentrated and which are not adequately covered by GSO satellites. The Commission agrees with commenters that the time is ripe to evaluate whether the Commission should implement rules for ESIMs communicating with NGSO FSS systems.

Frequency Bands for NGSO FSS ESIMs and Associated Rule Changes. The Commission seeks comment on, to the extent feasible, allowing ESIMs to communicate with NGSO FSS systems in the Ku- and Ka-bands where the Commission's rules allow ESIM communications with GSO FSS space stations, with the exception of the frequency bands 18.6–18.8 GHz and 29.25–29.5 GHz.

The Commission proposes to allow ESIMs to communicate with NGSO FSS systems on a primary basis in the following frequency bands: 11.7–12.2 GHz (space-to-Earth); 14.0–14.5 GHz (Earth-to-space); 18.3–18.6 GHz (space-to-Earth); 19.7–20.2 GHz (space-to-Earth); 28.35–28.6 GHz (Earth-to-space); and 29.5–30.0 GHz (Earth-to-space). There are no allocations to terrestrial services in any of these bands. Accordingly, the Commission seeks comment on adding paragraph (c) to footnote NG527A to indicate that ESIMs can operate with NGSO FSS space stations in these six frequency bands provided that such operations do not cause harmful interference to, or claim protection from, GSO FSS networks. There is also a secondary allocation to the Space Research service in the band 14–14.2 GHz. In order to ensure compatibility between NGSO ESIM and Space Research operations, the Commission seeks comment on modifying 47 CFR 25.228(j)(1) to extend to NGSO FSS systems conditions that

currently apply to ESIM operation with GSO FSS space stations.

The Commission also proposes to allow ESIMs to communicate with NGSO FSS systems on a primary basis in the 18.8–19.3 GHz (space-to-Earth), and the 28.6–29.1 GHz (Earth-to-space) frequency bands. In these bands, there are no terrestrial allocations and GSO FSS operations are secondary with respect to NGSO FSS. Accordingly, the Commission seeks comment on adding paragraph (e) to footnote NG527A to indicate that ESIMs can operate both with a GSO FSS space station and with NGSO FSS systems in these two frequency bands. Also, in these bands, GSO FSS operations must not cause harmful interference to, or claim protection from, NGSO FSS networks.

The Commission seeks comment on allowing ESIMs to receive signals from NGSO FSS space stations in the 10.7–11.7 GHz (space-to-Earth) frequency bands, on an unprotected basis, with respect to transmissions from non-Federal fixed service (FS) stations. FSS and FS are co-primary in these frequency bands and receive terrestrial stations will be protected by imposing on space station transmissions the appropriate power-flux density limits. Accordingly, the Commission seeks comment on revising paragraph (a) of footnote NG527A to indicate that ESIMs can operate on a non-protected basis with regard to non-Federal fixed service in this frequency band, both with a GSO FSS space station and with NGSO FSS systems. Also, in this band, NGSO FSS operations must not cause harmful interference to, or claim protection from, GSO FSS networks.

Similarly, the Commission seeks comment on allowing ESIMs to receive signals from NGSO FSS space stations in the 19.3–19.4 GHz (space-to-Earth) and 19.6–19.7 GHz (space-to-Earth) frequency bands, on an unprotected basis, with respect to transmissions from non-Federal fixed service stations. FSS and FS are co-primary in these frequency bands and receive terrestrial stations will be protected by imposing on space station transmissions the appropriate power-flux density limits. Accordingly, the Commission seeks comment on adding paragraph (f) to footnote NG527A to indicate that ESIMs can operate with NGSO FSS systems in these two frequency bands on a non-protected basis with regard to non-Federal fixed service. Also, in these frequency bands, NGSO FSS operations must not cause harmful interference to, or claim protection from, GSO FSS networks.

The Commission seeks comment on allowing ESIMs to receive signals from NGSO FSS systems on a secondary basis in the 17.8–18.3 GHz (space-to-Earth) frequency band. This frequency band is allocated to the FS on a primary basis and, given the FSS secondary status, ESIM receive earth stations will not be entitled to protection. Protection of terrestrial operations in this band will be ensured by imposing on space station transmissions the appropriate power-flux density limits. Accordingly, the Commission seeks comment on adding paragraph (d) to footnote NG527A to indicate that ESIMs can operate on a non-protected basis with regard to non-Federal fixed service in this frequency band, both with a GSO FSS space station and with NGSO FSS systems. Also, in this band, NGSO FSS operations must not cause harmful interference to, or claim protection from, GSO FSS networks.

The Commission will not consider allowing ESIMs to communicate with NGSO FSS systems in bands where communications with NGSO FSS space stations are not permitted under the U.S. Table of Frequency Allocations because the Commission believes the reasons for such limitations are also valid for ESIMs operating with NGSO FSS systems. Specifically, the Commission would not allow NGSO FSS ESIMs to operate in the 18.6–18.8 GHz (space-to-Earth) and 29.25–29.5 GHz (Earth-to-space) frequency bands.

Blanket Licensing. The Commission seeks comment on permitting blanket earth station licensing of ESIMs operating with NGSO FSS systems. Such blanket licensing would further maximize efficient spectrum use for the increased provision of broadband access and additional flexibility for FSS systems in bands where blanket licensing is already available for earth stations operating at fixed locations. The Commission believes that blanket licensing is appropriate given that ESIMs' communications with NGSO FSS systems would be limited to frequency bands in which NGSO FSS systems have a primary status, or have been found to be able to operate on a secondary or non-conforming basis, without causing interference to primary users of those bands. The Commission seeks comment on extending blanket licensing to ESIMs operating with NGSO FSS space stations.

Other Rule Revisions. In the paragraphs below, the Commission addresses other changes to our rules, in addition to those discussed above in connection with the frequency bands being proposed for NGSO FSS ESIM operation. The Commission seeks comment on these changes, and on any others necessary to implement the ESIM NGSO FSS operation described here.

First, the Commission seeks comment on amending the list of frequencies available to ESIMs in Sections 25.202(a)(8) and (a)(10) to reflect these changes.

Second, the Commission seeks comment on changes to Part 25 of the Commission's rules governing satellite communications to allow ESIM NGSO FSS operation as described above. Specifically, Sections 25.115(l)–(n) contain requirements in paragraphs (1), (2), and (3)(i) that pertain to the two-degree spacing rules for ESIMs communicating with GSO FSS space stations, which are not applicable to NGSO systems. The requirements in paragraphs (3)(ii)–(iv) of this section, however, are also appropriate for ESIMs operating in NGSO FSS systems. The Commission seeks comment on adding a new paragraph (o) to Section 25.115 to codify these requirements for ESIMs that communicate with NGSO FSS space stations. The Commission also seeks comment on changing the cross-references contained in the information requirements for earth station applications set forth in Section 25.115 for earth stations communicating with GSO and NGSO FSS space stations.

Third, Section 25.228 contains requirements in paragraphs (a), (b), (c), that codify the two-degree spacing requirements for ESIMs communicating with GSO FSS satellite networks, but are not specifically worded to apply only to such ESIMs. The Commission seeks comment on stating that these paragraphs apply only to ESIMs communicating with GSO FSS satellite networks. The requirements in the remaining paragraphs of Section 25.228 are equally applicable for ESIMs communicating with GSO FSS systems and NGSO FSS systems, and therefore the Commission does not consider any changes to them. Paragraph (j) of Section 25.228 is explicitly limited to ESIMs transmitting to GSO FSS satellites, and the Commission seeks comment on revising the language of the rule to apply to Ku-band ESIMs communicating with NGSO FSS space stations as well.

Fourth, consistent with these changes, the Commission would amend our definitions of ESV, VMES, and ESAA in Section 25.103, which restrict communications to ''geostationary-orbit FSS space stations.'' Pursuant to what was described above, communications between ESVs, VMESs, and ESAAs would also be permitted in NGSO FSS systems. Accordingly, the Commission seeks comment on removing the word

''geostationary-orbit'' from these definitions.

Finally, the Commission's Ka-band Plan has a secondary designation for NGSO–FSS in the 29.5–30.0 GHz band, as described in the *NGSO FSS Order.* The licensing provisions in Section 25.115(f) adopted in the *NGSO FSS Order,* however, inadvertently omitted the 29.5–30.0 GHz band. The Commission proposes to take this opportunity to extend the provisions of Section 25.115(f) to the 29.5–30.0 GHz band and seek comment on this proposal.

Other. The Commission recognizes that NGSO ESIM operations add a level of complexity in that both earth stations and space stations will be moving while communicating, and transitioning communications from one satellite to another will often be required. The Commission does not believe that these operational characteristics necessitate additional requirements on ESIM communications with NGSO FSS space stations beyond what the Commission has considered here because such operations are already being conducted. For example, O3b successfully provides broadband services to ESVs using an NGSO FSS constellation that was granted market access by the Commission through a waiver of the Table of Frequency Allocations and Ka-band Plan. In addition, several of the NGSO FSS constellations recently authorized or granted market access to the United States by the Commission intend to use earth stations in motion. For instance, OneWeb has recently joined an alliance of companies in the aviation sector focused on the provision of broadband communications to airplanes. The Commission invites comments on this conclusion, but also seek comment on the level of complexity that communications with ESIMs would introduce to the coordination between multiple NGSO FSS constellations under the Commission's rules and the potential for in-line interference as compared to that associated with the coordination between NGSO FSS constellations if communications were limited to fixed earth stations.

The Commission does not think there will be significant costs associated with these changes and the Commission invites comments that will help estimate costs and benefits of the rule changes. In addition, the Commission seeks comment on whether there are any other issues regarding the framework discussed for NGSO ESIMs operations that the Commission should consider. The Commission also seeks comment on any possible effects ESIMs communicating with NGSO FSS space stations may have on existing or future services in these bands or adjacent frequency bands. For example, the Commission notes that the Commission has an open proceeding exploring additional uses of ''mid-band spectrum,'' including bands considered for ESIM communication with NGSO FSS systems.

As required by the Regulatory Flexibility Act (RFA),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice. The Commission requests written public comments on this IRFA. Commenters must identify their comments as responses to the IRFA and must file the comments by the deadlines for comments on the Notice provided above in Section V.B. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[2] In addition, the Notice and IRFA (or summaries thereof) will be published in the **Federal Register**.[3]

Initial Regulatory Flexibility Analysis

A. Need for, and Objectives of, the Proposed Rules

The Notice of Proposed Rulemaking proposes to allow ESIMs to communicate with NGSO FSS space stations in the Ku- and Ka-bands.

B. Legal Basis

The proposed action is authorized under Sections 4(i), 7(a), 10, 303, 308(b), and 316 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157(a), 160, 303, 308(b), 316.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules May Apply

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.[4] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [5] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[6] 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 Small Business Administration (SBA).[7]

Satellite Telecommunications. This category comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' [8] The category has a small business size standard of $32.5 million or less in average annual receipts, under SBA rules.[9] For this category, Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.[10] Of this total, 299 firms had annual receipts of less than $25 million.[11] Consequently, the Commission estimates that the majority of satellite telecommunications providers are small entities.

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

The NPRM proposes to allow ESIMs to communicate with NGSO FSS space stations in the Ku- and Ka-bands. This would reduce paperwork costs for such satellite operators who would no longer need to file separate application materials for these systems. Operators will also no longer need to request waivers for operations that would be covered under specific regulations.

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 *et seq.,* has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. 603(a).

[3] *Id.*

[4] 5 U.S.C. 603(b)(3).

[5] 5 U.S.C. 601(6).

[6] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). Pursuant to the RFA, 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).

[7] Small Business Act, 15 U.S.C. 632 (1996).

[8] U.S. Census Bureau, 2012 NAICS Definitions, ''517410 Satellite Telecommunications''; *http://www.census.gov/naics/2007/def/ND517410.HTM.*

[9] 13 CFR 121.201, NAICS code 517410.

[10] U.S. Census Bureau, *2012 Economic Census of the United States,* Table EC1251SSSZ4, Information: Subject Series—Estab and Firm Size: Receipts Size of Firms for the United States: 2012, NAICS code 517410 *http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.*

[11] *Id.*

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

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.'' [12]

The NPRM proposes to allow ESIMs to communicate with NGSO FSS space stations in the Ku- and Ka-bands. This would reduce the economic and other impacts for these service providers by reducing the regulatory burden. Specifically, providers would no longer have to file applications that are outside of the standard rule provisions. However, the Commission invites comment on this change and any alternatives.

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

None.

List of Subjects

47 CFR Part 2

Radio, Table of Frequency Allocations.

47 CFR Part 25

Administrative practice and procedure, Earth stations, Satellites.

Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer, Office of the Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 2 and 25 as follows:

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

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

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

[12] 5 U.S.C. 603(c)(1)–(c)(4).

§ 2.106 [Amended].

■ 2. Amend § 2.106, the Table of Frequency Allocations, as follows:

■ a. Revise footnote NG527A in the list of Non-Federal Government (NG) Footnotes.

■ b. Revise paragraph (a) and paragraphs (c) through (f). The revisions and additions read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

Non-Federal Government (NG) Footnotes

* * * * *

NG527A Earth Stations in Motion (ESIMs), as regulated under 47 CFR part 25, are an application of the fixed-satellite service (FSS) and the following provisions shall apply:

(a) In the 10.7–11.7 GHz band, ESIMs may be authorized for the reception of FSS emissions from both geostationary and non-geostationary satellites, subject to the conditions that these earth stations may not claim protection from transmissions of nonFederal stations in the fixed service and that non-geostationary-satellite systems not cause unacceptable interference to, or claim protection from, geostationary-satellite networks.

* * * * *

(c) In the bands 11.7–12.2 GHz (space-to-Earth), 14.0–14.5 GHz (Earth-to-space), 18.3–18.6 GHz (space-to-Earth), 19.7–20.2 GHz (space-to-Earth), 28.35–28.6 GHz (Earth-to-space), and 29.5–30.0 GHz (Earth-to-space), ESIMs may be authorized to communicate with non-geostationary satellites, subject to the condition that nongeostationary-satellite systems may not cause unacceptable interference to, or claim protection from, geostationary-satellite networks.

(d) In the band 17.8–18.3 GHz (space-to-Earth), ESIMs may be authorized for the reception of FSS emissions from geostationary satellites on a secondary basis. In this band, ESIMs may also be authorized for the reception of FSS emissions from non-geostationary-satellites on a secondary basis, subject to the condition that non-geostationary-satellite systems not cause unacceptable interference to, or claim protection from, geostationary-satellite networks.

(e) In the bands 18.8–19.3 GHz and 28.6–29.1 GHz, ESIMs may be authorized to communicate with both geostationary and non-geostationary satellites, subject to the condition that geostationary-satellite networks may not cause unacceptable interference to, or claim protection from, non-geostationary satellite systems in the fixed-satellite service.

(f) In the 19.3–19.4 GHz, and 19.6–19.7 GHz bands, ESIMs may be authorized for the reception of FSS emissions from non-geostationary satellites, subject to the conditions that these earth stations may not claim protection from transmissions of nonFederal stations in the fixed service and not cause unacceptable interference to, or claim protection from, geostationary-satellite networks.

* * * * *

PART 25—SATELLITE COMMUNICATIONS

■ 3. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 310, 319, 332, 605, and 721, unless otherwise noted.

■ 4. Amend § 25.103 by revising the definitions of ''Earth Station on Vessel,'' ''Earth Stations Aboard Aircraft,'' and ''Vehicle-Mounted Earth Station'' to read as follows:

§ 25.103 Definitions.

* * * * *

Earth Station on Vessel (ESV). An earth station onboard a craft designed for traveling on water, receiving from and transmitting to Fixed-Satellite Service space stations.

Earth Stations Aboard Aircraft (ESAA). An earth station operating aboard an aircraft that receives from and transmits to Fixed-Satellite Service space stations.

* * * * *

Vehicle-Mounted Earth Station (VMES). An earth station, operating from a motorized vehicle that travels primarily on land, that receives from and transmits to Fixed-Satellite Service space stations and operates within the United States.

§ 25.115 [Amended]

■ 5. Amend § 25.115, as proposed to be amended on June 16, 2017 at 82 FR 27652, by revising paragraph (f) and adding paragraph (o) to read as follows:

* * * * *

(f) *NGSO FSS earth stations in 10.7–30.0 GHz.* (1) An application for an NGSO FSS earth station license in the 10.7–30.0 GHz band must include the certification described in § 25.146(a)(2).

(2) Individual or blanket license applications may be filed for operation in the 10.7–12.7 GHz, 14–14.5 GHz, 17.8–18.6 GHz, 18.8–19.4 GHz, 19.6–20.2 GHz, 28.35–29.1 GHz, or 29.5–30.0 GHz bands; however, blanket licensing in the 10.7–11.7 GHz, 17.8–18.3 GHz, 19.3–19.4 GHz, and 19.6–19.7 GHz bands is on an unprotected basis with

respect to current and future systems operating in the fixed service.

(3) Individual license applications only may be filed for operation in the 12.75–13.15 GHz, 13.2125–13.25 GHz, 13.75–14 GHz, or 27.5–28.35 GHz bands.

* * * * *

(o) The requirements in this paragraph apply to applications for ESIMs operation with NGSO satellites in the Fixed-Satellite Service, in addition to the requirements in paragraphs (a)(1), (a)(5), (e)(2), and (i) of this section:

(1) An exhibit describing the geographic area(s) in which the ESIMs will operate.

(2) The point of contact information referred to in § 25.228(e)(2), (f), or (g)(1) as appropriate.

(3) Applicants for ESIMs that will exceed the guidelines in § 1.1310 of this chapter for radio frequency radiation exposure must provide, with their environmental assessment, a plan for mitigation of radiation exposure to the extent required to meet those guidelines.

■ 6. Amend § 25.202 by removing and reserving paragraph (a)(8), revising paragraph (a)(10)(ii), and removing and reserving paragraph (a)(11) to read as follows:

§ 25.202 Frequencies, frequency tolerance, and emission limits.

(a) * * *

(10) * * *

(ii) The following frequencies are available for use by Earth Stations in Motion (ESIMs) communicating with NGSO FSS space stations, subject to the provisions in § 2.106 of this chapter:

10.7–11.7 GHz (space-to-Earth)
11.7–12.2 GHz (space-to-Earth)
14.0–14.5 GHz (Earth-to-space)
17.8–18.3 GHz (space-to-Earth)
18.3–18.6 GHz (space-to-Earth)
18.8–19.3 GHz (space-to-Earth)
19.3–19.4 GHz (space-to-Earth)
19.6–19.7 GHz (space-to-Earth)
19.7–20.2 GHz (space-to-Earth)
28.35–28.6 GHz (Earth-to-space)
28.6–29.1 GHz (Earth-to-space)
29.5–30.0 GHz (Earth-to-space)

* * * * *

■ 7. Amend § 25.228, as proposed to be added on June 16, 2017 at 82 FR 27652, by revising the introductory text of paragraph (j) to read as follows:

§ 25.228 Operating and coordination requirements for earth stations in motion (ESIMs).

* * * * *

(j) The following requirements govern all ESIMs transmitting to GSO or non-GSO satellites in the Fixed-Satellite Service in the 14.0–14.5 GHz band.

* * * * *

[FR Doc. 2018–27974 Filed 12–27–18; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2018–0074; 4500030113]

RIN 1018–BD43

Endangered and Threatened Wildlife and Plants; Section 4(d) Rule for Trispot Darter

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose a rule under section 4(d) of the Endangered Species Act of 1973 (Act), as amended, for the trispot darter (*Etheostoma trisella*), a fish from Alabama, Georgia, and Tennessee. This rule would provide measures necessary and advisable to conserve the species, which we list as a threatened species under the Act in a separate rulemaking published in today's **Federal Register**.

DATES: We will accept comments received or postmarked on or before February 26, 2019. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by February 11, 2019.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

http://www.regulations.gov. In the Search box, enter FWS–R4–ES–2018–0074, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2018–0074, U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see **INFORMATION REQUESTED**, below, for more information).

FOR FURTHER INFORMATION CONTACT: Bill Pearson, Field Supervisor, U.S. Fish and Wildlife Service, Alabama Ecological Services Field Office, 1208 Main Street, Daphne, AL 36526; telephone 251–441–5181; facsimile 251–441–6222. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Previous Federal Actions

On October 4, 2017, we published a proposed rule in the **Federal Register** (82 FR 46183) to list the trispot darter as a threatened species under the Act (16 U.S.C. 1531 *et seq.*). Please refer to that proposed rule for a detailed description of previous Federal actions concerning this species, as well as information on the trispot darter's taxonomy, habitat, life history, historical and current distribution, population estimates, and status, and a summary of factors affecting the species. In addition, a thorough review of the taxonomy, life history, and ecology of the trispot darter is presented in the species status assessment (SSA) report, available on *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0074.

Elsewhere in today's **Federal Register**, we publish (1) a final rule to list the trispot darter as a threatened species under the Act (''final listing rule''), and (2) a proposed rule to designate critical habitat for the trispot darter under the Act.

Background

The trispot darter is a freshwater fish found in the Coosa River System, above the fall line in the Ridge and Valley ecoregion of Alabama, Georgia, and Tennessee. This fish has a historical range from the middle to upper Coosa River Basin with recorded collections in tributaries to the Oostanaula, the mainstem Coosa, the Conasauga, and the Coosawattee Rivers, and their tributaries. Currently, the trispot darter is known to occur in Little Canoe Creek and tributaries (Coosa River), Ballplay Creek tributaries (Coosa River), Conasauga River and tributaries, and Coosawattee River and one tributary.

The trispot darter is a small-bodied, fish ranging in size from 1.3 to 1.6 inches (in) (3.3 to 4.1 centimeters (cm))

as an adult. The darter has three prominent black dorsal saddles, a pale undersurface, and a dark bar below the eye. Scattered dark blotches exist on the fins' rays. During breeding season, males are a reddish-orange color and have green marks along their sides and a red band through their spiny dorsal fin.

The trispot darter is a migratory species that utilizes distinct breeding and nonbreeding habitats. From approximately April to October, the species inhabits its nonbreeding habitat, which consists of small to medium river margins and lower reaches of tributaries with slower velocities. Trispot darters are associated with detritus, logs, and stands of water willow, and the substrate consists of small cobbles, pebbles, gravel, and often a fine layer of silt. During low flow periods, the darters move away from the peripheral zones and toward the main channel; edges of water willow beds, riffles, and pools; and mouths of tributaries. In late fall (approximately late November through early December), the species shifts its habitat preference and begins movement toward spawning areas; this is most likely stimulated by precipitation, but temperature changes and decreasing daylight hours may also provide cues to begin migration. The fish move from the main channels into tributaries, eventually reaching adjacent seepage areas where they will congregate and remain for the duration of spawning, until approximately late April. Breeding sites are intermittent seepage areas and ditches with little to no flow; shallow depths (12 in (30 cm) or less); moderate leaf litter covering mixed cobble, gravel, sand, and clay; a deep layer of soft silt over clay; and emergent vegetation. Trispot darters predominantly feed on mayfly nymphs and midge larvae and pupae.

A multitude of natural and anthropogenic factors that affect aquatic systems may impact the status of this species. The largest threat to the future viability of the trispot darters is habitat degradation from stressors that influence four habitat elements: water quality, water quantity, instream habitat, and habitat connectivity. All of these factors are exacerbated by the effects of climate change. These stressors include hydrologic alteration, sedimentation, loss of connectivity, loss of riparian vegetation, and contaminants entering the water system due to agricultural activities (such as excessive poultry litter and livestock entering streams) and urbanization within the watershed.

Provisions of Section 4(d) of the Act

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to threatened wildlife. Under section 4(d) of the Act, the Secretary of the Interior has the discretion to issue such regulations as he deems necessary and advisable to provide for the conservation of threatened species. The Secretary also has the discretion to prohibit, by regulation with respect to any threatened species of fish or wildlife, any act prohibited under section 9(a)(1) of the Act. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.31, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) threatened wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally.

For any threatened species, the Service may develop a protective regulation that is specific to the conservation needs of that species. The courts have recognized the extent of the Secretary's discretion to develop prohibitions, as well as exclusions from those prohibitions, that are appropriate for the conservation of a threatened species. For example, the Secretary may decide not to prohibit take, or to put in place only limited take prohibitions (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). In addition, as affirmed in *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988), the protective regulation for a threatened species need not address all the threats to the species. As noted by Congress when the Act was initially enacted, once an animal is listed as a threatened species, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to prohibit both taking and importation but allow the transportation of such species, as long as the measures will serve to conserve, protect, or restore the species concerned in accordance with the purposes of the Act.

Proposed 4(d) Rule for the Trispot Darter

Under this proposed section 4(d) rule, all prohibitions and provisions of section 9(a)(1) would apply to the trispot darter, except the following actions would not be prohibited:

(1) Species restoration efforts by State wildlife agencies, including collection of broodstock, tissue collection for genetic analysis, captive propagation, and subsequent stocking into currently occupied and unoccupied areas within the historical range of the species.

(2) Channel restoration projects that create natural, physically stable, ecologically functioning streams (or stream and wetland systems) that are reconnected with their groundwater aquifers and, if the projects involve known trispot darter spawning habitat, that take place between May 1 and December 31 to avoid the time period when the trispot darter will be found within such habitat. These projects can be accomplished using a variety of methods, but the desired outcome is a natural channel with low shear stress (force of water moving against the channel); bank heights that enable reconnection to the floodplain; a reconnection of surface and groundwater systems, resulting in perennial flows in the channel; riffles and pools comprised of existing soil, rock, and wood instead of large imported materials; low compaction of soils within adjacent riparian areas; and inclusion of riparian wetlands. Second- to third-order headwater streams reconstructed in this way would offer suitable habitats for the trispot darter and contain stable channel features, such as pools, glides, runs, and riffles, which could be used by the species' for spawning, rearing, growth, feeding, migration, and other normal behaviors.

(3) Streambank stabilization projects that utilize bioengineering methods to replace pre-existing, bare, eroding stream banks with vegetated, stable stream banks, thereby reducing bank erosion and instream sedimentation and improving habitat conditions for the species. Following these bioengineering methods, stream banks may be stabilized using live stakes (live, vegetative cuttings inserted or tamped into the ground in a manner that allows the stake to take root and grow), live fascines (live branch cuttings, usually willows, bound together into long, cigar-shaped bundles), or brush layering (cuttings or branches of easily rooted tree species layered between successive lifts of soil fill). These bioengineering

methods must not include the sole use of quarried rock (rip-rap) or the use of rock baskets or gabion structures, but rip-rap, rock baskets, or gabion structures could be used in conjunction with the bioengineering methods.

(4) Silviculture practices and forest management activities that:

(a) Implement highest-standard best management practices, particularly for Streamside Management Zones, stream crossings, and forest roads;

(b) Comply with forest practice guidelines related to water quality standards, or comply with Sustainable Forestry Initiative/Forest Stewardship Council/American Tree Farm System certification standards for both forest management and responsible fiber sourcing;

(c) Remove logging debris or any other large material placed within natural or artificial wet weather conveyances or ephemeral, intermittent, or perennial stream channels; and

(d) When silviculture practices and forest management activities involve trispot darter spawning habitat, are carried out between May 1 and December 31 to avoid the time period when the trispot darter will be found within spawning habitat.

(5) Development or other activities where transportation corridors cross streams that:

(a) Include the installation of structures engineered to allow organism passage at stream crossings, with specific consideration for fish passage; and

(b) Are performed between May 1 and December 31 to avoid the time period when the trispot darter will be found within spawning habitat, if such habitat is affected by the activity.

(6) Activities carried out under the Working Lands for Wildlife program of the Natural Resources Conservation Service, U.S. Department of Agriculture; or similar projects throughout the range of the trispot darter that may be created in the future that:

(a) Do not alter habitats known to be used by the trispot darter beyond the fish's tolerances; and

(b) Are performed between May 1 and December 31 to avoid the time period when the trispot darter will be found within its spawning habitat, if such habitat is affected by the activity.

Although these management activities may result in some minimal level of harm or temporary disturbance to the trispot darter, overall, these activities benefit the subspecies by contributing to conservation and recovery.

Across the species' range, instream habitats have been degraded physically by sedimentation, direct channel disturbance, pollution, and loss of connectivity. The activities proposed in this rule would correct some of these problems, creating more favorable habitat conditions for the species. These provisions are necessary and advisable because the species needs active conservation to improve the quality of its habitat and, absent protections, the species is likely to become in danger of extinction in the foreseeable future. These provisions can encourage cooperation by landowners and other affected parties in implementing conservation measures. This would allow for use of the land while at the same time ensuring the preservation of suitable habitat and minimizing impact on the species.

Under our regulations at 50 CFR 17.32, we may issue permits to carry out otherwise prohibited activities involving threatened wildlife under certain circumstances. A permit may be issued for the following purposes: for scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act.

Nothing in this proposed 4(d) rule would change in any way the recovery planning provisions of section 4(f) or consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the trispot darter.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition of a species through listing it results in public awareness, and leads Federal, State, Tribal, and local agencies; private organizations; and individuals to undertake conservation. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. Information about the protection required by Federal agencies, and the prohibitions against certain activities, and recovery planning and implementation and interagency consultation, are discussed in the proposed listing rule (82 FR 46183; October 4, 2017) and the final listing rule (published elsewhere in today's **Federal Register**).

Information Requested

We intend that any final action resulting from this proposal will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed 4(d) rule. We will consider all comments and information we receive during our preparation of a final 4(d) rule. Accordingly, our final decision may differ from this proposal based on specific public comments or any other new information that may become available.

We particularly seek comments concerning:

(1) Information concerning the appropriateness and scope of a 4(d) rule for the trispot darter. We are particularly interested in input from agriculture or forestry experts regarding forest management, restoration practices, water conservation, or related activities, along with the value of certified forestry and agricultural practices and of best management practices, that would be appropriately addressed through a 4(d) rule for the trispot darter.

(2) Additional provisions the Service may wish to consider for a 4(d) rule in order to manage and conserve the trispot darter.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Alabama Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

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

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed 4(d) rule in a manner consistent with these requirements.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for ''significant impact'' and a threshold for a ''substantial number of small entities.'' See 5 U.S.C. 605(b). Based on the information that is available to us at this time, we certify that, if adopted as proposed, this rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

Elsewhere in today's **Federal Register**, we published the final determination to list the trispot darter as a threatened species. That rule becomes effective 30 days after the date of publication. As a result, the trispot darter will be covered by the full protections of the Act, including the full section 9 prohibitions that make it illegal for any person subject to the jurisdiction of the United States to take (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any wildlife species listed as an endangered species, without written authorization. It also is illegal under section 9(a)(1) of the Act to possess, sell, deliver, carry, transport, or ship any such wildlife that is taken illegally. This proposed 4(d) rule states that all prohibitions in the Act's section 9(a)(1) would apply to the trispot darter, except regulated activities that are conducted consistent with the conservation needs of the species as laid out above. This would result in a less restrictive regulation under the Act, as it pertains to the trispot darter, than would otherwise exist. For the above reasons, we certify that, if adopted as proposed, this rule will not have a significant economic impact on a substantial number of small entities. Therefore, a final regulatory flexibility analysis is not required.

Executive Order 13771

This rule is not an E.O. 13771 (''Reducing Regulation and Controlling Regulatory Costs'') (82 FR 9339, February 3, 2017) regulatory action because this rule is not significant under E.O. 12866.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

This proposed rule would not impose an unfunded mandate on State, local, or tribal governments, or the private sector of more than $100 million per year. The rule would not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) is not required.

Energy Supply, Distribution or Use (Executive Order 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking actions that significantly affect energy supply, distribution, or use. For reasons discussed within this proposed rule, we believe that the rule would not have any effect on energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Takings—Executive Order 12630

In accordance with Executive Order 12630, this proposed rule would not have significant takings implications. We have determined that the rule has no potential takings of private property implications as defined by this Executive Order because this proposed 4(d) rule would, with limited exceptions, maintain the regulatory status quo regarding activities currently allowed under the Endangered Species Act. A takings implication assessment is not required.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed a 4(d) rule in accordance with the provisions of the Act. To assist the public in understanding the conservation needs of the species, the proposed rule identifies the prohibitions and exceptions to those prohibitions that are necessary and advisable to the conservation of the species.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed 4(d) rule does not have significant Federalism effects. A federalism summary impact statement is not required. This rule would not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of powers and responsibilities among the various levels of government.

Government-to-Government Relationships With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We have determined that no tribal lands would be affected by this proposed rule.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We intend to undertake an environmental assessment of this action under the authority of the National Environmental Policy Act of 1969. We will notify the public of the availability of the draft environmental assessment for this proposal when it is complete.

Authors

The primary authors of this proposed rule are the staff members of the Species Assessment Team and the Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, for the reasons just described, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.44 by revising paragraph (q) to read as follows:

§ 17.44 Special rules—fishes.

* * * * *

(q) Trispot darter (*Etheostoma trisella*).

(1) *Prohibitions.* Except as noted in paragraph (q)(2) of this section, all prohibitions and provisions of section 9(a)(1) of the Act apply to the trispot darter.

(2) *Exceptions from prohibitions.* Incidental take of the trispot darter will not be considered a violation of section 9 of the Act if the take results from any of the following activities:

(i) Species restoration efforts by State wildlife agencies, including collection of broodstock, tissue collection for genetic analysis, captive propagation, and subsequent stocking into currently occupied and unoccupied areas within the historical range of the species.

(ii) Channel restoration projects that create natural, physically stable, ecologically functioning streams (or stream and wetland systems) that are reconnected with their groundwater aquifers. These projects can be accomplished using a variety of methods, but the desired outcome is a natural channel with low shear stress (force of water moving against the channel); bank heights that enable reconnection to the floodplain; a reconnection of surface and groundwater systems, resulting in perennial flows in the channel; riffles and pools comprised of existing soil, rock, and wood instead of large imported materials; low compaction of soils within adjacent riparian areas; and inclusion of riparian wetlands.

(iii) Streambank stabilization projects that utilize bioengineering methods to replace pre-existing, bare, eroding stream banks with vegetated, stable stream banks, thereby reducing bank erosion and instream sedimentation and improving habitat conditions for the species. Stream banks may be stabilized using live stakes (live, vegetative cuttings inserted or tamped into the ground in a manner that allows the stake to take root and grow), live fascines (live branch cuttings, usually willows, bound together into long, cigar-shaped bundles), or brush layering (cuttings or branches of easily rooted tree species layered between successive lifts of soil fill). Stream banks must not be stabilized solely through the use of quarried rock (rip-rap) or the use of rock baskets or gabion structures.

(iv) Silviculture practices and forest management activities that:

(A) Implement highest-standard best management practices, particularly for Streamside Management Zones, stream crossings, and forest roads; and

(B) Comply with forest practice guidelines related to water quality standards, or comply with Sustainable Forestry Initiative/Forest Stewardship Council/American Tree Farm System certification standards for both forest management and responsible fiber sourcing.

(v) Transportation projects that provide for fish passage at stream crossings; and

(vi) Projects carried out in the species' range under the Working Lands for Wildlife program of the Natural Resources Conservation Service, U.S. Department of Agriculture.

* * * * *

Dated: October 26, 2018.

James W. Kurth,

Deputy Director, U.S. Fish and Wildlife Service, Exercising the Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2018–27977 Filed 12–27–18; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2018–0073; 4500090023]

RIN 1018–BD40

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Trispot Darter

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the trispot darter (*Etheostoma trisella*) under the Endangered Species Act of 1973 (Act), as amended. In total, approximately 181 river miles (291 kilometers) and 16,735 acres (6,772 hectares) in the Coosa River system in Alabama, Georgia, and Tennessee fall within the boundaries of the proposed critical habitat designation. If we finalize this rule as proposed, it would extend the Act's protections to this species' critical habitat. We also announce the availability of a draft economic analysis (DEA) of the proposed designation.

Elsewhere in today's **Federal Register**, we published a final rule listing the trispot darter as a threatened species under the Act.

DATES: We will accept comments on this proposed rule or the associated DEA that are received or postmarked on or before February 26, 2019. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by February 11, 2019.

ADDRESSES: *Comment submission:* You may submit comments on this proposed rule or the associated DEA by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov*. In the Search box, enter FWS–R4–ES–2018–0073, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2018–0073, U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Document availability: The DEA is available at *https://www.fws.gov/daphne/,* at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0073, and at the Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *https://www.fws.gov/daphne/,* at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2018–0073, and at the Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Fish and Wildlife Service website and Field Office set out above, and may also be included in the preamble and/or at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Bill Pearson, Field Supervisor, U.S. Fish and Wildlife Service, Alabama Ecological Services Field Office, 1208 Main Street, Daphne, AL 36526; telephone 251–441–5181. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act, if we determine that any species is endangered or threatened, we must designate critical habitat, to the maximum extent prudent and determinable concurrently with listing. Designations and revisions of critical habitat can only be completed by issuing a rule.

This rule proposes to designate critical habitat for the trispot darter. Elsewhere in today's **Federal Register**, we published a final rule listing the trispot darter as a threatened species under the Act.

The basis for our action. Section 4(a)(3) of the Act requires that if we determine that any species is endangered or threatened, we must designate critical habitat, to the maximum extent prudent and determinable, concurrently with listing. Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat.

We prepared a draft economic analysis (DEA) of the proposed designation of critical habitat. We prepared a draft analysis of the economic impacts of the proposed critical habitat designation. In this proposed rule, we announce the availability of the DEA for public review and comment.

Peer Review. In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270) and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought the expert opinions of appropriate specialists regarding the species status assessment report, which informed this proposed rule. The purpose of peer review is to ensure that our designation is based on scientifically sound data, assumptions, and analyses. The peer reviewers have expertise in fish biology, habitat, and stressors (factors negatively affecting the species) to the trispot darter. We invite any additional comment from the peer reviewers during this public comment period.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(2) Specific information on:

(a) The amount and distribution of trispot darter habitat, in particular locations and extent of spawning habitat used seasonally by the species;

(b) What areas, that were occupied at the time of listing and that contain the physical or biological features essential to the conservation of the species, should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on the trispot darter and proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the benefits of including or excluding areas that may be impacted.

(6) Information on the extent to which the description of probable economic impacts in the draft economic analysis (DEA) is a reasonable estimate of the likely economic impacts.

(7) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(8) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the associated documents of the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(9) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES.** We request that you send comments only by the methods described in **ADDRESSES**.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include. We also invite additional comments from peer reviewers during the public comment period.

All comments submitted electronically via *http://www.regulations.gov* will be presented on the website in their entirety as submitted. For comments submitted via hard copy, we will post your entire comment—including your personal identifying information—on *http://www.regulations.gov*. You may request at the top of your document that we withhold personal information such as your street address, phone number, or email address from public review; however, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register** (see **DATES**, above). Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Previous Federal Actions

On April 20, 2010, we received a petition from Center for Biological Diversity and others to list 404 aquatic species in the southeastern United States, including the trispot darter. In response to the petition, we completed a 90-day finding on September 27, 2011 (76 FR 59836), in which we announced our finding that the petition contained substantial information that listing may be warranted for the trispot darter. We conducted a status review for the species, and on October 4, 2017, we published a proposed rule to list the trispot darter as a threatened species (82 FR 46183). Elsewhere in today's **Federal Register**, we published a final rule listing the trispot darter as a threatened species under the Act.

Supporting Documents

A species status assessment (SSA) team prepared an SSA report for the trispot darter. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species. The SSA report underwent independent peer review by scientists with expertise in fish biology, habitat management, and stressors (factors negatively affecting the species) to the species. The SSA report and other materials relating to this proposal can be found on the Service's Southeast Region website at *https://www.fws.gov/southeast/* and at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0073. The draft economic analysis is available at *https://www.fws.gov/southeast/,* at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0073, and at the Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and

the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features within an area, we focus on the specific features that support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. We will determine whether unoccupied areas are essential for the conservation of the species by considering the life-history, status, and conservation needs of the species. This will be further informed by any generalized conservation strategy, criteria, or outline that may have been developed for the species to provide a substantive foundation for identifying which features and specific areas are essential to the conservation of the species and, as a result, the development of the critical habitat designation. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and its implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. The regulations at 50 CFR 424.12(a)(1) state

that the designation of critical habitat is not prudent when one or both of the following situations exist:

(1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or

(2) Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would not be beneficial, the factors the Service may consider include, but are not limited to, whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of ''critical habitat.''

As discussed in the final listing rule, which is published elsewhere in today's **Federal Register**, there is currently no imminent threat of take attributed to collection or vandalism identified under Factor B for this species, and identification and mapping of critical habitat is not expected to initiate any such threat. In the absence of finding that the designation of critical habitat would increase threats to a species, we must next determine whether such designation of critical habitat would not be beneficial to the species. In the final listing rule, we state our determination that there are habitat-based threats to the trispot darter identified under Factor A. Therefore, we find that the designation of critical habitat would be beneficial to trispot darter through the provisions of section 7 of the Act. Because we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and would be beneficial, we find that designation of critical habitat is prudent for the trispot darter.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the trispot darter is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.'' When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. We find that this information is sufficient for us to conduct both the biological and economic analyses required for the critical habitat determination. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is now determinable for the trispot darter.

Physical or Biological Features

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. For example, physical features might include gravel of a particular size required for spawning, alkali soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic needed to support the life history of the species. In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

The trispot darter is a freshwater fish found in the Coosa River System in the Ridge and Valley ecoregion of Alabama, Georgia, and Tennessee. It is a migratory species that utilizes distinct breeding and nonbreeding habitats. From approximately April to October, the species inhabits its nonbreeding habitat, which consists of small to medium margins of rivers and lower reaches of tributaries with slower velocities. It is associated with detritus, logs, and stands of water willow, and a substrate that consists of small cobbles, pebbles, gravel, and often a fine layer of silt. During low flow periods, the darters move away from the peripheral zones and toward the main channel; edges of water willow beds, riffles, and pools; and mouths of tributaries.

Migration into spawning areas begins in approximately late November or early December, with fish moving from the main channels into tributaries and eventually reaching adjacent seepage areas where they will congregate and remain for the duration of spawning, until approximately late April. Breeding sites are intermittent seepage areas and ditches with little to no flow; shallow depths (12 inches (30 centimeters) or less); moderate leaf litter covering mixed cobble, gravel, sand, and clay; a deep layer of soft silt over clay; and emergent vegetation. Additionally, breeding sites possess channels that maintain base flow throughout the winter and early spring.

Trispot darters predominantly feed on mayfly nymphs and midge larvae and pupae.

A thorough review of the life history and ecology of the trispot darter is presented in the SSA report (Service 2017, entire). A summary of the resource needs of the trispot darter is provided below in Table 1.

TABLE 1—LIFE-HISTORY AND RESOURCE NEEDS OF THE TRISPOT DARTER

Life stage	Resources needed
Fertilized Eggs	Ephemeral streams/ditches connected to nonbreeding habitat with adequate water quality; vegetation, rocks for adhesive eggs; eggs submerged on vegetation and/or rocks for approximately 30 days at 53 °F (12 °C).
Larvae	Ephemeral streams/ditches connected to nonbreeding habitat with adequate water quality; low predation, disease, and environmental stress; flushing rain events to reach lower stream reaches; 41 days to reach juvenile stage.

TABLE 1—LIFE-HISTORY AND RESOURCE NEEDS OF THE TRISPOT DARTER—Continued

Life stage	Resources needed
Juveniles	Flowing water with good water quality; low predation, disease, and environmental stress; adequate food availability.
Nonbreeding Adults (Mid-April to Mid-October).	Clear, flowing water in shallow pools and backwaters in main channel with good water quality but documented to be found with a fine layer of silt and/or debris, leaf litter; adequate food availability.
Breeding Adults (Late November to Late April).	Flowing water with adequate water quality, adequate flow to connect to breeding areas; clean structure (vegetation, rock, substrate); appropriate male to female demographics; appropriate spawning temperatures.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of trispot darter from studies of this species' habitat, ecology, and life history. Additional information can be found in the proposed listing rule published in the **Federal Register** on October 4, 2017 (82 FR 46183), the SSA report (Service 2017, entire), and the final listing rule published elsewhere in today's **Federal Register**. We have determined that the following physical or biological features are essential to the conservation of trispot darter:

(1) Geomorphically stable, small to medium streams with (a) detritus, woody debris, and stands of water willow (*Justicia americana*) over stream substrate that consists of small cobble, pebbles, gravel, and fine layers of silt; and (b) intact riparian cover to maintain stream morphology and reduce erosion and sediment inputs.

(2) Adequate seasonal water flows, or a hydrologic flow regime (which includes the severity, frequency, duration, and seasonality of discharge over time) necessary to maintain appropriate benthic habitats and to maintain and create connectivity between permanently flowing streams with associated streams that hold water from November through April, providing connectivity between the darter's spawning and summer areas.

(3) Water and sediment quality (including, but not limited to, conductivity; hardness; turbidity; temperature; pH; ammonia; heavy metals; pesticides; animal waste products; and nitrogen, phosphorus, and potassium fertilizers) necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages.

(4) Prey base of aquatic macroinvertebrates.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the trispot darter may require special management considerations or protections to reduce the following threats: (1) Urbanization of the landscape, including (but not limited to) land conversion for urban and commercial use, infrastructure (roads, bridges, utilities), and urban water uses (water supply reservoirs, wastewater treatment); (2) nutrient pollution from agricultural activities that impact water quantity and quality; (3) significant alteration of water quality; (4) improper forest management or silviculture activities that remove large areas of forested wetlands and riparian systems; (5) culvert and pipe installation that creates barriers to movement; (6) changes and shifts in seasonal precipitation patterns as a result of climate change; (7) other watershed and floodplain disturbances that release sediments or nutrients into the water or fill suitable spawning habitat; and (8) creation of reservoirs that convert permanently flowing streams and/or streams that hold water from November through April into lake or pond-like (lentic) environments.

Management activities that could ameliorate these threats include, but are not limited to, use of best management practices (BMPs) designed to reduce sedimentation, erosion, and bank-side destruction; protection of riparian corridors and suitable spawning habitat; retention of sufficient canopy cover along banks; moderation of surface and ground water withdrawals to maintain natural flow regimes; increased use of stormwater management and reduction of stormwater flows into the stream systems; placement of culverts or bridges that accommodate fish passage; and reduction of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat.

The current distribution of the trispot darter is reduced from its historical distribution. We anticipate that recovery will require continued protection of existing populations and habitat, as well as ensuring there are adequate numbers of fish in stable populations and that these populations occur over a wide geographic area. This will help to ensure that catastrophic events, such as floods, cannot simultaneously affect all known populations. Range-wide recovery considerations, such as maintaining existing genetic diversity and striving for representation of all major portions of the species' current range, were considered in formulating this proposed critical habitat designation.

Sources of data for this proposed critical habitat include multiple databases maintained by universities and State agencies in Tennessee, Alabama, and Georgia, and numerous survey reports on streams throughout the species' range. Other sources of available information on habitat requirements for this species include studies conducted at occupied sites and published in peer-reviewed articles, agency reports, and data collected during monitoring efforts (Service 2017, entire).

Areas Occupied at the Time of Listing

The proposed critical habitat designation does not include all streams known to have been occupied by the species historically; instead, it focuses on currently occupied streams and

rivers within the historical range that have retained the necessary physical or biological features that will allow for the maintenance and expansion of existing populations. For the purposes of critical habitat designation, we determined a unit to be occupied if it contains recent (*i.e.,* observed in the past 10 years (since 2007), based on the data available for the SSA analysis) observations of trispot darter. Collection records were compiled and provided to us by State partners funded under a concurrent section 6 status assessment for the trispot darter. Collection records were obtained through the website FISHNET2 (an online repository of ichthyological museum data) or directly from institutions. To delineate spawning areas for trispot darter, we identified waterways where trispot darter was observed from November to April between the years 2007 and 2017. We assume these observations represented fish in or near spawning habitat within the timeframe. We based this assumption on the knowledge that this short-lived migratory species will stage near spawning areas in pre-spawning congregations and that both spawning and non-spawning individuals will make a migration.

We considered areas of low topographic variation at lower elevations as exhibiting topographic characteristics that support recharge of a shallow soil water table, slow release of water into breeding channels, and connectivity between ephemeral breeding channels and permanent trispot darter summer habitat. These areas support the essential physical and biological features that allow for adequate seasonal water flows, the hydrologic flow regime that maintains appropriate trispot habitat, and connectivity between streams in the winter. Areas of low topographic variation would generally have slower stream velocities and retain water for longer duration (*i.e.,* have a less ''flashy'' hydrograph), in order to maintain necessary benthic habitat and stream substrate. Areas at lower elevation would interact with permanent streams and rivers, and be accessible to trispot darters attempting to migrate into adjacent ephemeral spawning streams.

To identify areas with both low elevation and low topographic variation, we conducted a geographic information system (GIS) analysis using a 30-meter digital elevation model (DEM). Low elevation for this analysis was defined as two standard deviations away from the mean elevation at which spawning trispot darters were observed. Therefore, elevation ranged from 558 to 790 feet (ft) (170 to 241 meters (m)). We used roughness as a measure of topographic variation. To calculate roughness, we used an ArcGIS tool (Evans *et al.* 2014) that implements an algorithm described by Riley *et al.* (1999, entire). We then conducted an overlay analysis using the spawning elevation layer and roughness layer to produce a map of potential spawning habitat.

Finally, we considered the dispersal ability of trispot darter when delineating critical habitat that included spawning habitat. Trispot darters have been recorded to travel approximately 6,000 ft (1,829 m). Therefore, we only delineate lands that exhibit topographic characteristics we consider suitable for trispot darter spawning habitat that are within 6,000 ft (1,829 m) of a trispot darter observed between November and April in the years 2007 to 2017.

The following rivers and streams meet the criteria described above and are considered occupied by the species at the time of listing where the essential physical and biological features are found: Big Canoe Creek, Ballplay Creek, Conasauga River, Mill Creek, Coahulla Creek, and Coosawattee River.

Areas Outside the Geographic Area Occupied at the Time of Listing

We are not proposing to designate any areas outside the geographical area currently occupied by the species because we did not find any unoccupied areas that were essential for the conservation of the species. The protection of six moderately or highly resilient management units across the physiographic representation of the range would sufficiently reduce the risk of extinction. Improving the resiliency of populations in the currently occupied streams will likely increase viability to the point that the protections of the Act are no longer necessary.

Developed Areas

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for trispot darter. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

Critical Habitat Maps

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0073, on our internet site at *https://www.fws.gov/daphne/,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**, above).

Proposed Critical Habitat Designation

We are proposing 181 river miles (mi) (291 kilometers (km)) and 16,735 acres (ac) (6,772 hectares (ha)) in six units as critical habitat for the trispot darter. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for trispot darter. All 6 areas we propose as critical habitat are in the Coosa River system in Alabama, Georgia, and Tennessee (Table 2). Table 2 shows the name, land ownership, acres, and approximate stream miles of the proposed designated units for the trispot darter. Per State regulations (Alabama Code section 9–11–80, Tennessee Code Annotated section 69–1–101, and Georgia Code section 52–1–31), navigable waters are considered public rights-of-way. Most, if not all, lands beneath the navigable waters included in this proposed rule are owned by the States of Alabama, Georgia, or Tennessee. Ownership of lands beneath most nonnavigable waters included in this proposed rule are determined by riparian land ownership. As discussed below, riparian lands along the waters described are owned by either private, State, or Federal entities.

TABLE 2—PROPOSED CRITICAL HABITAT UNITS FOR TRISPOT DARTER

Unit	Ownership* of river miles (kilometers)					Ownership* of acres (hectares)			
	Private	Local	State	Federal	Total	Private	State	Federal	Total
1. Big Canoe Creek	41 (66)	0	0	0	41 (66)	10,167 (4,114)	0	0	10,167 (4,114)
2. Ballplay Creek	17 (27)	0	0	0	17 (27)	2,527 (1,023)	0	0	2,527 (1,023)
3. Conasauga River	54.58 (87.84)	0	2.42 (3.90)	0	57 (92)	2,161 (875)	0	0	2,161 (875)
4. Mill Creek	13.69 (22.03)	1.31 (2.11)	0	0	15 (24)	438 (177)	0	0	438 (177)
5. Coahulla Creek	26 (42)	0	0	0	26 (42)	1,442 (584)	0	0	1,442 (584)
6. Coosawattee River	24.24 (39)	0	0.34 (0.55)	0.42 (0.68)	25 (40)	0	0	0	0
Total	176.51 (283.87)	1.31 (2.11)	2.76 (4.45)	0.42 (0.68)	181 (291)	16,735 (6,772)	0	0	16,735 (6,772)

* Adjacent riparian ownership is reported under ''river miles.''
Note: Measurements may not sum due to rounding.

We present brief descriptions of all proposed units, and reasons why they meet the definition of critical habitat for trispot darter below. All of the proposed units are currently occupied by the darter and contain the physical and biological features that are essential to the conservation of the species and which may require special management considerations or protection.

Unit 1: Big Canoe Creek

Unit 1 consists of 41 stream mi (66 km) in St. Clair County, Alabama, from approximately 3.5 mi (5.6 km) upstream of Pinedale Road, west of Ashville, Alabama, to approximately U.S. Highway (Hwy.) 11. In addition to Big Canoe Creek, Unit 1 includes the westernmost portion of Little Canoe Creek to State Hwy. 174 and all of its associated tributaries. Unit 1 also includes all low elevation areas (10,167 ac (4,114 ha)) containing channels that hold water from November through April beginning 0.5 mi (0.8 km) upstream of County Road 31 upstream to the U.S. Hwy. 11 crossing with Big Canoe Creek, approximately 0.70 miles (1.1 km) downstream of the Interstate 59 (I–59) crossing with the Left Hand Prong Little Canoe Creek, and the State Hwy. 174 crossing with Little Canoe Creek and Stovall Branch. The low elevation riparian areas that hold water seasonally in Unit 1 are privately owned, except for bridge crossings and road easements, which are owned by the State or County.

Additional special management considerations or protection may be required within Unit 1 to alleviate impacts from stressors that have led to the degradation of the habitat, including roadside erosion, urban development, fish barriers, and unstable stream banks. Livestock accessing streams and riparian buffers have led to high levels of sedimentation, siltation, contamination, and nutrient-loading, as well as destabilized stream banks.

Unit 2: Ballplay Creek

Unit 2 consists of 17 stream mi (27 km) of Ballplay Creek in Etowah, Cherokee, and Calhoun Counties, Alabama, and 2,527 ac (1,023 ha) of ephemeral spawning habitat. Unit 2 begins upstream of a wetland complex located at the border between Etowah and Cherokee Counties approximately at County Road 32, and continues upstream approximately to the U.S. Hwy. 278 crossing over Ballplay Creek in Calhoun County, Alabama. Unit 2 includes all low elevation areas (2,527 ac (1,023 ha)) containing channels that hold water from November through April beginning upstream of a wetland complex located at the border between Etowah and Cherokee Counties approximately 0.60 mi (1 km) southwest of County Road 32 and extending upstream to the confluence of Ballplay and Little Ballplay Creeks and to the west along Rocky Ford Road and Alford Road. The ephemeral spawning habitat proposed in Unit 2 is privately owned except for bridge crossings and road easements, which are owned by the State or Counties. Additional special management considerations or protection may be required within Unit 2 because entrenchment and channelization have altered the channel and may degrade spawning habitat and reduce floodplain access.

Unit 3: Conasauga River

Unit 3 consists of 57 stream mi (92 km) and 2,161 acres (875 ha) of ephemeral wetland spawning habitat in Whitfield and Murray Counties, Georgia, and Polk and Bradley Counties, Tennessee. Unit 3 begins in the Conasauga River upstream of the mouth of Coahulla Creek and continues upstream to the mouth of Minneawauga Creek. Unit 3 also includes: Mill Creek from its confluence with the Conasauga River in Bradley County, Tennessee, upstream to the first impoundment on Mill Creek approximately at Green Shadow Road SE; Old Fort Creek from Ladd Springs Road SE in Polk County, Tennessee, to its confluence with Mill Creek in Bradley County, Tennessee; and Perry Creek from its headwaters (approximately 0.35 mi (0.6 km) upstream of Tennga Gregory Road) to its confluence with the Conasauga River in Murray County, Georgia, and both of its tributaries. Unit 3 includes all low elevation areas (2,161 ac (875 ha)) containing channels that hold water from November through April, beginning from the confluence of the Conasauga River and Shears Branch (west of U.S. Hwy. 411 in Polk County, Tennessee) to approximately 0.30 mi (0.5 km) downstream of the confluence of the Conasauga River and Perry Creek; Mill Creek from Hicks Tanyard Road downstream to its confluence with the Conasauga River; Old Fort Creek from Hicks Tanyard Road to its confluence with Mill Creek; and Perry Creek. The ephemeral wetland areas surrounding the river proposed in this unit is a combination of private ownership, conservation easements, and State Natural Areas. These easements are held by Georgia Department of Transportation, Georgia Department of Natural Resources, and Georgia-Alabama Land trust.

Additional special management considerations or protection may be required within the Conasauga River Unit to reduce impacts from pollutants from agricultural runoff, construction of farm ponds that destroy spawning habitat, development, erosion, sedimentation, and dams and other barriers to dispersal.

Unit 4: Mill Creek

Unit 4 consists of 15 stream mi (24 km) of Mill Creek and 438 ac (177 ha) of ephemeral spawning habitat in Whitfield County, Georgia. The land surrounding the river in this unit is both in private ownership and owned by the City of Dalton, Georgia. Unit 4 begins at the confluence of Mill Creek with Coahulla Creek and continues upstream along Mill Creek for approximately 15 mi (24 km) to the U.S. Hwy. 41 crossing. The unit includes all low elevation areas (438 ac (177 ha)) containing channels that hold water from November through April, beginning from the U.S. Hwy. 41 crossing with Mill Creek downstream to the confluence of Mill Creek and Haig Mill Branch. Unit 4's spawning habitat is privately owned except for bridge crossings and road easements, which are owned by the State or County.

Additional special management considerations or protection may be required within Unit 4 to address pollutants from agricultural runoff, agricultural ditching, and the construction of farm ponds that remove spawning habitat. Sediment loading and excessive fecal contamination have degraded water quality and also require special management considerations.

Unit 5: Coahulla Creek

Unit 5 consists of 26 stream mi (42 km) of Coahulla Creek and 1,442 ac (584 ha) of ephemeral spawning habitat in Whitfield County, Georgia, and Bradley County, Tennessee. Unit 5 begins immediately upstream of the Prater Mill dam upstream of State Hwy. 2 in Georgia. The unit continues upstream for approximately 26 mi (42 km) to Ramsey Bridge Road SE and includes ephemeral wetland habitat from 0.5 mi (0.8 km) downstream of Hopewell Road to approximately 0.5 mi (0.8 km) upstream of McGaughey Chapel Road. The ephemeral spawning habitat surrounding the river in this unit is privately owned, except for bridge crossings and road easements, which are owned by the State or County.

Additional special management considerations or protection may be required within Unit 5 to address pollutants from agricultural runoff, agricultural ditching, and the construction of farm ponds that remove spawning habitat. Sediment loading and excessive fecal contamination have degraded water quality and also require special management considerations.

Unit 6: Coosawattee River

Unit 6 consists of 25 stream mi (40 km) of the Coosawattee River beginning at the confluence with the Conasauga River in Gordon County, Georgia. The unit continues upstream to Old Highway 411 downstream of Carters Lake Reregulation Dam in Murray County, Georgia. The ephemeral spawning habitat surrounding the river in this unit is a mix of State, private, and Federal (U.S. Army Corps of Engineers) ownership.

Additional special management considerations or protection may be required within Unit 6 to address erosion and sedimentation from urban runoff and development, rural unpaved roads, forestry practices, dam construction and use, and agriculture, leading to impairment of water quality.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule adopting a new definition of destruction or adverse modification on February 11, 2016 (81 FR 7214). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation. As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if

those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that result in a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of the trispot darter. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of these species or that preclude or significantly delay development of such features. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species. Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the trispot darter. These activities include, but are not limited to:

(1) Actions that would alter the minimum flow or the existing flow regime. Such activities could include, but are not limited to, impoundment, channelization, water diversion, water withdrawal, and hydropower generation. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of trispot darter by decreasing or altering flows to levels that would adversely affect their ability to complete their life cycles.

(2) Actions that would significantly alter water chemistry or temperature. Such activities could include, but are not limited to, release of chemicals (including pharmaceuticals, metals, and salts), biological pollutants, or heated effluents into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities could alter water conditions to levels that are beyond the tolerances of the trispot darter and result in direct or cumulative adverse effects to these individuals and their life cycles.

(3) Actions that would significantly increase sediment deposition within the stream channel. Such activities could include, but are not limited to, excessive sedimentation from livestock grazing, road construction, channel alteration, and other watershed and floodplain disturbances. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of the trispot darter by increasing the sediment deposition to levels that would adversely affect the species' ability to complete its life cycle.

(4) Actions that would significantly increase the phytoplankton algal community within the stream channel. Such activities could include, but are not limited to, release of nutrients into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities can result in excessive filamentous algae filling streams and reducing habitat for fish, degrading water quality during phytoplankton decay, and decreasing oxygen levels at night from phytoplankton respiration to levels below the tolerances of the fish.

(5) Actions that would significantly alter channel morphology or geometry. Such activities could include, but are not limited to, channelization, impoundment, road and bridge construction, mining, dredging, and destruction of riparian vegetation. These activities may lead to changes in water flows and levels that would degrade or eliminate the trispot darter habitat. These actions can also lead to increased sedimentation and degradation in water quality to levels that are beyond the tolerances of the fish.

(6) Actions that result in the introduction, spread, or augmentation of nonnative aquatic species in occupied stream segments, or in stream segments that are hydrologically connected to occupied stream segments, even if those segments are occasionally intermittent, or introduction of other species that compete with or prey on the trispot darter. Possible actions could include, but are not limited to, stocking of nonnative fishes, stocking of sport fish, or other related actions. These activities can introduce parasites or disease; result in direct predation; or affect the growth, reproduction, and survival of trispot darter.

(7) Actions that would result in the conversion of aquatic habitats from seeps or from ephemeral, periodic, intermittent, or permanent flowing streams to lake or pond-like environments. Such activities could include, but are not limited to, creating impoundments, digging ponds, or excavating channels. These actions could eliminate or reduce habitat and adversely affect the growth and reproduction of the trispot darter.

(8) Actions that would result in the conversion of aquatic habitats to terrestrial habitats. Such activities could include, but are not limited to, filling wetlands, seeps, or ephemeral, periodic, intermittent, or permanent flowing streams with soil or other material or draining wetlands. These actions could reduce water quantity to levels below the tolerances of the trispot darter.

(9) Actions that would result in decreased connectivity within and between suitable spawning and non-spawning habitat for the trispot darter. Such activities could include, but are not limited to, levee construction; transportation projects that span streams without consideration for fish passage or debris left in seeps; and logging or site preparation for development without consideration for ephemeral, periodic, intermittent, or permanent flowing streams. These activities could reduce the accessibility to habitat necessary for the growth and reproduction of the trispot darter and adversely affect the species' ability to complete its life cycle.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and

restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

We consult with the military on the development and implementation of INRMPs for installations with listed species. We analyze INRMPs developed by military installations located within the range of the proposed critical habitat designation to determine if they meet the criteria for exemption from critical habitat under section 4(a)(3) of the Act. We have determined that there are no Department of Defense lands within the proposed critical habitat designation.

Exclusions

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factors to use and how much weight to give to any factor.

As discussed below, we are not proposing to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information we obtain during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis (DEA) concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**).

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary 4(b)(2) exclusion analysis.

For this designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the trispot darter (IEc 2018, entire). The screening analysis enables us to focus on the key factors that are likely to result in incremental economic impacts. Its purpose is to filter out the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.,* absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. The screening analysis filters out particular areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. Ultimately, the screening analysis allows us to focus our analysis the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The screening analysis also assesses whether units are unoccupied by the species and may require additional management or conservation efforts as a result of the critical habitat designation for the species which may incur incremental economic impacts. This screening analysis, combined with the information contained in our IEM, constitutes our draft economic analysis (DEA) of the proposed critical habitat designation for the trispot darter, which is summarized in the narrative below.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed

designation of critical habitat for the trispot darter, first we identified, in the IEM dated August 8, 2018, probable incremental economic impacts associated with the following categories of activities: (1) Oil and gas; (2) agriculture; (3) silviculture/timber; (4) development; (5) conservation and restoration; (6) renewable energy; (7) in-water construction; and (8) transportation. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. Beginning on the effective date of the final rule listing the trispot darter as a threatened species (published elsewhere in today's **Federal Register**), in areas where the trispot darter is present, Federal agencies will be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into that existing consultation process.

In our IEM, we attempted to clarify the distinction between the effects that will result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the trispot darter's critical habitat. Because the designation of critical habitat for trispot darter is being proposed at the same time as the listing decision is made final, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the trispot darter would also likely adversely affect the essential physical or biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation.

The proposed critical habitat designation for the trispot darter totals approximately 181 river mi (291 km) and 16,735 ac (6,772 ha), all of which is currently occupied by the species. In these areas, any actions that may affect the species would also affect proposed critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the trispot darter. Therefore, even though some analysis of the impacts of the action of critical habitat may be necessary, and this additional analysis will require costs in time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant. We do not expect any additional consultations resulting from the designation of critical habitat. The total annual incremental costs of critical habitat designation are anticipated to be the additional resources expended in a maximum of four section 7 consultations annually at a cost of approximately $13,000 per year.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of this proposed rule and our required determinations. We may revise this proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, under section 4(b)(2) of the Act and its implementing regulations at 50 CFR 424.19, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. As discussed above, we have prepared an analysis of the probable economic impacts of the proposed critical habitat designation and related factors. Based on this analysis, the Secretary does not propose to exercise his discretion to exclude any areas from the final designation based on economic impacts.

Exclusions Based on National Security Impacts or Homeland Security Impacts

Under section 4(b)(2) of the Act, we also consider whether there are lands owned or managed by the Department of Defense where a national security impact might exist. We have determined that the lands within the proposed designation of critical habitat for trispot darter are not owned or managed by the Department of Defense or Department of Homeland Security, and, therefore, we anticipate no impact on national security. Consequently, the Secretary does not propose to exercise his discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements, or candidate conservation agreements with assurances, or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposal, we have determined that there are currently no HCPs or other management plans for trispot darter, and the proposed designation does not include any tribal lands or trust resources. We anticipate no impact on partnerships or HCPs from this proposed critical habitat designation. Accordingly, the Secretary does not intend to exercise his discretion to exclude any areas from the final designation based on other relevant impacts.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

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

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's

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

Executive Order 13771

This rule is not an E.O. 13771 (''Reducing Regulation and Controlling Regulatory Costs'') (82 FR 9339, February 3, 2017) regulatory action because this rule is not significant under E.O. 12866.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

The Service's current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself and, therefore, are not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated by this designation. There is no requirement under RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated if we adopt this rule as proposed, the Service certifies that, if made final, this proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis, we did not find that the designation of this proposed critical habitat would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)-(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the

legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because the lands being proposed for critical habitat designation are Federally or privately owned, or owned by the States of Alabama, Georgia, and Tennessee. These government entities do not fit the definition of ''small governmental jurisdiction.'' Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for trispot darter in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that this designation of critical habitat for trispot darter would not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies in Alabama, Georgia, and Tennessee. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule would not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these local governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The proposed critical habitat units are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We have determined that no tribal lands would be affected by this designation.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Authors

The primary authors of this proposed rule are the staff members of the U.S. Fish and Wildlife Service Species Assessment Team and Alabama Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.95(e) by adding an entry for ''Trispot Darter (*Etheostoma trisella*)'' immediately following the entry for Slackwater Darter (*Etheostoma boschungi*), to read as set forth below:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Trispot Darter (*Etheostoma trisella*)

(1) Critical habitat units are depicted for St. Clair, Etowah, Cherokee, and Calhoun Counties, Alabama; Whitfield, Murray, and Gordon Counties, Georgia; and Polk and Bradley Counties, Tennessee, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of the trispot darter consist of the following components:

(i) Geomorphically stable, small to medium streams with:

(A) Detritus, woody debris, and stands of water willow (*Justicia americana*) over stream substrate that consists of small cobble, pebbles, gravel, and fine layers of silt; and

(B) Intact riparian cover to maintain stream morphology and reduce erosion and sediment inputs.

(ii) Adequate seasonal water flows, or a hydrologic flow regime (which includes the severity, frequency, duration, and seasonality of discharge over time) necessary to maintain appropriate benthic habitats and to maintain and create connectivity between permanently flowing streams with associated streams that hold water from November through April, providing connectivity between the darter's spawning and summer areas.

(iii) Water and sediment quality (including, but not limited to, conductivity; hardness; turbidity; temperature; pH; ammonia; heavy metals; pesticides; animal waste products; and nitrogen, phosphorus, and potassium fertilizers) necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages.

(iv) Prey base of aquatic macroinvertebrates.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat map units.* The hydrologic data used in the critical habitat maps were extracted from the U.S. Geological Survey's 1:1M scale nationwide hydrologic layer with a projection of EPSG:4269–NAD83 Geographic. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at *https://www.fws.gov/daphne/,* at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0073, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

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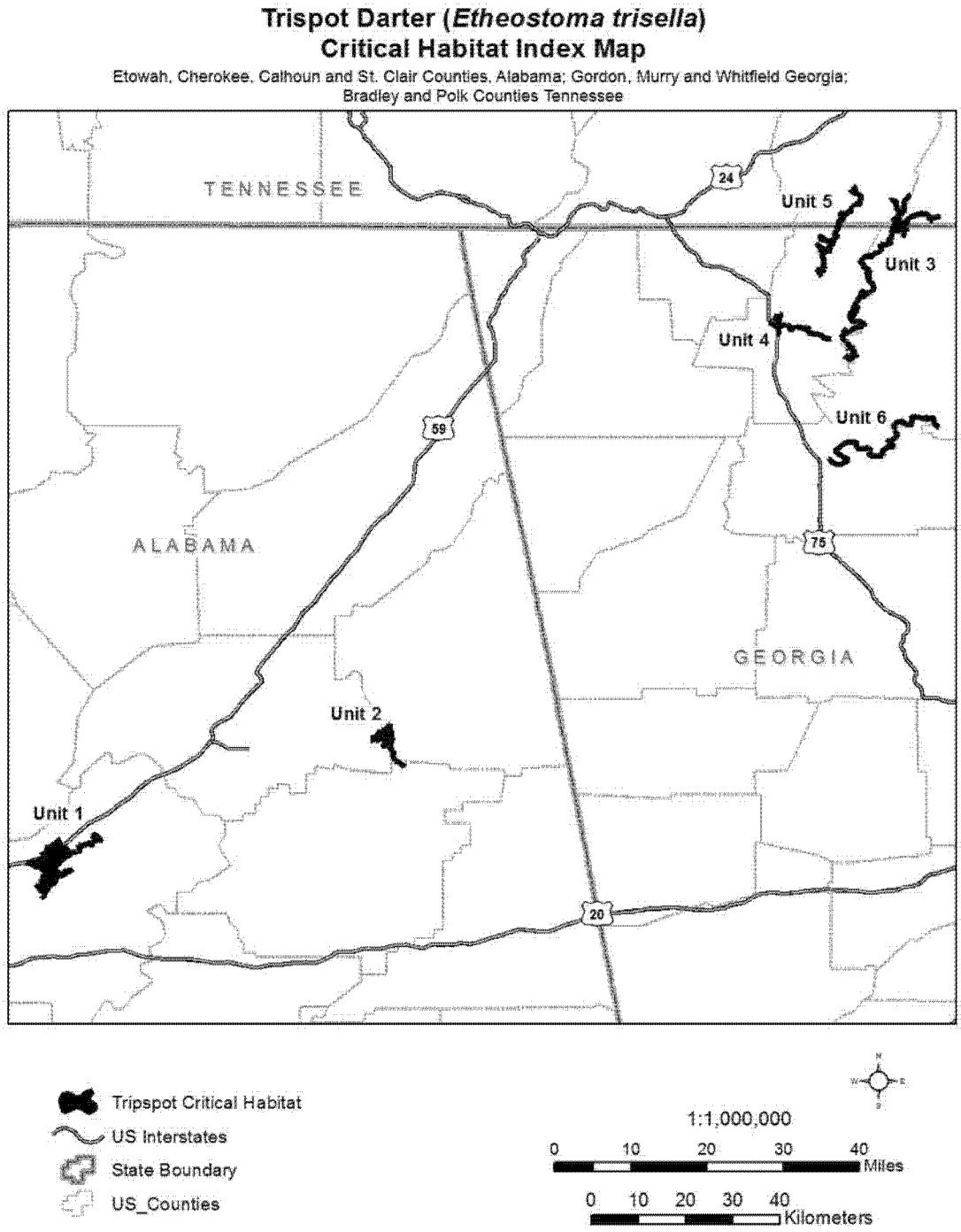
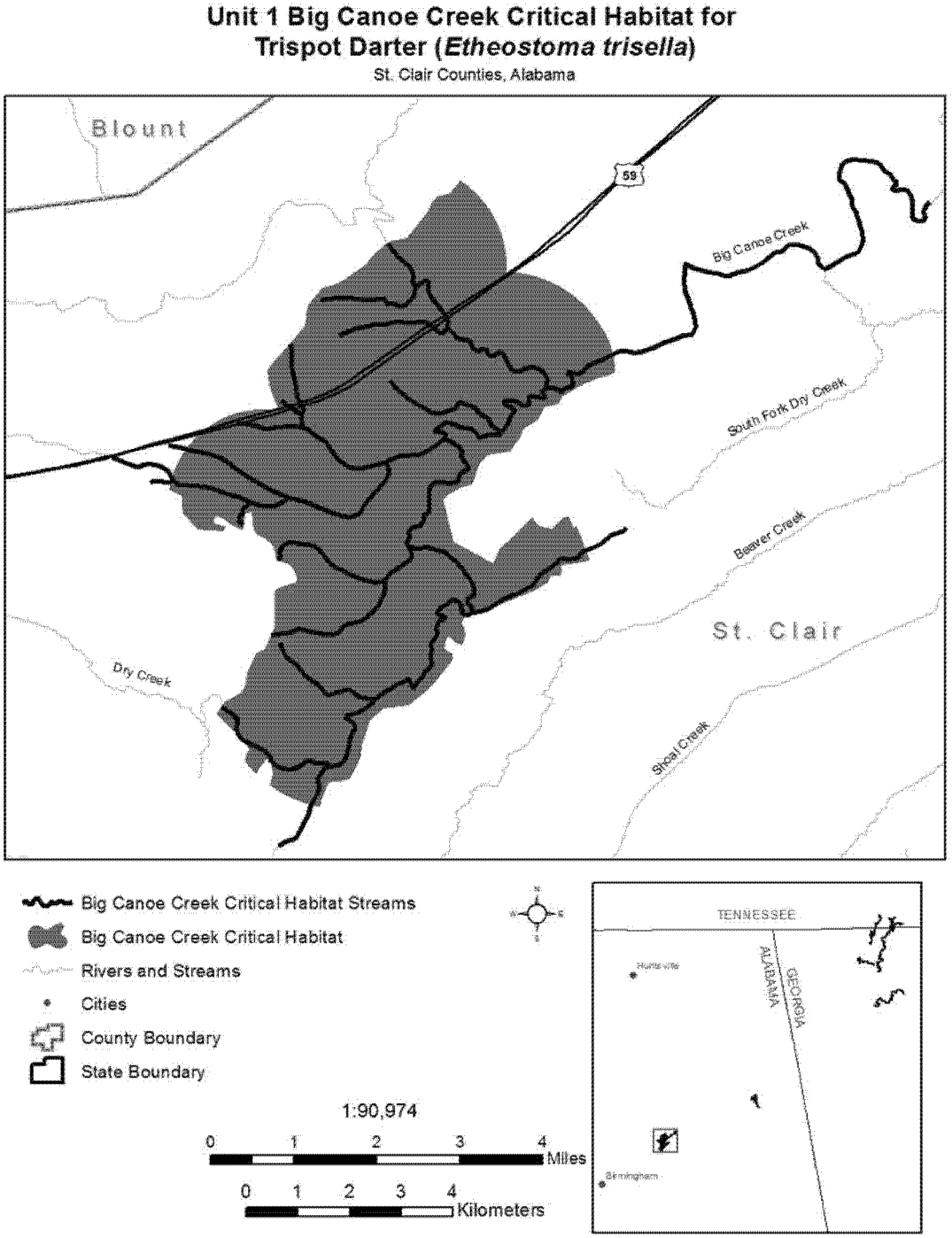
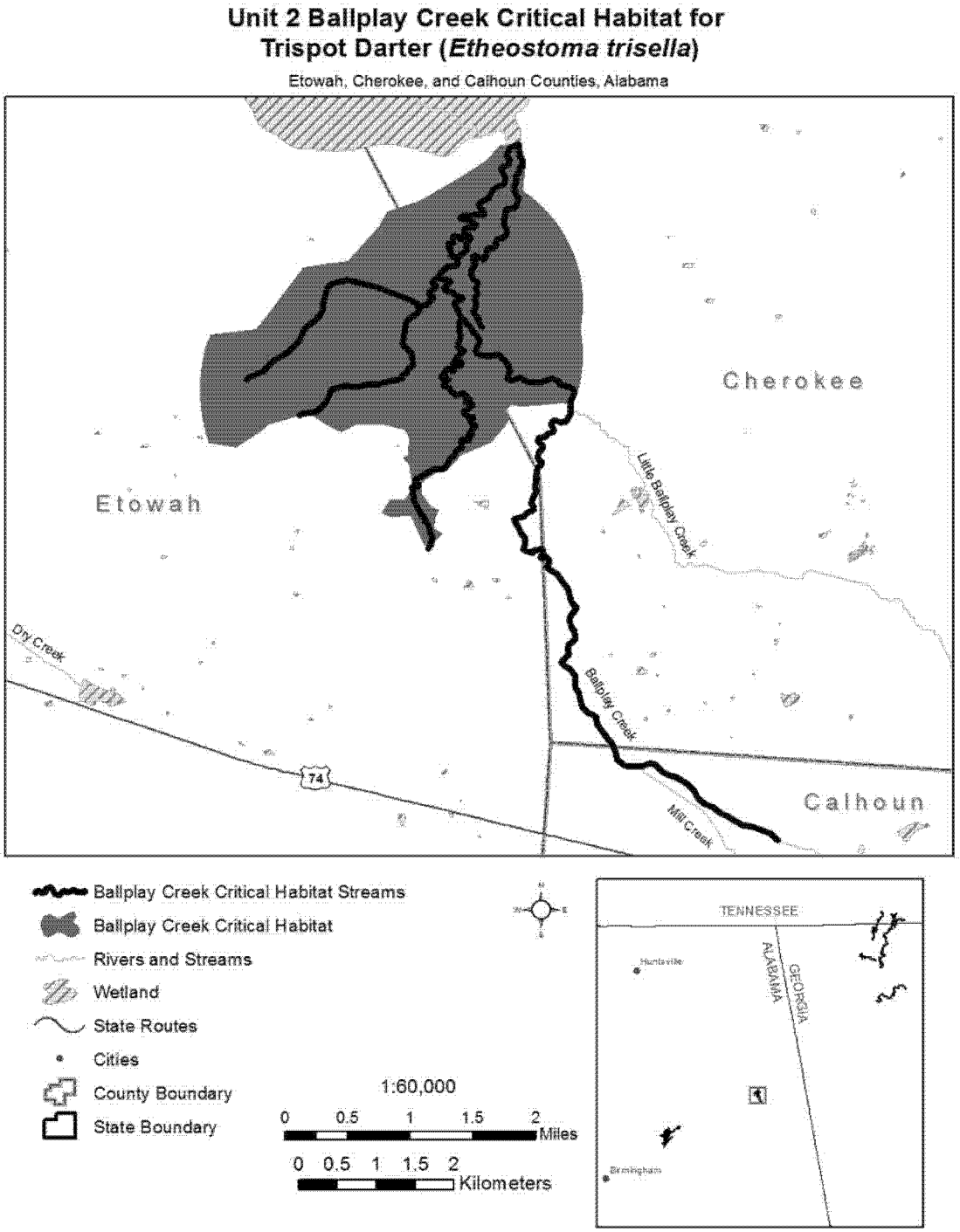
(5) *Note:* Index map follows:



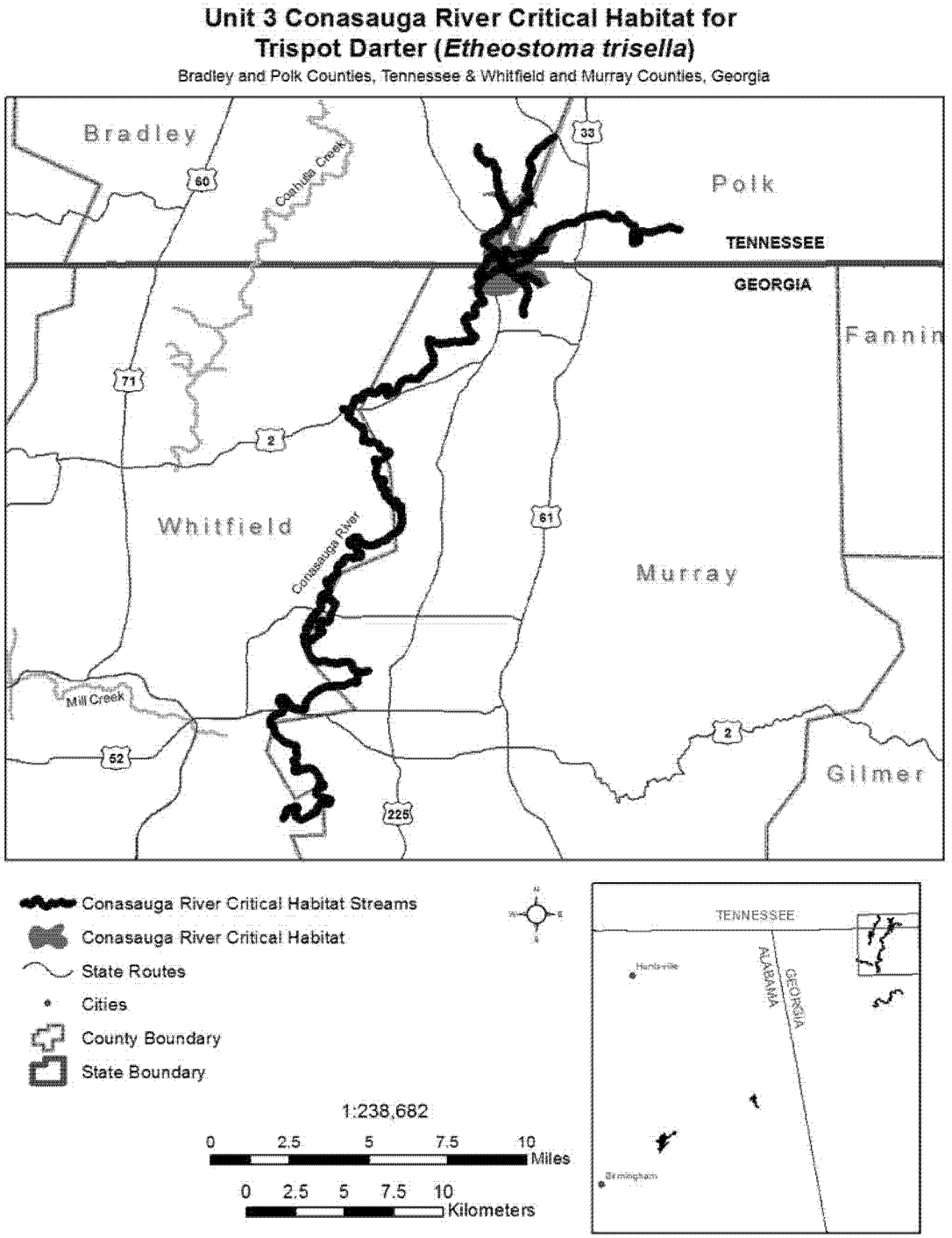
(6) Unit 1: Big Canoe Creek, St. Clair County, Alabama. Map of Unit 1 follows:



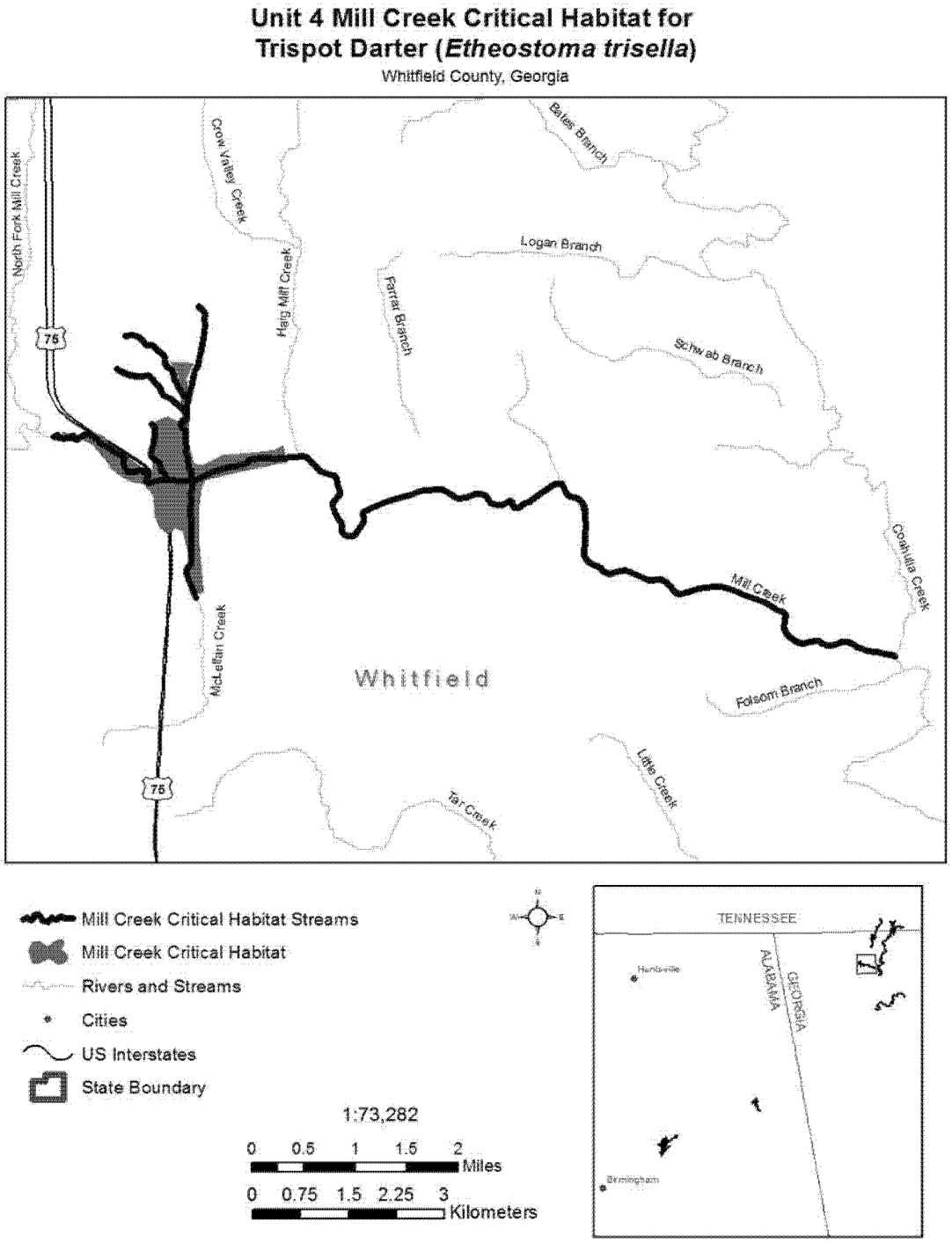
(7) Unit 2: Ballplay Creek, Etowah, Cherokee, and Calhoun Counties, Alabama. Map of Unit 2 follows:



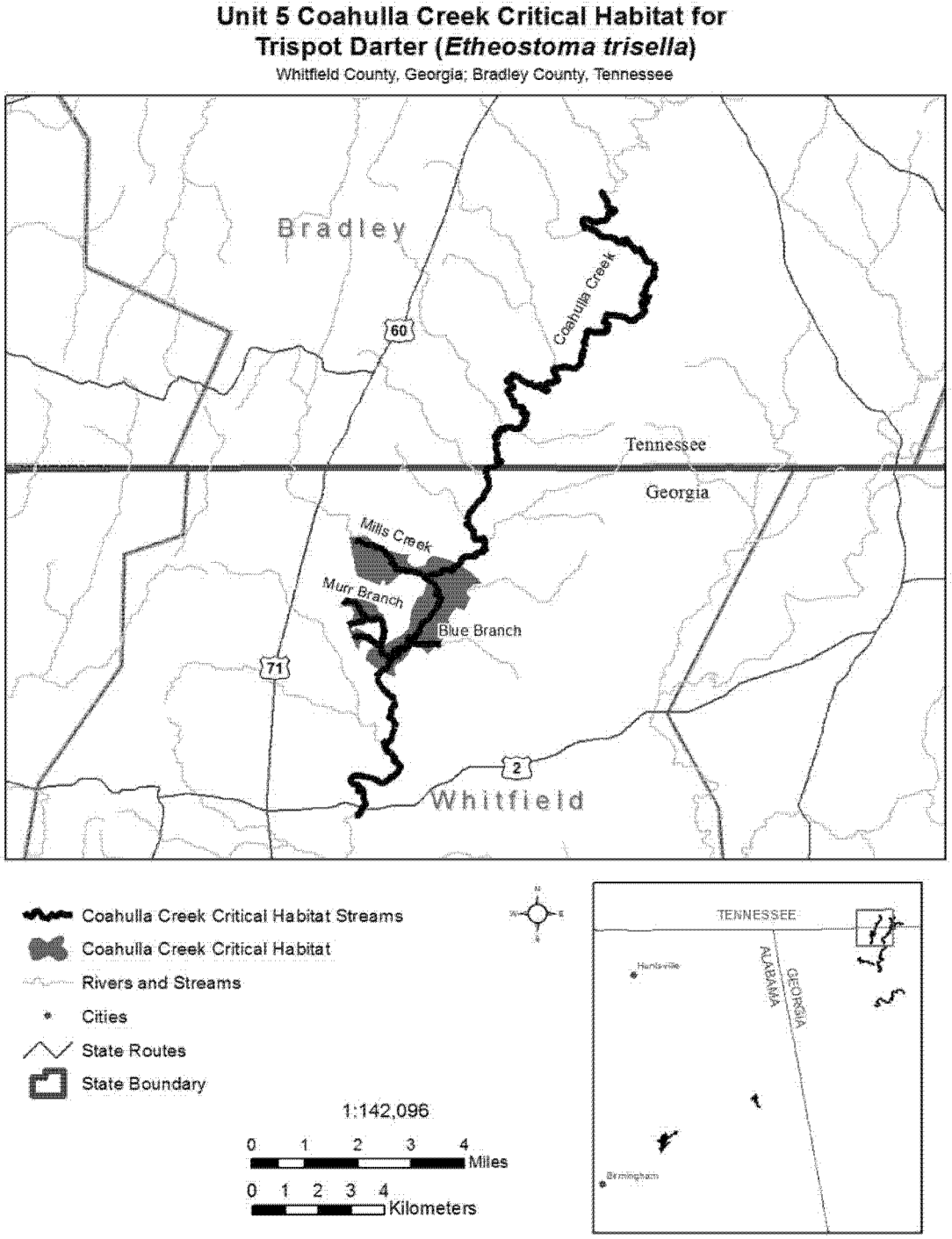
(8) Unit 3: Conasauga River, Whitfield and Murray Counties, Georgia, and Polk and Bradley Counties, Tennessee. Map of Unit 3 follows:



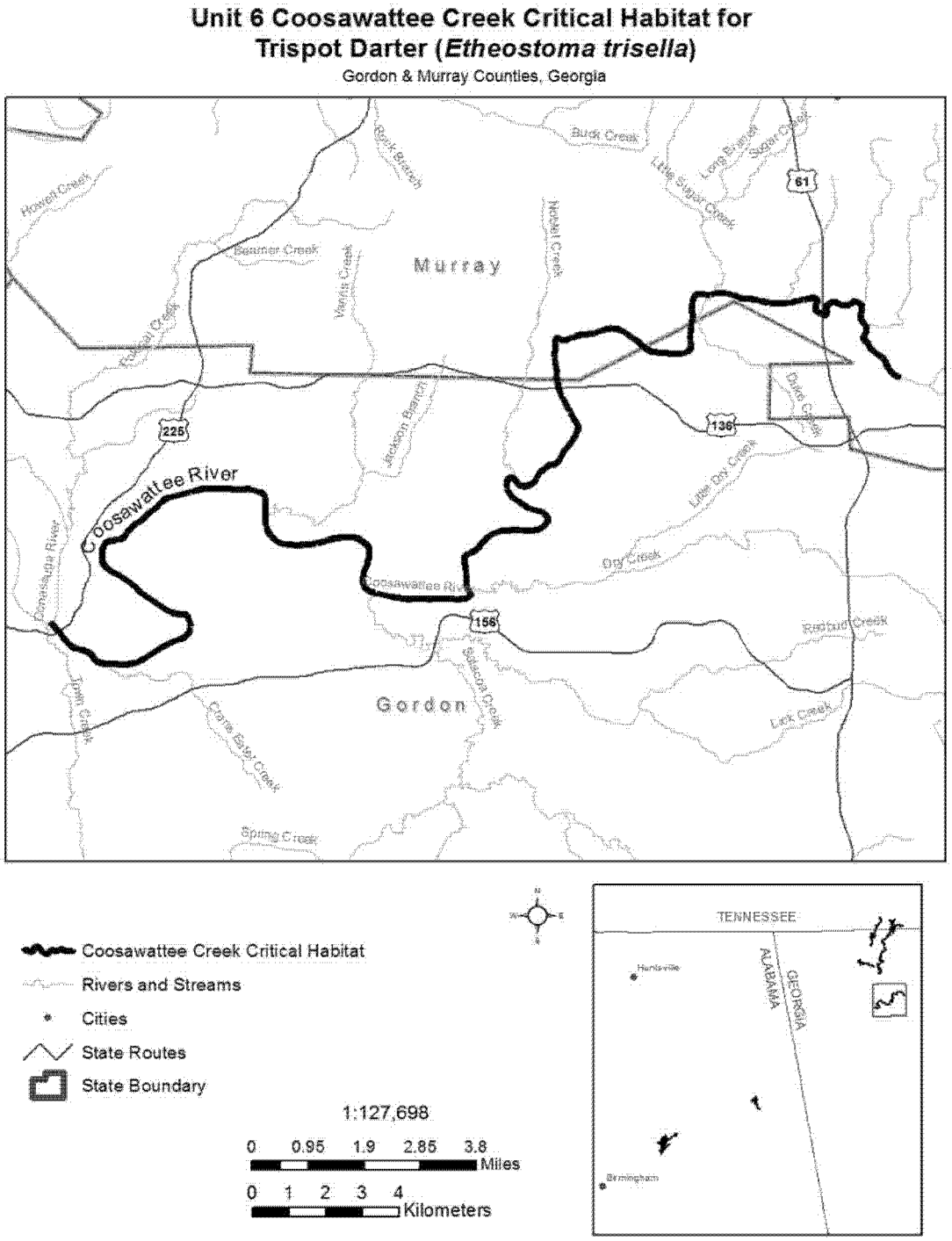
(9) Unit 4: Mill Creek, Whitfield County, Georgia. Map of Unit 4 follows:



(10) Unit 5: Coahulla Creek, Whitfield County, Georgia, and Bradley County, Tennessee. Map of Unit 5 follows:



(11) Unit 6: Coosawattee River, Gordon and Murray Counties, Georgia.
Map of Unit 6 follows:



* * * * *

Dated: October 26, 2018.

James W. Kurth,

Deputy Director, U.S. Fish and Wildlife Service, Exercising the Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2018–27976 Filed 12–27–18; 8:45 am]

BILLING CODE 4333–15–C

Notices

Federal Register
Vol. 83, No. 248
Friday, December 28, 2018

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

U.S. Codex Office

Codex Alimentarius Commission: Meeting of the Codex Committee on Fats and Oils (CCFO)

AGENCY: U.S. Codex Office, USDA.

ACTION: Notice of public meeting and request for comments.

SUMMARY: The U.S Codex Office is sponsoring a public meeting on January 16, 2019. The objective of the public meeting is to provide information and receive public comments on agenda items and draft United States (U.S.) positions to be discussed at the 26th Session of the Codex Committee on Fats and Oils (CCFO) of the Codex Alimentarius Commission, in Kuala Lumpur, Malaysia, February 25-March 1, 2019. The U.S. Manager for Codex Alimentarius and the Under Secretary, Office of Trade and Foreign Agricultural Affairs, recognize the importance of providing interested parties the opportunity to obtain background information on the 26th Session of the CCFO and to address items on the agenda.

DATES: The public meeting is scheduled for Wednesday, January 16, 2019 from 2:00 p.m. to 4:00 p.m. EST.

ADDRESSES: The public meeting will take place in Meeting Room 2B047 at the Center for Food Safety and Applied Nutrition, U.S. Food and Drug Administration, 5001 Campus Drive, College Park, MD 20740–3835. Documents related to the 26th Session of the CCFO will be accessible via the internet at the following address: *http://www.codexalimentarius.org/meetings-reports/en.*

Paul South, U.S. Delegate to the 26th Session of the CCFO invites U.S. interested parties to submit their comments electronically to the following email address: *paul.south@fda.hhs.gov.*

Call-In-Number: If you wish to participate in the public meeting for the 6th Session of the CCFO by conference call, please use the call-in-number: 1–888–844–9904 and participant code 5126092.

Registration: Attendees may register to attend the public meeting by emailing *Marie.Maratos@osec.usda.gov* by January 11, 2019. Early registration is encouraged because it will expedite entry into the building. The meeting will take place in a Federal building. Attendees should bring photo identification and plan for adequate time to pass through the security screening systems. Attendees who are not able to attend the meeting in person, but who wish to participate, may do so by phone, as discussed above.

For Further Information about the 6th Session of the CCFO Contact: U.S. Delegate, Dr. Paul South, Director, Division of Plant Products and Beverages, Office of Food Safety (HFS–317), Center for Food Safety and Applied Nutrition, U.S. Food and Drug Administration, 5001 Campus Drive, College Park, MD 20740–3835, Phone: +1 (240) 402–1640, Fax: +1 (301) 436–2632, *Paul.South@fda.hhs.gov.*

For Further Information about the Public Meeting Contact: Marie Maratos, U.S. Codex Office, 1400 Independence Avenue SW, Room 4861, South Agriculture Building, Washington, DC 20250. Phone: (202) 690–4795, Fax: (202) 720–3157, Email: *Marie.Maratos@osec.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Codex was established in 1963 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers and ensure fair practices in the food trade.

The Codex Committee on Fats and Oils (CCFO) is responsible for elaborating worldwide standards for fats and oils of animal, vegetable, and marine origin, including margarine and olive oil.

The CCFO is hosted by Malaysia. The United States attends CCFO as a member country of Codex.

Issues To Be Discussed at the Public Meeting

The following items on the Agenda for the 26th Session of the CCFO will be discussed during the public meeting:

- Matters referred by the Codex Alimentarius Commission and its subsidiary bodies
- Draft revision to the Standard for Named Vegetable Oils (CXS 210–1999): Addition of Palm Oil with High Oleic Acid (OXG)
- Proposed draft revision to the Standard for Olive Oils and Olive Pomace Oils (CXS 33–1981): Revision of Sections 3, 8, and Appendix
- Proposed draft revision to the Standard for Named Vegetable Oils (CXS 210–1999):
- Change in the Temperature for the Analysis of Refractive Index and Apparent Density of Palm Superolein
- Replacement of acid value with free fatty acids for virgin palm oil and inclusion of free fatty acids for crude palm kernel oil
- Revision of the essential composition of sunflowerseed oils
- Inclusion of walnut oil, almond oil, hazelnut oil, pistachio oil, flaxseed oil, and avocado oil in the Standard for Named Vegetable Oils (CODEX STAN 210–1999)
- Review of the List of Acceptable Previous Cargoes (Appendix II to CXC 36–1987)—Replies to Circular Letter (CL) 2017/61/OCS–CCFO
- Alignment of food additives provisions in standards for fats and oils (except fish oils) and technological justification for use of emulsifiers in Food Category 02.1.2 of the General Standard for Food Additives (GSFA)
- Report on the outcome of monitoring the conformity of named fish oils with the requirements (especially the fatty acid profile) of fish oil standard and its effect on trade (Replies to CL 2017/74–FO)
- Discussion paper on better management of the work of the Codex Committee on Fats and Oils
- Discussion paper on the Inclusion of unrefined edible tallow in the Standard for Named Animal Fats (CODEX STAN 211–1999)
- Discussion paper on the applicability of the fatty acid composition of other oils listed in Table 1 in relation to their corresponding crude form in the Standard for Named Vegetable Oils (CXS 210–1999)

- Discussion paper on the inclusion of free fatty acids as quality characteristics criteria for refined rice bran oil in in the Standard for Named Vegetable Oil (CXS 210–1999)
- Other Business

Public Meeting

At the January 16, 2019, public meeting, draft U.S. positions on the agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to Paul South, U.S. Delegate for the 26th Session of the CCFO (see **ADDRESSES**). Written comments should state that they relate to activities of the 26th Session of the CCFO.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, the U.S. Codex Office will announce this **Federal Register** publication on-line through the USDA Codex web page located at: *http://www.usda.gov/codex,* a link that also offers an email subscription service providing access to information related to Codex. Customers can add or delete their subscriptions themselves, and have the option to password protect their accounts.

USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How To File a Complaint of Discrimination

To File a Complaint of Discrimination, Complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email.

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410.

Fax: (202) 690–7442, Email: *program.intake@usda.gov.*

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC, on December 12, 2018.

Mary Lowe,

U.S. Manager for Codex Alimentarius.

[FR Doc. 2018–28187 Filed 12–27–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Information Collection Activity; Comment Request

AGENCY: Rural Housing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the U.S. Department of Agriculture (USDA) Rural Housing Service (RHS) invites comments on this information collection for Analyzing Credit Needs and Graduation of Borrowers, for which the Agency intends to request approval from the Office of Management and Budget (OMB) will be requested.

DATES: Comments on this notice must be received by February 26, 2019.

FOR FURTHER INFORMATION CONTACT: Thomas P. Dickson, Rural Development Innovation Center—Regulatory Team 2, USDA, 1400 Independence Avenue SW, STOP 1522, Room 5164, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Email *Thomas.dickson@usda.gov*.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RHS is submitting to OMB for revision.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent by any of the following methods:

- *Mail:* Thomas P. Dickson, Rural Development Innovation Center, 1400 Independence Avenue SW, STOP 1522, Room 5164, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Email: *Thomas.Dickson@wdc.usda.gov*.
- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov*. Follow the instructions for submitting comments.

Title: 7 CFR part 1951, subpart F, Analyzing Credit Needs and Graduation of Borrowers.

OMB Control Number: 0575–0093.

Type of Request: Revision of a currently approved information collection.

Abstract: Section 333 of the Consolidated Farm and Rural Development Act (CONACT) (7 U.S.C. 1983) requires the Agencies to ''graduate'' their direct loan borrowers to other credit when they are able to do so. Graduation is required because the Government loans are not to be extended beyond a borrower's need for subsidized rates or Government credit. Borrowers must refinance their direct Government loan when other credit becomes available at reasonable rates and terms. If other credit is not available, the Agencies will continue to review the account for possible graduation at periodic intervals. The information collected to carry out these statutory mandates is financial data such as amount of income, operating expenses, asset values and liabilities. This information collection is then submitted by the Agencies to private creditors.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 2 hours per response.

Respondents: Public bodies, Not for Profits, or Indian Tribes.

Estimated Number of Respondents: 575.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 585.

Estimated Total Annual Burden on Respondents: 1,160.

Copies of this information collection can be obtained from Robin M. Jones, Innovation Center, at (202) 772–1172, Email: *robin.m.jones@wdc.usda.gov*.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: December 20, 2018.

Curtis M. Anderson,

Acting Administrator, Rural Housing Service.

[FR Doc. 2018–28226 Filed 12–27–18; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Rural Utilities Service (RUS) an agency delivering the U.S. Department of Agriculture (USDA) Rural Development Utilities Programs invites comments on this information collection for Review Rating Summary, RUS Form 300 which approval from the Office of Management and Budget (OMB) will be requested.

DATES: Comments on this notice must be received by February 26, 2019.

FOR FURTHER INFORMATION CONTACT: Thomas P. Dickson, Rural Development Innovation Center—Regulatory Team 2, USDA, 1400 Independence Avenue SW, STOP 1522, Room 5164, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Email *Thomas.dickson@usda.gov*.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB for extension.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent by any of the following methods:

- *Mail:* Thomas P. Dickson, Rural Development Innovation Center, 1400 Independence Avenue SW., STOP 1522, Room 5164, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Email: *Thomas.Dickson@wdc.usda.gov*.
- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov*. Follow the instructions for submitting comments.

Title: Review Rating Summary, RUS Form 300, 7 CFR part 1730.

OMB Control Number: 0572–0025.

Type of Request: Extension of a currently approved information collection.

Abstract: RUS manages loan programs in accordance with the RE Act of 1936, as amended (7 U.S.C. 901 *et seq.*). An important part of safeguarding loan security is to see that RUS financed facilities are being responsibly used, adequately operated, and adequately maintained. Future needs must be anticipated to ensure that facilities will continue to produce revenue and loans will be repaid as required by the RUS mortgage. A periodic operations and maintenance (O&M) review, using the RUS Form 300, in accordance with 7 CFR part 1730, is an effective means for RUS to determine whether the Borrower's systems are being properly operated and maintained, thereby protecting the loan collateral. The O&M review is also used to rate facilities and can be used for appraisals of collateral as prescribed by OMB Circular A–129, Policies for Federal Credit Programs and Non-Taxable Receivables.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 4 hours per response.

Respondents: Not-for-profit institutions.

Estimated Number of Respondents: 217.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 868.

Copies of this information collection can be obtained from Robin M. Jones, Innovation Center, at (202) 772–1172, Email: *robin.m.jones@wdc.usda.gov*.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: December 19, 2018.

Bette B. Brand,

Acting Administrator, Rural Utilities Service.

[FR Doc. 2018–28225 Filed 12–27–18; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF COMMERCE

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: U.S. Census Bureau.

Title: 2020 Census.

The initial **Federal Register** Notice (''2020 Census,'' June 8, 2018, Vol. 83, Number 111, pp. 26643–26653, FR Doc No.: 2018–12365) described the 2020 Census in full. Approval for the 2020 Census is being sought from OMB in phases. The first phase of approval was for the 2020 Census Address Canvassing operation only, which was described in **Federal Register** Notice ''2020 Census,'' October 2, 2018 (Vol. 83, No. 191, pp. 49535–49539, FR Doc No.: 2018–21386). Address Canvassing creates the address list for the census and precedes census enumeration data collection. The remaining operations scoped for the 2020 Census data collection will be described below in this **Federal Register** Notice for an additional 30-day comment period; the full census description will be considered as a substantive change to the approved OMB materials.

OMB Control Number: 0607–1006.

Form Number(s): D–CN(E/S) (included with Address Canvassing approval), D–Q, D–Q(E/S), D–Q–GE, D–Q–GE(S), D–Q–UL, D–Q–UL(E/S), D–Q–TL, D–Q–TL(S), D–Q–UE, D–Q–RA, D–Q–TLRA, D–Q–GERA, D–Q–MV, D–CQ–TL, D–CQ–TL(S), D–CQ–UE, D–CQ–RA, D–CQ–TLRA, D–Q–AS, D–Q–MI, D–Q–GU, D–Q–VI, D–Q–VI(S), D–CQ–AS, D–CQ–MI, D–CQ–GU, D–CQ–VI, D–CQ–VI(S), D–Q–GE–AS, D–Q–GE–MI, D–Q–GE–GU, D–Q–GE–VI, D–Q–GE–VI(S), D–Q–ULPR(E/S), D–Q–GEPR, D–Q–GEPR(S), D–Q–PR(E/S), D–Q–TLPR, D–Q–TLPR(S), D–CQ–TLPR. D–CQ–TLPR(S).

Type of Request: Revision of a currently approved collection.

Number of Respondents: 180,962,929 for all operations in the 2020 Census. The total represents an addition from what was outlined in the previous **Federal Register** Notice due to the addition of an address collection period for a Group Quarters function.

Average Hours per Response: 10 minutes for census enumeration.

Burden Hours: 26,531,593 for 2020 Census. The total represents an addition from what was outlined in the previous **Federal Register** Notice due to the addition of an address collection period for a Group Quarters function.

2020 CENSUS

Operation or category	Estimated number of respondents	Estimated time per response	Total burden hours
Address Canvassing	15,786,734	5 minutes	1,315,561
Address Canvassing Listing QC	1,578,673	5 minutes	131,556
Address Canvassing Subtotal	17,365,407		1,447,117
Geographic Areas Focused on Self-Response (this includes Mailout and Update Leave)			
Internet/Telephone/Paper	80,700,000	10 minutes	13,450,000
Update Leave	11,900,000	5 minutes	991,667
Update Leave QC	1,190,000	5 minutes	99,167
Nonresponse Followup	52,700,000	10 minutes	8,783,333
Nonresponse Followup Reinterview	2,760,000	5 minutes	230,000
Self-Response Quality Assurance	250,000	10 minutes	41,667
Field Verification	400,000	2 minutes	13,333
Field Verification QC	40,000	2 minutes	1,333
Coverage Improvement	3,200,000	7 minutes	373,333
Non-ID Processing Phone Followup	750,000	5 minutes	62,500
Self-Response Areas Subtotal	153,890,000		24,046,043
Geographic Area Focused on Update Enumerate			
Update Enumerate Production	506,000	12 minutes	101,200
Update Enumerate Listing QC	50,600	5 minutes	4,217
Update Enumerate Reinterview	25,300	10 minutes	4,217
Update Enumerate Subtotal	581,900		109,634
Group Quarters			
GQ Update Program	7,168	10 minutes	1,195
GQ Advance Contact (facility)	297,000	10 minutes	49,500
GQ Enumeration—eResponse (facility)	14,300	20 minutes	4,767
GQ Enumeration—person contact	8,000,000	5 minutes	666,667
Group Quarters QC	8,500	5 minutes	708
Group Quarters Subtotal	8,326,968		722,837
Enumeration at Transitory Locations—Advance Contact	50,000	10 minutes	8,333
Enumeration at Transitory Locations—Units	600,000	10 minutes	100,000
Federally Affiliated Count Overseas	82	5 minutes	7
Island Areas Censuses—Housing Units	138,281	40 minutes	92,187
Island Areas Censuses—Group Quarters	10,291	30 minutes	5,146
Totals	180,962,929		26,531,593

Overview of 2020 Census Operations

Below is a summary of the needs of uses of the 2020 Census, followed by a more detailed overview of data collection operations. The geographic areas discussed in this notice refer only to the 50 states, the District of Columbia, and Puerto Rico, unless otherwise noted. The 2020 Census also includes the Island Areas (U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands).

Needs and Uses:

Article 1, Section 2 of the United States Constitution mandates that the U.S. House of Representatives be reapportioned every ten years by conducting a national census of all residents. In addition to the reapportionment of the U.S. Congress, Census data are used to draw legislative district boundaries within states. Census data are also used by numerous agencies to determine funding allocations for the distribution of an estimated $675 billion of federal funds each year.

The Census Bureau plans to conduct the most automated, modern, and dynamic decennial census in history. The 2020 Census includes design changes in four key areas, discussed below:

(1) New methodologies to conduct the Address Canvassing operation.

(2) Innovative ways of optimizing self-response.

(3) The use of administrative records and third-party data to reduce the Nonresponse Followup (NRFU) operation workload.

(4) The use of technology to reduce the manual effort and improve the productivity of field operations, while decreasing the amount of physical space required to perform the field operations.

(1) Reengineering Address Canvassing

An accurate address list is the cornerstone of a successful census. In order to manage the work for decennial census, the Census Bureau uses the address and physical location of each place where someone is, or could be, living. The Census Bureau maintains this address list and spatial data for the

United States and Puerto Rico in its Master Address File (MAF)/ Topologically Integrated Geographic Encoding and Referencing (TIGER) System database.

This database was created using the address files from the 1990 Census and has been subsequently and regularly updated using:

- Information collected from decennial census operation updates, including address and spatial updates.
- The Delivery Sequence File of addresses from the United States Postal Service (USPS).
- Input from tribal, state, and local governments and third parties, including address and boundary updates from various programs conducted over the decade, such as the Local Update of Census Addresses operation.
- Information collected in other Census Bureau programs, such as the American Community Survey.

The purpose of Address Canvassing is (1) to deliver a complete and accurate address list and spatial database for enumeration and tabulation, and (2) to determine the type and address characteristics for each living quarter. Prior to a field Address Canvassing data collection, the Census Bureau will delineate the entire land area of the United States, Puerto Rico, and Island Areas into Type of Enumeration Areas (TEAs). Most stateside United States living quarters will be delineated into the self-response area, where the census address list will be created before the census, census materials will be provided in the mail, and self-response modes will be supported and promoted. Other areas will be designated for Update Leave, Update Enumerate (including Remote Alaska), Military Enumeration, or Island Areas Enumeration.

For the 2020 Census there will be a full Address Canvassing of the country that will consist of In-Office Address Canvassing complemented with In-Field Address Canvassing. In-Office Address Canvassing is the process of using empirical geographic evidence (*e.g.,* imagery, comparison of the Census Bureau's address list to address lists provided by the United States Postal Service and governmental units that partner with the Census Bureau) to assess the current address list and make changes where necessary. This component also detects and captures areas of change from high-quality administrative records and third-party data. Advancements in technology have enabled continual address and spatial updates to occur throughout the decade as part of the In-Office Address Canvassing effort. Since 2015, satellite imagery has been used for the identification of areas where there are changes in living quarters. Where the necessary updates can be captured from electronic sources and are deemed to be sufficiently accurate, In-Office Address Canvassing will complete the update process prior to the census. The remaining blocks will become eligible to be sent to In-Field Address Canvassing for updating on the ground by field staff.

(2) Optimizing Self-Response

The goal of this innovation area is to make it as easy and efficient as possible for people to respond to the 2020 Census by offering new response options through the internet and telephone, in addition to the traditional mailback paper questionnaire option. Self-response reduces the need to conduct in-person follow-up operations to complete the enumeration, by far the most expensive method of data collection. To that end, the Census Bureau will motivate people to respond, as well as make it easy for people to respond, from any location at any time, even if they don't have the Census Bureau's preassigned ID for the address.

The importance of responding to the 2020 Census will be communicated in a variety of ways, including through mailings, questionnaire delivery, advertising, and partnership efforts. In particular, the Integrated Partnership and Communications operation is responsible for communicating the importance of responding to the 2020 Census.

Internet response represents a substantial innovation for the Census Bureau. The internet was not a response option in the 2010 Census. The internet response option has been included in multiple tests leading up to the 2020 Census: The 2014 Census Test; all three census tests performed in 2015; the 2016 Census Test; the 2017 Census Test; and the 2018 End-to-End Census Test. It has also been used in the American Community Survey since 2013.

(3) Utilizing Administrative Records and Third-Party Data

For the 2020 Census, ''administrative records'' and ''third-party data'' are terms used to describe microdata records contained in files collected and maintained by Federal, state, and local government agencies (''administrative records'') and commercial entities (''third-party data'') for administering programs and providing services. For many decades, the Census Bureau has successfully and securely used administrative records and third-party data for statistical purposes. For the 2020 Census, the Census Bureau intends to use administrative records from both internal sources, such as data from prior decennial censuses and the American Community Survey, and from a range of other Federal agencies, including the Internal Revenue Service (IRS), the Social Security Administration, the Centers for Medicare and Medicaid Services, the Department of Housing and Urban Development, the Indian Health Service, the Selective Service, and the U.S. Postal Service. The Census Bureau is also working to acquire state government administrative records from enrollment in Federal block grant programs, such as the U.S. Department of Agriculture's Supplemental Nutrition Assistance Program and the Special Supplemental Nutrition Program for Women, Infants, and Children.

Throughout the decade, the Census Bureau continuously conducted analyses and assessments to verify that the proposed uses of administrative records and third-party data sources in the 2020 Census were appropriate in each instance. Based on this research, testing, and analyses, the Census Bureau announced its plans in November 2015 to utilize administrative records and third-party data in the 2020 Census. The 2020 Census Operational Plan calls for employing this information for the following purposes:

I. Consistent with previous decennial censuses, the Census Bureau will utilize administrative records from federal and state government agencies and third-party data to refine contact strategies and build and update the residential address list.

II. Also consistent with previous decennial censuses, the Census Bureau will utilize federal and state administrative records to edit or impute invalid, inconsistent, or missing responses.

III. The new use of administrative records for the 2020 Census is to use data exclusively from federal administrative records to improve the accuracy and efficiency of the NRFU operation by:

a. reducing followup on vacant housing units and nonresidential addresses, as designated by administrative records.

b. enumerating households that do not self-respond and whom we were unable to contact after six mailings and one in-person field visit.

For each of the purposes listed in items II, IIIa, and IIIb, the Census Bureau will use or plans to use administrative data only when it can confirm empirically across multiple sources that the data are consistent, of high quality, and can be accurately

applied to the addresses and households in question. The Census Bureau plans to enumerate households utilizing administrative records only from Federal government agencies, such as the IRS. Use of administrative records for nonresponding addresses will be evaluated under a strict set of Census Bureau rules throughout the process to ensure completeness and accuracy.

Based on the research and tests conducted, the Census Bureau estimates that under the current operational plan, Federal administrative records will be used to enumerate up to 6.2 million households of the projected total of approximately 62 million addresses that are expected to be in the NRFU workload for the 2020 Census. These 6.2 million households represent less than five percent of the approximately 147 million addresses in the Census master address file. Where the Census Bureau does not have confidence in the data, such as when the data are inconsistent or missing in the Federal administrative records, the household will remain in the NRFU workload to be enumerated in person.

(4) Reengineering Field Operations

The final innovation area, ''Reengineering Field Operations,'' has a goal of using technology to manage the 2020 Census fieldwork efficiently and effectively, and as a result, reduce the staffing, infrastructure, and brick and mortar footprint for the 2020 Census. The Census Bureau plans to provide most listers and enumerators with the capability to work completely remotely and perform all administrative and data collection tasks directly from a mobile device.

Supporting Documents About the 2020 Census Design and the 2020 Census Objectives

Multiple Census Bureau publications provide background on the plans for the 2020 Census. The 2020 Census Operational Plan *v3.0,* which was published in September 2017, describes each of the 35 operations scoped and defined for the census. Every task performed for the 2020 Census must be assigned to one of the 35 operations. The Operational Plan also summarizes the major findings of the census tests performed this decade. Moreover, this document shows the planned design of the 2020 Census as of September 2017 and identifies design decisions made, as well as remaining decisions to be made using census test results. (Note that the 2020 Census Operational Plan v4.0 will be released publicly in February 2019.) Key design components for the 2020 Census for every operation are discussed in Chapter 5 of the 2020 Census Operational Plan. In addition, for most of the 2020 Census Operations, the Census Bureau is developing a Detailed Operational Plan to document objectives and procedures of the operation, major tasks involved in implementation, the overall workflow, and the overall resources required. The Operational Plan and Detailed Operational Plans available at *www.census.gov* can be reference for more details about the tasks performed for each operation.

Type of Enumeration Areas

Prior to the census, it is necessary to delineate all geographic areas into Type of Enumeration Areas (TEAs). These TEAs describe what methodology will be used for census material delivery and household enumeration in order to use the most cost-effective enumeration approach for achieving maximum accuracy and completeness. TEAs also describe what methodology will be used for updating the address frame. For the United States and Puerto Rico, TEAs are delineated at the block level based on the address and spatial data in the MAF/TIGER database.

The MAF/TIGER does not contain data for the Island Areas, so a separate TEA is designated for these areas. The TEAs designated for the 2020 Census are:

* TEA 1 = Self-Response.
* TEA 2 = Update Enumerate.
* TEA 3 = Island Areas.
* TEA 4 = Remote Alaska.
* TEA 5 = Military.
* TEA 6 = Update Leave.

The most common enumeration method by percentage of households is self-response (TEA 1), where materials will be delivered to each address through the mail, and self-response will be supported and promoted. After the initial self-response phase, nonresponding households will be enumerated in the NRFU operation. Update Enumerate uses the methodology of updating the address list and attempting household enumeration at the same time. This will be used for a very small portion of the addresses in country, such as those with access problems or minimal mail service. The Island Areas are not included in MAF/TIGER. For these areas, the address list will be created and enumeration will be attempted at the same time. Remote Alaska uses the Update Enumerate methodology but in remote areas of Alaska that require a different schedule for enumeration due to changes in transportation accessibility and living situations related to the presence of ice. Military areas require special procedures due to security restrictions. Update Leave is an update of the address list at the same time that a questionnaire is left at each individual housing unit and the enumeration data is expected to be returned or submitted by a respondent. Puerto Rico is designated as entirely Update Leave (except for military locations) in order to create a current address list at the time of the census, in response to changes that may have occurred due to natural disasters.

A. Content and Forms Design

The Content and Forms Design (CFD) operation is responsible for identifying and finalizing the content and design of questionnaires and associated nonquestionnaire materials. To support the 2020 Census, the CFD operation ensures content consistency across data collection modes and operations, as question wording varies depending on mode of data collection. The CFD operation is responsible for creating, refining, and finalizing instrument specifications for all data collection modes—internet, phone, paper, and field enumeration. This is a significant departure from the 2010 Census, which relied on paper for virtually all data collection.

As required by law (Title 13, United States Code), the subjects planned for the 2020 Census were submitted to Congress on March 28, 2017, and the questions planned for the 2020 Census were submitted to Congress on March 29, 2018. The proposed questions for the 2020 Census questionnaire include age, citizenship, Hispanic origin, race, relationship, sex, and tenure.

B. Language Services

The Language Services operation provides questionnaires and related materials in non-English materials for respondents of Limited English Proficiency. For the 2020 Census, the internet instrument and Census Questionnaire Assistance will be available in Spanish, Chinese, Vietnamese, Korean, Russian, Arabic, Tagalog, Polish, French, Haitian Creole, Portuguese, and Japanese, in addition to English. The bilingual paper questionnaire, enumerator instrument, and field enumeration materials will be available in Spanish. In addition, language guides and language identification cards will be available in the following languages: Albanian, Amharic, Arabic, Armenian, Bengali, Bosnian, Bulgarian, Burmese, Chinese, Croatian, Czech, Dutch, Farsi, French, German, Gujarati, Greek, Haitian Creole, Hebrew, Hindi, Hmong, Hungarian, Igbo, Ilocano, Indonesian, Italian,

Japanese, Khmer, Korean, Lao, Lithuanian, Malayalam, Marathi, Navajo, Nepali, Polish, Portuguese, Punjabi, Romanian, Russian, Serbian, Sinhala, Slovak, Somali, Spanish, Swahili, Tagalog, Tamil, Telugu, Thai, Tigrinya, Turkish, Twi, Ukranian, Urdu, Vietnamese, Yiddish, and Yoruba.

C. Address Canvassing

Address Canvassing, as described above, consists of two major components: In-Office Address Canvassing and In-Field Address Canvassing. In-Office Address Canvassing is the process of using empirical geographic evidence (*e.g.,* imagery, comparison of the Census Bureau's address list to partner-provided lists) to assess the current address list and make changes where necessary. This component detects and captures areas of change from high quality administrative records and third-party data. Advancements in technology have enabled continual address and spatial updates to occur throughout the decade as part of the In-Office Address Canvassing effort.

Areas not resolved by In-Office Address Canvassing become the universe of geographic areas worked during In-Field Address Canvassing. Only the In-Field component of Address Canvassing involves in person collection of information from residents at their living quarters.

For In-Field Address Canvassing, an extract of addresses from the MAF is created, and this address list is verified and updated in the field, as needed. Updates can include adding units missing from the address list and removing nonexistent or nonresidential units from the list. In addition, living quarters are classified as housing units or group quarters. Group quarters are living quarters where people who are typically unrelated have group living arrangements and frequently are receiving some type of service. College/university student housing and nursing/skilled-nursing facilities are examples of group quarters.

The MAF also has geographic data for transitory locations, which include recreational vehicle parks, campgrounds, racetracks, circuses, carnivals, marinas, hotels, and motels. People residing at transitory locations during the census are recorded as living in housing units located at transitory locations.

During In-Field Address Canvassing, listers knock on doors at every structure in the assignment in an attempt to locate living quarters and classify each living quarter as a housing unit, group quarter, or transitory location. If someone answers, the lister will provide a Confidentiality Notice and ask about the address in order to verify or update the information, as appropriate. The listers will then ask if there are any additional living quarters in the structure or on the property. If there are additional living quarters, the listers will collect/update that information, as appropriate. In addition, there will be a check on the quality of the address listing work on approximately 10 percent of the address listing workload.

The results of Address Canvassing are processed with MAF/TIGER and then used as input into the creation of the census address list for enumeration. This address list in turn, is used in conjunction with the TEA delineation to determine which materials should be printed for use in the operation(s) designated for each area of the country.

D. Forms Printing and Distribution

The Forms Printing and Distribution operation prints and distributes paper forms to support the 2020 Census mailing strategy and enumeration of the population. The Forms Printing and Distribution operation is responsible for the printing and distribution of mailed internet invitations, reminder cards or letters, and questionnaire mail packages where materials are mailed, in multiple languages as determined by the Language Services operation. The letters, reminder cards, and questionnaires are delivered according to the mailing contact strategy, which is part of the internet Self-Response operation (discussed below).

Every address record will be identified by an ID, which will be printed on questionnaires and letters and used for tracking responses. Paper questionnaires and responses from field operations will be linked to the ID in data capture. Internet and telephone respondents will be requested but not required to provide the ID. When an ID is not provided, these will be considered Non-ID responses. The Non-ID operation is discussed below.

E. Internet Self-Response

The internet Self-Response (ISR) operation performs the following functions:

- Maximize online response to the 2020 Census through contact strategies and improved access for respondents.
- Collect response data via the internet to reduce paper and the NRFU universe.

Contact Strategies for Mailing Materials

''Contact strategies for mailing materials'' refers to all attempts by the Census Bureau to make direct contact with individual households by mail. Types of contact strategies include invitation letters, postcards, and questionnaires mailed to households.

A primary objective of the 2020 Census is for a majority of self-respondents to complete their census questionnaire online. An approach called ''Internet First,'' in which the first mailing includes an invitation to respond to the census online, has been developed for TEA 1 areas to encourage respondents to use the internet. Subsequent mailings will be reminders to respond to the census online, until all remaining nonresponding households in the internet First areas receive a paper questionnaire in the fourth mailing. In TEA 1 areas with low internet coverage or connectivity or other characteristics that may make it less likely the respondents will complete the census questionnaire online, the ''Internet Choice'' contact strategy will be designated for use instead. This strategy includes both an invitation to complete the census online and a paper questionnaire as part of the first mailing. The Census Bureau anticipates about 20 percent of the households in the self-response TEA will receive the internet Choice treatment.

In summary, the contact strategies for mailing materials including mailing date are outlined in the table below:

Panel	Cohort	Mailing 1 *Letter (Internet First) or Letter + Questionnaire (Internet Choice)*	Mailing 2 *Letter*	Mailing 3* *Postcard*	Mailing 4* *Letter + Questionnaire*	Mailing 5* *"It's not too late" Postcard*
Internet First	1	March 12, 2020	March 16, 2020	March 26, 2020	April 8, 2020	April 20, 2020
	2	March 13, 2020	March 17, 2020	March 27, 2020	April 9, 2020	April 20, 2020
	3	March 19, 2020	March 23, 2020	April 2, 2020	April 15, 2020	April 27, 2020
	4	March 20, 2020	March 24, 2020	April 3, 2020	April 16, 2020	April 27, 2020
Internet Choice	N/A	March 13, 2020	March 17, 2020	March 27, 2020	April 9, 2020	April 20, 2020

* Targeted only to nonrespondents.

Internet Self-Response Instrument

The internet application and all related support systems are designed to handle the volume of responses that are expected to be received by internet in the 2020 Census. It is imperative that the application and systems service the scale of the operation in order to ensure that users do not experience delays while completing the survey or unavailability of the application. In addition, the internet application and other associated systems were developed to adhere to the highest standards of data security in order to ensure that all respondent data are secure and confidential.

F. Census Questionnaire Assistance

The Census Questionnaire Assistance (CQA) operation has three primary functions:

- Provide questionnaire assistance by answering questions about specific items on the census questionnaire or other frequently asked questions about the census.
- Provide an option for respondents to complete a census interview over the telephone.
- Provide outbound calling in support of Coverage Improvement (discussed in the NRFU section below).

Respondents using the internet instrument will have the ability to contact CQA by telephone when web-based self-service help tools cannot answer their questions. Each of the 13 supported languages, including English, will have its own toll-free number for callers. Respondents calling the English and Spanish language lines will initially be presented with a self-service Interactive Voice Response system, offering an assortment of automated responses to Frequently Asked Question information. At any time, respondents may opt to transfer to a customer service representative, who is prepared to further assist and enumerate them. All callers who need assistance in other languages will be connected directly to an appropriately-skilled customer service representative fluent in the language, based on the toll-free number called.

G. Update Leave

The Update Leave (UL) operation is designed for areas where the majority of housing units either do not have mail delivered to the physical location of the housing unit or the mail delivery information for the housing unit cannot be verified. Designated during TEA delineation, UL can occur in geographic areas that:

- Do not have city-style addresses.
- Do not receive mail through city-style addresses.
- Receive mail at post office boxes.
- Have been affected by major disasters.

The purpose of the UL operation is to update the address and feature data for the area assigned and to leave an internet Choice questionnaire package at every housing unit identified to allow the household to self-respond. Enumerators do not attempt to enumerate the household in person at this point.

Occupants can respond online, using the ID printed on the questionnaire, or they can fill out and mail back the paper questionnaire. If they have questions or wish to respond on the telephone, they can call the CQA number, which is provided in the package.

The UL operation includes mailing a reminder letter and a reminder postcard to addresses that are capable of receiving mail within the areas designated for UL. These mailed materials include the ID for the given address and the website address for the household to use in order to respond online. As in TEA 1, where all materials are mailed to housing units, any households that do not self-respond will be contacted during the NRFU operation. Finally, the UL operation performs a check on the quality of the address listing work (quality control [QC]) on approximately 10 percent of the production workload.

H. Update Enumerate

The Update Enumerate (UE) operation is designated for areas where the initial visit requires enumerating at the living quarters while updating the address list. The majority of the operation will occur in remote geographic areas that have unique challenges associated with accessibility. UE can occur in the following geographic areas:

- Remote Alaska.
- Areas that were a part of the 2010 Census Remote UE operation, such as northern parts of Maine and southeast Alaska.
- Select American Indian areas that request to be enumerated in person during the initial visit.

Note that the areas included in the 2010 Census Remote Update Enumerate operation might be delineated into TEA 1 or TEA 6 for the 2020 Census, based on changes in address type or mailability.

In the UE operation, field staff update the address and feature data and enumerate respondents in person. The address and feature data are updated on paper address registers and paper maps. The enumeration is collected on paper questionnaires. Field staff conducting UE follow a specific contact strategy for the remote locations and conduct any needed follow-up. The UE operation will promote the quality of the address work and of the enumeration data by having staff work in pairs and by supervisors reviewing all data collected for completion and any anomalies. Supervisors will rework an area to collect geographic and/or enumeration data when necessary to improve the

quality of the collected data. Formalized, separate Listing QC and Reinterview operations will not be conducted for the operation in 2020.

I. Non-ID Processing

For the 2020 Census, respondents will be encouraged, but not required, to use the Census Bureau's preassigned ID for the living quarters. Within the internet instrument, and, consequently, within CQA, it will be possible for respondents to submit their census response without the preassigned ID. Non-ID Processing is the effort to associate census responses that lack a Census ID with records included on the Census Bureau's 2020 Census address frame. This processing can occur through automated or clerical procedures. With the ISR instrument collecting the response and address data, it will be possible to perform automated processing to determine whether the address was already included on the address frame and extracted from the MAF. For those Non-ID responses not matched during automated processing, a clerical operation will make a further attempt to match the address to the 2020 Census address frame and validate nonmatching addresses. Some of the clerical work may require contacting the respondent to help determine a match or to verify the existence and location of the address; this is known as Non-ID Processing Phone Followup. Any nonmatching address whose existence and location cannot be verified by the clerical Non-ID operation will become a Field Verification assignment, handled as a component of the NRFU operation. Notably, Field Verification is only an address verification effort and does not include collection of the census questionnaire data.

J. Nonresponse Followup

The NRFU operation serves two primary purposes:

- Determines or resolves housing unit status for addresses included in the NRFU workload.
- Enumerates housing units that are determined to have a housing unit status of occupied.

The NRFU workload is comprised of addresses from a number of sources, including:

- Nonresponding addresses in TEAs 1 and 6.
- Blank mail returns or mail returns otherwise deemed to be too incomplete.
- Addresses considered to represent new or recently completed housing. These addresses are identified by the spring 2020 USPS Delivery Sequence File and other special efforts undertaken to identify new housing around the time of the census—New Construction and Housing Unit Count Review; addresses upheld in the Local Update of Census Addresses appeals process; and potentially other addresses determined to require follow-up after the initial enumeration universe is established.
- Addresses with a vacant status (reported as 0 occupants) from internet Self-Response.
- Field Verification cases.
- Coverage Improvement cases.
- Self-Response Quality Assurance cases.

The 2020 Census NRFU operation will be different from the NRFU operation conducted in the 2010 Census. The Census Bureau will implement a NRFU operational design that utilizes a combination of the following:

- Automation to facilitate data collection.
- Administrative records and third-party data usage to reduce the workload.
- Reengineering of staffing and management of field operations.
- A Best-Time-to-Contact model to increase the likelihood of making contact attempts when an enumerator will find people at home.

After giving the population in the United States and Puerto Rico an opportunity to self-respond to the 2020 Census, the Census Bureau will use the most cost-effective strategy for contacting and counting people to ensure an accurate count.

During the NRFU operation, enumerators will visit each housing unit designated for followup and determine whether the unit exists and then the occupancy status of the unit on April 1, 2020. If the unit exists, they complete an interview using an automated application on a smartphone. The devices will use a secure Census Bureau-provided enumeration application solution for conducting the NRFU field data collection. Enumeration data and workload updates will be transmitted between the NRFU instruments and response processing systems on a regular basis. Various techniques will be used during NRFU to make the data collection as efficient as possible. The number of allowed attempts to contact will be controlled within the automated instrument, and best-time-to-contact modeling will be used in the creation of the daily assignments. Every case in the NRFU workload will initially have a maximum of six unique contact days. (During the Closeout phase of the operation, cases may receive additional attempts, as necessary, to resolve incomplete cases.) After a third attempt to contact a household does not yield a respondent, a case will become proxy-eligible. A proxy is a neighbor, landlord, real estate agent, or other knowledgeable person who can provide information about the unit and the people who live there. An enumerator should attempt three proxies after each noninterview for a proxy-eligible case.

In addition to the initial in-person contact attempt, these addresses will also receive a final mailing that encourages occupants to self-respond to the 2020 Census. If the initial in-person contact attempt was unsuccessful, the Census Bureau will use administrative records for the unit status or as the household response data when it has high-quality administrative records from trusted sources. Undeliverable-as-Addressed information from the USPS will serve as the primary administrative records source for the identification of vacant addresses and addresses that do not exist. Examples of sources of administrative records and third-party data used to enumerate occupied housing units include IRS Individual Tax Returns, IRS Information Returns, and the Center for Medicare and Medicaid Statistics Medicare Enrollment Database. Addresses will also be removed from the workload throughout the course of the NRFU operation as self-responses continue to be received.

Early NRFU

Early NRFU occurs in areas where there are high concentrations of college students living in off-campus housing who are unlikely to be present during the scheduled dates for regular NRFU. The enumeration procedures for early NRFU are the same as regular NRFU, but just conducted at an earlier time to accommodate the schedules of select colleges and universities. Any early NRFU addresses that are unresolved by the start of NRFU will receive additional field attempts during regular NRFU.

NRFU Reinterview

The NRFU Reinterview program will check the quality of the work done by enumerators in NRFU. A sample of approximately 5 percent of NRFU interviews will be selected for verification through NRFU Reinterview. The NRFU Reinterview program involves conducting an independent field reinterview for selected cases to verify that an enumerator conducted the interview and followed procedures. The NRFU Reinterview interviewer/enumerator always attempts to contact the respondent from the original interview, which may be a household member, neighbor, or some other proxy. If the original respondent confirms that

he/she was contacted and an enumerator conducted the original interview, the NRFU Reinterview interviewer/enumerator collects roster names and ends the interview. If the respondent was not contacted or does not know if an enumerator conducted the original interview, the NRFU Reinterview interviewer/enumerator conducts a full interview with the respondent.

During the early weeks of NRFU, enumerators will conduct interviews with multiunit structure managers to determine the occupancy status of nonresponding units within the multiunit structure. This Manager Visit (MV) allows enumerators to identify several units as vacant or delete without having to attempt each unit individually. Enumerators have a maximum of two unique contact days to complete the MV cases. The MV Reinterview program will check the quality of work done by enumerators during the MV and will target MVs with high numbers of vacant and delete unit statuses. During the MV Reinterview, the enumerator will ask to speak to the manager from the original MV interview. If the respondent confirms that he/she was contacted and an enumerator conducted the original interview, the MV RI enumerator asks about a subset of the list checked during the MV. If the respondent was not contacted or does not know if an enumerator conducted the original MV interview, the MV Reinterview enumerator conducts a full interview and asks about the entire list during the MV.

The NRFU universe also includes cases from Non-ID Processing that were not able to be matched to the address frame. As discussed in the Non-ID section, these are Field Verification (FV) cases, where the enumerators attempt to locate the address in question and collect its Global Positioning System (GPS) coordinates. A sample of the FV cases is selected for verification through FV QC. Since FV cases only require an enumerator to determine the existence of an address and will not require an interview with a respondent, the FV QC program will consist of an independent check of the production enumerators where the FV QC enumerator will conduct the same procedures as the FV enumerator. FV cases, along with their QC component, have a maximum of one field contact day.

The Coverage Improvement operation resolves categories of erroneous enumerations (people counted in the wrong place or counted more than once) and omissions (people who were missed) identified through collected enumeration data. The Coverage Improvement operation will attempt to resolve these issues from both self-response and NRFU responses. All cases that are selected for Coverage Improvement with a valid phone number will be subject to an interview attempt by a CQA Customer Service Representative. The workload identified for the Coverage Improvement operation will be responses where a household enumeration shows a difference between the answer for the number of people within the household and the number of people enumerated, and answers to coverage questions in the initial enumeration that reflect potential coverage errors. Automation and the internet self-response option should reduce the prevalence of these types of respondent errors as compared to the 2010 Census, which was completed almost entirely on paper questionnaires.

Self-Response Quality Assurance cases are generated as part of the quality assurance efforts for self-response. This re-collection of the enumeration data will also be worked within NRFU.

K. Group Quarters

The 2020 Census Group Quarters (GQ) operation will enumerate people living or staying in group quarters and will provide an opportunity for people experiencing homelessness and receiving service at a service-based location, such as a soup kitchen, to be counted in the census.

The 2020 Census GQ operation consists of the following components:

- In-Office GQ Advance Contact.
- GQ Enumeration.
- Service-Based Enumeration.
- Military Enumeration.
- Maritime Vessel (Shipboard) Enumeration.

In-Office GQ Advance Contact

The In-Office GQ Advance Contact is an in-office activity conducted in the area census offices. Preferred dates, times, methods of enumeration, and expected population on Census Day will be collected. Special instructions or concerns related to privacy, confidentiality, and security will also be addressed.

GQ Enumeration

The GQ Enumeration will cover all 50 states, the District of Columbia, and Puerto Rico. An additional late GQ enumeration phase allows for the stakeholder identification and enumeration of group quarters that may have been missed during the earlier time frame. The primary method of conducting in-person enumeration of people residing in group quarters will be by using the Individual Census Questionnaire as the paper data collection instrument. In-person interviewing is planned for all group quarter types that are part of the field enumeration workload.

GQ Enumeration—eResponse Data Transfer

eResponse uses electronic data transfer from GQ administrators to the Census Bureau. Client-level data from systems maintained by GQ Administrators can be transferred to a standardized Census Bureau system that will accept electronically submitted data in a standardized template. These data will be accepted in lieu of use of the Individual Census Questionnaire if data are deemed to be of sufficiently high quality and completeness.

Service-Based Enumeration

The Service-Based Enumeration is specifically designed to approach people using service facilities because they may be missed during the traditional enumeration at housing units and group quarters. These service locations and outdoor locations include the following:

- Shelters: Shelters with sleeping facilities for people experiencing homelessness; shelters for children who are runaways, neglected, or experiencing homelessness.
- Soup kitchens.
- Regularly-scheduled mobile food vans: Stops where regularly scheduled mobile food vans distribute meals.
- Targeted non-sheltered outdoor locations.

For the 2020 Census, the Service-Based Enumeration operation will be conducted over the three-day period that ends on April 1, 2020, Census Day. Service providers for shelters, soup kitchens, and regularly-scheduled mobile food vans will be given the flexibility for their facility to be enumerated on any one of the three days. Targeted nonsheltered outdoor locations will be enumerated April 1, 2020. Field Partnership Specialists with local knowledge will help to identify non-sheltered outdoor locations during the time of the census.

Domestic Violence Shelters

Domestic violence shelters are facilities for those seeking safety from domestic violence. Domestic violence shelters are enumerated using special procedures and specially trained personnel. These special procedures include inviting members for the State Coalition of the ''National Coalition Against Domestic Violence'' to participate in the 2020 Census Group

Quarters Update Program to create a comprehensive and current address listing for domestic violence shelters. These special procedures are designed to protect the safety and security of respondents being enumerated at these locations.

Military Enumeration and Maritime Vessel Enumeration

Military Enumeration involves enumeration of people living in GQs or barracks on stateside military installations or military vessels. Military installations are fenced, secured areas used for military purposes. An important feature of the military enumeration operation is that it includes both group quarters and housing units. A military vessel is defined as a United States Navy or United States Coast Guard vessel assigned to a home port in the United States. See part Q for methods we will use to count overseas military.

L. Paper Data Capture

The Paper Data Capture operation scans and converts data from 2020 Census paper questionnaires. Core sources for the Paper Data Capture operation include housing unit self-response questionnaires mailed back by respondents and Group Quarters Individual Census Reports. The Census Bureau's in-house Integrated Computer Assisted Data Entry system is used to capture paper responses from questionnaires. Each write-in and checkbox data field is data-captured, and Optical Character Recognition and Optical Mark Recognition are performed. If Key From Image is needed for forms that cannot be processed through Optical Character Recognition or Optical Mark Recognition, staff are presented the image of the page and are able to clarify, correct, or add to what was captured. The Census Bureau maintains the data, images of the forms, and the paper forms themselves until confirmation that the data have been correctly captured, at which point the paper forms are sent to destruction while the data and images are retained. The Census Bureau maintains the images for archiving purposes until such time as the National Archiving and Records Administration takes possession of the images for permanent archiving.

M. Response Processing

The Response Processing Operation (RPO) supports the three major components of the 2020 Census: Pre-data collection activities, data collection activities, and post-data collection activities. Specifically, the operation supports the following activities:

Pre-Data Collection

- Create and distribute the initial 2020 Census enumeration universe of living quarters.
- Assign the specific enumeration strategy for each living quarter based on case status and associated paradata.

Data Collection

- Create and distribute workload files required for enumeration operations.
- Track case enumeration status.
- Check for suspicious returns.

Post-Data Collection

- Run post-data collection processing actions in preparation for producing the final 2020 Census results.

N. Redistricting Data Program

The purpose of the 2020 Census Redistricting Data Program (RDP) is to provide to each state the legally required redistricting data tabulations by the mandated deadline of one year from Census Day: April 1, 2021. In compliance with Public Law (Pub. L.) 94–171, the Census Bureau will tabulate for each state the total population counts by race and Hispanic origin. The Census Bureau will tabulate these counts for the total population and for the population age 18 and over in a prototype redistricting data file released as part of the 2018 End-to-End Census Test. The Census Bureau intends to work with stakeholders, specifically ''the officers or public bodies having initial responsibility for the legislative apportionment of each state,'' to solicit feedback on the content of the prototype redistricting data file. If those stakeholders indicate a need for tabulations of citizenship data on the 2020 Census Public Law 94–171 Redistricting Data File, the Census Bureau will make a design change to include citizenship as part of that data. That new design would then be published in the **Federal Register** after it is completed in the summer of 2019. The Census Bureau will also tabulate housing unit counts by occupancy status (occupied or vacant) and provide total population counts for group quarters by group quarters type. For the prototype and for the 2020 Census Redistricting Data Files, the Census Bureau will provide these tabulations for a variety of standard census geographic areas including state, county, place, tract, and tabulation block. If states provide their congressional, legislative, and voting district boundaries through the Redistricting Data Program, the Census Bureau will also provide the tabulations for these areas. Tabulations by congressional, legislative, and voting districts will be available for the 50 states; equivalent tabulations will be available for the District of Columbia and the Commonwealth of Puerto Rico.

This program has a separate OMB clearance number. There is more detail about this program in **Federal Register** Notice ''Redistricting Data Program,'' July 26, 2018, (Vol. 83, No. 144, pp. 35458–35460. FR Doc No. 2018–15972).

O. Data Products and Dissemination

The Data Products and Dissemination (DPD) operation performs three primary functions:

- Prepare and deliver the 2020 Census apportionment data for the President of the United States to provide to Congress by December 31, 2020.
- Tabulate 2020 Census data products for use by the states for redistricting.
- Tabulate and disseminate 2020 Census data for use by the public.

The DPD operation produces information required by Public Law to satisfy apportionment and redistricting requirements. Title 13, U.S. Code (U.S.C.) requires that the apportionment population counts be delivered to the Office of the President within nine months of the census date. Apportionment counts are based on the Census Unedited File, the Federally Affiliated Overseas Personnel and Dependents Count File, and a geographic file of state changes. For the 2020 Census, the census date is April 1, 2020, and the President will receive the counts by December 31, 2020.

The DPD operation is also responsible for the production and dissemination of many data products, including national and state summary files, tabulated informational files, and data comparison tables. This includes electronic and printed products that cover population and housing unit tabulations, geographical maps, and products specific to the Island Areas (U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands).

The Center for Enterprise Dissemination Services and Consumer Innovation initiative is responsible for developing enterprise dissemination requirements. DPD is conducting a thorough review of the past product design (cross-tabulations and iterations of characteristics), while also looking to ensure that users can find data after the 2020 Census quickly and easily. The Census Bureau will undertake a thorough analysis of the proposed 2020 Census data products in keeping with our sworn obligation to protect

respondents' data as data stewards under Title 13. **Federal Register** Notice ''*Soliciting Feedback from Users on 2020 Census Data Products,*'' July 19, 2018 (Vol. 83, pp. 34111—34112, FR Doc No. 2018–15458) was published with a 60-day comment period. It requested feedback from users on specific tables and geographic detail for decennial census products such as Summary File 1, Summary File 2, and the Demographic Profile. The last day to provide comment on the notice was September 17, 2018. Subsequently, this notice was reopened for an additional 60-day comment period on October 9, 2018 (Vol. 83, p. 50636, FR Doc No. 2018–21837). The last day to provide comments on this notice was November 8, 2018. The final suite of 2020 Census data products will be determined in the summer of 2019.

P. Archiving

The Archiving (ARC) Operation performs the following functions:

- Coordinates storage of the materials and data and provides records deemed permanent as the official data of the 2020 Census, including files containing the individual responses to the 2020 Census, to the National Archives and Records Administration (NARA).
- Provides similar files to the Census Bureau's National Processing Center in Indiana to use as source materials to conduct the Age Search Service.
- Stores data to cover in-house needs.

Q. Federally Affiliated Count Overseas

The Federally Affiliated Count Overseas operation obtains counts by home state of United States military and federal civilian employees who are stationed or assigned overseas and their dependents living with them. For the 2020 Census, overseas is defined as anywhere outside the 50 states, the District of Columbia, Puerto Rico, and the Island Areas: American Samoa, Commonwealth of the Northern Mariana Islands, Guam, and the United States Virgin Islands. Counts are submitted from Federal agencies and the Department of Defense (Defense Manpower Data Command) through a Census Bureau secure server and are used to allocate the federally affiliated population living overseas to their home state for the purposes of apportioning seats in the U.S. House of Representatives. If military and federal civilian employees of the U.S. government are deployed overseas while stationed or assigned within the U.S., they are counted at their U.S. residence where they live or sleep most of the time using administrative data provided by Federal agencies and the Department of Defense. See Section K for more info on how we count stateside military personnel.

R. Island Areas Censuses

The purpose of the Island Areas Censuses (IAC) operation is to enumerate all residents of American Samoa, the Commonwealth of the Northern Mariana Islands (CNMI), Guam, and the U.S. Virgin Islands; process and tabulate the collected data; and disseminate data products to the public. All data collection activities for the IAC will rely on the use of paper questionnaires, paper maps, and paper address registers to record the physical addresses of housing units and group quarters. The IAC questionnaire will leverage the American Community Survey questionnaire with minor wording changes in order to take into account the Island Areas local governments' concerns, where possible.

Enumerators will list the addresses using paper address registers. Once the addresses have been listed, enumerators will visit every living quarter to conduct interviews with household members and follow up as necessary. The IAC will perform a clerical review of all completed questionnaires for completeness and data consistency, a reinterview for a sample of questionnaires, and an independent address check. The response data will be processed through the Decennial Response Processing System. Data products will include counts of the population and housing units, data profiles, subject tables, ranking tables, and supplemental tables.

S. Evaluations and Experiments

The Census Bureau is not currently planning a separate package for the Evaluations and Experiments program, as has been done in past censuses. For the 2020 Census, these evaluations and experiments will be described either as Substantive Changes to this package, to the Census Bureau's Post-Enumeration Survey Independent Listing and QC OMB package, or within the Generic Clearance for Decennial Census Field Tests and Evaluations, covered under OMB approval #0607–0971.

Affected Public: Individuals or Households.

Frequency: Once every 10 years.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13, United States Code, Section 141.

This information collection request may be viewed at www.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, identified by Docket number OMB–2018–0004, may be submitted to the Federal e-Rulemaking portal: *https://www.regulations.gov* within 30 days of publication of this notice. You may also submit comments and recommendations to *2020_Census_Comments@omb.eop.gov* or fax to (202)395–5806. All comments received are part of the public record and will be posted to *http://www.regulations.gov* for public viewing. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Sheleen Dumas,

Departmental Lead PRA Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2018–28164 Filed 12–27–18; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–979]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2016–2017

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that producers and/or exporters subject to this administrative review made sales of subject merchandise at less than normal value. Interested parties are invited to comment on these preliminary results of review.

DATES: Applicable December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Jeff Pedersen and Krisha Hill, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2769 and (202) 482–4037, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce is conducting an administrative review of the antidumping duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells), from the People's Republic of China (China), and initiated the review on February 23, 2018.[1] The POR is December 1, 2016, through November 30, 2017. On July 27, 2018, we rescinded the review with respect to Changzhou Trina Solar Energy Co., Ltd./Trina Solar (Changzhou) Science and Technology Co., Ltd./Yancheng Trina Solar Energy Technology Co., Ltd./Changzhou Trina Solar Yabang Energy Co., Ltd./Turpan Trina Solar Energy Co., Ltd./Hubei Trina Solar Energy Co., Ltd.[2]

Scope of the Order

The merchandise covered by the order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.[3] Merchandise covered by this order is classifiable under subheadings 8501.61.0000, 8507.20.80, 8541.40.6015, 8541.40.6020, 8541.40.6025, 8541.40.6030, 8541.40.6035, 8541.40.6045, and 8501.31.8000 of the Harmonized Tariff Schedule of the United States (HTSUS).[4] Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Preliminary Determination of No Shipments

We preliminarily determine that there is no evidence calling into question the no shipment claims of the following companies: Anji DaSol Solar Energy Science & Technology Co., Ltd.; BYD (Shangluo) Industrial Co., Ltd.; Jiawei Solarchina Co., Ltd.; LERRI Solar Technology Co., Ltd.; Ningbo ETDZ Holdings, Ltd.; Sunpreme Solar Technology (Jiaxing) Co., Ltd.; and, Toenergy Technology Hangzhou Co., Ltd. We found that Wuxi Suntech Power Co., Ltd/Luoyang Suntech Power Co., Ltd. and Zhejiang ERA Solar Technology Co., Ltd., which claimed no exports, sales or entries of subject merchandise during the POR did, in fact, sell subject merchandise to the United States during the POR. Neither of these companies filed a separate rate application or certification and thus they have not established their entitlement to a separate rate in this review. For additional information regarding this preliminary determination, *see* the Preliminary Decision Memorandum.

Preliminary Affiliation and Single Entity Determination

We preliminarily determine that Chint Energy (Haining) Co., Ltd., Chint Solar (Jiuquan) Co., Ltd., and Chint Solar (Hong Kong) Company Limited are affiliated with Chint Solar (Zhejiang) Co., Ltd. (CSZ) (collectively, Chint Solar), pursuant to section 771(33)(E) of the Tariff Act of 1930, as amended (the Act), and that all of these companies should be treated as a single entity pursuant to 19 CFR 351.401(f)(1)–(2). For additional information, *see* the Preliminary Decision Memorandum.

We also preliminarily determine that Risen (Wuhai) New Energy Co., Ltd., Zhejiang Twinsel Electronic Technology Co., Ltd., Risen (Luoyang) New Energy Co., Ltd., Jiujiang Shengchao Xinye Technology Co., Ltd., Jiujiang Shengzhao Xinye Trade Co., Ltd. Ruichang Branch, and Risen Energy (HongKong) Co., Ltd. are affiliated with Risen Energy Co., Ltd. (Risen Energy) (collectively, Risen) pursuant to sections 771(33)(E) and (F) of the Act and all of these companies should be treated as a single entity pursuant to 19 CFR 351.401(f)(1)–(2). For additional information, *see* the Preliminary Decision Memorandum and Risen Collapsing Memorandum.[5]

Use of Partial Facts Available (FA) and Partial Adverse Facts Available (AFA)

Certain unaffiliated tollers of inputs used to produce subject merchandise, as well as certain unaffiliated suppliers of solar cells and solar modules failed to provide factors of production (FOP) data for use in calculating the weighted-average dumping margins of Risen and Chint Solar. We preliminarily determine that it is appropriate to apply AFA, pursuant to section 776(a) and (b) of the Act, with respect to the unreported FOPs for purchased solar cells and solar modules. These unreported FOPs for solar cells and solar modules represent a material amount of necessary FOP information. However, in accordance with section 776(a)(1) of the Act, Commerce is applying facts available with respect to the unreported FOPs for the inputs used by the unaffiliated tollers. For details regarding these determinations, *see* the Preliminary Decision Memorandum and the Risen and Chint Solar Unreported FOP Memoranda.[6]

Separate Rates

Commerce preliminarily determines that the information placed on the record by Risen and Chint Solar, as well as by the other companies listed in the rate table in the ''Preliminary Results of Review'' section below, demonstrates that these companies are entitled to separate rate status. Commerce calculated rates for the mandatory respondents, Risen and Chint Solar, that are not zero, *de minimis,* or based entirely on facts available and calculated a rate for the companies to which it granted separate rates status, but which it did not individually examine, as described in the Separate Rate Calculation Memorandum[7] and the Preliminary Decision Memorandum.

Commerce preliminarily determines that the following companies have not demonstrated their entitlement to separate rates status because they did not file a separate rate application or certification with Commerce:

1. De-Tech Trading Limited HK
2. Dongguan Sunworth Solar Energy Co., Ltd.

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 8058 (February 23, 2018) at *http://enforcement.trade.gov/frn/index.html.*

[2] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review; 2016–2017,* 83 FR 35620 (July 27, 2018).

[3] For a complete description of the scope of the order, *see* DOC Memorandum re: Decision Memorandum for the Preliminary Results of the 2016–2017 Antidumping Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People's Republic of China, issued concurrently with and hereby adopted by this notice (Preliminary Decision Memorandum).

[4] As detailed in the DOC memorandum entitled ''Request from Customs and Border Protection to Update the ACE AD/CVD Case Reference File,'' dated August 2, 2018, the HTS numbers concerning solar cells and solar modules have been updated and we have updated the scope accordingly.

[5] *See* DOC memorandum entitled ''Preliminary Affiliation and Collapsing Memorandum for Risen Energy Co. Ltd., Risen (Wuhai) New Energy Co., Ltd., Zhejiang Twinsel Electronic Technology Co., Ltd., Risen (Luoyang) New Energy Co., Ltd., Jiujiang Shengchao Xinye Technology Co., Ltd., Jiujiang Shengzhao Xinye Trade Co., Ltd. Ruichang Branch, and Risen Energy (HongKong) Co., Ltd.,'' dated concurrently with this notice (Risen Collapsing Memorandum).

[6] *See* DOC Memoranda entitled ''Unreported Factors of Production: Chint Solar (Zhejiang) Co., Ltd.'' and ''Unreported Factors of Production: Risen Energy Co. Ltd.'' issued concurrently with and hereby adopted by this notice.

[7] *See* DOC Memorandum entitled ''2016–2017 Administrative Review of the Antidumping Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People's Republic of China: Calculation of the Dumping Margin for Respondents Not Selected for Individual Examination,'' dated concurrently with this notice.

3. Eoplly New Energy Technology Co., Ltd.
4. ERA Solar Co., Ltd.
5. Hangzhou Sunny Energy Science and Technology Co., Ltd.
6. Jinko Solar Co., Ltd.
7. Jinko Solar International Limited
8. LightWay Green New Energy Co., Ltd.
9. Systemes Versilis, Inc.
10. tenKsolar (Shanghai) Co., Ltd.
11. Yingli Green Energy Holding Company Limited
12. Yingli Green Energy International Trading Company Limited
13. Zhejiang Jinko Solar Co., Ltd.

Commerce is preliminarily treating these companies as part of the China-wide entity. Because no party requested a review of the China-wide entity, the entity is not under review and the entity's rate (*i.e.,* 238.95 percent) is not subject to change.[8] For additional information regarding Commerce's separate rates determinations, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this administrative review in accordance with section 751(a)(1)(B) of the Act. Commerce calculated export and constructed export prices in accordance with section 772 of the Act. Because Commerce has determined that China is a non-market economy country,[9] within the meaning of section 771(18) of the Act, Commerce calculated NV in accordance with section 773(c) of the Act.

For a full description of the methodology underlying the preliminary results of this review, *see* the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a public document and is made available to the public *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov* and is available to all parties in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be found at *https://enforcement.trade.gov/frn/*. The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of Review

Commerce preliminarily determines that the following weighted-average dumping margins exist for the POR:

Exporter	Weighted-average dumping margin (percent)
Chint Solar (Zhejiang) Co., Ltd./Chint Energy (Haining) Co., Ltd./Chint Solar (Jiuquan) Co., Ltd./Chint Solar (Hong Kong) Company Limited	98.41
Risen Energy Co. Ltd./Risen (Wuhai) New Energy Co., Ltd./Zhejiang Twinsel Electronic Technology Co., Ltd./Risen (Luoyang) New Energy Co., Ltd./Jiujiang Shengchao Xinye Technology Co., Ltd./Jiujiang Shengzhao Xinye Trade Co., Ltd. Ruichang Branch/Risen Energy (HongKong) Co., Ltd	15.74
Canadian Solar International Limited/Canadian Solar Manufacturing (Changshu), Inc./Canadian Solar Manufacturing (Luoyang) Inc./CSI Cells Co., Ltd./CSI–GCL Solar Manufacturing (YanCheng) Co., Ltd./CSI Solar Power (China) Inc	44.25
ET Solar Energy Limited	44.25
Hengdian Group DMEGC Magnetics Co., Ltd	44.25
JA Solar Technology Yangzhou Co., Ltd	44.25
Jiangsu High Hope Int'l Group	44.25
Jiawei Solarchina (Shenzhen) Co., Ltd	44.25
JingAo Solar Co., Ltd	44.25
Jinko Solar Import and Export Co., Ltd	44.25
Nice Sun PV Co., Ltd	44.25
Ningbo Qixin Solar Electrical Appliance Co., Ltd	44.25
Shanghai BYD Co., Ltd	44.25
Shanghai JA Solar Technology Co., Ltd	44.25
Shenzhen Sungold Solar Co., Ltd	44.25
Shenzhen Topray Solar Co., Ltd	44.25
Sumec Hardware & Tools Co., Ltd	44.25
Taizhou BD Trade Co., Ltd	44.25
Wuxi Tianran Photovoltaic Co., Ltd	44.25
Xiamen Eco-sources Technology Co., Ltd	44.25
Yingli Energy (China) Company Limited/Baoding Tianwei Yingli New Energy Resources Co., Ltd./Tianjin Yingli New Energy Resources Co., Ltd./Hengshui Yingli New Energy Resources Co., Ltd./Lixian Yingli New Energy Resources Co., Ltd./Baoding Jiasheng Photovoltaic Technology Co., Ltd./Beijing Tianneng Yingli New Energy Resources Co., Ltd./Hainan Yingli New Energy Resources Co., Ltd./Shenzhen Yingli New Energy Resources Co., Ltd	44.25
Zhejiang Sunflower Light Energy Science & Technology Limited Liability Company	44.25

Disclosure and Public Comment

Commerce intends to disclose to parties the calculations performed for these preliminary results of review within five days of the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs no later than 30 days

[8] The China-wide entity rate was last changed in the first administrative review of this proceeding and has been the applicable rate for the entity in each subsequent review, including the one most recently completed. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012–2013,* 80 FR 40998, 41002 (July 14, 2015) (*AR1 Final*); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015–2016,* 83 FR 35616, 35618 (July 27, 2018).

[9] *See Antidumping Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less-Than-Fair Value and Postponement of Final Determination,* 82 FR 50858, 50861 (November 2, 2017) (citing Memorandum, ''China's Status as a Non-Market Economy,'' dated October 26, 2017 (China NME Status Memo)), unchanged in *Certain Aluminum Foil from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 83 FR 9282 (March 5, 2018).

after the date of publication of these preliminary results of review.[10] Rebuttal briefs may be filed no later than five days after case briefs are due and may respond only to arguments raised in the case briefs.[11] A table of contents, list of authorities used, and an executive summary of issues should accompany any briefs submitted to Commerce. The summary should be limited to five pages total, including footnotes.[12]

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice.[13] Requests should contain the party's name, address, and telephone number, the number of participants in, and a list of the issues to be discussed at, the hearing. Oral arguments at the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, Commerce intends to hold the hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, at a date and time to be determined.[14] Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date of the hearing.

All submissions, with limited exceptions, must be filed electronically using ACCESS.[15] An electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5 p.m. Eastern Time (ET) on the due date. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with the APO/Dockets Unit in Room 18022 and stamped with the date and time of receipt by 5 p.m. ET on the due date.[16]

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results of review, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results of this review, Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.[17] Commerce intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. For each individually examined respondent in this review whose weighted-average dumping margin in the final results of review is not zero or *de minimis* (*i.e.,* less than 0.5 percent), Commerce intends to calculate importer-specific assessment rates, in accordance with 19 CFR 351.212(b)(1).[18] Where the respondent reported reliable entered values, Commerce intends to calculate importer-specific *ad valorem* assessment rates by aggregating the amount of dumping calculated for all U.S. sales to the importer and dividing this amount by the total entered value of the sales to the importer.[19] Where the respondent did not report entered values, Commerce will calculate importer-specific assessment rates by dividing the amount of dumping for reviewed sales to the importer by the total sales quantity associated with those transactions. Commerce will calculate an estimated *ad valorem* importer-specific assessment rate to determine whether the per-unit rate is *de minimis,* however, Commerce will direct CBP to assess importer-specific assessment rates where the entered value was not reported based on the resulting per-unit rates.[20] Where an importer-specific *ad valorem* assessment rate is not zero or *de minimis,* Commerce will instruct CBP to collect the appropriate duties at the time of liquidation. Where either the respondent's weighted average dumping margin is zero or *de minimis,* or an importer-specific *ad valorem* assessment rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[21]

Pursuant to Commerce's refinement to its practice, for sales that were not reported in the U.S. sales database submitted by an exporter individually examined during this review, Commerce will instruct CBP to liquidate such merchandise at the rate for the China-wide entity.[22] Additionally, where Commerce determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's CBP case number will be liquidated at the rate for the China-wide entity.

In accordance with section 751(a)(2)(C) of the Act, the final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated antidumping duties, where applicable.

Cash Deposit Requirements

Commerce will instruct CBP to require a cash deposit for antidumping duties equal to the weighted-average amount by which the NV exceeds U.S. price. The following cash deposit requirements will be effective for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date of this notice, as provided by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be equal to the weighted-average dumping margin established in the final results of this review (except, if the rate is *de minimis* (*i.e.,* less than 0.5 percent), then the cash deposit rate will be zero for that exporter); (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding; (3) for all Chinese exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the China-wide entity (*i.e.,* 238.95 percent[23]) and (4) for all non-Chinese exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to China exporter that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties and/or countervailing duties prior to

[10] *See* 19 CFR 351.309(c)(ii).

[11] *See* 19 CFR 351.309(d).

[12] *See* 19 CFR 351.309(c)(2), (d)(2).

[13] *See* 19 CFR 351.310(c).

[14] *See* 19 CFR 351.310(d).

[15] *See generally* 19 CFR 351.303.

[16] *See* 19 CFR 351.303 (for general filing requirements); *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

[17] *See* 19 CFR 351.212(b)(1).

[18] *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012) (*Final Modification*).

[19] *See* 19 CFR 351.212(b)(1).

[20] *Id.*

[21] *See Final Modification,* 77 FR at 8103.

[22] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011), for a full discussion of this practice.

[23] *See AR1 Final,* 80 FR at 41002.

liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties and/or countervailing duties has occurred, and the subsequent assessment of double antidumping duties and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213 and 351.221(b)(4).

Dated: December 20, 2018.

P. Lee Smith,

Deputy Assistant Secretary for Policy and Negotiations.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

- Summary
- Background
- Scope of the Order
- Preliminary Determination of No Shipments
- Selection of Respondents
- Single Entity Treatment
- Discussion of the Methodology
  - Non-Market Economy Country
  - Separate Rates
  - Application of Partial Facts Available (FA) and Adverse Facts Available (AFA)
  - Surrogate Country Selection
  - Date of Sale
  - Fair Value Comparisons
  - U.S. Price
  - Normal Value
  - Adjustments for Countervailable Subsidies
  - Export Subsidy Adjustment
  - Separate Rate Companies
  - Currency Conversion
- Recommendation

[FR Doc. 2018–28239 Filed 12–27–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–983]

Drawn Stainless Steel Sinks From the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that certain companies made sales of subject merchandise at less than normal value during the period of review (POR), April 1, 2017, through March 31, 2018. We invite interested parties to comment on these preliminary results.

DATES: Applicable December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Rebecca Janz or Joshua Tucker, 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) 482–2972 or (202) 482–2044, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The products covered by the order include drawn stainless steel sinks. Imports of subject merchandise are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7324.10.0000 and 7324.10.0010. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.[1]

Preliminary Determination of No Shipments

Based on our analysis of U.S. Customs and Border Production (CBP) information and information provided by the companies, we preliminarily determine that Zhuhai KOHLER Kitchen & Bathroom Products Co., Ltd. (Zhuhai KOHLER) and Yuyao Afa Kitchenware Co., Ltd. (Yuyao Afa) did not have any reviewable transactions during the POR. In addition, Commerce finds that, consistent with its assessment practice in non-market economy (NME) cases, it is appropriate not to rescind the review in part in these circumstances, but to complete the review with respect to these three companies and issue appropriate instructions to CBP based on the final results.[2] For additional information regarding this determination, *see* the Preliminary Decision Memorandum.

With respect to Zhongshan Superte Kitchenware Co., Ltd. (Superte), we obtained information from CBP indicating that Superte had shipments during the POR, contradicting its no shipments certification. Thus, we preliminarily determine that Superte is part of the China-wide entity, and we will complete the review with respect to this company. For a full discussion of this determination, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act). Because Feidong Import and Export Co., Ltd. (Feidong); Xinhe Stainless Steel Products Co., Ltd. (Xinhe); Jiangmen New Star Hi-Tech Enterprise Ltd. (New Star); and Ningbo Afa Kitchen and Bath Co., Ltd. (Ningbo Afa) did not participate in this segment of the proceeding, we preliminarily determine that they are ineligible for a separate rate and are part of the People's Republic of China (China)-wide entity, subject to the China-wide entity rate of 76.45 percent.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and to all parties in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content. A list of topics included in the Preliminary Decision Memorandum is provided as an appendix to this notice.

Preliminary Results of Review

Commerce finds that the four mandatory respondents have not established eligibility for a separate rate and are considered to be part of China-wide entity for these preliminary results. Additionally, because Guangdong G–Top Import & Export Co., Ltd. (Guangdong G–Top) and Jiangmen Pioneer Import & Export Co., Ltd. (Jiangmen Pioneer) did not submit separate rate applications or certifications by the deadline established in the *Initiation Notice* or make a claim that they had no shipments of subject merchandise during the POR, we find that these companies failed to establish their entitlement to a separate rate and, therefore, remain part of the China-wide

[1] For a complete description of the Scope of the Order, *see* Memorandum, ''Decision Memorandum for Preliminary Results of the Antidumping Duty Administrative Review: Drawn Stainless Steel Sinks from the People's Republic of China,'' issued concurrently with and hereby adopted by this notice (Preliminary Decision Memorandum).

[2] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694, 65694–95 (October 24, 2011) (*NME AD Assessment*) and the ''Assessment Rates'' section, below.

entity. Commerce's policy regarding conditional review of China-wide entity applies to this administrative review.[3] Under this policy, the China-wide rate will not be under review unless a party requests, or Commerce self-initiates, a review of the entity. Because no party requested a review of China-wide entity, and Commerce did not self-initiate, the entity is not under review, and the entity's rate is not subject to change.

The statute and Commerce's regulations do not address what rate to apply to respondents who are not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for non-selected respondents that are not examined individually in an administrative review. Section 735(c)(5)(A) of the Act states that the all-others rate should be calculated by averaging the weighted-average dumping margins for individually-examined respondents, excluding rates that are zero, *de minimis,* or based entirely on facts available. Section 735(c)(5)(B) of the Act provides that where all rates are zero, *de minimis,* or based entirely on facts available, Commerce may use ''any reasonable method'' for assigning a rate to non-examined respondents.

However, for these preliminary results, we have not calculated any individual rates or assigned a rate based on facts available. Therefore, consistent with our recent practice,[4] we preliminary assigned to the four non-individually examined companies that demonstrated their eligibility for a separate rate the most recently assigned separate rate in this proceeding (*i.e.,* 1.78 percent).[5]

Commerce preliminarily determines that the following weighted-average dumping margins exist for the period April 1, 2017, through March 31, 2018:

Exporter	Weighted-average dumping margin (percent)
KaiPing Dawn Plumbing Products, Inc	1.78
Guangdong New Shichu Import & Export Company Limited	1.78
Elkay (China) Kitchen Solutions Co., Ltd	1.78
B&R Industries Limited	1.78

Disclosure and Public Comment

Normally, Commerce will disclose the calculations used in our analysis to parties in this review within five days of the date of publication of the notice of preliminary results in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, here Commerce preliminary applied a separate rate [6] and China-wide rate [7] that were established in prior segments of the proceeding. Thus, there are no calculations on this record to disclose.

Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review.[8] Rebuttals to case briefs may be filed no later than five days after the written comments are filed, and all rebuttal comments must be limited to comments raised in the case briefs.[9]

Any interested party may request a hearing within 30 days of publication of this notice.[10] Hearing requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.[11]

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in the case briefs, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[12] Commerce intends to issue appropriate assessment instructions to CBP 15 days after the publication of the final results of this review. For the companies receiving a separate rate, we intend to assign an assessment rate of 1.78 percent, consistent with the methodology described above. For the final results, if we continue to treat Guangdong G-Top, Jiangmen Pioneer, Superte, and the mandatory respondents as part of China-wide entity, we will instruct CBP to apply an *ad valorem* assessment rate of 76.45 percent to all entries of subject merchandise during the POR that were produced and/or exported by those companies. In addition, if we continue to find that Yuyao Afa and Zhuhai KOHLER had no shipments of the subject merchandise, any suspended entries of subject merchandise from these companies will be liquidated at China-wide rate.[13]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For the companies listed above that have a separate rate, the cash deposit rate will be that rate established in the final results of this review (except, if the rate is zero or *de minimis,* then a cash deposit rate of zero will be established for that company); (2) for previously investigated or reviewed Chinese and non-Chinese exporters that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for China-wide entity, which is 76.45 percent; and (4) for all non-Chinese exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to Chinese exporter(s) that supplied that non-

[3] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[4] *See, e.g., Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review; 2015–2016,* 81 FR 62717 (September 12, 2016), and accompanying Preliminary Decision Memorandum at 10–11, *unchanged in Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review; 2015–2016,* 82 FR 11431 (February 23, 2017).

[5] *See Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2016–2017,* 83 FR 23424, 23426 (June 23, 2017) (*Sinks 4AR Final*).

[6] *See Sinks 4AR Final.*

[7] *See Drawn Stainless Steel Sinks from the People's Republic of China: Investigation, Final Determination,* 78 FR 13019 (February 26, 2013).

[8] *See* 19 CFR 351.309(c).

[9] *See* 19 CFR 351.309(d).

[10] *See* 19 CFR 351.310(c).

[11] *See* 19 CFR 351.310(d).

[12] *See* 19 CFR 351.212(b)(1).

[13] For a full discussion of this practice, *see NME AD Assessment.*

Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these preliminary results in accordance with sections 751(a)(l) and 777(i)(l) of the Act and 19 CFR 351.213.

Dated: December 20, 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.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of Methodology
A. Preliminary Determination of No Shipments
B. Non-Market Economy Country Status
C. Separate Rates Determination
1. Absence of *De Jure* Control
2. Absence of *De Facto* Control
3. Companies Not Eligible for a Separate Rate
4. Separate Rate for Eligible, Non-Selected Companies
V. Recommendation

[FR Doc. 2018–28279 Filed 12–27–18; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–814]

Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China; Rescission of the Antidumping Duty Administrative Review, In Part; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On September 10, 2018, the Department of Commerce (Commerce) published a notice of initiation of an administrative review of the antidumping duty order on carbon steel butt-weld pipe fittings from the People's Republic of China (China). Based on Jinan Mech Piping Technology Co., Ltd (Jinan Mech)'s timely withdrawal of its request for review, we are now rescinding this administrative review with respect to Jinan Mech.

DATES: Applicable December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Hannah Falvey, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone (202) 482–4889.

Background

On July 6, 1992, Commerce published in the **Federal Register** the antidumping duty order on carbon steel butt-weld pipe fittings from China.[1] In July 2018, Commerce received multiple timely requests to conduct an administrative review of the *Order.* Based upon these requests, on September 10, 2018, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), Commerce published in the **Federal Register** a notice of initiation of an administrative review covering the period July 1, 2017, through June 30, 2018, with respect to two companies: Jinan Mech Piping Technology Co., Ltd. and Pantech Steel Industries SDN BHD.[2] On October 11, 2018, Jinan Mech timely withdrew its request for an administrative review.[3] No other party requested an administrative review of Jinan Mech.

Rescission

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party who requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review, and no other party requested a review of the company. Jinan Mech timely withdrew its request for an administrative review, and no other party requested a review of Jinan Mech. Accordingly, we are rescinding this review of the *Order* for the period July 1, 2017, through June 30, 2018, with respect to Jinan Mech, in accordance with 19 CFR 351.213(d)(1). This administrative review will continue with respect to Pantech Steel Industries SDN BHD.

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. For the company for which this review is rescinded, antidumping duties shall be assessed on its entries of subject merchandise during the period of review at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, 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. This notice is issued and published in accordance with sections 751(a) and 777(i)(l) of the Act and 19 CFR 351.213(d)(4).

Dated: December 20, 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. 2018–28241 Filed 12–27–18; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Antidumping Duty Order and Amendment to the Final Determination of Sales at Less Than Fair Value; Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China,* 57 FR 29702 (July 6, 1992) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 45596, 45601–02 (September 10, 2018).

[3] *See* Jinan Mech's Letter, ''*Administrative Review of the Antidumping Duty Order on Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China: Withdrawal of Request for Review,*'' dated October 11, 2018.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–971]

Multilayered Wood Flooring From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review, Rescission of Review, in Part, and Intent To Rescind Review, in Part; 2016

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that countervailable subsidies are being provided to producers and exporters of multilayered wood flooring (wood flooring) from the People's Republic of China (PRC). Interested parties are invited to comment on these preliminary results of review.

DATES: Applicable December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Dennis McClure or Suzanne Lam, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: 202–482–5973 or 202–482–0783, respectively.

SUPPLEMENTARY INFORMATION:.

Background

On December 8, 2011, Commerce issued a countervailing duty (CVD) order on multilayered wood flooring from the PRC.[1] Interested parties requested that Commerce conduct an administrative review of the countervailing duty order,[2] and on February 23, 2018, Commerce published in the **Federal Register** a notice of initiation of an administrative review of the *Order* on 149 producers/exporters for the period of review (POR).[3]

Scope of the Order

The product covered by the *Order* is wood flooring from the PRC. For a complete description of the scope of this administrative review, *see* the Preliminary Decision Memorandum.[4]

Rescission of Administrative Review, in Part

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation of the requested review. This review was initiated on February 23, 2018. On March 14, 2018, Huzhou Jesonwood submitted a withdrawal request within the 90-day deadline.[5] On May 7, 2018, Dalian Penghong and 15 other companies submitted withdrawal requests.[6] The petitioner filed withdrawal requests for Dalian Penghong, Dunhua City Jisen Wood Industry Co., Ltd (Dunhua City Jisen), and Dalian Shumaike Floor Manufacturing Co., Ltd. (Dalian Shumaike).[7] All of the withdrawal requests submitted above were within the 90-day deadline. Therefore, because there are no remaining requests to review the following companies, in accordance with 19 CFR 351.213(d)(1), and consistent with our practice, we are rescinding this review with respect to Dalian Penghong, Dalian Shumaike, Dunhau City Jisen, Fusong Jinqui, Huzhou Jesonwood, and Shanghaifloor.

Intent To Rescind Administrative Review, in Part

We received timely filed no-shipment certifications from eight companies.[8] Commerce issued no-shipment inquiries to U.S. Customs and Border Protection (CBP) requesting any information that may contradict the no-shipment claims. We have not received information from CBP to date that contradicts Anhui Boya Bamboo & Wood Products Co., Ltd.'s, Chinafloors Timber (China) Co., Ltd.'s, Jiangsu Keri Wood Co., Ltd.'s, Jiashan On-Line Lumber Co., Ltd.'s, Kingman Floors Co., Ltd.'s, Linyi Bonn Flooring Manufacturing Co., Ltd.'s, and Zhejiang Shiyou Timber Co., Ltd.'s claims of no sales, shipments or entries of subject merchandise to the United States during the POR.[9] Because these companies timely filed their no-shipment certifications and CBP has not provided information that contradicts the companies' claims, we preliminarily intend to rescind the review of these companies. Absent any evidence of shipments being placed on the record,

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[1] *See Multilayered Wood Flooring from the People's Republic of China: Countervailing Duty Order,* 76 FR 76693 (December 8, 2011) (*Order*).

[2] *See, e.g.,* the Petitioner's Letter, ''Request for Administrative Review: Multilayered Wood Flooring from the People's Republic of China,'' dated December 28, 2017; Dalian Peghong Floor Products Co., Ltd.'s (Dalian Penghong) *et al* Letter, ''Multilayered Wood Flooring from the People's Republic of China,'' dated December 22, 2017; and Huzhou Jesonwood Co., Ltd.'s (Huzhou Jesonwood) *et al.,* Letter, ''Request for Administrative Review of the Countervailing Duty Order on Multilayered Wood Flooring from the People's Republic of China,'' dated January 2, 2018.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 8058 (February 23, 2018) (*Initiation Notice*).

[4] *See* Memorandum, ''Decision Memorandum for the Preliminary Results in the Countervailing Duty Administrative Review of Multilayered Wood Flooring from the People's Republic of China: 2016'' (Preliminary Decision Memorandum), dated concurrently with, and hereby adopted by, this notice.

[5] *See* Huzhou Jesonwood's Letter, ''Withdrawal of Review Request in the 6th Administrative Review of the Countervailing Duty Order on Multilayered Wood Flooring from the People's Republic of China,'' dated March 14, 2018.

[6] The following companies submitted withdrawal requests: Changzhou Hawd Flooring Co., Ltd., Dalian Huilong Wooden Products Co., Ltd., Dalian Qianqiu Wooden Product Co., Ltd., Dunhua City Dexin Wood Industry Co., Ltd., Dunhua City Hongyuan Wood Industry Co., Ltd., Dunhua City Jisen Wood Industry Co., Ltd., Fusong Jinlong Wooden Group Co., Ltd. (Fusong Jinlong), Fusong Jinqiu Wooden Product Co., Ltd. (Fusong Jinqiu), Fusong Qianqiu Wooden Product Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Karly Wood Product Limited, Shanghaifloor Timber (Shanghai) Co., Ltd. (Shanghaifloor), Xiamen Yung De Ornament Co., Ltd., Yingyi-Nature (Kunshan) Wood Industry Co., Ltd., and Zhejiang Shuimojiangnan New Material Technology Co., Ltd.

[7] *See* Dalian Penghong Floor Products Co., Ltd.'s Letter, ''Multilayered Wood Flooring from the People's Republic of China Withdrawal of Request for Review,'' dated May 7, 2018; American Manufacturers of Multilayered Wood Flooring's (Petitioner's) Letter, ''Withdrawal of Request for Administrative Review, in Part'' dated March 3, 2018 (Petitioners' Withdrawal Request of Dalian); and Petitioner's Letter, ''Withdrawal of Request for Administrative Review, in Part'' dated May 24, 2018 (Petitioner's Withdrawal Request of Dunhua City Jisen).

[8] *See* Anhui Boya Bamboo & Wood Products Co., Ltd.'s (Anhui Boya Bamboo) Letter, ''Multilayered Wood Flooring from the People's Republic of China: No Shipments Certification,'' dated March 13, 2018; Chinafloors Timber (China) Co., Ltd.'s (China Floors) Letter, ''Multilayered Wood Flooring from the People's Republic of China: No Shipment Certification of Chinafloors Timber (China) Co., Ltd.,'' dated March 23, 2018; Hunchun Forest Wolf Wooden Industry Co., Ltd.'s (Hunchun Forest) Letter, ''Multilayered Wood Flooring from the People's Republic of China: No Shipments Certification,'' dated March 13, 2018; Jiangsu Keri Wood Co., Ltd.'s (Jiangsu Keri Wood) Letter, ''Multilayered Wood Flooring from the People's Republic of China: No Sales Certification,'' dated March 14, 2018; Jiashan On-Line Lumber Co., Ltd.'s (Jiashan On-Line Lumber) Letter, ''Multilayered Wood Flooring from the People's Republic of China: No Sales Certification,'' dated March 13, 2018; Kingman Floors Co., Ltd.'s (Kingman Floors) Letter, ''Multilayered Wood Flooring from the People's Republic of China: No Sales Certification,'' dated March 13, 2018; Linyi Bonn Flooring Manufacturing Co., Ltd.'s (Linyi Bonn Flooring) Letter, ''Multilayered Wood Flooring from the People's Republic of China: No Sales Certification,'' dated March 20, 2018; and Zhejiang Shiyou Timber Co., Ltd.'s (Zhejiang Shiyou Timber) Letter, ''Multilayered Wood Flooring from the People's Republic of China: No Sales Certification,'' dated March 13, 2018.

[9] *See* Memorandum, ''Certain Multilayered Wood Flooring from China: No Shipment Inquiry with Respect to the Companies Below during the 01/01/2016 through 12/31/2016,'' dated September 13, 2018; *see also* Commerce Memorandum, ''Multilayered Wood Flooring from the People's Republic of China: U.S. Customs and Border Protection No Shipment Inquiry,'' dated October 9, 2018 (stating that the CBP Center for Excellence and Expertise found 34 shipment entries for Hunchun Forest Wolf Wooden Industry Co., Ltd. and no-shipment entries of subject merchandise by Anhui Boya Bamboo, China Floors, Jiangsu Keri Wood, Jiashan On-Line Lumber, Kingman Floors, Linyi Bonn Flooring and Zhejiang Shiyou Timber).

pursuant to 19 CFR 351.213(d)(3), we intend to rescind the administrative review of these companies in the final results of review.

On October 29, 2018, Huzhou Muyun Wood Co., Ltd. (Muyun Wood) filed a no-shipment certification.[10] On November 13, 2018, we rejected Muyun Wood's request for no-shipment status because the request was untimely filed.[11] Consequently, Muyun Wood continues to be subject to this administrative review.

Hunchun Forest timely filed a no-shipment certification.[12] However, Hunchun Forest subsequently withdrew its no-shipment submssion.[13] Therefore, we are continuing to include Hunchun Forest in this administrative review for purposes of the preliminary results.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (Act). For each of the subsidy programs found countervailable, we preliminarily determine that there is a subsidy, *i.e.,* a financial contribution by an ''authority'' that confers a benefit to the recipient, and that the subsidy is specific.[14] For a full description of the methodology underlying our preliminary conclusions, *see* the Preliminary Decision Memorandum.

The Preliminary Decision Memorandum is a public document and is on file electronically *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov* and in the Central Records Unit, Room B8024 of the main Department building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the internet at *http://enforcement.trade.gov/frn/index.html.* The signed Preliminary Decision Memorandum and the electronic version of the Preliminary Decision Memorandum are identical in content. A list of topics discussed in the Preliminary Decision Memorandum is included as an Appendix to this notice.

In making these preliminary results, the Commerce relied, in part, on facts otherwise available.[15] For further information, *see* ''Provision of Electricity for Less Than Adequate Remuneration (LTAR), Provision of Land-Use Rights to Certain Industrial Zones for LTAR, Provision of Veneers for LTAR, Provision of Cut Timber for LTAR, Export Buyers' Credit, and Other Subsidies'' in the Preliminary Decision Memorandum. For further information, *see* ''Use of Facts Otherwise Available and Application of Adverse Inferences'' in the Preliminary Decision Memorandum.

Rate for Non-Selected Companies Under Review

There are 132 companies for which a review was requested and not rescinded, and which were not selected as mandatory respondents or found to be cross-owned with a mandatory respondent. For these companies, we are preliminarily applying the average of the rates calculated for the mandatory respondents, Jiangsu Senmao Bamboo Wood Industry Co., Ltd. (Jiangsu Senmao) and Riverside Plywood Corp. (Riverside Plywood), which are above *de minimis.* For further information on the calculation of the non-selected respondent rate, refer to the section in the Preliminary Decision Memorandum entitled ''Preliminary *Ad Valorem* Rate for Non-Selected Companies Under Review.''

Preliminary Results of the Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated a countervailable subsidy rate for each of the mandatory respondents, Jiangsu Senmao and Riverside Plywood, and their cross-owned affiliates where applicable.

We preliminarily find the countervailable subsidy rates for the mandatory and non-selected respondents under review to be as follows:

Producer/exporter	Subsidy rate (percent)
Jiangsu Senmao Bamboo Wood Industry Co., Ltd	2.17
Riverside Plywood Corp. and its Cross-Owned Affiliates[16]	3.25
A&W (Shanghai) Woods Co., Ltd	2.81
Anhui Longhua Bamboo Product Co., Ltd	2.81
Anhui Suzhou Dongda Wood Co., Ltd	2.81
Armstrong Wood Products (Kunshan) Co., Ltd	2.81
Baishan Huafeng Wooden Product Co., Ltd	2.81
Baiying Furniture Manufacturer Co., Ltd	2.81
Benxi Flooring Factory (General Partnership)	2.81
Benxi Wood Company	2.81
Changbai Mountain Development and Protection Zone Hongtu Wood Industrial Co., Ltd	2.81
Changzhou Hawd Flooring Co., Ltd	2.81
Cheng Hang Wood Co., Ltd	2.81
Dalian Dajen Wood Co., Ltd	2.81
Dalian Huade Wood Product Co., Ltd	2.81
Dalian Huilong Wooden Products Co., Ltd	2.81
Dalian Jaenmaken Wood Industry Co., Ltd	2.81
Dalian Jiahong Wood Industry Co., Ltd	2.81
Dalian Jiuyuan Wood Industry Co., Ltd	2.81
Dalian Kemian Wood Industry Co., Ltd	2.81
Dalian Qianqiu Wooden Product Co., Ltd	2.81
Dalian T-Boom Wood Products Co., Ltd	2.81
Dalian Xinjinghua Wood Co., Ltd	2.81
Dongtai Fuan Universal Dynamics, LLC	2.81

[10] *See* Muyun Wood's Letter ''Multilayered Wood Flooring from the People's Republic of China—No Sales Certification,'' dated October 29, 2018.

[11] *See* Commerce Letter re: Multilayered Wood Flooring from the People's Republic of China: Rejection of Letter Submitted October 29, 2018, dated November 13, 2018.

[12] *See* Hunchun Forest's Letter, ''Multilayered Wood Flooring from the People's Republic of China: No Shipments Certification,'' dated March 13, 2018.

[13] *See* Hunchun Forest's Letter, ''Multilayered Wood Flooring from the People's Republic of China: Comments on Hunchun Forest Shipments,'' dated October 23, 2018.

[14] *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.

[15] *See* section 776 of the Act.

Producer/exporter	Subsidy rate (percent)
Dongtai Zhangshi Wood Industry Co. Ltd	2.81
Dun Hua Sen Tai Wood Co., Ltd	2.81
Dunhua City Dexin Wood Industry Co., Ltd	2.81
Dunhua City Hongyuan Wood Industry Co., Ltd	2.81
Dunhua City Wanrong Wood Industry Co., Ltd	2.81
Dunhua Shengda Wood Industry Co., Ltd	2.81
Fine Furniture (Shanghai) Limited	2.81
Fu Lik Timber (HK) Co., Ltd	2.81
Fujian Wuyishan Werner Green Industry Co., Ltd	2.81
Fusong Jinlong Wooden Group Co., Ltd	2.81
Fusong Qianqiu Wooden Product Co., Ltd	2.81
GTP International Ltd	2.81
Guangdong Fu Lin Timber Technology Limited	2.81
Guangdong Yihua Timber Industry Co., Ltd	2.81
Guangzhou Homebon Timber Manufacturing Co., Ltd	2.81
Guangzhou Panyu Kangda Board Co., Ltd	2.81
Guangzhou Panyu Southern Star Co., Ltd	2.81
HaiLin LinJing Wooden Products, Ltd	2.81
HaiLin XinCheng Wooden Products, Ltd	2.81
Hangzhou Dazhuang Floor Co., Ltd. (dba Dasso Industrial Group Co., Ltd.)	2.81
Hangzhou Hanje Tec Company Limted	2.81
Hangzhou Huahi Wood Industry Co., Ltd	2.81
Hangzhou Zhengtian Industrial Co., Ltd	2.81
Henan Xingwangjia Technology Co., Ltd	2.81
Hong Kong Easoon Wood Technology Co., Ltd	2.81
Huaxin Jiasheng Wood Co., Ltd	2.81
Huber Engineering Wood Corp.	2.81
Hunchun Forest Wolf Wooden Industry Co., Ltd	2.81
Hunchun Xingjia Wooden Flooring Inc	2.81
Huzhou Chenghang Wood Co., Ltd	2.81
Huzhou City Nanxun Guangda Wood Co., Ltd	2.81
Huzhou Fulinmen Imp. & Exp. Co., Ltd	2.81
Huzhou Fuma Wood Co., Ltd	2.81
Huzhou Muyun Wood Co., Ltd	2.81
Huzhou Sunergy World Trade Co., Ltd	2.81
Innomaster Home (Zhongshan) Co., Ltd	2.81
Jiafeng Wood (Suzhou) Co., Ltd	2.81
Jiangsu Guyu International Trading Co., Ltd	2.81
Jiangsu Kentier Wood Co., Ltd	2.81
Jiangsu Simba Flooring Co., Ltd	2.81
Jiangsu Yuhui International Trade Co., Ltd	2.81
Jiashan Fengyun Timber Co., Ltd	2.81
Jiashan HuiJiaLe Decoration Material Co., Ltd	2.81
Jiaxing Brilliant Import & Export Co., Ltd	2.81
Jiaxing Hengtong Wood Co., Ltd	2.81
Jilin Forest Industry Jinqiao Flooring Group Co., Ltd	2.81
Jilin Xinyuan Wooden Industry Co., Ltd	2.81
Jingsu Mingle Flooring Co., Ltd	2.81
Karly Wood Product Limited	2.81
Kember Flooring, Inc	2.81
Kemian Wood Industry (Kunshan) Co., Ltd	2.81
Kornbest Enterprises Limited	2.81
Kunming Alston (AST) Wood Products Co., Ltd	2.81
Les Planchers Mercier, Inc	2.81
Linyi Anying Wood Co., Ltd	2.81
Linyi Youyou Wood Co., Ltd	2.81
Metropolitan Hardwood Floors, Inc	2.81
Mudanjiang Bosen Wood Industry Co., Ltd	2.81
Nakahiro Jyou Sei Furniture (Dalian) Co., Ltd	2.81
Nanjing Minglin Wooden Industry Co., Ltd	2.81
Ningbo Tianyi Bamboo and Wood Products Co., Ltd	2.81
Pinge Timber Manufacturing (Zhejiang) Co., Ltd	2.81
Power Dekor Group Co. Ltd	2.81
Qingdao Barry Flooring Co., Ltd	2.81
Samling Elegant Living Trading (Labuan) Ltd	2.81
Samling Global USA, Inc	2.81
Samling Riverside Co., Ltd	2.81
Scholar Home (Shanghai) New Material Co. Ltd	2.81
Shandong Kaiyuan Wood Industry Co., Ltd	2.81
Shandong Longteng Wood Co., Ltd	2.81
Shandong Puli Trading Co., Ltd	2.81
Shanghai Anxin (Weiguang) Timber Co., Ltd	2.81
Shanghai Demeija Timber Co., Ltd	2.81

Producer/exporter	Subsidy rate (percent)
Shanghai Eswell Timber Co., Ltd	2.81
Shanghai Lairunde Wood Co., Ltd	2.81
Shanghai Lizhong Wood Products Co., Ltd. (aka The Lizhong Wood Industry Limited Company of Shanghai)	2.81
Shanghai New Sihe Wood Co., Ltd	2.81
Shanghai Shenlin Corporation	2.81
Shenyang Haobainian Wooden Co., Ltd	2.81
Shenyang Sende Wood Co., Ltd	2.81
Shenzhenshi Huanwei Woods Co., Ltd	2.81
Sino-Maple (Jiangsu) Co., Ltd	2.81
Suzhou Anxin Weiguang Timber Co., Ltd	2.81
Suzhou Dongda Wood Co., Ltd	2.81
Tak Wah Building Material (Suzhou) Co	2.81
Tech Wood International Ltd	2.81
Tongxiang Jisheng Import and Export Co., Ltd	2.81
Vicwood Industry (Suzhou) Co. Ltd	2.81
Xiamen Yung De Ornament Co., Ltd	2.81
Xuzhou Antop International Trade Co., Ltd	2.81
Xuzhou Shenghe Wood Co., Ltd	2.81
Yekalon Industry, Inc	2.81
Yihua Lifestyle Technology Co., Ltd	2.81
Yingyi-Nature (Kunshan) Wood Industry Co., Ltd	2.81
Yixing Lion-King Timber Industry	2.81
Zhejiang Anji Xinfeng Bamboo and Wood Industry Co., Ltd	2.81
Zhejiang Biyork Wood Co., Ltd	2.81
Zhejiang Dadongwu Green Home Wood Co., Ltd	2.81
Zhejiang Desheng Wood Industry Co., Ltd	2.81
Zhejiang Fudeli Timber Industry Co., Ltd	2.81
Zhejiang Fuerjia Wooden Co., Ltd	2.81
Zhejiang Fuma Warm Technology Co., Ltd	2.81
Zhejiang Haoyun Wooden Co., Ltd	2.81
Zhejiang Jesonwood Co., Ltd	2.81
Zhejiang Jiechen Wood Industry Co., Ltd	2.81
Zhejiang Longsen Lumbering Co., Ltd	2.81
Zhejiang Shuimojiangnan New Material Technology Co., Ltd	2.81
Zhejiang Simite Wooden Co., Ltd	2.81
Zhejiang Tianzhen Bamboo & Wood Development Co., Ltd	2.81
Zhejiang Yongyu Bamboo Joint-Stock Co., Ltd	2.81

Disclosure and Public Comment

We will disclose to parties in this proceeding the calculations performed in reaching the preliminary results within five days of publication of these preliminary results.[17] Interested parties may submit written comments (case briefs) on the preliminary results no later than 30 days from the date of publication of this **Federal Register** notice, and rebuttal comments (rebuttal briefs) within five days after the time limit for filing case briefs.[18] Pursuant to 19 CFR 351.309(d)(2), rebuttal briefs must be limited to issues raised in the case briefs. Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this review are requested to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold the hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, at a date and time to be determined.[19] Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Parties are reminded that briefs and hearing requests are to be filed electronically using ACCESS and that electronically filed documents must be received successfully in their entirety by 5 p.m. Eastern Time on the due date.

Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act, we intend to issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their comments, within 120 days after publication of these preliminary results.

Assessment Rates

In accordance with 19 CFR 351.221(b)(4)(i), we preliminarily assigned subsidy rates in the amounts shown above for the producer/exporters shown above. Upon completion of the administrative review, consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries covered by this review. We intend to issue instructions directly to CBP 15 days after publication of the final results of this review. For the companies for which this review is rescinded, Commerce will instruct CBP to assess countervailing duties on all appropriate entries at a rate equal to the cash deposit of estimated countervailing

[16] Cross-owned affiliates are Baroque Timber Zhongshan Co. Ltd. and Suzhou Times Flooring Co., Ltd.

[17] *See* 19 CFR 351.224(b).

[18] *See* 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1).

[19] *See* 19 CFR 351.310.

duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period January 1, 2016, through December 31, 2016, in accordance with 19 CFR 351.212(c)(l)(i). Commerce intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Cash Deposit Requirements

In accordance with section 751(a)(1) of the Act, Commerce intends upon publication of the final results to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for each of the respective companies listed 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 administrative 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. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Interested Parties

These preliminary results are issued and published pursuant to sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: December 20, 2018.

P. Lee Smith,

Deputy Assistant Secretary for Policy and Negotiations.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
A. Case History
B. Postponement of Preliminary Results
C. Period of Review
D. Rescission of Review, In Part
E. Intent To Rescind, in Part, the Administrative Review
III. Scope of the Order
IV. Use of Facts Otherwise Available and Application of Adverse Inferences
A. Legal Standard
B. Application of AFA: Provision of Electricity for LTAR
C. Application of AFA: Provision of Land-Use Rights to Certain Industrial Zones for LTAR
D. Application of AFA: Provision of Veneers for LTAR
E. Application of AFA: Provision of Cut Timber for LTAR
F. Application of AFA: Export Buyers' Credit
G. Application of AFA: ''Other Subsidies''
V. Subsidies Valuation
A. Allocation Period
B. Attribution of Subsidies
C. Denominators
VI. Interest Rate Benchmarks, Discount Rates, Inputs, Land-Use and Electricity
VII. Analysis of Programs
A. Programs Preliminarily Determined To Be Countervailable
B. Programs Preliminarily Determined Not To Confer a Countervailable Benefit
C. Programs Preliminarily Determined Not To Confer a Measurable Benefit
D. Programs Preliminarily Determined Not To Be Used
VIII. Preliminary *Ad Valorem* Rate for Non-Selected Companies Under Review
IX. Recommendation

[FR Doc. 2018–28240 Filed 12–27–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG705

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 Scallop 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 Friday, January 18, 2019 at 9 a.m.

ADDRESSES: *Meeting address:* The meeting will be held at the Hilton Garden Inn, 100 Boardman Street, Boston, MA 02128; phone: (617) 567–6789.

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 Scallop Committee will receive an update on the implementation timeline for Framework Adjustment 30. They will also review the 2019 scallop workload based on priorities approved by the Council at its December meeting in Newport, RI, and discuss potential timelines for completing each task. The panel will review a draft scoping document for an action to address NGOM Scallop Management and LAGC IFQ trip limit. They also plan to discuss the potential harvest of small scallops in the NLS–S deep as part of 2020 scallop specifications. Additionally, they will discuss potential elements of an action to mitigate impacts on yellowtail flounder. The panel will also discuss potential approaches to evaluate the scallop rotational management program. Other business may 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. 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 21, 2018.

Tracey L. Thompson,

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

[FR Doc. 2018–28233 Filed 12–27–18; 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 (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Coastal Zone Management Program Administration.

OMB Control Number: 0648–0119.

Form Number(s): None.

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

Number of Respondents: 34.

Average Hours per Response: Performance reports, 27 hours; assessment and strategy documents, 240 hours; Section 306A questionnaire and documentation, 15 hours; amendments and routine program changes, 16 hours; CNP documentation, 320 hours; CZMA Performance Management System, 24 hours.

Burden Hours: 6,280.

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

In 1972, in response to intense pressure on United States (U.S.) coastal resources, and because of the importance of U.S. coastal areas, the U.S. Congress passed the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq*. The CZMA authorized a federal program to encourage coastal states and territories to develop comprehensive coastal management programs. The CZMA has been reauthorized on several occasions, most recently with the enactment of the Coastal Zone Protection Act of 1996. (CZMA as amended). The program is administered by the Secretary of Commerce, who in turn has delegated this responsibility to the National Oceanic and Atmospheric Administration's (NOAA) National Ocean Services (NOS).

The coastal zone management grants provide funds to states and territories to: Implement federally-approved coastal management programs; complete information for the Coastal Zone Management Program (CZMP) Performance Management System; develop multi-year program assessments and strategies to enhance their programs within priority areas under Section 309 of the CZMA; submit documentation as described in the CZMA Section 306A on the approved coastal zone management programs; submit requests to update their federally-approved programs through amendments or program changes; and develop and submit state coastal nonpoint pollution control programs (CNP) as required under Section 6217 of the Coastal Zone Act Reauthorization Amendments.

Revisions

1. The CZMA Section 306A guidance and project questionnaire have been updated to reduce confusion. The 306A Guidance and project questionnaire currently in use were developed in 1999 and need to be updated to ensure consistency with NOAA/NOS environmental compliance policies or grants requirements, and CZMA national strategic priorities, such as community resilience. The revised 306A guidance and questionnaire will provide clarification on the collection of project information and resolve confusion over grants management timelines. The current guidance and proposed revisions can be found at *https://coast.noaa.gov/czm/guidance/.* Based on recent experience, the time estimate for completing the questionnaire and collecting the necessary documentation is being increased from 5 hours to 15 hours per project.

An electronic system is being developed to improve the routine program change submission process and will replace the current paper-only submission process. The new site will provide the following functionalities: Make active program change documents electronically available to the public, states and federal agencies; Provide electronic notices to state agencies, federal agencies and the public of state program change submissions, OCM decision deadlines and OCM decisions; Automatically notify federal agencies, states and members of the public who request such notifications via email; Allow federal agencies and the public to submit comments to OCM on individual state program change submissions; Allow ability of OCM staff to upload text-searchable PDF documents that are part of program changes. These uploads need to be allowable on a daily basis, and need to be uploaded into a publicly available database. The database should have the ability to contain information for each program change (as in what is currently included in the Microsoft Access database) and to hold associated program change documents; Allow the ability to provide electronic notices to state agencies, federal agencies and the public by adding the notices to the online database and also automatically sending them to a particular list of contacts; and Provide an area on the website/database interface for interested parties to request to be added to the automatic notification contact list. The system is currently being designed and will undergo beta testing later this year. Respondents will have the ability to make their submissions using the new system or by paper until the system is fully operational and accurate, which is expected to be within one year.

Affected Public: State, local or tribal governments.

Frequency: Annually, semi-annually 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 21, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–28209 Filed 12–27–18; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG704

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 Scallop 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 Thursday, January 17, 2019 at 9 a.m.

ADDRESSES:

Meeting address: The meeting will be held at the Hilton Garden Inn, 100 Boardman Street, Boston, MA 02128; phone: (617) 567–6789.

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 Scallop Advisory Panel will receive an update on the implementation timeline for Framework Adjustment 30. They will also review the 2019 scallop workload based on priorities approved by the Council at its December meeting in Newport, RI, and discuss potential timelines for completing each task. The panel will review a draft scoping document for an action to address NGOM Scallop Management and LAGC IFQ trip limit. They also plan to discuss the potential harvest of small scallops in the NLS–S

deep as part of 2020 scallop specifications. Additionally, they will discuss potential elements of an action to mitigate impacts on yellowtail flounder. The panel will also discuss potential approaches to evaluate the scallop rotational management program. Other business may 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. 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 21, 2018.

Tracey L. Thompson,

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

[FR Doc. 2018–28232 Filed 12–27–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

41st Meeting of the U.S. Coral Reef Task Force; Public Meeting

AGENCY: Coral Reef Conservation Program, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

ACTION: Notice of public meeting, notice of public comment.

SUMMARY: The U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) and the U.S. Department of Interior will hold a public meeting of the 41st U.S. Coral Reef Task Force (USCRTF).

DATES: The public meeting will be held Thursday, February 21, from 8:00 a.m. to 5:00 p.m. with an opportunity to provide public comments. Written comments must be received on or before January 30, 2019. For specific the date, time, and location of the public meeting, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: You may submit comments to the USCRTF by any of the following methods:

Public Meeting and Oral Comments: A public meeting will be held in Washington DC. For the specific location, see **SUPPLEMENTARY INFORMATION**.

Written Comments: Please direct written comments to Jennifer Koss, NOAA, USCRTF Steering Committee Point of Contact, NOAA Coral Reef Conservation Program, 1305 East-West Highway, N/OCM, Silver Spring, MD 20910 or via email to *Jennifer.Koss@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Koss, NOAA USCRTF Steering Committee Point of Contact, NOAA Coral Reef Conservation Program, 1305 East-West Highway, N/OCM, Silver Spring, MD 20910 at (301) 533–0777 or Liza Johnson, USCRTF Executive Secretary, U.S. Department of Interior, MS–3530–MIB, 1849 C Street NW, Washington, DC 20240 at (202) 208–5004 or visit the USCRTF website at *http://www.coralreef.gov.*

SUPPLEMENTARY INFORMATION: The meeting provides a forum for coordinated planning and action among federal agencies, state and territorial governments, and nongovernmental partners. Registration is requested for all events associated with the meeting. This meeting has time allotted for public comment. All public comments must be submitted in written format. A written summary of the meeting will be posted on the USCRTF website within two months of occurrence. For information about the meeting, registering and submitting public comments, go to *http://www.coralreef.gov.* Commenters may address the meeting, the role of the USCRTF, or general coral reef conservation issues. 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 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. Established by Presidential Executive Order 13089 in 1998, the USCRTF mission is to lead, coordinate and strengthen U.S. government actions to better preserve and protect coral reef ecosystems. Co-chaired by the Departments of Commerce and Interior, USCRTF members include leaders of 12 federal agencies, seven U.S. states and territories and three freely associated states.

You may participate and submit oral comments at the public meeting. The public meeting occurs annually in Washington DC, and is scheduled as follows:

Date: Thursday, February 21, 2019.

Time: 8:00 a.m. to 5:00 p.m. EST.

Location: U.S. Environmental Protection Agency, 1201 Constitution Ave. NW, Washington, DC 20460, Room 1151.

Written comments must be received on or before January 30, 2019.

Dated: December 19, 2018.

Nicole R. LeBoeuf,

Acting Assistant Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.

[FR Doc. 2018–28360 Filed 12–27–18; 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 (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Economic Value of the Reduction in the Risk of Whale Strikes in the Channel Islands National Marine Sanctuary.

OMB Control Number: 0648–0729.

Form Number(s): None.

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

Number of Respondents: 500.

Average Hours per Response: 20 minutes per on-site interview of passengers, 20 minutes per importance-satisfaction mail back and 20 minutes for the expenditure mail back.

Burden Hours: 367.

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

NOAA is sponsoring a class project at the Bren School of Management & Science at the University of California, Santa Barbara to estimate the market

and non-market economic values associated with the reduction in risk of whale strikes by different scenarios of changes in traffic lanes and/or vessel speeds for major commercial vessels operating in the region of southern California where the Channel Islands National Marine Sanctuary is located.

The required information is to conduct surveys of the for hire operations that take people out for non-consumptive recreation to watch whales or other wildlife to obtain total use by type of activity (*e.g.* whale watching, and other wildlife observation) and the spatial use by type of activity. Information will also be obtained on costs-and-earnings of the operations and demographic information on owner/captains and crews. Surveys will also be conducted of the passengers aboard the for hire operation boats to obtain their market and non-market economic use values for the reduction in the risk of whale strikes. Additional information will be obtained on importance-satisfaction ratings of key natural resource attributes, facilities and services along with demographic profiles of passengers.

Note: We have completed the for-hire operations survey and one season of the Passenger Survey. We need to complete the second season of the Passenger Survey.

Affected Public: Individuals or households.

Frequency: One time.

Respondent's Obligation: Voluntary.

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 21, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–28211 Filed 12–27–18; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Economic Expenditure Survey of Golden Crab Fishermen in the U.S. South Atlantic Region.

OMB Control Number: 0648–0631.

Form Number(s): None.

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

Number of Respondents: 9.

*Average Hours per Response:*1.

Burden Hours: 9.

Needs and Uses: This request is for extension of a currently approved information collection. The National Marine Fisheries Service (NMFS) proposes to collect economic information from golden-crab landing commercial fishermen in the United States (U.S.) South Atlantic region. The data gathered will be used to evaluate the likely economic impacts of management proposals. In addition, the information will be used to satisfy legal mandates under Executive Order 12898, the Magnuson-Stevens Fishery Conservation and Management Act (U.S.C. 1801 *et seq.*), the Regulatory Flexibility Act, the Endangered Species Act, and the National Environmental Policy Act, and other pertinent statues.

Affected Public: Business or other for-profit organizations.

Frequency: Once every 4 years.

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 21, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–28212 Filed 12–27–18; 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 (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Economic Value of Non-consumptive Recreation Use from those Accessing the Monterey Bay National Marine Sanctuary via For Hire Operation Boats.

OMB Control Number: 0648–0726.

Form Number(s): None.

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

Number of Respondents: 1,050.

Average Hours per Response: 2 hours per for hire operation, 20 minutes per on-site interview of passengers, 20 minutes per importance-satisfaction/knowledge, attitudes & perceptions mail back, and 20 minutes for the expenditure mail back.

Burden Hours: 733.

Needs and Uses: This request is for extension of a currently approved information collection. The collection was approved three years ago but had not begun.

The required information will be obtained through surveys of the for hire operations that take people out for non-consumptive recreation to obtain total use by type of activity and the spatial use by type of activity. Information will also be obtained on costs-and-earnings of the operations, knowledge, attitudes & perceptions of sanctuary management strategies and regulations, and demographic information on owner/captains and crews. Surveys will also be conducted of the passengers aboard the for hire operation boats to obtain their market and non-market economic use values for non-consumptive recreation use and how those value change with changes in natural resource attribute conditions and user characteristics. Additional information will be obtained on importance-satisfaction ratings of key natural resource attributes, facilities and services, knowledge, attitudes and perceptions of management strategies and regulations, and demographic profiles of passengers. This survey was not started during the 2015–2018 OMB approval period.

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

Frequency: One time.

Respondent's Obligation: One time.

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 21, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–28210 Filed 12–27–18; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG709

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 58 Data Workshop for Atlantic Cobia.

SUMMARY: The SEDAR 58 assessment(s) of the Atlantic stock of Cobia will consist of a series of workshops and webinars: Stock Identification (ID) Workshop; Stock ID Review Workshop; Stock ID Joint Cooperator Technical Review; Data Workshop; Assessment Webinars; and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 58 Data Workshop will be held on January 14, 2019, from 1 p.m. until 6 p.m.; January 15–17, 2019, from 8 a.m. until 6 p.m., and January 18, 2019, from 8 a.m. until 1 p.m. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from, or completed prior to the time established by this notice. Additional SEDAR 58 workshops and webinar dates and times will publish in a subsequent issue in the **Federal Register**.

ADDRESSES:

Meeting address: The SEDAR 58 Data Workshop will be held at the Town and Country Inn, 2008 Savannah Highway, Charleston, SC 29407; phone: (843) 571–1000.

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405; *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Julia Byrd, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4366; email: *julia.byrd@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the Data Workshop are as follows:

Participants will evaluate all available data and select appropriate sources for providing information on life history characteristics, catch statistics, discard estimates, length and age composition, and fishery independent and fishery dependent measures of stock abundance, as specified in the Terms of Reference for the workshop, to develop an assessment data set and associated documentation.

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 this meeting. Action will be restricted to those issues specifically identified 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 to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: December 21, 2018.

Tracey L. Thompson,

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

[FR Doc. 2018–28234 Filed 12–27–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG689

Whaling Provisions; Aboriginal Subsistence Whaling Quotas

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

ACTION: Notice; notification of quota for bowhead whales.

SUMMARY: NMFS notifies the public of the aboriginal subsistence whaling quota for bowhead whales that it has assigned to the Alaska Eskimo Whaling Commission (AEWC), and of limitations on the use of the quota deriving from regulations of the International Whaling Commission (IWC). For 2019, the quota is 93 bowhead whales struck. This quota and other applicable limitations govern the harvest of bowhead whales by members of the AEWC.

DATES: Applicable December 28, 2018.

ADDRESSES: Office for International Affairs and Seafood Inspection, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Carolyn Doherty, (301) 427–8385.

SUPPLEMENTARY INFORMATION: Aboriginal subsistence whaling in the United States is governed by the Whaling Convention Act (WCA) (16 U.S.C. 916 *et seq.*). Under the WCA, IWC regulations shall

generally become effective with respect to all persons and vessels subject to the jurisdiction of the United States, within 90 days of notification from the IWC Secretariat of an amendment to the IWC Schedule (16 U.S.C. 916k). Regulations that implement the WCA, found at 50 CFR 230.6, require the Secretary of Commerce (Secretary) to publish, at least annually, aboriginal subsistence whaling quotas and any other limitations on aboriginal subsistence whaling deriving from regulations of the IWC.

At the 67th Meeting of the IWC, the Commission set catch limits for aboriginal subsistence use of bowhead whales from the Bering-Chukchi-Beaufort Seas stock. The bowhead and other aboriginal subsistence whaling catch limits were based on a joint request by Denmark on behalf of Greenland, the Russian Federation, St. Vincent and the Grenadines, and the United States, accompanied by documentation concerning the needs of the Native groups.

The IWC set a 7-year block catch limit of 392 bowhead whales landed. For each of the years 2019 through 2025, the number of bowhead whales struck may not exceed 67, with unused strikes from the three prior quota blocks carried forward and added to the annual strike quota of subsequent years, provided that no more than 50 percent of the annual strike limit is added to the strike quota for any one year. At the end of the 2018 harvest, there were 33 unused strikes available for carry-forward, so the combined strike quota set by the IWC for 2019 is 100 (67 + 33).

An arrangement between the United States and the Russian Federation ensures that the total quota of bowhead whales landed and struck in 2019 will not exceed the limits set by the IWC. Under this arrangement, the Russian natives may use no more than seven strikes, and the Alaska natives may use no more than 93 strikes.

Through its cooperative agreement with the AEWC, NOAA has assigned 93 strikes to the AEWC. The AEWC will in turn allocate these strikes among the 11 villages whose cultural and subsistence needs have been documented, and will ensure that its hunters use no more than 93 strikes.

At its 67th Meeting, the IWC also provided for automatic renewal of aboriginal subsistence whaling catch limits under certain circumstances. Commencing in 2026, bowhead whale catch limits shall be extended every six years provided: (a) The IWC Scientific Committee advises in 2024, and every six years thereafter, that such limits will not harm the stock; (b) the Commission does not receive a request from the United States or the Russian Federation for a change in the bowhead whale catch limits based on need; and (c) the Commission determines that the United States and the Russian Federation have complied with the IWC's approved timeline and that the information provided represents a status quo continuation of the hunts.

Other Limitations

The IWC regulations, as well as the NOAA regulation at 50 CFR 230.4(c), forbid the taking of calves or any whale accompanied by a calf.

NOAA regulations (at 50 CFR 230.4) contain a number of other prohibitions relating to aboriginal subsistence whaling, some of which are summarized here:

- Only licensed whaling captains or crew under the control of those captains may engage in whaling;
- Captains and crew must follow the provisions of the relevant cooperative agreement between NOAA and a Native American whaling organization;
- The aboriginal hunters must have adequate crew, supplies, and equipment to engage in an efficient operation;
- Crew may not receive money for participating in the hunt.
- No person may sell or offer for sale whale products from whales taken in the hunt, except for authentic articles of Native American handicrafts; and
- Captains may not continue to whale after the relevant quota is taken, after the season has been closed, or if their licenses have been suspended. They may not engage in whaling in a wasteful manner.

Dated: December 20, 2018.

John Henderschedt,

Director, Office for International Affairs and Seafood Inspection, National Marine Fisheries Service.

[FR Doc. 2018–28163 Filed 12–27–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Air Force

U.S. Air Force Scientific Advisory Board; Notice of Federal Advisory Committee Meeting

AGENCY: Department of the Air Force, U.S. Air Force Scientific Advisory Board, 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 U.S. Air Force Scientific Advisory Board will take place.

DATES: Closed to the public Wednesday January 23, 2019 from 8:00 a.m. to 5:00 p.m.

ADDRESSES: Beckman Center Auditorium, Arnold and Mabel Beckman Center of the National Academies of Sciences and Engineering, 100 Academy Way, Irvine, CA 92617.

FOR FURTHER INFORMATION CONTACT: Evan Buschmann, (240) 612–5503 (Voice), 703–693–5643 (Facsimile), *evan.g.buschmann.civ@us.af.mil* (Email). Mailing address is 1500 West Perimeter Road, Ste. #3300, Joint Base Andrews, MD 20762. Website: *http://www.sab.af.mil/*. 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 purpose of this United States Air Force Scientific Advisory Board quarterly meeting is to provide dedicated time for members to begin collaboration on research and formally commence the United States Air Force Scientific Advisory Board's three FY19 Secretary of the Air Force directed studies: (1) 21st Century Training and Education Technologies, (2) Fidelity of Modeling, Simulation, and Analysis to Support Air Force Decision Making, and (3) Multi-Source Data Fusion for Target Location and Identification. At this meeting the United States Air Force Scientific Advisory Board will also deliberate and finalize the FY19 Air Force Research Laboratory Science & Technology Review Integrated Outbrief.

Agenda: 0800–0815 Welcome Remarks from Dr. James S. Chow, Chair, U.S. Air Force Scientific Advisory Board; 0815–0945 21st Century Training and Education Technologies; 1000–1145 Fidelity of Modeling, Simulation, and Analysis to Support Air Force Decision Making; 1200–1300 Lunch Break; 1300–1445 Multi-Source Data Fusion for Target Location and Identification; 1500–1600 FY19 Air Force Research Laboratory Science & Technology Review Integrated Outbrief; 1615–1700 Closing Remarks, from Dr. James S. Chow, Chair, U.S. Air Force Scientific Advisory Board.

Meeting Accessibility: The Air Force Scientific Advisory Board Winter Meeting will be closed to the public

because the Board will discuss classified information and matters covered by Section 552b of Title 5, United States Code, subsection (c), subparagraph (1).

Written Statements: Any member of the public that wishes to provide input on the Air Force Scientific Advisory Board Winter Meeting must contact the meeting organizer at the phone number or email address listed in this announcement at least five working days prior to the meeting date. Please ensure that you submit your written statement in accordance with 41 CFR 102–3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act. Statements being submitted in response to the agenda mentioned in this notice must be received by the Scientific Advisory Board meeting organizer at least five calendar days prior to the meeting commencement date. The Scientific Advisory Board meeting organizer will review all timely submissions and respond to them prior to the start of the meeting identified in this notice. Written statements received after this date may not be considered by the Scientific Advisory Board until the next scheduled meeting.

Henry Williams, Jr.,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2018–28205 Filed 12–27–18; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2018–OS–0061]

Submission for OMB Review; Comment Request

AGENCY: National Guard Bureau (NGB), 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 28, 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: Joint Services Support (JSS) System; OMB Control Number 0704–0537.

Type of Request: Extension

Number of Respondents: 281,400.

Responses per Respondent: 1.

Annual Responses: 281,400.

Average Burden per Response: 1 minute.

Annual Burden Hours: 4690.

Needs and Uses: The information collection requirement is necessary for the agency, its programs, and stakeholders, to ensure key activities may be associated with system-registrants for program management, accountability, reporting, and support purposes. Examples of use of such information include: Validating program-specific and congressionally-mandated event registration and attendance; enabling users to login to system to facilitate outreach and communication activities; supporting Civilian Employer Information (CEI) collection; and enabling leadership across the participating programs with oversight and reporting.

Affected Public: Individuals or 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 20, 2018.

Shelly E. Finke,

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

[FR Doc. 2018–28223 Filed 12–27–18; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, U.S. Army Corps of Engineers

Announcement of the Selection of the Ten Pilot Projects Pursuant to Section 1122 of the Water Resources Development Act of 2016, Beneficial Use of Dredged Material

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Announcement.

SUMMARY: Section 1122 of the Water Resources Development Act (WRDA) of 2016 requires the U.S. Army Corps of Engineers (USACE) establish a pilot program to recommend ten projects for the beneficial use of dredged material. In response to a **Federal Register** Notice issued on February 9, 2018, the USACE received 95 proposals for beneficial use of dredged material. Those 95 proposals were evaluated by a team of subject matter experts. Based on criteria contained in Section 1122, ten projects were selected as having a high likelihood of delivering environmental, economic, and social benefits described in the proposals, and exhibit geographic diversity.

ADDRESSES: An Environmental Assessment and Findings of No Significant Impact (EA/FONSI) were prepared for this action and are available upon email request sent to: *Section-1122-Beneficial-Use-Of-Dredged-Material@usace.army.mil.*

FOR FURTHER INFORMATION CONTACT: Mr. Joseph R. Wilson, Environmental Dredging Program Manager, at 202–761–7697, or email: *joseph.r.wilson@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Section 1122 of WRDA 2016 requires the USACE establish a pilot program to carry out 10 projects for the beneficial use of dredged material, including projects for the purposes of—

(1) Reducing storm damage to property and infrastructure;

(2) promoting public safety;

(3) protecting, restoring, and creating aquatic ecosystem habitats;

(4) stabilizing stream systems and enhancing shorelines;

(5) promoting recreation;

(6) supporting risk management adaptation strategies; and

(7) reducing the costs of dredging and dredged material placement or disposal, such as projects that use dredged material for—

(A) Construction or fill material;

(B) civic improvement objectives; and

(C) other innovative uses and placement alternatives that produce public economic or environmental benefits.

The USACE has developed implementation guidance for carrying out the provisions of Section 1122. That implementation guidance can be obtained at *http://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/wrda2016/wrda2016_impguide.* Search Section 1122(a)–(h) for links to the implementation guidance and other Section 1122 information.

The ten recommended projects, listed alphabetically by state/territory follow:

CA	Restoring San Francisco Bay's Natural Infrastructure with Dredged Sediment: Strategic Placement.
HI	Haleiwa Small Boat Harbor Maintenance Dredging and Beach Restoration.
IL	Public Beach Protection Pilot in Four Illinois Coastal Communities.
MS	Deer Island Lagoon Project.
NJ	Beneficial Use Placement Opportunities in the State of New Jersey Using Navigation Channel Sediments: Barnegat Inlet.
PR	Condado Lagoon.
SC	Crab Bank Seabird Sanctuary.
TX	Hickory Cove Marsh Restoration and Living Shoreline.
WA	Grays Harbor South Jetty Sand Placement Pilot Project.
WI	Mississippi River Upper Pool 4, Pierce County Islands and Head of Lake Pepin Backwater Complex—Beneficial Use of Dredged Material.

The USACE process for evaluating all of the 95 proposals received and the decision to select the 10 projects is documented in the EA/FONSI. Further project specific evaluation of the 10 selected projects will be accomplished by the appropriate USACE office in accordance with Section 1122 implementation guidance and applicable USACE policies and regulations.

Dated: December 18, 2018.

Thomas P. Smith,

Chief, Operations and Regulatory Division, U.S. Army Corps of Engineers.

[FR Doc. 2018–28306 Filed 12–27–18; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare an Environmental Impact Statement for Chicago Area Waterway System Dredged Material Management Plan Study, Chicago, Illinois

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is preparing an Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA) for the Chicago Area Waterway System Dredged Material Management Plan Study. The study is sponsored by the Chicago Department of Transportation (CDOT) on behalf of the City of Chicago. The purpose of the EIS is to assess the likely social, economic, and environmental effects of a range of potential alternative plans to ensure that maintenance dredging activities are performed in an environmentally acceptable manner, use sound engineering techniques, are economically warranted, and provide sufficient confined disposal capacity, as needed, for at least the next 20 years. Based on stakeholder and public concerns voiced throughout the process of preparing an Environmental Assessment, the Corps has determined that an EIS is warranted for the study.

DATES: *Previous Scoping* letters and outreach occurred between February 2, 2018 and March 5, 2018. *Public Workshops* were held on April 28, 2018 and April 30, 2018 to share preliminary analyses and further solicit public input on potential study alternatives.

ADDRESSES: Mr. Mike Padilla, Project Manager, U.S. Army Corps of Engineers Chicago District, 231 South LaSalle Street, Suite 1500, Chicago, IL 60608.

FOR FURTHER INFORMATION CONTACT: For further information and/or questions about this Dredged Material Management Plan and EIS, please contact Mr. Mike Padilla, Project Manager, by *telephone:* 312–846–5427, by *email: michael.c.padilla@usace.army.mil,* or by *mail:* ATTN: Mike Padilla, Project Manager, U.S. Army Corps of Engineers Chicago District, 231 South LaSalle Street, Suite 1500, Chicago, IL 60608.

SUPPLEMENTARY INFORMATION: The Chicago District is preparing an Environmental Impact Statement (EIS) to determine the potential impacts of the Dredged Material Management Plan (DMMP) for the Chicago Area Waterway System (CAWS). The purpose of the DMMP is to find a new location for a Confined Disposal Facility (CDF) for contaminated sediment in the CAWS, which includes the Calumet River and Harbor and the Cal-Sag Channel. The current CDF is approaching capacity and will be full by 2022.

Dredged material management planning for all federal harbor projects is conducted by the Corps to ensure that maintenance dredging activities are performed in an environmentally acceptable manner, use sound engineering techniques, are economically warranted, and that sufficient confined disposal facilities are available for at least the next 20 years. These plans address dredging needs, disposal capabilities, capacities of disposal areas, environmental compliance requirements, potential for beneficial use of dredged material, and indicators of continued economic justification. The federal navigation channels in the Chicago Area Waterway System are a vital part of the local and regional economy and the Corps regularly performs maintenance dredging to provide sufficient depths for safe and efficient navigation within Calumet Harbor & River.

The Calumet Harbor and River navigation project is the third largest by tonnage among Great Lakes harbors, with shipments and receipts totaling 14 million tons annually. Commercial navigation activities at the Calumet Harbor & River and Cal-Sag Channel are locally and regionally significant, supporting more than 3,700 jobs and $600 million in annual sales in the Chicagoland area. If a plan for managing the dredged material is not identified, sediment would accumulate in the federal channel, reducing the safe depth at which vessels can operate, forcing ships to carry less cargo. Shipping costs would increase, impacting businesses at the harbor. The project requires annual dredging of approximately 50,000 cubic yards (CY) to maintain deep draft navigation. Dredged material is currently placed in the Chicago Area

Confined Disposal Facility (CDF). With over 1.3 million CY placed since inception in 1984, the CDF will reach capacity in 2022. The plan will include disposal management of more highly contaminated dredged sediment and beneficial use planning for material that is deemed suitable for various identified uses. The study is identifying and analyzing potential locations along the Calumet harbor and River to construct a new sediment management facility, as well as the feasibility of expanding the existing CDF to provide the required capacity for safely handling material that is too contaminated for beneficial use.

The Corps has hosted a number of stakeholder engagements and public workshops up to this point and is continuing to coordinate with stakeholders and resource agencies to identify and assess any potentially significant adverse impacts to human health and the environment associated with the study. Availability of the Draft Dredged Material Management Plan and EIS is anticipated in the spring of 2019 for a 45-day period of public review. A public hearing(s) will be conducted following public release.

Additional information about the Chicago Area Waterway System and the Dredged Material Management Plan is available on the study website at: *https://www.lrc.usace.army.mil/Missions/Civil-Works-Projects/Calumet-Harbor-and-River/.*

Felicia Kirksey,

Assistant Chief, Planning Programs and Project Management Division, U.S. Army Corps of Engineers, Chicago District.

[FR Doc. 2018–28344 Filed 12–27–18; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Expanding Opportunity Through Quality Charter Schools Program (CSP)—Grants to State Entities

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education is issuing a notice inviting applications for fiscal year (FY) 2019 for CSP—Grants to State Entities, Catalog of Federal Domestic Assistance (CFDA) number 84.282A.

DATES: *Applications Available:* December 28, 2018.

Date of Pre-Application Webinar: January 3, 2019, 2 p.m., Eastern Time.

Deadline for Transmittal of Applications: February 12, 2019.

Deadline for Intergovernmental Review: April 15, 2019.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 12, 2018 (83 FR 6003), and available at *www.govinfo.gov/content/pkg/FR-2018-02-12/pdf/2018-02558.pdf.*

FOR FURTHER INFORMATION CONTACT: Ashley Gardner, U.S. Department of Education, 400 Maryland Avenue SW, Room 4W216, Washington, DC 20202–5970. Telephone: (202) 453–6787. Email: *ashley.gardner@ed.gov.*

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

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The major purposes of the CSP are to expand opportunities for all students, particularly traditionally underserved students, to attend public *charter schools* [1] and meet challenging *State* academic standards; provide financial assistance for the planning, program design, and initial implementation of *charter schools;* increase the number of *high-quality charter schools* available to students across the United States; evaluate the impact of *charter schools* on student achievement, families, and communities; share best practices between *charter schools* and other public schools; encourage *States* to provide facilities support to *charter schools;* and support efforts to strengthen the charter school authorizing process.

Through the CSP Grants to State Entities (CSP State Entities) competition (CFDA number 84.282A), the Department awards grants to *State entities* that, in turn, award subgrants to *eligible applicants* for the purpose of opening and preparing for the operation of new *charter schools* and *replicated high-quality charter schools,* and *expanding high-quality charter schools.* Grant funds may also be used to provide technical assistance to *eligible applicants* and *authorized public chartering agencies* in opening and preparing for the operation of new *charter schools* and *replicating* and *expanding high-quality charter schools;* and to work with *authorized public chartering agencies* in the *State* to improve authorizing quality, including developing capacity for, and conducting, fiscal oversight and auditing of *charter schools.*

Background: The CSP State Entities program provides financial assistance to *State entities (SEs)* to support *charter schools* that serve elementary and secondary school students in a given *State. Charter schools* receiving funds under the CSP State Entities program also may serve students in *early childhood education programs* or postsecondary students.

The CSP State Entities program is authorized under Title IV, Part C of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESEA) (20 U.S.C. 7221–7221j).[2] This notice contains information regarding eligibility, priorities, definitions, application requirements, and selection criteria under the CSP State Entities program.

All *charter schools* receiving CSP funds must meet each element of the definition of *charter school* in section 4310(2) of the ESEA, including the requirement to comply with the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, section 444 of the General Education Provisions Act (GEPA), and part B of the Individuals with Disabilities Education Act (IDEA).

Priorities: This notice includes six competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(iv), these priorities are from section 4303(g)(2) of the ESEA.

Competitive Preference Priorities: For FY 2019 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award:

- An additional two points to an application that meets competitive preference priority 1; and
- Up to an additional 16 points to an application that meets one or more of competitive preference priorities 2 through 6, depending on how well the application addresses the priorities.

[1] Italicized terms are defined in the Definitions section of this notice.

[2] Prior to enactment of the Every Student Succeeds Act (ESSA), the ESEA, as amended by the No Child Left Behind Act of 2001 (NCLB), authorized the Secretary to make awards to *State educational agencies (SEAs)* to enable them to conduct charter school subgrant programs in their *States. State entities,* which include *SEAs,* are eligible applicants under the ESSA. In December 2015, Congress enacted the ESSA, which reauthorized the ESEA, as amended by NCLB.

An application may receive a total of up to 18 additional points under the competitive preference priorities.

These priorities are:

Competitive Preference Priority 1—At Least One Authorized Public Chartering Agency Other than a Local Educational Agency, or an Appeals Process (0 or 2 points).

To meet this priority, an applicant must demonstrate that it is located in a *State* that—

(a) Allows at least one entity that is not a local educational agency (LEA) to be an *authorized public chartering* agency for *developers* seeking to open a *charter school* in the *State;* or

(b) In the case of a *State* in which LEAs are the only *authorized public chartering agencies,* the *State* has an appeals process for the denial of an application for a *charter school.*

Competitive Preference Priority 2—Equitable Financing (up to 3 points).

To be eligible to receive points under this priority, an applicant must demonstrate the extent to which the *State* in which it is located ensures equitable financing, as compared to traditional public schools, for *charter schools* and students in a prompt manner.

Competitive Preference Priority 3—Charter School Facilities (up to 4 points).

To be eligible to receive points under this priority, an applicant must demonstrate the extent to which the *State* in which it is located provides *charter schools* one or more of the following:

(a) Funding for facilities;

(b) Assistance with facilities acquisition;

(c) Access to public facilities;

(d) The ability to share in bonds or mill levies;

(e) The right of first refusal to purchase public school buildings; or

(f) Low- or no-cost leasing privileges.

Competitive Preference Priority 4—Best Practices to Improve Struggling Schools and LEAs (up to 2 points).

To be eligible to receive points under this priority, an applicant must demonstrate the extent to which the *State* in which it is located uses best practices from *charter schools* to help improve struggling schools and LEAs.

Competitive Preference Priority 5—Serving At-Risk Students (up to 3 points).

To be eligible to receive points under this priority, an applicant must demonstrate the extent to which it supports *charter schools* that serve at-risk students through activities such as dropout prevention, dropout recovery, or comprehensive career counseling services.

Competitive Preference Priority 6—Best Practices for Charter School Authorizing (up to 4 points).

To be eligible to receive points under this priority, an applicant must demonstrate the extent to which it has taken steps to ensure that all *authorized public chartering agencies* implement best practices for charter school authorizing.

Note: For purposes of this competition, ''best practices for charter school authorizing'' includes, but is not limited to, the practices for monitoring *charter schools* described in Assurance E below.

Application Requirements:

These application requirements are from section 4303(f) of the ESEA (20 U.S.C. 7221b(f)). The Department will reject an application that does not meet each application requirement.

Under selection criterion (b) *Objectives,* the Secretary considers the *ambitiousness* of the *State entity's* objectives for its quality charter school program. An applicant may choose to respond to some or all of the elements of application requirement (I) *Description of Program* in the context of its response to selection criterion (b) *Objectives,* and should note the locations and page numbers of the responses accordingly.

Applications for funding under the CSP State Entities program must contain the following:

(I) Description of Program—A description of the *State entity's* objectives in running a quality charter school program and how the objectives of the program will be carried out, including—

(A) A description of how the *State entity* will—

(1) Support the opening of *charter schools* through the startup of new *charter schools* and, if applicable, the *replication* of *high-quality charter schools,* and the *expansion* of *high-quality charter schools* (including the proposed number of new *charter schools* to be opened, *high-quality charter schools* to be opened as a result of the *replication* of a *high-quality charter school,* or *high-quality charter schools* to be *expanded* under the *State entity's* program);

(2) Inform eligible *charter schools, developers,* and *authorized public chartering agencies* of the availability of funds under the program;

(3) Work with *eligible applicants* to ensure that the eligible applicants access all Federal funds that such applicants are eligible to receive, and help the *charter schools* supported by the applicants and the students attending those *charter schools*—

(a) Participate in the Federal programs in which the schools and students are eligible to participate;

(b) Receive the commensurate share of Federal funds the schools and students are eligible to receive under such programs; and

(c) Meet the needs of students served under such programs, including students with disabilities [3] and *English learners;*

(4) Ensure that *authorized public chartering agencies,* in collaboration with surrounding LEAs where applicable, establish clear plans and procedures to assist students enrolled in a *charter school* that closes or loses its charter to attend other high-quality schools;

(5) In the case of a *State entity* that is not a *State educational agency* (*SEA*)—

(a) Work with the *SEA* and *charter schools* in the *State* to maximize *charter school* participation in Federal and State programs for which *charter schools* are eligible; and

(b) Work with the *SEA* to operate the *State entity's* program under section 4303 of the ESEA, if applicable;

(6) Ensure that each *eligible applicant* that receives a subgrant under the *State entity's* program—

(a) Is using funds provided under this program for one of the activities described in section 4303(b)(1) of the ESEA; and

(b) Is prepared to continue to operate *charter schools* funded under section 4303 of the ESEA in a manner consistent with the *eligible applicant's* application for such subgrant once the subgrant funds under this program are no longer available;

(7) Support—

(a) *Charter schools* in LEAs with a significant number of schools identified by the *State* for comprehensive support and improvement under section 1111(c)(4)(D)(i) of the ESEA; and

(b) The use of *charter schools* to improve struggling schools, or to turn around struggling schools;

(8) Work with *charter schools* on—

(a) Recruitment and enrollment practices to promote inclusion of all students, including by eliminating any barriers to enrollment for educationally disadvantaged students (who include foster youth and unaccompanied homeless youth); and

(b) Supporting all students once they are enrolled to promote retention, including by reducing the overuse of discipline practices that remove students from the classroom;

[3] For purposes of this competition, ''students with disabilities'' or ''student with a disability'' has the same meaning as *children with disabilities* or *child with a disability.*

(9) Share best and promising practices between *charter schools* and other public schools;

(10) Ensure that *charter schools* receiving funds under the *State entity's* program meet the educational needs of their students, including *children with disabilities* and *English learners;*

(11) Support efforts to increase charter school quality initiatives, including meeting the quality authorizing elements described in section 4303(f)(2)(E) of the ESEA;

(12)(a) In the case of a *State entity* that is not a *charter school support organization,* a description of how the *State entity* will provide oversight of authorizing activity, including how the *State* will help ensure better authorizing, such as by establishing authorizing standards that may include approving, monitoring, and re-approving or revoking the authority of an *authorized public chartering agency* based on the performance of the *charter schools* authorized by such agency in the areas of student achievement, student safety, financial and operational management, and compliance with all applicable statutes and regulations; and

(b) In the case of a *State entity* that is a *charter school support organization,* a description of how the *State entity* will work with the *State* to support the *State's* system of technical assistance and oversight, as described in subsection (a), of the authorizing activity of *authorized public chartering agencies;* and

(13) Work with *eligible applicants* receiving a subgrant under the *State entity's* program to support the opening of new *charter schools* or *charter school* models described in application requirement (I)(A)(1) that are high schools;

(B) A description of the extent to which the *State entity*—

(1) Is able to meet and carry out competitive preference priorities 1 through 6; [4]

(2) Is working to develop or strengthen a cohesive statewide system to support the opening of new *charter schools* and, if applicable, the *replication* of *high-quality charter schools,* and the *expansion* of *high-quality charter schools;* and

(3) Is working to develop or strengthen a cohesive strategy to encourage collaboration between *charter schools* and LEAs on the sharing of best practices;

(C) A description of how the *State entity* will award subgrants, on a competitive basis, including—

(1) A description of the application each *eligible applicant* desiring to receive a subgrant will be required to submit, which application shall include—

(a) A description of the roles and responsibilities of *eligible applicants,* partner organizations, and *charter management organizations,* including the administrative and contractual roles and responsibilities of such partners;

(b) A description of the quality controls agreed to between the *eligible applicant* and the *authorized public chartering agency* involved, such as a contract or performance agreement, how a school's performance in the *State's* accountability system and impact on student achievement (which may include student academic growth) will be one of the most important factors for renewal or revocation of the school's charter, and how the *State entity* and the *authorized public chartering agency* involved will reserve the right to revoke or not renew a school's charter based on financial, structural, or operational factors involving the management of the school;

(c) A description of how the autonomy and flexibility granted to a *charter school* is consistent with the definition of *charter school* in section 4310 of the ESEA;

(d) A description of how the *eligible applicant* will solicit and consider input from *parents* and other members of the community on the implementation and operation of each *charter school* that will receive funds under the *State entity's* program;

(e) A description of the *eligible applicant's* planned activities and expenditures of subgrant funds to support opening and preparing for the operation of new *charter schools,* opening and preparing for the operation of *replicated high-quality charter schools,* or *expanding high-quality charter schools*, and how the *eligible applicant* will maintain financial sustainability after the end of the subgrant period; and

(f) A description of how the *eligible applicant* will support the use of effective *parent,* family, and community engagement strategies to operate each *charter school* that will receive funds under the *State entity's* program; and

(2) A description of how the *State entity* will review applications from *eligible applicants*;

(D) In the case of a *State entity* that partners with an outside organization to carry out the *State entity's* quality charter school program, in whole or in part, a description of the roles and responsibilities of the partner;

(E) A description of how the *State entity* will ensure that each *charter school* receiving funds under the *State entity's* program has considered and planned for the transportation needs of the school's students;

(F) A description of how the *State* in which the *State entity* is located addresses *charter schools* in the *State's* open meetings and open records laws; and

(G) A description of how the *State entity* will support diverse charter school models, including models that serve rural communities.

(II) Assurances—Assurances that—

(A) Each *charter school* receiving funds through the *State entity's* program will have a high degree of autonomy over budget and operations, including autonomy over personnel decisions;

(B) The *State entity* will support *charter schools* in meeting the educational needs of their students, including *children with disabilities* and *English learners*;

(C) The *State entity* will ensure that the *authorized public chartering agency* of any *charter school* that receives funds under the *State entity's* program adequately monitors each *charter school* under the authority of such agency in recruiting, enrolling, retaining, and meeting the needs of all students, including *children with disabilities* and *English learners*;

(D) The *State entity* will provide adequate technical assistance to *eligible applicants* to meet the objectives described in application requirement (I)(A)(8);

(E) The *State entity* will promote quality authorizing, consistent with *State* law, such as through providing technical assistance to support each *authorized public chartering agency* in the *State* to improve such agency's ability to monitor the *charter schools* authorized by the agency, including by—

(1) Assessing annual performance data of the schools, including, as appropriate, graduation rates, student academic growth, and rates of student attrition;

(2) Reviewing the schools' independent, annual audits of financial statements prepared in accordance with generally accepted accounting

[4] In accordance with 34 CFR 105(c)(2)(i), applications are not required to address competitive preference priorities but may receive additional points if they do so. However, to meet this application requirement, the *State entity* must describe the extent to which it is able to meet and carry out competitive preference priorities 1 through 6. If the *State entity* is unable to meet and carry out one or more of these competitive preference priorities, the description for that priority should state that the *State entity* is unable to meet or carry out the priority.

principles and ensuring that any such audits are publically reported; and

(3) Holding *charter schools* accountable to the academic, financial, and operational quality controls agreed to between the *charter school* and the *authorized public chartering agency* involved, such as renewal, non-renewal, or revocation of the school's charter;

(F) *The State entity* will work to ensure that *charter schools* are included with the traditional public schools in decisionmaking about the public school system in the *State*; and

(G) The *State entity* will ensure that each *charter school* receiving funds under the *State entity's* program makes publicly available, consistent with the dissemination requirements of the annual *State* report card under section 1111(h) of the ESEA, including on the website of the school, information to help *parents* make informed decisions about the education options available to their children, including—

(1) Information on the educational program;

(2) Student support services;

(3) Parent contract requirements (as applicable), including any financial obligations or fees;

(4) Enrollment criteria (as applicable); and

(5) Annual performance and enrollment data for each of the subgroups of students, as defined in section 1111(c)(2) of the ESEA, except that such disaggregation of performance and enrollment data shall not be required in a case in which the number of students in a group is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student.

(III) Waivers—Requests for information about waivers, including—

(A) A request and justification for waivers of any Federal statutory or regulatory provisions that the *State entity* believes are necessary for the successful operation of the *charter schools* that will receive funds under the *State entity's* program under section 4303 of the ESEA or, in the case of a *State entity* that is a *charter school support organization,* a description of how the *State entity* will work with the *State* to request such necessary waivers, where applicable; and

(B) A description of any *State* or local rules, generally applicable to public schools, that will be waived or otherwise not apply to such schools.

Definitions:

The following definitions are from sections 4303(a), 4310, and 8101 of the ESEA (20 U.S.C. 7221b(a), 7221i, and 7801); and 34 CFR 77.1.

Ambitious means promoting continued, meaningful improvement for program participants or for other individuals or entities affected by the grant, or representing a significant advancement in the field of education research, practices, or methodologies. When used to describe a *performance target,* whether a *performance target* is *ambitious* depends upon the context of the *relevant performance measure* and the *baseline* for that measure (34 CFR 77.1).

Authorized public chartering agency means a *State educational agency,* local educational agency, or other public entity that has the authority pursuant to *State* law and approved by the Secretary to authorize or approve a *charter school* (ESEA section 4310(1)).

Baseline means the starting point from which performance is measured and targets are set (34 CFR 77.1).

Charter school means a public school that—

(a) In accordance with a specific *State* statute authorizing the granting of charters to schools, is exempt from significant *State* or local rules that inhibit the flexible operation and management of public schools, but not from any rules relating to the other requirements of this definition;

(b) Is created by a *developer* as a public school, or is adapted by a *developer* from an existing public school, and is operated under public supervision and direction;

(c) Operates in pursuit of a specific set of educational objectives determined by the school's *developer* and agreed to by the *authorized public chartering agency*;

(d) Provides a program of elementary or secondary education, or both;

(e) Is nonsectarian in its programs, admissions policies, employment practices, and all other operations, and is not affiliated with a sectarian school or religious institution;

(f) Does not charge tuition;

(g) Complies with the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*), section 444 of GEPA (20 U.S.C. 1232g) (commonly referred to as the ''Family Educational Rights and Privacy Act of 1974''), and part B of the IDEA;

(h) Is a school to which *parents* choose to send their children, and that—

(1) Admits students on the basis of a lottery, consistent with section 4303(c)(3)(A) of the ESEA, if more students apply for admission than can be accommodated; or

(2) In the case of a school that has an affiliated *charter school* (such as a school that is part of the same network of schools), automatically enrolls students who are enrolled in the immediate prior grade level of the affiliated *charter school* and, for any additional student openings or student openings created through regular attrition in student enrollment in the affiliated *charter school* and the enrolling school, admits students on the basis of a lottery as described in paragraph (1);

(i) Agrees to comply with the same Federal and *State* audit requirements as do other elementary schools and secondary schools in the *State,* unless such State audit requirements are waived by the *State*;

(j) Meets all applicable Federal, *State,* and local health and safety requirements;

(k) Operates in accordance with *State* law;

(l) Has a written performance contract with the *authorized public chartering agency* in the *State* that includes a description of how student performance will be measured in *charter schools* pursuant to *State* assessments that are required of other schools and pursuant to any other assessments mutually agreeable to the *authorized public chartering agency* and the *charter school*; and

(m) May serve students in *early childhood education programs* or postsecondary students (ESEA section 4310(2)).

Charter management organization means a nonprofit organization that operates or manages a network of *charter schools* linked by centralized support, operations, and oversight (ESEA section 4310(3)).

Charter school support organization means a nonprofit, non-governmental entity that is not an *authorized public chartering agency* and provides, on a statewide basis—

(a) Assistance to *developers* during the planning, program design, and initial implementation of a *charter school*; and

(b) Technical assistance to operating *charter schools* (ESEA section 4310(4)).

Child with a disability means—

(a) A child (1) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to as ''emotional disturbance''), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (2) who, by reason

thereof, needs special education and related services.

(b) For a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the *State* and the LEA, include a child (1) experiencing developmental delays, as defined by the *State* and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Physical development; cognitive development; communication development; social or emotional development; or adaptive development; and (2) who, by reason thereof, needs special education and related services (ESEA section 8101(4)).

Demonstrates a rationale means a key *project component* included in the *project's logic model* is informed by research or evaluation findings that suggest the *project component* is likely to improve *relevant* outcomes (34 CFR 77.1).

Developer means an individual or group of individuals (including a public or private nonprofit organization), which may include teachers, administrators and other school staff, *parents,* or other members of the local community in which a charter school *project* will be carried out (ESEA section 4310(5)).

Early childhood education program means (a) a Head Start program or an Early Head Start program carried out under the Head Start Act (42 U.S.C. 9831 *et seq.*), including a migrant or seasonal Head Start program, an Indian Head Start program, or a Head Start program or an Early Head Start program that also receives State funding; (b) a State licensed or regulated child care program; or (c) a program that (1) serves children from birth through age six that addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development; and (2) is (i) a *State* prekindergarten program; (ii) a program authorized under section 619 or part C of the IDEA; or (iii) a program operated by an LEA (ESEA section 8101(16)).

Eligible applicant means a *developer* that has—

(a) Applied to an *authorized public chartering authority* to operate a *charter school*; and

(b) Provided adequate and timely notice to that authority (ESEA section 4310(6)).

English learner, when used with respect to an individual, means an individual—

(a) Who is aged 3 through 21;

(b) Who is enrolled or preparing to enroll in an elementary school or secondary school;

(c)(1) Who was not born in the United States or whose native language is a language other than English;

(2)(i) Who is a Native American or Alaska Native, or a native resident of the outlying areas; and

(ii) Who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or

(3) Who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and

(d) Whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual—

(1) The ability to meet the challenging State academic standards;

(2) The ability to successfully achieve in classrooms where the language of instruction is English; or

(3) The opportunity to participate fully in society (ESEA section 8101(20)).

Expand, when used with respect to a *high-quality charter school,* means to significantly increase enrollment or add one or more grades to the *high-quality charter school* (ESEA section 4310(7)).

High-quality charter school means a *charter school* that—

(a) Shows evidence of strong academic results, which may include strong student academic growth, as determined by a *State*;

(b) Has no significant issues in the areas of student safety, financial and operational management, or statutory or regulatory compliance;

(c) Has demonstrated success in significantly increasing student academic achievement, including graduation rates where applicable, for all students served by the *charter school*; and

(d) Has demonstrated success in increasing student academic achievement, including graduation rates where applicable, for each of the subgroups of students, as defined in section 1111(c)(2) of the ESEA, except that such demonstration is not required in a case in which the number of students in a group is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student (ESEA section 4310(8)).

Logic model (also referred to as theory of action) means a framework that identifies key *project components* of the proposed *project* (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the *relevant* outcomes) and describes the theoretical and operational relationships among the key *project components* and *relevant* outcomes (34 CFR 77.1).

Parent includes a legal guardian or other person standing in loco parentis (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare) (ESEA section 8101(38)).

Performance measure means any quantitative indicator, statistic, or metric used to gauge program or project performance (34 CFR 77.1).

Performance target means a level of performance that an applicant would seek to meet during the course of a *project* or as a result of a *project* (34 CFR 77.1).

Project component means an activity, strategy, intervention, process, product, practice, or policy included in a *project.* Evidence may pertain to an individual *project component* or to a combination of *project components* (*e.g.,* training teachers on instructional practices for *English learners* and follow-on coaching for these teachers) (34 CFR 77.1).

Relevant outcome means the student outcome(s) or other outcome(s) the key *project component* is designed to improve, consistent with the specific goals of the program (34 CFR 77.1).

Replicate, when used with respect to a *high-quality charter school,* means to open a new *charter school,* or a new campus of a *high-quality charter school,* based on the educational model of an existing *high-quality charter schoo*l, under an existing charter or an additional charter, if permitted or required by *State* law (ESEA section 4310(9)).

State means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas (ESEA section 8101(48)).

State educational agency means the agency primarily responsible for the *State* supervision of public elementary schools and secondary schools (ESEA section 8101(49)).

State entity means—

(a) A *State educational agency*;

(b) A *State* charter school board;

(c) A Governor of a *State*; or

(d) A *charter school support organization* (ESEA section 4303(a)).

Program Authority: Title IV, part C of the ESEA (20 U.S.C. 7221–7221j).

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 76, 77, 79, 81, 82, 84, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as

regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

II. Award Information

Type of Award: Discretionary grant.

Estimated Available Funds: $108,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in subsequent years from the list of unfunded applications from this competition.

Estimated Range of Awards: $2,000,000 to $25,000,000 per year.

Estimated Average Size of Awards: $10,000,000 per year.

Maximum Award: See section III.4.(a) of this notice, *Reasonable and Necessary Costs,* for information regarding the maximum amount of funds that *SEs* may award for each *charter school* receiving subgrant funds.

Estimated Number of Awards: 3–8.

Note: The Department is not bound by any estimates in this notice. The estimated range and average size of awards are based on a single 12-month budget period. We may use FY 2019 funds to support multiple 12-month budget periods for one or more grantees.

Project Period: Up to five years.

III. Eligibility Information

1. *Eligible Applicants: SEs* in *States* with a specific *State* statute authorizing the granting of charters to schools.

Under section 4303(e)(1) of the ESEA, no *SE* may receive a grant under this competition for use in a *State* in which an *SE* has a current CSP State Entities grant. The Department awarded new CSP State Entities grants under section 4303 of the ESEA in FY 2017 and FY 2018.

Accordingly, no *SE* may receive a grant under this competition for use in a *State* in which an *SE* received a CSP State Entities grant in FY 2017 or FY 2018, and is currently using the grant; these *States* are Arizona, Arkansas, Colorado, Delaware, Idaho, Indiana, Maryland, Michigan, Minnesota, Mississippi, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Texas, and Wisconsin. *SEs* in *States* in which an *SEA* has a current CSP grant for *SEAs* that was awarded prior to FY 2017, under the ESEA, as amended by the NCLB, are eligible to apply for a CSP State Entities grant under this competition, so long as no other *SE* in the *State* has a current CSP State Entities grant.

In addition, consistent with section 4303(e)(1) of the ESEA, if multiple *SEs* in a *State* submit applications that receive high enough scores to be recommended for funding under this competition, only the highest-scoring application among such *State entities* would be funded.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* (a) Under section 4303(b) and (c)(2) of the ESEA, an *SE* may award subgrants to *eligible applicants* and technical assistance providers.

(b) Under section 4303(d)(2) of the ESEA, an *SE* awarding subgrants to eligible applicants must use a peer-review process to review applications.

Note: An *eligible applicant* (*i.e.,* charter school *developer* or *charter school*) in a *State* in which no *SE* has an approved grant application under section 4303 of the ESEA may apply for funding directly from the Department under the CSP Grants to Developers (CFDA number 84.282B or 84.282E) competition. Additional information about the CSP Grants to Developers program and any upcoming competitions is available at *https://innovation.ed.gov/what-we-do/charter-schools/charter-schools-program-non-state-educational-agencies-non-sea-planning-program-design-and-initial-implementation-grant/*.

4. *Other:* (a) *Reasonable and Necessary Costs:* The Secretary may elect to impose maximum limits on the amount of subgrant funds that an *SE* may award to an *eligible applicant* per new *charter school* created or *replicated,* per *charter school expanded,* or per new school seat created.

For this competition, the maximum amount of subgrant funds an *SE* may award to a subgrantee per new *charter school, replicated high-quality charter school,* or *expanding high-quality charter school* over a five-year subgrant period is $1,500,000.

Note: Applicants must ensure that all costs included in the proposed budget are necessary and reasonable to meet the goals and objectives of the proposed *project.* Any costs determined by the Secretary to be unreasonable or unnecessary will be removed from the final approved budget.

(b) *Audits:* (i) A non-Federal entity that expends $750,000 or more during the non-Federal entity's fiscal year in Federal awards must have a single or program-specific audit conducted for that year in accordance with the provisions of 2 CFR part 200. (2 CFR 200.501(a)).

(ii) A non-Federal entity that expends less than $750,000 during the non-Federal entity's fiscal year in Federal awards is exempt from Federal audit requirements for that year, except as noted in 2 CFR 200.503 (Relation to other audit requirements), but records must be available for review or audit by appropriate officials of the Federal agency, pass-through entity, and Government Accountability Office. (2 CFR 200.501(d)).

IV. Application and Submission Information

1. *Application Submission Instructions:* For information on how to submit an application please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 12, 2018 (83 FR 6003) and available at *www.govinfo.gov/content/pkg/FR-2018-02-12/pdf/2018-02558.pdf.*

2. *Submission of Proprietary Information:* Given the types of *projects* that may be proposed in applications for funds under the CSP State Entities grant competition, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

4. *Funding Restrictions:* In accordance with section 4303(c) of the ESEA, an *SE* receiving a grant under this program shall: (a) Use not less than 90 percent of the grant funds to award subgrants to *eligible applicants,* in accordance with the quality charter school program described in the *SE's* application pursuant to section 4303(f), for activities

related to opening and preparing for the operation of new *charter schools* and *replicated high-quality charter schools,* or *expanding high-quality charter schools;* (b) reserve not less than 7 percent of the grant funds to provide technical assistance to *eligible applicants* and *authorized public chartering agencies* in carrying out such activities, and to work with *authorized public chartering agencies* in the *State* to improve authorizing quality, including developing capacity for, and conducting, fiscal oversight and auditing of *charter schools;* and (c) reserve not more than 3 percent of the grant funds for administrative costs, which may include technical assistance. An *SE* may use a grant received under this program to provide technical assistance and to work with *authorized public chartering agencies* to improve authorizing quality under section 4303(b)(2) of the ESEA directly or through grants, contracts, or cooperative agreements.

Limitation on Grants and Subgrants: Under section 4303(d) of the ESEA, a grant awarded by the Secretary to an *SE* under this competition shall be for a period of not more than five years.

A subgrant awarded by an *SE* under this program shall be for a period of not more than five years, of which an *eligible applicant* may use not more than 18 months for planning and program design. An *eligible applicant* may not receive more than one subgrant under this program for each individual *charter school* for a five-year period, unless the *eligible applicant* demonstrates to the *SE* that such individual *charter school* has at least three years of improved educational results for students enrolled in such *charter school,* with respect to the elements described in section 4310(8)(A) and (D) of the ESEA.[5]

Other CSP Grants: A *charter school* that previously received CSP funds for opening or preparing to operate a new charter school, *replication,* or *expansion* under this program, the CSP Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools (CMO) program (CFDA number 84.282M), or the CSP Grants to Developers for the Opening of New Charter Schools and for the Replication and Expansion of High-quality Charter Schools (Developer) program (CFDA numbers 84.282B and 84.282E) may not use funds under this program to carry out the same activities. However, such *charter school* may be eligible to receive funds under this competition to *expand* the *charter school* beyond the existing grade levels or student count.

Likewise, a *charter school* that receives funds from an *SE* under this program is ineligible to receive funds to carry out the same activities under the CMO program (CFDA number 84.282M) or Developer program (CFDA numbers 84.282B and 84.282E), including for opening or preparing to operate a new charter school, *replication,* or *expansion.*

Uses of Subgrant Funds: State entities awarded grants under this competition shall award subgrants to *eligible applicants* to enable such *eligible applicants* to—

(a) Open and prepare for the operation of new *charter schools*;

(b) Open and prepare for the operation of *replicated high-quality charter schools*; or

(c) *Expand high-quality charter schools.*

An *eligible applicant* receiving a subgrant under this program shall use such funds to support activities related to opening and preparing for the operation of new *charter schools* or *replicating* or *expanding high-quality charter schools,* which shall include one or more of the following:

(a) Preparing teachers, school leaders, and specialized instructional support personnel, including through paying costs associated with—

(i) Providing professional development; and

(ii) Hiring and compensating, during the *eligible applicant's* planning period specified in the application for subgrant funds, one or more of the following:

(A) Teachers.

(B) School leaders.

(C) Specialized instructional support personnel.

(b) Acquiring supplies, training, equipment (including technology), and educational materials (including developing and acquiring instructional materials).

(c) Carrying out necessary renovations to ensure that a new school building complies with applicable statutes and regulations, and minor facilities repairs (excluding construction).

(d) Providing one-time, startup costs associated with providing transportation to students to and from the *charter school.*

(e) Carrying out community engagement activities, which may include paying the cost of student and staff recruitment.

(f) Providing for other appropriate, non-sustained costs related to opening, *replicating,* or *expanding high-quality charter schools* when such costs cannot be met from other sources.

Diversity of Projects: Each *State entity* awarding subgrants under this competition shall award subgrants in a manner that, to the extent practicable and applicable, ensures that such subgrants—

(a) Are distributed throughout different areas, including urban, suburban, and rural areas; and

(b) Will assist *charter schools* representing a variety of educational approaches.

Award Basis: In determining whether to approve a grant award and the amount of such award, the Department will consider, among other things, the applicant's performance and use of funds under a previous or existing award under any Department program (34 CFR 75.217(d)(3)(ii) and 233(b)). In assessing the applicant's performance and use of funds under a previous or existing award, the Secretary will consider, among other things, the outcomes the applicant has achieved and the results of any Departmental grant monitoring, including the applicant's progress in remedying any deficiencies identified in such monitoring.

We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit and English Language Requirement:* The application narrative (Part III of the application) is where you, the applicant, address the priorities, selection criteria, and application requirements that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 60 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

Applications must be in English, and peer reviewers will only consider

[5] Section 4303(e)(2) of the ESEA prescribes the circumstances under which an *eligible applicant* may be eligible to apply to an *SE* for a second subgrant for an individual *charter school* for a five-year period. The *eligible applicant* still would have to meet all program requirements, including the requirements for *replicating* or *expanding* a *high-quality charter school.*

supporting documents submitted with the application that are in English.

The recommended page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

6. *Pre-Application Webinar Information:* The Department will hold a pre-application meeting via webinar for prospective applicants on January 3, 2019, 2 p.m., Eastern Time. Individuals interested in attending this meeting are encouraged to pre-register by emailing their name, organization, and contact information with the subject heading ''STATE ENTITIES GRANTS PRE–APPLICATION MEETING'' to *CharterSchools@ed.gov.* There is no registration fee for attending this meeting.

For further information about the pre-application meeting, contact Ashley Gardner, U.S. Department of Education, 400 Maryland Avenue SW, Room 4W216, Washington, DC 20202–5970. Telephone: (202) 453–6787. Email: *ashley.gardner@ed.gov.*

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from section 4303(g)(1) of the ESEA (20 U.S.C. 7221b(g)(1)) and 34 CFR 75.210. The maximum possible total score an application can receive for addressing the criteria is 100 points. The maximum possible score for addressing each criterion is indicated in parentheses following the criterion.

(a) *Quality of the Project Design (up to 15 points).* The Secretary considers the quality of the design of the proposed *project.* In determining the quality of the design of the proposed *project,* the Secretary considers:

(1) The extent to which the proposed *project demonstrates a rationale* (up to 10 points); and

(2) The extent to which the goals, objectives, and outcomes to be achieved by the proposed *project* are clearly specified and measurable (up to 5 points).

(b) *Objectives (up to 20 points):* The *ambitiousness* of the *State entity's* objectives for the quality charter school program carried out under the CSP State Entities program.

Note: In response to this criterion, an applicant may address (or cross-reference) some or all of the components of application requirements (I)(A)–(G) in this notice, which require the applicant to provide a description of the *State entity's* objectives in running a quality charter school program and how the objectives of the program will be carried out.

(c) *Quality of Eligible Subgrant Applicants (up to 15 points):* The likelihood that the *eligible applicants* receiving subgrants under the program will meet those objectives and improve educational results for students.

(d) *State Plan (up to 20 points):* The *State entity's* plan to—

(1) Adequately monitor the *eligible applicants* receiving subgrants under the *State entity's program* (up to 5 points);

(2) Work with the *authorized public chartering agencies* involved to avoid duplication of work for the *charter schools* and *authorized public chartering agencies* (up to 5 points); and

(3) Provide technical assistance and support for—

(i) The *eligible applicants* receiving subgrants under the *State entity's* program; and

(ii) Quality authorizing efforts in the *State* (up to 10 points).

(e) *Quality of the Management Plan (up to 15 points).* The Secretary considers the quality of the management plan for the proposed *project.* In determining the quality of the management plan for the proposed *project,* the Secretary considers:

(1) The adequacy of the management plan to achieve the objectives of the proposed *project* on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing *project* tasks; and

(2) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed *project.*

(f) *Parent and Community Involvement (up to 10 points):* The *State entity's* plan to solicit and consider input from *parents* and other members of the community on the implementation and operation of *charter schools* in the *State.*

(g) *Flexibility (up to 5 points):* The degree of flexibility afforded by the *State's* charter school law and how the *State entity* will work to maximize the flexibility provided to *charter schools* under such law.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $150,000) under 2 CFR 200.205(a)(2), we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) In accordance with section 4303(i) of the ESEA, each *State entity* receiving a grant under this section must submit to the Secretary, at the end of the third year of the five-year grant period (or at the end of the second year if the grant period is less than five years), and at the end of such grant period, a report that includes the following:

(1) The number of students served by each subgrant awarded under this section and, if applicable, the number of new students served during each year of the period of the subgrant.

(2) A description of how the *State entity* met the objectives of the quality charter school program described in the *State entity's* application, including—

(A) How the *State entity* met the objective of sharing best and promising practices as outlined in section 4303(f)(1)(A)(ix) of the ESEA in areas such as instruction, professional development, curricula development, and operations between *charter schools* and other public schools; and

(B) If known, the extent to which such practices were adopted and implemented by such other public schools.

(3) The number and amount of subgrants awarded under this program to carry out activities described in section 4303(b)(1)(A) through (C) of the ESEA.

(4) A description of—

(A) How the *State entity* complied with, and ensured that *eligible applicants* complied with, the assurances included in the *State entity's* application; and

(B) How the *State entity* worked with *authorized public chartering agencies,* and how the agencies worked with the management company or leadership of the schools that received subgrant funds under this program, if applicable.

(d) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

5. *Performance Measures:*

(a) The Secretary has established two performance indicators to measure annual progress towards achieving the purposes of the program, which are discussed elsewhere in this notice. The performance indicators are: (1) The number of new *charter schools* and *charter school* campuses in operation around the Nation; (2) the number of *States* that demonstrate annual increases in the percentage of fourth- and eighth-grade *charter school* students who are achieving at or above the proficient level on State assessments in mathematics and reading/language arts; (3) the number of *States* that demonstrate annual decreases in the percentage of *charter schools* that are identified as a comprehensive support and improvement school. Additionally, the Secretary has established the following measure to examine the efficiency of the CSP: The Federal cost per student in implementing a successful school (defined as a school in operation for three or more consecutive years).

(b) *Project-Specific Performance Measures.* Applicants must propose project-specific *performance measures* and *performance targets* consistent with the objectives of the proposed *project.* Applications must provide the following information as directed under 34 CFR 75.110(b) and (c).

(1) *Performance measures.* How each proposed *performance measure* would accurately measure the performance of the *project* and how the proposed *performance measure* would be consistent with the *performance measures* established for the program funding the competition.

(2) *Baseline data.* (i) Why each proposed *baseline* is valid; or (ii) if the applicant has determined that there are no established *baseline* data for a particular *performance measure,* an explanation of why there is no established *baseline* and of how and when, during the project period, the applicant would establish a valid *baseline* for the *performance measure.*

(3) *Performance targets.* Why each proposed *performance target* is *ambitious* yet achievable compared to the *baseline* for the *performance measure* and when, during the project period, the applicant would meet the *performance target(s).*

(4) *Data collection and reporting.* (i) The data collection and reporting methods the applicant would use and why those methods are likely to yield reliable, valid, and meaningful performance data; and (ii) the applicant's capacity to collect and report reliable, valid, and meaningful performance data, as evidenced by high-quality data collection, analysis, and reporting in other projects or research.

All grantees must submit an annual performance report with information that is responsive to these *performance measures.*

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the *project*; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the *performance targets* in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

7. *Project Director's Meeting:* Applicants approved for funding under this competition must attend a two-day meeting for project directors at a location to be determined in the continental United States during each year of the *project.* Applicants may include the cost of attending this meeting in their proposed budgets as allowable administrative costs.

VII. Other Information

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

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

Dated: December 21, 2018.

James C. Blew,

Acting Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2018–28284 Filed 12–27–18; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Availability of Supplemental Environmental Impact Statement for Disposition of Depleted Uranium Oxide Conversion Product Generated From DOE's Inventory of Depleted Uranium Hexafluoride

AGENCY: Office of Environmental Management, U.S. Department of Energy.

ACTION: Notice of availability and public hearings.

SUMMARY: The U.S. Department of Energy (DOE), Office of Environmental Management, announces the availability of the Draft Supplemental Environmental Impact Statement for Disposition of Depleted Uranium Oxide Conversion Product Generated from DOE's Inventory of Depleted Uranium Hexafluoride (Draft SEIS) (DOE/EIS–0359–S1; DOE/EIS–0360–S1). DOE also announces three web-based public hearings to receive comments on the Draft SEIS. The Draft SEIS evaluates the potential environmental impacts associated with the transportation to final disposition of depleted uranium (DU) oxide conversion product from its depleted uranium hexafluoride (DUF_6) conversion facilities at the Paducah, Kentucky, and Portsmouth, Ohio, sites at three alternative offsite low-level radioactive waste disposal facilities: The DOE-owned low-level radioactive waste disposal facility at the Nevada National Security Site (NNSS) in Nye County, Nevada; the Energy*Solutions* low-level radioactive waste disposal facility in Clive, Utah; and the Waste Control Specialists LLC (WCS) low-level radioactive waste disposal facility in Andrews, Texas.

DATES: DOE is inviting public comments on the Draft SEIS starting with the date of publication of this Notice and ending on Monday, February 11, 2019. DOE will host three web-based public hearings to receive comments on the Draft SEIS. Comments submitted during this public comment period will be considered in preparation of the Final SEIS. DOE will consider late comments to the extent practicable. DOE will conduct web-based public comment hearings on the dates indicated below:

- Tuesday, January 22, 2019 from 2:00–4:00 p.m., Web-based
- Wednesday, January 23, 2019 from 4:00–6:00 p.m., Web-based
- Thursday, January 24, 2019, from 7:00–9:00 p.m., Web-based

ADDRESSES: Comments on the Draft SEIS maybe be submitted by any of the following methods:

- *Mail:* Ms. Jaffet Ferrer-Torres, Document Manager, Office of Environmental Management, Department of Energy, EM–4.22, 1000 Independence Avenue SW, Washington, DC 20585. Note: Comments submitted by U.S. Postal Service may be delayed by mail screening.
- *Email: DUF6_NEPA@em.doe.gov.*
- WebEx Meeting Room (during scheduled dates see Web-based Public Hearing Information Section):
  - *https://doe.webex.com/join/duf6_nepa* (Copy and Paste into web browser).
- DU Oxide SEIS Website: *http://www.energy.gov/em/disposition-uranium-oxide-conversion-depleted-uranium-hexafluoride.*

This NOA, the Environmental Protection Agency NOA, and the Draft SEIS will be posted on the DOE NEPA website at *http://energy.gov/nepa.* These documents, and additional materials relating to this Draft SEIS, will be also available on the DU Oxide SEIS website at: *http://www.energy.gov/em/disposition-uranium-oxide-conversion-depleted-uranium-hexafluoride.*

FOR FURTHER INFORMATION CONTACT: For further information about this Draft SEIS, please contact Ms. Jaffet Ferrer-Torres, U.S. Department of Energy at the mailing addresses listed in **ADDRESSES**. For information on DOE's NEPA process, please contact Mr. William Ostrum, Acting NEPA Compliance Officer, Office of Regulatory Compliance, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585; or email at *askNEPA@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

The Draft SEIS has been prepared in accordance with Council on Environmental Quality (CEQ) and DOE NEPA implementing regulations at 40 CFR parts 1500–1508 and 10 CFR part 1021, respectively. The Draft SEIS evaluates the potential impacts from three Action Alternatives and the No Action alternative (in accordance with 40 CFR 1502.14). Under the No Action alternative, transportation to and disposal of the conversion product at an offsite low-level waste disposal facility would not occur and refilled cylinders of DU oxide conversion product would remain in storage at DOE's Paducah and Portsmouth sites.

Preferred Alternative

DOE does not have a preferred alternative for the disposal of depleted uranium, but does identify factors that DOE plans to consider in developing a preferred alternative or alternatives for inclusion in the Final SEIS. These factors are discussed in the **SUMMARY** and chapter four of the Draft SEIS. The preferred alternative could be a combination of two or more alternatives. DOE invites public comments on these factors and any additional factors that should be considered in the selection of a preferred alternative and why.

Next Steps

Following the end of the public comment period, DOE will consider public comments on the Draft SEIS in preparing the Final SEIS. After issuing the Final SEIS, DOE will consider the environmental impacts presented in the Final SEIS, along with other appropriate information in proposing its decision(s) related to the disposal of depleted uranium for an Amended Record of Decision.

Web-based Public Hearing Information

Registration details are included below and are also available on the DOE EM SEIS project website (See **ADDRESSES** section). If you are joining the web-based public hearing via internet, copy and paste the link below to login to the WebEx Meeting Room, then follow prompts after entering the access code. If you are joining the web-based public hearing via phone, dial the US Toll number below and follow prompts to enter access code. For Global Call in numbers, visit the DU Oxide SEIS website. Documents and the presentation for the public hearing will be made available at *http://www.energy.gov/em/disposition-uranium-oxide-conversion-depleted-uranium-hexafluoride,* as well as shared during live web-based public hearings. Comments will be accepted during the web-based public hearing, by mail, by email, and through submittal of comment forms on the DU Oxide SEIS website. Persons who wish to speak may sign up to speak before each meeting by submitting a request to *DUF6_NEPA@em.doe.gov.*

- Join web-based public hearing via WebEx Meeting Room:
  - *https://doe.webex.com/join/duf6_nepa_*(Copy and Paste into web browser).
- Join web-based public hearing by phone:
  - US Toll: 1–415–527–5035 (For Global Call-In Numbers visit DU Oxide SEIS website).
  - Access code: 988 230 782 #.

Public Reading Rooms and Libraries

Copies of the Draft SEIS are available at *http://www.energy.gov/em/disposition-uranium-oxide-conversion-depleted-uranium-hexafluoride.* Copies may also be found for public review at the locations listed below:

District of Columbia

U.S. Department of Energy
Freedom of Information Act Electronic Reading Room:
https://www.energy.gov/management/office-management/operational-management/freedom-information-act/reading-room

Nevada

Nevada Site Office, U.S. Department of Energy
Public Reading Room
755 East Flamingo Road, Room 103
Las Vegas, NV 89119, (702) 794–5106.

Amargosa Valley Library
829 E Farm Road
HCR 69 Box 401–T
Amargosa, NV 89020, (775) 372–5340.

Clark County Library
1401 E Flamingo Road
Las Vegas, NV 89119, (702) 507–3400.

Indian Springs Library
715 Gretta Lane
P.O. Box 629
Indian Springs, NV 89018, (702) 879–3845.

Las Vegas Library
833 N Las Vegas Boulevard
Las Vegas, NV 89101, (702) 507–3500.

Pahrump Community Library,
701 S. East Street
Pahrump, NV 89048, (775) 727–5930.

Tonopah Public Library,
167 S Central Street
Tonopah, NV 89049, (775) 482–3374.

Utah

Tooele City Public Library
128 W Vine Street
Tooele, UT 84074, (435) 882–2182.

Texas

Andrews County Library
109 NW 1st Street
Andrews, TX 79714, (432)-523–9819.

Kentucky

U.S. DOE Environmental Information Center
Emerging Technology Center (Room 221)
5100 Alben Barkley Drive
Paducah, KY 42001, (270) 554–3004.

McCracken County Public Library
555 Washington Street
Paducah, KY 42003, (270) 442–2510.

Ohio

U.S. DOE Environmental Information Center
Ohio State Endeavor Center
1862 Shyville Road (Room 207)
Piketon, OH 45661, (740) 289–8898.

Portsmouth Public Library
1220 Gallia Street
Portsmouth, OH 45662, (740) 354–5688.

Scioto County Law Library
602 Seventh Street (Room 306)
Portsmouth, OH 45662, (740) 355–8259.

Individual commentators' names and addresses (including email addresses) received as part of oral statements at the public hearings or comment documents on this Draft SEIS normally are part of the public record. DOE plans to reproduce comment documents in their entirety in the Final SEIS, as appropriate, and to post all comment documents received in their entirety on the DU oxide SEIS website *at the close of the public comment period.* Any person wishing to have his/her name, address, or other identifying information withheld from the public record of comment documents must state this request prominently at the beginning of any comment document. DOE will honor the request to the extent allowable by law. All submissions from organizations or businesses will be included in the public record and open to public inspection in their entirety.

Issued at Washington, DC on December 20, 2018.

Elizabeth A. Connell,

Acting Associate Principal Deputy Assistant Secretary for Regulatory and Policy Affairs.

[FR Doc. 2018–28249 Filed 12–27–18; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Study on Macroeconomic Outcomes of LNG Exports: Response to Comments Received on Study

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of response to comments.

	FE Docket No.
Jordan Cove Energy Project, L.P	12–32–LNG
Gulf LNG Liquefaction Company, LLC	12–101–LNG

	FE Docket No.
CE FLNG, LLC	12–123–LNG
MPEH LLC	13–26–LNG
Venture Global Calcasieu Pass, LLC	13–69–LNG
Eos LNG LLC	13–116–LNG
Barca LNG LLC	13–118–LNG
Commonwealth LNG, LLC	13–153–LNG
Venture Global Calcasieu Pass, LLC	14–88–LNG
SCT&E LNG, LLC	14–98–LNG
Venture Global Calcasieu Pass, LLC	15–25–LNG
G2 LNG LLC	15–45–LNG
Texas LNG Brownsville LLC	15–62–LNG
Strom Inc	15–78–LNG
Port Arthur LNG, LLC	15–96–LNG
Rio Grande LNG, LLC	15–190–LNG
Eagle LNG Partners Jacksonville, LLC	16–15–LNG
SeaOne Gulfport, LLC	16–22–CGL
Venture Global Plaquemines LNG, LLC	16–28–LNG
Driftwood LNG, LLC	16–144–LNG
Fourchon LNG, LLC	17–105–LNG
Galveston Bay LNG, LLC	17–167–LNG
Freeport LNG Expansion L.P., and FLNG	18–26–LNG
Corpus Christi Liquefaction Stage III, LLC	18–78–LNG
Energía Costa Azul, S. de R.L. de C.V	18–144–LNG
Energía Costa Azul, S. de R.L. de C.V	18–145–LNG

SUMMARY: On June 12, 2018, the Office of Fossil Energy (FE) of the Department of Energy (DOE) gave notice of the availability of a study, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (2018 LNG Export Study or 2018 Study), in the above-referenced proceedings and invited the submission of public comments on the Study. DOE commissioned the 2018 LNG Export Study to inform its decision on pending and future applications seeking authorization to export domestically produced liquefied natural gas (LNG) from the lower-48 states to countries with which the United States does not have a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (non-FTA countries). The 2018 LNG Export Study evaluates a wider range of scenarios than DOE's prior LNG export studies, including examining the probability of various export scenarios. In this document, DOE/FE responds to the 19 public comments received on the 2018 Study and summarizes its conclusions on the Study. The 2018 LNG Export Study and the public comments are posted on the DOE/FE website at: *https://fossil.energy.gov/app/docketindex/docket/index/10.*

DATES: *Applicable on:* December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Amy Sweeney, U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585; (202) 586–2627; *amy.sweeney@hq.doe.gov;* or Cassandra Bernstein, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6D–033, 1000 Independence Ave. SW, Washington, DC 20585; (202) 586–9793; *cassandra.bernstein@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Acronyms and Abbreviations. A number of acronyms and abbreviations are used in this document and set forth below for reference.

AEO Annual Energy Outlook
APA Administrative Procedure Act
API American Petroleum Institute
Bcf/d Billion Cubic Feet per Day
Bcf/yr Billion Cubic Feet per Year
CLNG Center for Liquefied Natural Gas
CNG Compressed Natural Gas
DOE Department of Energy
DQA Data Quality Act
EA Environmental Assessment
EIA U.S. Energy Information Administration
EIS Environmental Impact Statement
FE Office of Fossil Energy, U.S. Department of Energy
FERC Federal Energy Regulatory Commission
FTA Free Trade Agreement
GDP Gross Domestic Product
GNGM Global Natural Gas Model
HOGR High Oil and Gas Resource and Technology
IEA International Energy Agency
IEO International Energy Outlook
JCEP Jordan Cove Energy Project L.P.
LNG Liquefied Natural Gas
LOGR Low Oil and Gas Resource and Technology
MMBtu Million British Thermal Units
mtpa Million Metric Tons per Annum
NEPA National Environmental Policy Act of 1969
NERA NERA Economic Consulting
NGA Natural Gas Act of 1938
NGL Natural Gas Liquid
NOA Notice of Availability
ppm Parts Per Million
ROW Rest of World
Tcf Trillion Cubic Feet
WEO World Energy Outlook

I. Background
A. DOE Export Authorizations Under Section 3 of the Natural Gas Act
B. Public Interest Review for Non-FTA Export Authorizations
C. Judicial Decisions Upholding DOE's Non-FTA Authorizations

II. DOE's Prior LNG Export Studies
A. 2012 EIA and NERA Studies (Collectively, the 2012 LNG Export Study)
B. 2014 and 2015 LNG Export Studies

III. Overview of 2018 LNG Export Study

IV. 2018 LNG Export Study, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports*
A. Overview of NERA's Findings
B. Methodology and Scenarios
C. NERA's Global Natural Gas Model (GNGM)
D. NERA's N_{ew}Era Macroeconomic Model
E. Results of the 2018 Study

V. Notice of Availability of the 2018 LNG Export Study

VI. Comments on the 2018 LNG Export Study and DOE/FE Responses
A. Data Input and Estimates of Natural Gas Demand
B. Economic Benefits Associated With LNG Exports
C. Distributional Impacts
D. Regional Impacts
E. Estimates of Domestic Natural Gas Supply

F. Cost of Environmental Externalities
G. Natural Gas Price Impacts
H. Benefits to U.S. Trade Balance
I. Procedural Arguments
J. Potential Impact on DOE/FE's Regulatory Process

VII. Discussion and Conclusions

I. Background

A. DOE Export Authorizations Under Section 3 of the Natural Gas Act

DOE is responsible for authorizing exports of domestically produced natural gas to foreign countries pursuant to section 3 of the Natural Gas Act (NGA), 15 U.S.C. 717b.[1] In relevant part, section 3(c) of the NGA applies to applications for exports of natural gas, including LNG, to countries with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (FTA countries).[2] Section 3(c) was amended by section 201 of the Energy Policy Act of 1992 (Pub. L. 102–486) to require that FTA applications ''shall be deemed to be consistent with the public interest'' and granted ''without modification or delay.'' [3] Therefore, DOE/FE approves applications for FTA authorizations without modification or delay.[4] None of the comments or discussion herein apply to FTA authorizations issued under NGA section 3(c).

For applications to export natural gas to non-FTA countries, section 3(a) of the NGA sets forth the following standard of review:

> [N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the [Secretary of Energy [5]] authorizing it to do so. The [Secretary] shall issue such order upon application, unless after opportunity for hearing, [he] finds that the proposed exportation or importation *will not be consistent with the public interest.* The [Secretary] may by [the Secretary's] order grant such application, in whole or part, with such modification and upon such terms and conditions as the [Secretary] may find necessary or appropriate.[6]

DOE has consistently interpreted this provision as creating a rebuttable presumption that a proposed export of natural gas to non-FTA countries is in the public interest.[7] Accordingly, DOE conducts an informal adjudication on non-FTA applications and will grant each application unless DOE finds that the proposed exportation will not be consistent with the public interest.[8] Before reaching a final decision, DOE must also comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

B. Public Interest Review for Non-FTA Export Authorizations

Although section 3(a) establishes a broad public interest standard and a presumption favoring export authorizations, the statute does not define ''public interest'' or identify criteria that must be considered. In prior decisions, DOE/FE has identified a range of factors that it evaluates when reviewing an application to export LNG to non-FTA countries. These factors include economic impacts, international impacts, security of natural gas supply, and environmental impacts, among others. To conduct this review, DOE/FE looks to record evidence developed in the application proceeding.[9]

DOE/FE's prior decisions have also looked to certain principles established in its 1984 Policy Guidelines.[10] The goals of the Policy Guidelines are to minimize federal control and involvement in energy markets and to promote a balanced and mixed energy resource system. The Guidelines provide:

> The market, not government, should determine the price and other contract terms of imported [or exported] natural gas . . . . The federal government's primary responsibility in authorizing imports [or exports] will be to evaluate the need for the gas and whether the import [or export] arrangement will provide the gas on a competitively priced basis for the duration of the contract while minimizing regulatory impediments to a freely operating market.[11]

While nominally applicable to natural gas import cases, DOE/FE subsequently held in Order No. 1473 that the same policies should be applied to natural gas export applications.[12]

In Order No. 1473, DOE/FE stated that it was guided by DOE Delegation Order No. 0204–111. That delegation order, which authorized the Administrator of the Economic Regulatory Administration to exercise the agency's review authority under NGA section 3, directed the Administrator to regulate exports ''based on a consideration of the domestic need for the gas to be exported and such other matters as the Administrator finds in the circumstances of a particular case to be appropriate.'' [13]

Although DOE Delegation Order No. 0204–111 is no longer in effect, DOE/FE's review of export applications has continued to focus on: (i) The domestic need for the natural gas proposed to be exported, (ii) whether the proposed exports pose a threat to the security of domestic natural gas supplies, (iii) whether the arrangement is consistent with DOE/FE's policy of promoting market competition, and (iv) any other factors bearing on the public interest described herein. Under this public interest standard, DOE has issued 30 final authorizations to export domestically produced LNG or compressed natural gas (CNG) to non-FTA countries to date, bringing the

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[1] The authority to regulate the imports and exports of natural gas, including liquefied natural gas, under section 3 of the NGA (15 U.S.C. 717b) has been delegated to the Assistant Secretary for FE in Redelegation Order No. 00–006.02 issued on November 17, 2014.

[2] 15 U.S.C. 717b(c). The United States currently has FTAs requiring national treatment for trade in natural gas with Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea, and Singapore. FTAs with Israel and Costa Rica do not require national treatment for trade in natural gas.

[3] 15 U.S.C. 717b(c).

[4] Unless otherwise stated, all references to exports of LNG herein refer to domestically produced natural gas liquefied in the United States. Additionally, DOE/FE uses the terms ''authorization'' and ''order'' interchangeably.

[5] The Secretary's authority was established by the Department of Energy Organization Act, 42 U.S.C. 7172, which transferred jurisdiction over imports and export authorizations from the Federal Power Commission to the Secretary of Energy.

[6] 15 U.S.C. 717b(a) (emphasis added).

[7] *See Sierra Club* v. *U.S. Dep't of Energy,* 867 F.3d 189, 203 (DC Cir. 2017) (''We have construed [NGA section 3(a)] as containing a 'general presumption favoring [export] authorization.' '') (quoting *W. Va. Pub. Serv. Comm'n* v. *U.S. Dep't of Energy,* 681 F.2d 847, 856 (DC Cir. 1982)).

[8] *See id.* (''there must be 'an affirmative showing of inconsistency with the public interest' to deny the application'' under NGA section 3(a)) (quoting *Panhandle Producers & Royalty Owners Ass'n* v. *Econ. Regulatory Admin.,* 822 F.2d 1105, 1111 (DC Cir. 1987)). We note that, as of August 24, 2018, qualifying small-scale exports of natural gas to non-FTA countries are treated differently—specifically, they are deemed to be consistent with the public interest under NGA section 3(a) (10 CFR 590.102(p); 590.208(a)). *See* U.S. Dep't of Energy, Small-Scale Natural Gas Exports; Final Rule, 83 FR 35106 (July 25, 2018).

[9] *See, e.g., Eagle LNG Partners Jacksonville II LLC,* DOE/FE Order No. 4078, FE Docket No. 17–79–LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas in ISO Containers Loaded at the Eagle Maxville Facility in Jacksonville, Florida, and Exported by Vessel to Free Trade Agreement and Non-Free Trade Agreement Nations (Sept. 15, 2017).

[10] New Policy Guidelines and Delegations Order Relating to Regulation of Imported Natural Gas, 49 FR 6684 (Feb. 22, 1984) [hereinafter 1984 Policy Guidelines].

[11] *Id.* at 6685.

[12] *Phillips Alaska Natural Gas,* DOE/FE Order No. 1473 at 14 (citing *Yukon Pacific Corp.,* DOE/FE Order No. 350, Order Granting Authorization to Export Liquefied Natural Gas from Alaska, 1 FE ¶ 70,259, ¶ 71,128 (1989)).

[13] DOE Delegation Order No. 0204–111 at 1; *see also* 1984 Policy Guidelines, 49 FR 6690. In February 1989, the Assistant Secretary for Fossil Energy assumed the delegated responsibilities of the Administrator of the Economic Regulatory Administration.

cumulative total of approved non-FTA exports to 23.05 billion cubic feet per day (Bcf/d) of natural gas, or 8.41 trillion cubic feet (Tcf) per year.[14] Each of these non-FTA orders authorize an export term of 20 years, as set forth in the orders.

C. Judicial Decisions Upholding DOE's Non-FTA Authorizations

Beginning in 2015, Sierra Club petitioned the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) for review of five long-term LNG export authorizations issued by DOE/FE under the standard of review described above. Sierra Club challenged DOE/FE's approval of LNG exports to non-FTA countries from projects proposed or operated by the following authorization holders: Freeport LNG Expansion, L.P., *et al.;* Dominion Energy Cove Point LNG, LP (formerly Dominion Cove Point LNG, LP); Sabine Pass Liquefaction, LLC; and Cheniere Marketing, LLC, *et al.* The D.C. Circuit subsequently denied four of the five petitions for review: one in a published decision issued on August 15, 2017 (*Sierra Club I*),[15] and three in a consolidated, unpublished opinion issued on November 1, 2017 (*Sierra Club II*).[16] Sierra Club subsequently withdrew its fifth and remaining petition for review.[17]

In *Sierra Club I,* the D.C. Circuit concluded that DOE/FE had complied with both NGA section 3(a) and NEPA in issuing the challenged non-FTA authorization. Freeport LNG Expansion, L.P. and its related entities (collectively, Freeport) had applied to DOE/FE for authorization to export LNG to non-FTA countries from the Freeport Terminal located on Quintana Island, Texas. DOE/FE granted the application in 2014 in a volume equivalent to 0.4 Bcf/d of natural gas, finding that Freeport's proposed exports were in the public interest under NGA section 3(a). DOE/FE also considered and disclosed the potential environmental impacts of its decision under NEPA. Sierra Club petitioned for review of the Freeport authorization, arguing that DOE fell short of its obligations under both the NGA and NEPA. The D.C. Circuit rejected Sierra Club's arguments in a unanimous decision, holding that, ''Sierra Club has given us no reason to question the Department's judgment that the [Freeport] application is not inconsistent with the public interest.'' [18]

In the consolidated opinion in *Sierra Club II* issued on November 1, 2017, the D.C. Circuit ruled that ''[t]he court's decision in [*Sierra Club I*] largely governs the resolution of the [three] instant cases.'' [19] Upon its review of the remaining ''narrow issues'' in those cases, the Court again rejected Sierra Club's arguments under the NGA and NEPA, and upheld DOE/FE's actions in issuing the non-FTA authorizations in those proceedings.[20]

II. DOE's Prior LNG Export Studies

The 2018 LNG Export Study [21] builds upon four prior studies commissioned by DOE to examine the economic impacts of U.S. LNG exports. With one early exception, DOE/FE has issued the 30 existing non-FTA authorizations based on its consideration of one or more of these economic studies under NGA section 3(a). These studies are summarized below.

A. 2012 EIA and NERA Studies (Collectively, the 2012 LNG Export Study)

In 2011, DOE/FE engaged the U.S. Energy Information Administration (EIA) and NERA Economic Consulting (NERA) to conduct a two-part study of the economic impacts of U.S. LNG exports, which together was called the ''2012 LNG Export Study.'' The first part, performed by EIA and originally published in January 2012, assessed how specified scenarios of increased natural gas exports could affect domestic energy markets. Specifically, EIA examined how prescribed levels of natural gas exports (at 6 Bcf/d and 12 Bcf/d) above baseline cases could affect domestic energy markets.

The second part, performed by NERA under contract to DOE, evaluated the macroeconomic impact of LNG exports on the U.S. economy. NERA used a general equilibrium macroeconomic model of the U.S. economy with an emphasis on the energy sector and natural gas in particular. The 2012 NERA Study projected that, across all scenarios studied—assuming either 6 Bcf/d or 12 Bcf/d of LNG export volumes—the United States would experience net economic benefits from allowing LNG exports.

In December 2012, DOE/FE published a notice of availability of the 2012 LNG Export Study in the **Federal Register** for public comment.[22] DOE/FE subsequently responded to the public comments in connection with the LNG export proceedings identified in that notice.[23]

B. 2014 and 2015 LNG Export Studies

By May 2014, in light of the volume of LNG exports to non-FTA countries then-authorized by DOE/FE and the number of non-FTA export applications still pending, DOE/FE determined that an updated study was warranted to consider the economic impacts of exporting LNG from the lower-48 states to non-FTA countries.[24] On May 29, 2014, DOE announced plans to undertake new economic studies to gain a better understanding of how potentially higher levels of U.S. LNG exports—at levels between 12 and 20 Bcf/d of natural gas—would affect the public interest.[25]

DOE/FE commissioned two new macroeconomic studies. The first, *Effect of Increased Levels of Liquefied Natural Gas Exports on U.S. Energy Markets,* was performed by EIA and published in October 2014 (2014 EIA LNG Export Study or 2014 Study).[26] The 2014 Study

[14] *See Mexico Pacific Limited LLC,* DOE/FE Order No. 4312, FE Docket No. 18–70–LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export U.S.-Sourced Natural Gas by Pipeline to Mexico for Liquefaction and Re-Export in the Form of Liquefied Natural Gas to Non-Free Trade Agreement Countries, at 37 (Dec. 14, 2018).

[15] *Sierra Club* vs. *U.S. Dep't of Energy,* 867 F.3d 189 (Aug. 15, 2017) (denying petition of review of the LNG export authorization issued to Freeport LNG Expansion, L.P., *et al.*).

[16] *Sierra Club* v. *U.S. Dep't of Energy,* Nos. 16–1186, 16–1252, 16–1253, 703 Fed. Appx. 1 (D.C. Cir. Nov. 1, 2017) (denying petitions of review of the LNG export authorization issued to Dominion Cove Point LNG, LP; Sabine Pass Liquefaction, LLC; and Cheniere Marketing, LLC, *et al.,* respectively).

[17] *See Sierra Club* v. *U.S. Dep't of Energy,* No. 16–1426, Per Curiam Order (D.C. Cir. Jan. 30, 2018) (granting Sierra Club's unopposed motion for voluntarily dismissal).

[18] *Sierra Club I,* 867 F.3d at 203.

[19] *Sierra Club,* 703 Fed. Appx. 1 at *2.

[20] *Id.*

[21] NERA Economic Consulting, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (June 7, 2018), *available at: https://www.energy.gov/sites/prod/files/2018/06/f52/Macroeconomic%20LNG%20Export%20Study%202018.pdf* [hereinafter 2018 LNG Export Study].

[22] *See* 2012 LNG Export Study, 77 FR 73627 (Dec. 11, 2012), *available at: http://energy.gov/sites/prod/files/2013/04/f0/fr_notice_two_part_study.pdf* (Notice of Availability of the LNG Export Study).

[23] *See, e.g., Freeport LNG Expansion L.P., et al.,* DOE/FE Order No. 3282, FE Docket No. 10–161–LNG, Order Conditionally Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Freeport LNG Terminal on Quintana Island, Texas to Non-Free Trade Agreement Nations, at 56–109 (May 17, 2013).

[24] Because there is no natural gas pipeline interconnection between Alaska and the lower 48 states, DOE/FE generally views those LNG export markets as distinct. DOE/FE therefore focuses on LNG exports from the lower-48 states for purposes of determining macroeconomic impacts.

[25] *See* U.S. Dep't of Energy, Office of Fossil Energy, Request for an Update of EIA's January 2012 Study of Liquefied Natural Gas Export Scenarios, *available at: http://energy.gov/fe/downloads/request-update-eia-s-january-2012-study-liquefied-natural-gas-export-scenarios* (May 29, 2014) (memorandum from FE to EIA).

[26] U.S. Energy Information Administration, *Effect of Increased Levels of Liquefied Natural Gas Exports on U.S. Energy Markets* (Oct. 2014), *available at: https://www.eia.gov/analysis/requests/fe/pdf/lng.pdf.*

assessed how specified scenarios of increased natural gas exports could affect domestic energy markets. At DOE's request, this 2014 Study served as an update of EIA's January 2012 study of LNG export scenarios and used baseline cases from EIA's *Annual Energy Outlook* 2014 (AEO 2014).[27]

The second study, *The Macroeconomic Impact of Increasing U.S. LNG Exports,* was performed jointly by the Center for Energy Studies at Rice University's Baker Institute and Oxford Economics under contract to DOE/FE (together, Rice-Oxford) and published in October 2015 (2015 LNG Export Study or 2015 Study).[28] The 2015 Study is a scenario-based assessment of the macroeconomic impact of levels of U.S. LNG exports, sourced from the lower-48 states, under different assumptions including U.S. resource endowment, U.S. natural gas demand, international LNG market dynamics, and other factors. The 2015 Study considers export volumes ranging from 12 to 20 Bcf/d of natural gas, as well as a high resource recovery case examining export volumes up to 28 Bcf/d of natural gas. The analysis covers the 2015 to 2040 time period.

In December 2015, DOE/FE published a Notice of Availability of the 2014 and 2015 LNG Export Studies in the **Federal Register**, and invited public comment on those Studies.[29] DOE/FE subsequently responded to the public comments in connection with the LNG export proceedings identified in that notice.[30]

III. Overview of 2018 LNG Export Study

At the time DOE commissioned the 2018 LNG Export Study earlier this year, DOE/FE had 25 pending applications requesting authorization to export domestically produced LNG to non-FTA countries.[31] In light of both the cumulative volume of exports to non-FTA countries authorized at that time (equivalent to 21.35 Bcf/d of natural gas) and the additional volume of LNG requested for export in those pending applications, DOE/FE determined that a new macroeconomic study was warranted.[32] Accordingly, DOE/FE, through its support contractor KeyLogic Systems, Inc., commissioned NERA to conduct the 2018 LNG Export Study.

Like the four prior economic studies, the 2018 LNG Export Study examines the impacts of varying levels of LNG exports on domestic energy markets. As explained below, the 2018 LNG Export Study assesses different levels of ''unconstrained'' LNG exports (defined as market-determined levels of exports), and analyzes the outcomes of different LNG export levels on the U.S. natural gas markets and the U.S. economy as a whole, over the 2020 to 2050 time period. As part of this analysis, DOE/FE directed NERA to examine the likelihood of conditions leading to various export scenarios, making it the first DOE macroeconomic study to squarely address this issue.

To summarize, the 2018 LNG Export Study differs from DOE/FE's prior economic studies in the following ways:

(i) Includes a larger number of scenarios (54 scenarios) to capture a wider range of uncertainty in four natural gas market conditions than examined in the previous studies;

(ii) Includes LNG exports in all 54 scenarios that are market-determined levels, including the three alternative baseline scenarios that are based on the projections in EIA's *Annual Energy Outlook* 2017 (AEO 2017);[33]

(iii) Examines unconstrained LNG export volumes beyond the levels examined in the previous studies;

(iv) Examines the likelihood of those market-determined LNG export volumes; and

(v) Provides macroeconomic projections associated with several of the scenarios lying within the more likely range.

IV. 2018 LNG Export Study, Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports

A. Overview of NERA's Findings

NERA's key findings in the 2018 Study include the following:

- The more likely range of LNG exports in the year 2040 was judged to range from 8.7 to 30.7 Bcf/d of natural gas. This assessment was based on a probabilistic analysis of 54 different scenarios constructed for the Study.[34]
- U.S. natural gas prices range from $5 to approximately $6.50 per million British thermal unit (MMBtu) in 2040 (in constant 2016 dollars) under Reference case supply assumptions. These central cases have a combined probability of 47%.[35]
- Levels of gross domestic product (GDP) are most sensitive to assumptions about U.S. supply of natural gas, with high supply driving higher levels of GDP. For each of the supply scenarios, higher levels of LNG exports in response to international demand consistently lead to higher levels of GDP. GDP achieved with the highest level of LNG exports in each group exceeds GDP with the lowest level of LNG exports by $13 to $72 billion in 2040 (in constant 2016 dollars).[36]
- About 80% of the increase in LNG exports is satisfied by increased U.S. production of natural gas, with positive effects on labor income, output, and profits in the natural gas production sector.[37]
- Chemical industry subsectors of the economy that rely heavily on natural gas for energy and as a feedstock continue to exhibit robust growth even at higher LNG export levels. This growth is only insignificantly slower than cases with lower LNG export levels.
- Even the most extreme scenarios of high LNG exports outside the more likely probability range (exhibiting a combined probability of less than 3%) show higher overall economic performance in terms of GDP, household income, and consumer welfare than lower export levels associated with the same domestic supply scenarios.

B. Methodology and Scenarios

The 2018 Study develops 54 scenarios by identifying various assumptions for domestic and international supply and demand conditions to capture a wide range of uncertainty in the natural gas markets. The scenarios include three

[27] Each Annual Energy Outlook (AEO) presents EIA's long-term projections of energy supply, demand, and prices. It is based on results from EIA's National Energy Modeling System (NEMS) model.

[28] Center for Energy Studies at Rice University Baker Institute and Oxford Economics, *The Macroeconomic Impact of Increasing U.S. LNG Exports* (Oct. 29, 2015), *available at: http://energy.gov/sites/prod/files/2015/12/f27/20151113_macro_impact_of_lng_exports_0.pdf.*

[29] U.S. Dep't of Energy, Macroeconomic Impacts of LNG Exports Studies; Notice of Availability and Request for Comments, 80 FR 81300, 81302 (Dec. 29, 2015).

[30] *See, e.g., Sabine Pass Liquefaction, LLC,* DOE/FE Order No. 3792, FE Docket No. 15–63–LNG, Final Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel From the Sabine Pass LNG Terminal Located in Cameron Parish, Louisiana, to Non-Free Trade Agreement Nations, at 66–121 (Mar. 11, 2016).

[31] *See* U.S. Dep't of Energy, Study on Macroeconomic Outcomes of LNG Exports; Notice of Availability of the 2018 LNG Export Study and Request for Comments, 83 FR 27314 (June 12, 2018) (identifying 25 docket proceedings).

[32] Additionally, to date, DOE/FE has authorized a cumulative total of LNG exports to FTA countries under section 3(c) of the NGA in a volume of 59.33 Bcf/d from LNG projects. These FTA volumes are not additive to the authorized non-FTA volumes.

[33] U.S. Energy Info. Admin., *Annual Energy Outlook* 2017 (with projections to 2050) (Jan. 5, 2017), *available at: https://www.eia.gov/outlooks/aeo/pdf/0383(2017).pdf.*

[34] *See* 2018 LNG Export Study at 14.

[35] *Id.* at 17.

[36] *Id.* at 18.

[37] *Id.* at 21.

baseline cases based on EIA's AEO 2017 projections (the most recent EIA projections available at the time), with varying assumptions about U.S. natural gas supply.[38] Alternative scenarios add other assumptions about both future U.S. and international demand for natural gas. International assumptions are based on EIA's *International Energy Outlook* 2017 (IEO 2017) and the International Energy Agency's (IEA) *World Energy Outlook* 2016 (WEO 2016).

As noted above, the 2018 Study also examines the likelihood of conditions leading to various export scenarios. Specifically, the 2018 Study includes peer-reviewed probabilities of uncertainties surrounding developments in the international and domestic natural gas markets that were, in turn, combined to develop the 54 export scenarios and their associated macroeconomic impacts.

1. Scenarios

a. U.S. Natural Gas Supply

The amount of natural gas that can be supplied at a given price depends on a number of factors, including how extraction technology develops, the magnitude of the extractable resource, political positions for or against limits on unconventional natural gas resource development (*i.e.,* hydraulic fracturing), as well as the cost to develop natural gas resources.[39] The 2018 Study specifies three different cases for U.S. natural gas supply derived from EIA's AEO 2017:

i. AEO 2017's Reference case provides a central estimate of U.S. natural gas production;

ii. High Oil and Gas Resource and Technology (HOGR) case provides more optimistic resource development estimates than the Reference case; and

iii. Low Oil and Gas Resource and Technology (LOGR) case provides less optimistic resource development estimates than the Reference case.

The differences in the natural gas production levels across these three cases arise from varying assumptions around unproven offshore resources, onshore shale gas resources, tight gas resources, and conventional and tight oil associated gas resources, as well as the costs of producing these resources.[40]

b. U.S. Natural Gas Demand

The 2018 Study notes that U.S. natural gas demand is primarily influenced by economic growth, population growth, per capita income, and environmental policies that influence fuel choices among sources of energy and total demand for energy.[41] The 2018 Study specifies three different cases for U.S. natural gas demand:

i. AEO 2017's Reference case, which provides a central estimate of U.S. natural gas demand;

ii. A Robust Economic Growth case, which provides a high estimate for U.S. natural gas demand driven by higher levels of gross domestic product growth; and

iii. A Renewables Mandate case, which provides a low estimate for U.S. natural gas demand driven by the imposition of a stringent renewables mandate.

c. Rest of World Natural Gas Supply

The 2018 Study considers two cases for international natural gas supply:

i. IEO 2017's Reference case; and

ii. A Low Supply case, which was created by reducing the IEO 2017 Reference case natural gas production consistent with supply reductions in the LOGR case for U.S. supply.[42]

d. Rest of World Natural Gas Demand

NERA notes that there are relatively few global natural gas forecasts that provide a range of scenarios that would allow NERA to isolate drivers of global natural gas demand outside the United States.[43] NERA identifies two such forecasts as EIA's IEO 2017 and IEA's WEO 2016. The 2018 Study considers three cases for international natural gas demand:

i. IEO 2017's Reference case;

ii. WEO 2016's Current Policies scenario, which provided a high estimate for international natural gas demand; and

iii. WEO 2016's 450 parts per million (ppm) case, which provides a low estimate for international natural gas demand based on policies with the objective of limiting the average global temperature increase in 2100 to 2 degrees Celsius above pre-industrial levels.

2. Probability Assignments

A key feature of the 2018 Study is to provide not only quantification of the effects to the U.S. natural gas market and its overall economy under each of the scenarios outlined, but also an assessment of the probability of each of these scenarios, and thus the probability of the natural gas and macroeconomic outcomes associated with each.

NERA first developed estimates of the probabilities for the level of U.S. supply and demand, as well as supply and demand in the rest of the world.[44] DOE/FE and its support contractor KeyLogic, Inc. contacted a set of independent experts recommended by DOE (hereinafter the peer reviewers) to obtain their probability assignments for these same four metrics. After receiving feedback from the peer reviewers, NERA reevaluated the original probability assignments to arrive at the final probabilities.

a. U.S. Supply Case Probabilities and Ranges

The peer reviewers did not converge on common recommendations for U.S. supply case probabilities and ranges. One peer reviewer suggested focusing the probabilities more towards the Reference case by reducing the prominence of both the high and low cases.[45] Another peer reviewer recommended reducing the probability for the Reference case and increasing the probabilities for both the high and low cases. Several other peer reviewers agreed with the original assignment of probabilities. According to NERA, there did not appear to be a consensus on how to change the proposed probabilities. The recommendations from the peer reviewers seemed either to offset each other or to agree with the original probabilities. For this reason, NERA decided to retain the original probability assignments. NERA made no change to its original range of U.S. supply values or the probabilities assigned to them.

b. U.S. Demand Scenario Probabilities and Ranges

In evaluating NERA's U.S. demand scenario probabilities and ranges, the peer reviewers did not have a consistent theme in their recommendations. One peer reviewer recommended greater emphasis on the Reference case, while another recommended deemphasizing the Reference case to increase the importance of the high and low cases.[46] Two other peer reviewers recommended that NERA retain the probability assignments with no changes. Because the recommendations lacked a common theme but nevertheless seemed to offset each other, NERA retained the original probability assignments and made no changes to the original range of U.S. Demand.

[38] *See id.* at 12; *see also supra* at note 33.

[39] 2018 LNG Export Study at 25.

[40] *Id.* at 25–26, 28; *see also* AEO 2017 at 12, 16.

[41] 2018 LNG Export Study at 26.

[42] *Id.* at 29–30.

[43] *Id.* at 30.

[44] *Id.* at 37.

[45] *Id.* at 43.

[46] *Id.*

c. Rest of World Supply Scenario Probabilities and Ranges

In evaluating the Rest of World supply scenarios, NERA noted several common themes from the peer reviewers. Several of the peer reviewers felt the proposed probabilities were reasonable. Another peer reviewer recommended assigning greater probability to the Reference case. No peer reviewer recommended that the low case receive more emphasis. As a result, the probability of the Reference case was increased by 5% while reducing the probability of the low case by the same amount. NERA made no changes to the original range of Rest of World Supply.

d. Rest of World Demand Scenario Probabilities and Ranges

In evaluating the Rest of World demand scenarios, NERA noted common agreement on several themes. None of the peer reviewers recommended increasing the probability of the low world demand case. Several of the peer reviewers agreed that the Reference case should receive greater importance, with the high case receiving less importance. The peer reviewers disagreed on the degree to which the relative importance should be modified. In addition, the peer reviewers felt that the high end of the range for Rest of World demand should be increased to a level double the original differential between the reference and high cases. Based on the peer review recommendations, the high end of the range was increased as recommended by one peer reviewer. Overall, the high case probability was decreased to 50%, the Reference case probability was increased to 45%, and the low case stayed at a probability of 5%.

Table 1 below presents the final probability assignments after peer review and the central estimate of the ranges adopted for the analysis.[47]

TABLE 1—FINAL PROBABILITY ASSIGNMENTS AND CENTRAL SUPPLY/DEMAND ESTIMATES (TRILLIONS OF CUBIC FEET) FOR EACH CASE IN 2040

		U.S. supply	U.S. demand	ROW supply	ROW demand
	Case	AEO 2017, HOGR	Robust Economic Growth	.....	WEO
High	Estimate	49	39	.....	172
	Probability	30%	17%	.....	50%
	Case	AEO 2017, Reference	AEO 2017, Reference	IEO 2017, Reference	IEO 2017, Reference
Reference	Estimate	39	33	139	145
	Probability	55%	66%	80%	45%
	Case	AEO 2017, LOGR	Renewables Mandate	Low Supply	WEO 2016, 450 ppm
Low	Estimate	28	27	90	113
	Probability	15%	17%	20%	5%

C. NERA's Global Natural Gas Model (GNGM)

The 2018 Study used the GNGM, which NERA describes as a worldwide model of the natural gas market based on LNG trade, interregional pipelines, and regional supply and demand.[48] This model allows NERA to examine the likely direct and indirect impacts on regional natural gas markets of various industry developments and policy choices. Using the GNGM, NERA can take into account developments in individual regions and gauge region-specific market outcomes.

The GNGM's structure has full flexibility in terms of the time periods and regions it covers. For the 2018 Study, the model divides the world into 18 regions and solves for equilibrium natural gas flows, supply, and demand for the years 2020 to 2040 in five-year time steps.[49] The model can be adapted to analyze any individual region in the world, as well as to consider a more granular time scale. The regional structure allows the model to factor in key components driving the natural gas market, including pipeline and marine linkages among regions, competition among supplier regions, and competition between LNG and natural gas pipelines.

D. NERA's N_{ew}ERA Macroeconomic Model

NERA developed the N_{ew}ERA model to forecast the impact of policy, regulatory, and economic factors on the energy sector and the economy as a whole. To evaluate policies that have significant impacts on the entire U.S. economy, NERA uses the N_{ew}ERA model to capture the effects as they ripple through all sectors of the economy and the associated feedback effects. The version of the N_{ew}ERA model used for the 2018 Study includes a macroeconomic model that represents all sectors of the economy.

The macroeconomic model incorporates all production sectors, including liquefaction plants required for LNG exports; energy extraction; manufacturing and service sectors; and final demand for goods and services by households, the government, and for investment.[50] The consequences of changes in LNG exports are transmitted throughout the U.S. economy as sectors respond until the economy reaches equilibrium. Producers and households are able to change their demand for goods and services in response to changes in prices.

The N_{ew}ERA model addresses the key factors affecting future U.S. natural gas demand, supply, and price. One of the major uncertainties is the availability of shale gas in the United States. To account for this uncertainty and the effect it could have on domestic markets, the N_{ew}ERA model includes resource supply curves for U.S. natural gas. The model also accounts for pipeline trade in natural gas with Mexico and Canada, and the potential build-up of liquefaction plants for exporting LNG. The N_{ew}ERA model also has a supply (demand) curve for U.S. imports (exports) that represents how

[47] 2018 LNG Export Study at 43–44 (Table 3).

[48] *Id.* at 33.

[49] *Id.*

[50] *Id.* at 34.

the global LNG market price would react to changes in U.S. imports or exports.[51]

U.S. wellhead natural gas prices in the N_{ew}ERA model are matched to the resulting prices from the GNGM. The baselines for the N_{ew}ERA model are based on EIA's AEO 2017 Reference, High Oil and Gas Supply, and Low Oil and Gas Supply cases.

E. Results of the 2018 Study

The 54 scenarios in the 2018 Study provide a wide range of results. NERA chose to focus on a subset of more likely outcomes, given DOE's assumptions about the probabilities associated with U.S. natural gas production, demand and supply, and demand for natural gas in the rest of the world. NERA defined the more likely outcomes as those that result in U.S. LNG exports that are within a one standard deviation of the mean level of exports.[52] In the Study, NERA stated that an interval of plus or minus one standard deviation was chosen as more informative because it indicates a reasonable range of uncertainty without unduly emphasizing very unlikely outcomes.[53]

The 2018 Study finds that, by the year 2040, there is a 16% chance that U.S. LNG exports will be below 9.0 Bcf/d and a 16% chance that they will be above 30.7 Bcf/d of natural gas.[54] Put differently, there is approximately a 68% probability that U.S. LNG exports will be between 9.0 and 30.7 Bcf/d in 2040. Table 2 below lists 27 scenarios that are the ''more likely'' scenarios in 2040 (*i.e.,* within one standard deviation of the mean for all 54 scenarios).[55] The scenario nomenclature in Table 2 refers to the case used for U.S. natural gas supply, U.S. natural gas demand, Rest of World natural gas supply, and Rest of World natural gas demand, respectively.

TABLE 2—LNG EXPORTS AND SCENARIO PROBABILITY FOR THE MORE LIKELY SCENARIOS IN 2040

Scenario	LNG exports Bcf/day	Scenario probability (%)
Low_High_Low_High	22.7	0.3
Low_Low_Low_High	26.1	0.3
Low_Low_Low_Ref	12.4	0.2
Low_Ref_Low_High	23.4	1.0
Low_Ref_Low_Ref	9.9	0.9
Ref_High_Low_Low	15.5	0.1
Ref_High_Low_Ref	28.9	0.8
Ref_High_Ref_High	23.4	3.7
Ref_High_Ref_Ref	12.4	3.4
Ref_Low_Low_Low	18.3	0.1
Ref_Low_Low_Ref	30.5	0.8
Ref_Low_Ref_High	25.7	3.7
Ref_Low_Ref_Ref	18.6	3.4
Ref_Ref_Low_Low	17.0	0.4
Ref_Ref_Low_Ref	29.6	3.3
Ref_Ref_Ref_High	24.0	14.5
Ref_Ref_Ref_Ref	12.9	13.1
High_High_Low_Low	22.2	0.1
High_High_Ref_High	30.1	2.0
High_High_Ref_Low	8.7	0.2
High_High_Ref_Ref	22.6	1.8
High_Low_Low_Low	23.6	0.1
High_Low_Ref_Low	12.4	0.2
High_Low_Ref_Ref	23.6	1.8
High_Ref_Low_Low	22.8	0.2
High_Ref_Ref_High	30.7	7.9
High_Ref_Ref_Low	9.0	0.8
High_Ref_Ref_Ref	23.3	7.1

The 2018 Study summarized changes in Henry Hub prices in 2040 (in constant 2016 dollars) by the different U.S. natural gas supply scenarios, as follows:

- For all of the reference U.S. supply scenarios in the more likely range, Henry Hub natural gas prices could be from $5 to $6.50 per million British thermal units (MMBtu) in 2040. These mid-range scenarios have a combined probability of 47%.[56]
- For all of the HOGR supply scenarios in the more likely range, Henry Hub prices range from $3.50 to $4 per MMBtu in 2040.[57] These scenarios with natural gas prices at the low end of the range have a combined probability of 22%.[58]
- For all of the LOGR supply scenarios in the more likely range, Henry Hub prices range from $10 to $13 per MMBtu in 2040. These scenarios with natural gas prices at the high end of the range have a combined probability of 3%.

The 2018 Study finds two important relationships between U.S. LNG exports and U.S. natural gas prices:

- ''Increasing U.S. LNG exports under any given set of assumptions about U.S. natural gas resources and their production leads to only small increases in U.S. natural gas prices;'' [59] and
- ''Available natural gas resources have the largest impact on natural gas prices. Therefore, U.S. natural gas prices are far more dependent on available resources and technologies to extract

[51] *Id.*

[52] 2018 LNG Export Study at 47.

[53] *Id.*

[54] *Id.* at 49–50.

[55] 2018 LNG Export Study at 50–51 (Table 4).

[56] *Id.* at 54; *see also id.* at 53 (Figure 12).

[57] *Id.* at 53 (Table 12).

[58] *Id.* at 54.

[59] *Id.* at 55 (discussing Figure 12).

available resources than on U.S. policies surrounding LNG exports.'' [60]

Applying the same one-standard deviation interval of a probability greater than 16% and less than 84% reveals that the more likely range of Henry Hub price is from $3.90 to $6.70 per MMBtu of natural gas.[61]

The 2018 Study identifies 12 representative scenarios for macroeconomic analysis. The 12 scenarios include three different baselines and nine alternative shock scenarios (three per baseline).[62] The scenarios are grouped according to the outlook for U.S. natural gas supply, as described previously: Reference, HOGR, and LOGR cases. All of the nine alternative N_{ew}ERA scenarios project LNG export levels that are higher than their corresponding reference scenario. This selection of scenarios allows the analysis to capture the macroeconomic effects of higher LNG exports associated with higher levels of demand for U.S. LNG exports from the rest of the world.

However, not all of the scenarios evaluated produce LNG export levels that fall within a one-standard deviation interval around the mean of modeled LNG export volumes (the ''more likely'' range). Therefore, the 2018 Study discusses the macroeconomic effects for the seven macroeconomic scenarios that do fall within the range of more likely scenarios, as shown in bold in Table 3: [63]

TABLE 3—MACROECONOMIC SCENARIOS

U.S. supply	U.S. demand	ROW supply	ROW demand	LNG exports (Bcf/day)	Cumulative probability (%)
Ref	**Ref**	**Ref**	**Ref**	**12.9**	**33**
Ref	**Ref**	**Low**	**Ref**	**29.6**	**76**
Ref	Ref	Low	High	45.7	96
Ref	**Ref**	**Ref**	**High**	**24.0**	**68**
High	**Ref**	**Ref**	**Ref**	**23.3**	**47**
High	Ref	Low	Ref	40.4	91
High	Ref	Low	High	52.8	99
High	**Ref**	**Ref**	**High**	**30.7**	**87**
Low	Ref	Ref	Ref	0.1	5
Low	**Ref**	**Low**	**Ref**	**9.9**	**16**
Low	**Ref**	**Low**	**High**	**23.4**	**48**
Low	Ref	Ref	High	8.2	11

Finally, the 2018 Study summarizes a number of the broad macroeconomic effects on the U.S. economy of increased LNG exports, as discussed below.

1. U.S. Consumer Well-Being Increases With Rising LNG Exports

For the more likely scenarios, consumer welfare ranges from $30.25 trillion to $30.26 trillion (a variation of $10 billion).[64] As U.S. LNG exports increase, U.S. households receive additional income from two sources. First, the LNG exports provide additional export revenues, and second, households that hold shares in companies that own liquefaction plants receive additional income from take-or-pay tolling charges for LNG exports. These additional sources of income for U.S. consumers outweigh the income loss associated with higher energy prices.

2. Total Economic Activity Expands With Rising LNG Exports

Gross domestic product (GDP), or the level of total economic activity in the economy, is another economic metric that is often used to evaluate the effect of a change to the economy. The GDP effects associated with higher LNG exports increase as the economy benefits from investment in the liquefaction process, export revenues, resource income, and additional wealth transfers (in the form of tolling charges). The impact of LNG exports results in shifts in income between different sources, but overall GDP improves as LNG exports increase for all scenarios with the same U.S. natural gas supply conditions.

Levels of GDP are most sensitive to assumptions about U.S. supply, with high natural gas supply driving higher levels of GDP. For each of the supply scenarios, higher levels of LNG exports in response to international demand consistently lead to higher levels of GDP. GDP achieved with the highest level of LNG exports in each group exceeds GDP with the lowest level of LNG exports by $13 to $72 billion in 2040 (in constant 2016 dollars).[65]

3. Sectoral Growth Rates Change Negligibly for Key Economic Sectors and Energy-Intensive Sectors

Sectoral growth rates remain robust for all of the sectors that rely on natural gas as fuel and raw material input. The variation in the growth rates attributable to differences in LNG exports ranges from one to seven basis points (0.01% to 0.07%). Even for the scenario with the largest change in sectoral growth rates, the change is still relatively small.[66] According to NERA, it is reasonable to conclude that an increased level of LNG exports will have a negligible effect on how quickly these sectors grow.[67]

4. Household Income Shifts Between Different Sources But Is Positive Overall

When comparing changes in resource income between the baseline and the scenarios, resource income associated with natural gas significantly increases. This is because both the value of the natural gas resource, as well as returns to specialized capital and labor, increase when additional LNG exports are allowed.[68] Value-added income (wage and capital income) also increases because of the increased opportunity for exports and the resulting boost to labor income, profits, and GDP.

At the same time, the resource income associated with coal and crude oil changes minimally. Therefore, the total change in resource income is positive for the scenarios, and the changes in

[60] *Id.*

[61] 2018 LNG Export Study at 55; *see also id.* at 56 (Figure 13).

[62] *Id.* at 62.

[63] *Id.* at 63 (Table 9).

[64] *See id.* at 67; *see also id.* at 66 (Figure 16), 67 (Table 10).

[65] 2018 LNG Export Study at 18.

[66] *Id.* at 70.

[67] *Id.*

[68] *Id.* at 73.

resource income increase with the level of LNG exports. Income associated with net transfers includes government transfers and all tolling charges on LNG exports. Government transfers remain the same between the baseline and scenarios, so the net transfer reflects the additional wealth transfer. Changes in tax revenue are ''grossed up'' in value added.[69]

5. Aggregate Consumption and Investment Is Higher

Aggregate consumption measures the total spending on goods and services in the economy. Within each U.S. natural gas supply scenario, aggregate consumption is higher when LNG exports are higher.

As with the welfare and GDP results, wealth transfer associated with LNG exports increases household income which, in turn, leads to higher spending on goods and services. Under the Reference U.S. natural gas supply scenario, aggregate consumption is $25,049 billion and LNG exports are 12.9 Bcf/d. When LNG exports increase as a result of natural gas demand pull, aggregate consumption is $25,054 billion (for 29.6 Bcf/d), an increase of about $5 billion.[70] A similar pattern is observed in the outcomes for aggregate consumption in each of the groups of scenarios based on alternative U.S. natural gas supply assumptions.[71]

6. U.S. LNG Exports Are Backed by Increased Natural Gas Production

The results from NERA's analysis indicate there is no support for the concern that LNG exports would come at the expense of domestic natural gas consumption. To the contrary, a large share of the increase in LNG exports is supported by an increase in domestic natural gas production, leading to a modest increase in natural gas prices and additional income from export revenues.[72] About 80% of the increase in LNG exports is satisfied by increased domestic production of natural gas, with positive effects on labor income, output, and profits in the natural gas production sector.

In the Reference U.S. supply scenarios, as total natural gas exports increase from 5.8 Tcf (in the Ref_Ref_Ref_Ref scenario) to 12.9 Tcf (in the Ref_Ref_Low_Ref scenario), natural gas production increases for the corresponding scenarios from 37.7 Tcf to 43.9 Tcf, respectively, in 2040.[73]

V. Notice of Availability of the 2018 LNG Export Study

On June 12, 2018, DOE published notice of availability (NOA) of the 2018 LNG Export Study and a request for comments.[74] The purpose of the NOA was ''to enter the 2018 LNG Export Study into the administrative record of the 25 pending non-FTA export proceedings [identified in the NOA] and to invite comments on the Study for use in the pending and future non-FTA application proceedings.'' [75] DOE provided the following instructions:

> Comments must be limited to the methodology, results, and conclusions of the 2018 LNG Export Study on the factors evaluated. These factors include the potential impact of LNG exports on domestic energy consumption, production, and prices; the macroeconomic factors identified in the Study, including gross domestic product, consumption, U.S. economic sector analysis, and U.S. LNG export feasibility analysis; and any other factors included in the Study. In addition, comments may be directed toward the feasibility of various scenarios used in the Study.[76]

Publication of the NOA began a 45-day public comment period that ended on July 27, 2018.

DOE received 19 comments on the 2018 LNG Export Study from a variety of sources, including participants in the natural gas industry, environmental organizations, and individuals. Of those, nine comments supported the Study,[77] eight comments opposed the 2018 Study and/or exports of LNG,[78] one comment took no position,[79] and one comment was non-responsive.[80] The NOA and comments received on the NOA are available on DOE's website at *https://fossil.energy.gov/app/docketindex/docket/index/10.*

VI. Comments on the 2018 LNG Export Study and DOE/FE Response

DOE has evaluated the comments received during the public comment period. Below, DOE/FE summarizes: (i) The pertinent arguments by topic, with reference to representative comments, and (ii) DOE/FE's basis for the conclusions that it drew in reviewing those comments. In so doing, DOE/FE has responded to the relevant and significant issues raised by the commenters.[81]

A. Data Inputs and Estimates of Natural Gas Demand

1. Comments

Every commenter supporting the 2018 LNG Export Study expresses support for NERA's study design. For example, Cheniere states that the 2018 Study's ''refined approach'' is well-suited to the present context, in which DOE/FE has approved non-FTA exports in a volume (at the time of Cheniere's filing) up to 21.35 Bcf/d, with more non-FTA applications pending.[82] The commenters point out that the study design—with 54 different scenarios reflecting a range of market uncertainties and market-determined levels of export volumes—differs from past studies that were based on prescribed LNG export volumes. JCEP states that the 2018 Study takes the ''next logical step'' in studying unbounded exports driven by market demand.[83] For this reason, commenters including LNG Allies and API characterize the 2018 Study as the most comprehensive of DOE's export studies to date.

LNG Allies observes that the 2018 Study uses data from AEO 2017 for its analysis, but notes that the projections in EIA's *Annual Energy Outlook* 2018 (AEO 2018) [84] indicate ''significantly lower natural gas prices in the United States in the future, as well as considerably higher U.S. natural gas production under all scenarios (versus

[69] *Id.* at 73.

[70] We noted that, in the narrative section of the 2018 Study on this point, there is a typo in the Reference case number. *See* 2018 LNG Export Study at 75 (''Under the Reference U.S. natural gas supply scenario, Ref_Ref_Ref_Ref, aggregate consumption is $24,049 billion and LNG exports are 12.9 Bcf/d.''). The $24,049 billion number is actually $25,049, as shown in the corresponding Table 14. *See id.* at 76.

[71] 2018 LNG Export Study at 75.

[72] *Id.* at 77.

[73] *Id.* at 78 and Figure 21.

[74] *See* U.S. Dep't of Energy, Study on Macroeconomic Outcomes of LNG Exports; Notice of Availability of the 2018 LNG Export Study and Request for Comments, 83 FR 27314 (June 12, 2018).

[75] *Id.* at 27315.

[76] *Id.* at 27316 (noting that ''[w]hile this invitation to comment covers a broad range of issues, DOE may disregard comments that are not germane to the present inquiry.'').

[77] Supporting comments were filed by the Marcellus Shale Coalition; the Center for Liquefied Natural Gas (CLNG); the Pennsylvania Chamber of Business and Industry; the American Petroleum Institute (API); Cheniere Energy, Inc. (Cheniere); Jordan Cove Energy Project L.P. (JCEP); LNG Allies; NextDecade Corp.; and Anonymous. The Anonymous comment is comprised of five comments filed by the same anonymous author.

[78] Opposing comments were filed by Patricia Weber; Oil Change International; Food & Water Watch; Industrial Energy Consumers of America (IECA); Oregon Wild; Sierra Club; Deb Evans and Ron Schaaf (the Evans Schaaf Family); and Jody McCaffree (individually and as executive director of Citizens for Renewables/Citizens Against LNG). Oil Change International and Food & Water Watch filed identical comments.

[79] Comment of John Young.

[80] Comment of Vincent Burke.

[81] *See, e.g., Public Citizen* v. *F.A.A.,* 988 F.2d 186, 197 (D.C. Cir. 1993).

[82] Comment of Cheniere at 3.

[83] Comment of JCEP at 3.

[84] U.S. Energy Info. Admin., *Annual Energy Outlook* 2018 (with projections to 2050) (Feb. 6, 2018), *available at: https://www.eia.gov/outlooks/aeo/pdf/AEO2018.pdf.*

AEO 2017).'' [85] LNG Allies asserts that, had it been possible for the 2018 Study to draw upon EIA's most recent data in AEO 2018, the evidence supporting market-determined levels of U.S. LNG exports would have been ''*even more persuasive.*'' [86]

JCEP also endorses the 2018 Study's design as ''appropriate and important given the state of the U.S. LNG export market to date.'' [87] Specifically, JCEP notes that some LNG export projects have received authorizations from the Federal Energy Regulatory Commission (FERC) and DOE, but have not yet moved forward on construction or may never move forward. In JCEP's view, these ''stalled'' projects should not prevent other projects from obtaining export authorizations through artificial limits on approved export volumes. Therefore, JCEP asserts, the 2018 Study correctly evaluated LNG exports limited only by market demand, not by regulatory constraints imposed by DOE.[88]

On the other hand, several commenters—including Sierra Club, Oregon Wild, and the Industrial Energy Consumers of America (IECA)—challenge the scope of the 2018 Study and the data used as inputs. Specifically, these commenters assert that the 2018 Study relies on inaccurate assumptions that fail to reflect conditions that adversely affect (and will continue to affect) the viability of U.S. LNG exports.

First, Oregon Wild states that the U.S. market for fossil fuels is deeply flawed. According to Oregon Wild, the current prices for natural gas do not reflect either the full costs of production or significant externalities (*e.g.,* global climate change and ocean acidification), and thus are artificially low. Low prices for LNG, in turn, result in artificially high demand and supply that ''far exceeds'' optimal levels.[89] Consequently, Oregon Wild states that increasing exports of U.S. LNG ''will increase the supply of a commodity that is already oversupplied at a global scale.'' [90]

Commenters including Oil Change International, Food & Water Watch, and Sierra Club assert that the 2018 Study is based on flawed projections of global demand for natural gas. Sierra Club argues that the 2018 Study ''drastically overstates'' global demand, which ''significantly skews'' the 2018 Study's overall analysis and conclusions.[91] Oil Change International, Food & Water Watch, and other commenters also allege the following deficiencies in NERA's study design:

- Fails to account for the negative impacts of increased natural gas production and related infrastructure;
- Fails to consider shifts in anti-fossil fuel energy policies at the state level that will impact U.S. supplies;
- Fails to acknowledge the transition to renewable energy and storage (*i.e.,* flexible generation technologies) that compete with natural gas globally, as well as efforts in the United States to build out renewable energy sources and increase energy efficiency;
- Improperly relies on ''projected diminishing Rest of World'' natural gas supplies;
- Fails to properly account for economic costs related to environmental issues, particularly the costs associated with climate change; and
- Fails to account for international efforts to address climate change and/or assumes that such efforts will fail, which allegedly will impact global demand for natural gas.[92]

Addressing the climate change argument, Oil Change International and Food & Water Watch first challenge the statement in the 2018 Study that '' 'NERA [has] followed the development of international agreements on climate change for many years, and we do not expect that future progress will be very much greater than in the past.' '' [93] On this basis, NERA attributed a ''low probability''—specifically, a 5% probability—to the ''low international demand case'' for the rest of the world (ROW), in which international demand for natural gas is reduced due to policies to address climate change.[94]

The Evans Schaaf Family submitted a comment challenging NERA's assumption, asserting that ''[t]he most glaring of [NERA's] predictions is that there is a mere 5% probability that the [Rest of World] would meet the 450 ppm [parts per million] of CO2e [carbon dioxide equivalent] as set forth in the Paris Climate Agreement.'' [95] The 450 ppm case assumes a set of policies with the objective of limiting the average global temperature increase in 2100 to 2 degrees Celsius above pre-industrial levels.[96] NERA noted that, ''[t]o achieve this concentration, it is necessary to phase out all fossil fuel use including natural gas over the course of the next century.'' [97] Oil Change International and Food & Water Watch contend, however, that NERA ''provide[d] no scientific reasoning for attributing a 5% probability to international gas demand levels that align with the . . . 450 ppm Scenario.'' [98]

Oil Change International and Food & Water Watch also state that the 2018 Study should have given much greater emphasis to low natural gas demand scenarios that align with the Paris Agreement.[99] In their view, rather than NERA adopting a ''subjective and cynical'' view towards international climate negotiations, a ''methodologically sound approach would be to project the level of U.S. LNG exports that align with global success in meeting the Paris goals.'' [100] They point out that the Paris Agreement has been ratified by more than 170 nations, with the United States being the only country to back away from the Agreement.

According to the commenters, this approach would show a much lower global demand for U.S. LNG exports by the middle of this century, indicating a very different trajectory to any of those described in the 2018 Study. They claim that, by attributing a low probability to the likelihood that demand for U.S. natural gas will be reduced in light of climate policies, the 2018 Study is ''predicated on a failure to prevent catastrophic climate impacts.'' [101]

Similarly, Sierra Club asserts that the 2018 Study overstates global natural gas demand, and thus market support for U.S. LNG exports, ''by assuming that the most likely [demand] scenario is for the rest of the world to take *no* further action to limit greenhouse gas emissions.'' [102] Specifically, Sierra Club disputes NERA's judgment that the high demand case—assigned a 65% probability—should assume that 2016 is the last year in which the global community undertakes any effort to limit greenhouse gas emissions, *i.e.,* that no further action is taken between 2018 and 2040.[103] In Sierra Club's view, ''this

[85] Comment of LNG Allies at 2.

[86] *Id.* (emphasis in original).

[87] Comment of JCEP at 3.

[88] *Id.*

[89] Comment of Oregon Wild at 1.

[90] *Id.*

[91] Comment of Sierra Club at 1.

[92] Comments of Oil Change International and Food & Water Watch at 1.

[93] *Id.* at 2 (citing 2018 LNG Export Study at 42).

[94] 2018 LNG Export Study at 41–42.

[95] Comment of the Evans Schaaf Family at 1.

[96] 2018 LNG Export Study at 30; *see also id.* at 41 (explaining that the ''lowest natural gas demand is obtained from a scenario in which the IEA assumes that every country adopts policies sufficient to keep global greenhouse gas concentrations under 450 ppm CO2e.'').

[97] *Id.* at 41.

[98] Comments of Oil Change International and Food & Water Watch at 2.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] Comments of Sierra Club at 1 (emphasis in original).

[103] *Id.* (citing 2018 LNG Export Study at 41–43) (NERA explaining that ''we assign . . . the highest

Continued

scenario might represent a useful hypothetical 'ceiling' on global natural gas demand,'' but the 2018 Study does not demonstrate that it is plausible, much less the ''*most likely*'' scenario.[104]

Turning to renewable energy, Oil Change International and Food & Water Watch cite recent analysis from Bloomberg New Energy Finance, the *New Energy Outlook* 2018.[105] They argue that this Bloomberg analysis projects a very different picture of future energy demand than assumed in the 2018 Study. For example, they argue that, by 2050, renewable energy will make up over two-thirds of global power generation, while fossil energy will have declined to 29% from 63% today.[106] Citing these and other projections, the commenters argue that there will be substantial constraints on growth in the demand for U.S. LNG. The commenters argue that, without these adjustments, the 2018 Study exaggerates both the potential for U.S. LNG exports and the related macroeconomic benefits.

Patricia Weber and other commenters express concern about NERA's statement that the 2018 Study '' 'does not investigate' '' the variations in domestic versus foreign ownership of assets as part of its N_{ew}Era model.[107] Ms. Weber questions why NERA did not consider the implications for the U.S. economy of a foreign-owned pipeline exporting U.S. LNG through a foreign-owned facility. She cites JCEP's pending LNG export project, in which the proposed Jordan Cove Energy Project and associated Pacific Connector Gas Pipeline would be owned by a Canadian corporation.[108]

Similarly, Ms. Weber and the Evans Schaaf Family question whether the 2018 Study excludes Canadian (or Mexican) natural gas supply as a factor. In their view, since NERA states that ''countries in the North American region share a single natural gas market,'' [109] any macroeconomic benefits associated with LNG exports should be applied across North America, and not assumed to accrue only to the United States, as the 2018 Study suggests.

Finally, some commenters, including Ms. Weber and Jody McCaffree, dispute the 2018 Study's conclusions regarding international levels of U.S. LNG exports. They suggest that the current volumes of LNG exports across the world (not only U.S. LNG) are already excessive and will result in a global oversupply. Citing a 2017 report by the International Gas Union, Ms. McCaffree warns that ''it would take *15 years* . . . until the current excess of LNG volumes would likely be absorbed into the international LNG export markets.'' [110] Ms. Weber also questions whether the 2018 Study considers any potential macroeconomic impacts if the infrastructure created from increased LNG exports exceeds the bounds of what the market demands—for example, if the LNG industry ''overbuilds'' two to three times more export capacity than ultimately needed.[111]

2. DOE/FE Response

The 2018 Study considered 54 different scenarios of LNG exports from the United States over the coming decades. Different assumptions regarding future supply and demand conditions provided a wide range of possible outcomes for further macroeconomic analysis. Through a peer-reviewed process, the 2018 Study assigned probabilities for each of the supply and demand cases, which, when combined, provided likelihoods for the scenarios. This approach allowed NERA to consider very unlikely scenarios for U.S. LNG exports—with export levels much lower and much higher than the Reference case—thus providing a more comprehensive range of outcomes than considered in DOE's previous LNG export studies. The 2018 Study found a ''positive correlation between GDP and LNG exports for the more likely scenarios in 2040,'' such that ''[i]n all scenarios with common assumptions about U.S. natural gas supply and demand, there is greater gain in GDP as the LNG export volume increases.'' [112]

We take note of EIA's projections in AEO 2018, published on February 6, 2018, for natural gas supply, demand, and prices.[113] One commenter noted the lower domestic natural gas prices and higher domestic natural gas production projected in AEO 2018 than in the projections from AEO 2017 used in the 2018 Study. Projected Reference case domestic dry natural gas production for the year 2040 increased by 2.41 Tcf between AEO 2017 and AEO 2018 (from 37.74 Tcf to 40.15 Tcf, respectively). The Henry Hub price in 2040 declined from $5.18 per million British thermal units (MMBtu) in the AEO 2017 projections to $4.50/MMBtu in the AEO 2018 projections (both prices in constant 2017 dollars). Reference case LNG exports in the year 2040 increased from the 2017 to 2018 projections by 0.92 Tcf (from 4.44 Tcf to 5.36 Tcf). As described here, the AEO 2018 Reference case, even more so than AEO 2017, projects robust domestic supply conditions that are more than adequate to meet domestic needs and supply exports.

Several commenters suggested the 2018 LNG Export Study overstates the future level of U.S. LNG exports, as well as the probability of those levels of exports occurring. DOE/FE commissioned the 2018 Study to inform its public interest analysis of pending long-term applications to export LNG to non-FTA countries beyond the 21.35 Bcf/d of exports already approved at that time. To develop scenarios with much larger volumes of exports than under Reference case conditions, the 2018 Study performers examined unconstrained cases and assigned probabilities to help illustrate the likelihood of LNG export levels much lower and much higher than the Reference case. The macroeconomic analysis of the export scenarios provides valuable input to inform DOE/FE's public interest analysis. The 2018 Study does not (and was not intended to) provide an analysis of any ''optimal'' level of LNG exports based on different policy objectives. Further, the 2018 Study Reference case rate of exports in 2040 (''Ref_Ref_Ref_Ref'') is in the range of LNG exports projected in AEO 2018 for the same time period—12.9 Bcf/d in the 2018 Study, compared to 14.7 Bcf/d in AEO 2018.

If increased global demand for U.S. LNG exports does not materialize, as some commenters suggest, there would be no corresponding incremental domestic supply or price impact since additional LNG exports would not occur, irrespective of regulatory approvals. As some commenters point out, multiple proposed projects have received full approval for their export facilities from FERC and DOE, yet they have neither made a final investment decision nor begun construction. Given the significant capital costs of liquefaction and export facilities, project developers in the United States typically must demonstrate long-term

probability to the WEO Current Policies case that assumes no additional actions to limit emissions [after 2016].'').

[104] *Id.*

[105] Comments of Oil Change International and Food & Water Watch at 3 n.4 (citation omitted).

[106] *Id.* at 3.

[107] Comment of Patricia Weber at 1 (quoting 2018 LNG Export Study at 34 n.34) (NERA stating that, ''[i]n the N_{ew}ERA model, it is possible to represent these variations in domestic versus foreign ownership of assets and capture export revenues to better understand the issues. However, this study does not investigate these issues.'').

[108] *Id.*

[109] 2018 LNG Export Study at 56 n.48.

[110] Comment of Jody McCaffree at 2 (emphasis in original) (citing International Gas Union, *2017 World LNG Report,* at 4–5) (attached as Exh. 1 to McCaffree Comment).

[111] *Id.*

[112] 2018 LNG Export Study at 67.

[113] *See* AEO 2018, *supra* note 84.

demand for their projects through the execution of long-term contracts to raise the needed capital to finance their projects. DOE/FE also notes that current large-scale liquefaction capacity in operation or under construction in the United States today equals approximately 11 Bcf/d of exports, which is more than 3 Bcf/d below the AEO 2018 Reference case rate of LNG exports projected in 2040.

B. Economic Benefits Associated With LNG Exports

1. Economic Benefits Realized to Date

a. Comments

Cheniere states that it agrees with the results of the 2018 LNG Export Study, and emphasizes that, ''for Cheniere, the positive economic impacts of LNG exports are not just a matter of economic theory.'' [114] In the years since DOE/FE published its first LNG export study, Cheniere—through its subsidiary, Sabine Pass Liquefaction, LLC—has constructed and launched operations at the Sabine Pass Liquefaction Project, located at the Sabine Pass LNG Terminal in Cameron Parish, Louisiana. Cheniere states that it has constructed four liquefaction trains at the Sabine Pass LNG Terminal, and is in the process of commencing exports from a fifth train.[115] DOE/FE (as well as the Anonymous commenter) notes that Cheniere began exporting U.S. LNG from the Sabine Pass LNG Terminal on February 24, 2016, and, to date, has exported 501 LNG cargoes from Sabine Pass (both long-term and short-term exports) with deliveries to 29 countries and regions worldwide.[116] Cheniere states that, through other subsidiaries, it is also in the process of constructing three liquefaction trains at the Corpus Christi LNG Terminal in San Patricio County, Texas.

According to Cheniere, these two LNG export projects have created approximately 9,000 direct construction jobs at peak construction over a period of several years, as well as more than 1,000 permanent, full-time jobs.[117] Cheniere asserts that the construction and operation of both the Sabine Pass and Corpus Christi Liquefaction Projects have generated, and will continue to generate, tens of thousands of indirect jobs across the United States. Cheniere states that, to date, it has sourced natural gas for the Sabine Pass Liquefaction Project from dozens of producers located in Texas, Louisiana, Arkansas, Pennsylvania, Ohio, West Virginia, Oklahoma, Illinois, and Kentucky. Cheniere maintains that jobs have been created due to the demand its LNG export operations have created for natural gas infrastructure—including in the steel industry and in other segments of the natural gas supply chain.[118]

In this regard, Cheniere states that liquefaction projects require a wide variety of manufactured parts and components, many of which can be sourced from domestic manufacturers. Cheniere states that, to date, its LNG facilities have procured components from 1,590 U.S. manufacturers in 46 states.[119] In sum, Cheniere maintains that, ''through its procurement of domestic natural gas and across its manufacturing supply chain,'' it ''has seen first-hand the broad economic benefits of LNG exports to the American economy.'' [120]

The American Petroleum Institute (API) agrees that the results of the 2018 LNG Export Study ''are consistent with U.S. LNG experience to date.'' [121] Specifically, API states that U.S. LNG cargoes commenced in early 2016, yet the impact on domestic prices of natural gas has been negligible. Likewise, the Pennsylvania Chamber of Business and Industry states that concerns about significant increases in natural gas prices occurring after DOE/FE began authorizing LNG exports have not been borne out.[122]

b. DOE/FE Response

The 2018 Study did not attempt to quantify the macroeconomic impacts or other direct and indirect effects of LNG exports since February 2016. Nonetheless, to provide one estimate of the current value of U.S. LNG exports, DOE/FE points to the quantity and price of U.S. LNG exported to date, as reported by DOE/FE export authorization holders. Since initial exports began from the lower-48 states in February 2016, a cumulative volume of over 1.7 trillion cubic feet of natural gas has been exported through October 2018, and the corresponding volume-weighted prices for the same period yield a value of over $7.9 billion.[123] Additionally, as noted previously, since U.S. LNG exports from the lower-48 states began, the projected Henry Hub price in 2040 has decreased from AEO 2017 to AEO 2018, which is a function of the size of domestic natural gas supply to meet both domestic and export demand.

2. Macroeconomic Benefits Under DOE's Studies to Date

a. Comments

Several commenters point out that the 2018 LNG Export Study builds on both DOE's prior macroeconomic studies and several studies conducted by other authors in reaffirming the economic benefits of LNG exports.[124] Cheniere notes that, even before the 2018 Study, DOE/FE had already developed a large body of analysis demonstrating the substantial macroeconomic benefits of LNG exports to the United States. Cheniere, JCEP, and API state that DOE's four prior studies were varied in their methodology, but they all confirm the same fundamental conclusion: LNG exports are a clear net benefit to the U.S. economy and are therefore in the public interest.[125] The commenters maintain that the conclusions of the 2018 LNG Export Study—especially when considered along with DOE's prior LNG studies—should put to rest any lingering concerns that increased U.S. LNG exports are not in the public interest. According to API, ''[i]t should now be abundantly clear that U.S. LNG offers sizable benefits to U.S. consumers, workers, and the economy overall.'' [126]

b. DOE/FE Response

DOE's prior LNG export studies (the 2012, 2014, and 2015 LNG Export Studies) consistently have projected positive economic benefits from increased levels of U.S. LNG exports, as measured by GDP.

[114] Comment of Cheniere at 1.

[115] *Id.*

[116] *See* FE LNG Monthly, Dec. 2018, and LNG Annual 2016, 2017, *available at: https://www.energy.gov/fe/listings/lng-reports; see also* Comment of NextDecade Corp. at 9; Comment of API at 2. Additionally, we note that Dominion Energy Cove Point LNG, LP (DECP) commenced LNG exports on March 2, 2018. To date, DECP has exported 36 LNG cargoes from its terminal in Lusby, Maryland (both long-term and short-term exports), with deliveries to 13 countries and regions worldwide.

[117] *See* Comment of Cheniere at 2.

[118] *See id.*

[119] *See id.*

[120] *Id.*

[121] Comment of API at 2.

[122] Comment of Pennsylvania Chamber of Business and Industry at 1–2; *see infra* at § VI.G.

[123] LNG exports of 186,841 million cubic feet (MMcf) in 2016 * $4.71/thousand cubic feet (Mcf) + LNG exports of 707,542 MMcf in 2017 * $4.69/Mcf + LNG exports of 852,368 MMcf from Jan.–Oct. 2018 at $4.90/Mcf, as reported in EIA's Natural Gas Monthly (Nov. 2018), *available at: https://www.eia.gov/naturalgas/monthly/pdf/table_05.pdf* (Table 5, U.S. natural gas exports, 2016–2018) and FE LNG Monthly, Dec. 2018, *available at: https://www.energy.gov/fe/listings/lng-reports.*

[124] Cheniere, LNG Allies, and API identify other studies examining LNG exports by authors including the Brookings Institution, Deloitte, IHS, IHS Energy, ICF International, and API.

[125] Comment of Cheniere at 2–3 & nn.6–10 (citations omitted); Comment of JCEP at 3; Comment of API at 2.

[126] Comment of API at 3.

C. Distributional Impacts

1. Gross Domestic Product (GDP)

a. Comments

Some commenters, including IECA, Sierra Club, and the Evans Schaaf Family, allege that any macroeconomic benefits from the 2018 LNG Export Study are likely overstated. These commenters allege that, in concluding that LNG exports would create a net benefit to the economy, the 2018 Study relied too heavily on the fact that exports will increase GDP while failing to give adequate weight to projected domestic natural gas price increases, as well as to negative socio-economic, sectoral, and regional impacts. IECA also disagrees with the fact that the 2018 Study emphasizes the national net economic benefits of LNG exports. IECA charges that this focus is not consistent with the U.S. Supreme Court's definition of ''public interest,'' which it claims is intended to focus on ''impacts to people, not GDP.'' [127]

Other commenters—including the Marcellus Shale Coalition, API, CLNG, NextDecade Corp., and the Anonymous commenter—assert that LNG exports will provide macroeconomic benefits to the United States. These commenters point out that, across a wide range of scenarios, the 2018 Study found that LNG exports will provide a net benefit to the U.S. economy and will allow for continued economic growth. JCEP and Cheniere emphasize the 2018 Study's conclusion that '' 'there is greater gain in GDP as the LNG export volume increases.' ''[128] Specifically, as commenters point out, the 2018 Study demonstrates that GDP grows as LNG exports increase because the U.S. economy benefits from investment in liquefaction facilities, export revenues, income from the upstream and midstream natural gas industry, and tolling charges generated by the LNG export facilities. JCEP emphasizes that these increases in GDP result, in part, from the fact that exports of LNG will not result in decreased domestic consumption of natural gas. Rather, LNG exports will be in addition to, not in place of, domestic uses of natural gas.[129]

NextDecade acknowledges the 2018 Study's conclusion that ''there is virtually no chance'' that non-FTA LNG exports will reach the 55.04 Bcf/d level in aggregate volumes for which DOE had approved and/or received applications by 2040 (as of the date of the Study).[130] Nonetheless, NextDecade points out that, regardless of the volume of LNG ultimately exported, the 2018 Study found that LNG exports are in the public interest. For this reason, NextDecade asserts that the market, not DOE, should decide which of the pending LNG export projects will meet global market demand. NextDecade further notes the 2018 Study's finding that '' 'any restrictions on LNG exports would forgo the additional GDP to be gained by allowing exports to respond to market conditions.' '' [131] In sum, these commenters support NERA's conclusion that allowing the market to determine the level of U.S. LNG exports will ''lead to an increase in overall economic activity leading to higher GDP.'' [132]

b. DOE/FE Response

The 2018 Study measured the broad macroeconomic effects on the U.S. economy through several metrics, including ''the wellbeing of the average U.S. consumer, total household income from all sources, economy-wide investment, output effects on key manufacturing sectors, and gross domestic product (GDP).'' [133] With respect to consumer well-being, the 2018 Study found that all scenarios within the more likely range of results are welfare-improving for the average U.S. household. This result is driven by households' receipt of additional income from export revenues and take-or-pay tolling charges for LNG exports, and this additional income outweighs the income lost from higher energy prices.[134]

In terms of total household income, the 2018 Study considered two broad categories of income sources: Resource income and value-added income. The resource income reflects the value of the natural gas resource as well as returns to specialized capital and labor. The value-added income is a measure of labor income and capital income. In the 2018 Study, both resource income and value-added income increase as LNG exports increase for given domestic natural gas supply assumptions across the more likely scenarios examined.[135]

In terms of economy-wide investment, the 2018 Study shows higher levels of aggregate investment for higher levels of LNG exports. Within the natural gas sector, additional investments take place to expand natural gas production and to build liquefaction capacity. Overall aggregate investment also grows with capacity increases in industries that supply machinery and equipment that make up the overall natural gas value chain.[136]

Finally, in terms of GDP, as noted previously, the 2018 Study found a ''positive correlation between GDP and LNG exports for the more likely scenarios in 2040.'' [137]

2. Sectoral Impacts

a. Comments

Some commenters, including IECA, Jody McCaffree, and the Evans Schaaf Family, debate whether LNG exports will impact the domestic energy-intensive, trade-exposed (EITE) sectors disproportionately, at too high a cost to the U.S. economy to justify exporting LNG.[138] Specifically, IECA asserts that increasing U.S. LNG exports reduces the cost of natural gas to global competitors and simultaneously increases the domestic cost of natural gas and electricity—creating a ''double negative impact'' on EITE industries.[139] According to these commenters, these price impacts will lead to lost jobs and lower wages in the EITE sectors, while also making it more difficult for the U.S. to compete globally, invest capital, and create high-paying middle class jobs.

According to IECA, the oil and natural gas industry employed 512,000 jobs in 2017, whereas the manufacturing sector currently employs 12,713,000 jobs.[140] Of the approximately 12.7 million manufacturing jobs, approximately 5,125,600 jobs in the EITE industries would be most affected by LNG exports.[141] IECA cautions that if DOE ''approves too many export terminals and natural gas prices rise,'' DOE will be putting ''at risk trillions of dollars of manufacturing assets and over 12.7 million jobs.'' [142] In light of the various alleged flaws in the 2018 Study identified by IECA and discussed herein, IECA maintains that the 2018 Study overinflates economic growth and job projections attributed to LNG exports.

Other commenters, including CLNG and API, dispute these arguments. They disagree with the notion that an LNG

[127] Comment of IECA at 3.

[128] *See, e.g.,* Comment of Cheniere at 5 (quoting 2018 LNG Export Study at 67–68).

[129] Comment of JCEP at 4 (citing 2018 LNG Export Study at 77).

[130] Comment of NextDecade Corp. at 11 (quoting 2018 LNG Export Study at 49).

[131] *Id.* (quoting 2018 LNG Export Study at 68).

[132] 2018 LNG Export Study at 68.

[133] *Id.* at 65.

[134] *Id.* at 66–67.

[135] *Id.* at 73–74.

[136] *Id.* at 76.

[137] *Id.* at 67.

[138] IECA states that its members in EITE sectors represent industries including: Chemicals, plastics, steel, iron ore, aluminum, paper, food processing, fertilizer, insulation, glass, industrial gases, building products, automotive, independent oil refining, and cement. *See* Comment of IECA at 2.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

export industry cannot co-exist with a growing domestic manufacturing base. They emphasize the size and productivity of the U.S. natural gas resource base, contending that there is an abundance of natural gas to support both LNG export demand and continued growth in the EITE industries.

CLNG argues that the ''dramatic increase'' in natural gas supply has enabled an industrial renaissance in the U.S. manufacturing sector, with demand for natural gas from the manufacturing sector reaching an all-time high this past winter.[143] According to CLNG, growth in LNG exports sends market signals to incentivize domestic production of natural gas. This increased production benefits U.S. consumers, as well as industries involved in the natural gas supply chain (such as construction and manufacturing)—spurring more economic growth.[144] NextDecade similarly asserts that, under the 2018 Study's most likely scenarios, industries that rely on natural gas for fuel and as a raw material input will maintain strong growth, even if LNG exports increase.[145]

Additionally, API argues that the economic benefits of increased natural gas use extend to the industrial sector—including through the increased production of associated natural gas liquids (NGLs), which must be extracted before natural gas is liquefied for export. CLNG and API maintain that growth in NGLs creates a competitive advantage for U.S. chemical manufacturers and leads to greater investment, industry growth, and new jobs.[146] API contends that NGLs ''have bolstered the U.S. petrochemical sector and fostered a renaissance in U.S. manufacturing,'' underscoring the value of U.S. LNG at home and abroad.[147]

Next, CLNG argues that companies from around the world are investing in new projects to build or expand their ''shale-advantaged capacity'' in the United States. CLNG states that, between 2010 and 2015, 48 new industrial projects in the petrochemical, fertilizer, steel, and natural gas-to-liquids sectors were completed, representing an investment of $28 billion.[148] According to CLNG, experts forecast additional industrial investment of $135 billion to build 59 new projects and 11 expansions between 2017 and 2022.[149]

In sum, CLNG cautions that suppressing LNG exports will limit production of natural gas which, in turn, will limit both: (i) Overall economic benefits to the domestic economy, and (ii) the opportunity for the United States to continue growing its manufacturing sectors that benefit from increased supplies of natural gas.[150]

b. DOE/FE Response

With respect to the argument that natural gas confers greater value on the U.S. economy when used in manufacturing than when produced for export, DOE observes that more natural gas is likely to be produced domestically if LNG exports are authorized than if they are prohibited. There is no one-for-one trade-off between natural gas used in manufacturing and natural gas diverted for export. These observations are consistent with DOE/FE's analysis of similar arguments made in response to its prior macroeconomic studies.[151] The competition between the demand for natural gas for domestic consumption and the demand for natural gas for export is captured in the modelling for the 2018 Study. In scenarios with increased levels of U.S. LNG exports with common domestic natural gas supply assumptions, the 2018 Study found that greater economic benefits, in terms of GDP, accrued to the U.S. economy due to those exports.

Contrary to IECA's concerns about the negative impacts to EITE industries potentially caused by increased LNG exports, the 2018 Study found: ''All negatively affected sectors, and in particular the natural gas intensive sectors, continue to grow robustly at higher levels of LNG exports, albeit at slightly lower rates of increase than they would at lower levels.'' [152] The 2018 Study further found that, ''[s]ectoral growths rates remain robust for all of the sectors that rely on natural gas as fuel and raw material input,'' with ''[t]he variation in the growth rates attributable to differences in LNG exports ranges from one to seven basis points (0.01% to 0.07%).'' [153] Based on these findings (which no commenters attempt to rebut), we are not persuaded by IECA's claim that DOE's approval of LNG exports will put trillions of dollars of U.S. manufacturing assets and millions of jobs at risk, among other alleged negative impacts.

With respect to the argument that some industries derive greater economic value from natural gas than others, DOE/FE continues to be guided by the long-standing principle established in the 1984 Policy Guidelines that resource allocation decisions of this nature are better left to the market, rather than to DOE, to resolve.[154]

3. Consumer Welfare

a. Comments

Sierra Club, IECA, the Evans Schaaf Family, and other commenters maintain that the positive macroeconomic benefits of LNG exports will not accrue to most U.S. citizens. They contend that the 2018 Study acknowledges both the positive and negative effects associated with LNG exports, but glosses over the fact that these positive and negative effects are not equally or evenly distributed.[155] According to these commenters, exports of LNG will harm all Americans by increasing natural gas prices, and thus most Americans will not share in any benefits associated with LNG exports.

Sierra Club and IECA argue that the main beneficiaries of LNG exports will be a very small fraction of the U.S population—namely, American households that own stock in natural gas production and export companies. Sierra Club claims that the 2018 Study ''simply asserts'' that households in general own the LNG production processes and industries, without providing any analysis of which households own this stock or how the benefits and harms of exports will be distributed among the American public.[156] These commenters argue that, without such analysis, DOE cannot conclude that LNG exports are in the public interest. IECA adds that a future revenue stream from LNG exports cannot predict the level of dividends paid out to shareholders or whether a share price will rise—and alleges that NERA did not disclose the economics behind this claim.[157]

Additionally, IECA argues that the 2018 Study points to a second economic benefit of LNG exports that will offset household economic losses due to

[143] Comment of CLNG at 4 & n.17 (citing Energy Ventures Analysis, Inc., *2017–2018 Winter Outlook for Natural Gas,* 2017).

[144] *See id.* at 4.

[145] Comment of NextDecade Corp. at 5.

[146] Comment of CLNG at 4.

[147] Comment of API at 2–3.

[148] Comment of CLNG at 4.

[149] *Id.* (citing Energy Ventures Analysis, Inc., *2017–2018 Winter Outlook for Natural Gas,* 2017).

[150] *Id.* at 4.

[151] *See, e.g., Golden Pass Products LLC,* DOE/FE Order No. 3978, FE Docket No. 12–156–LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Golden Pass LNG Terminal Located in Jefferson County, Texas, to Non-Free Trade Agreement Nations, at 77–80 (Apr. 25, 2017).

[152] 2018 LNG Export Study at 70.

[153] *Id.*

[154] *See infra* § I.B.

[155] Comment of Sierra Club at 2 (quoting 2018 LNG Export Study at 64).

[156] *Id.*

[157] Comment of IECA at 3.

higher energy costs: an increase in the value of the U.S. dollar. IECA disputes this benefit, contending (among other arguments) that it is speculative to assume that LNG exports would increase the value of the dollar, when there are far greater influences on the dollar's value.[158]

On the other hand, NextDecade contends that all of the ''more likely'' scenarios considered by NERA will improve consumer welfare for the average U.S. household, with consumer welfare strengthening even when global demand for LNG exports increases.[159] According to NextDecade, the 2018 Study shows that consumer welfare is highest when the United States has an abundant, low-cost, domestic natural gas supply.[160] Citing the 2018 Study, NextDecade and JCEP argue that this wealth transfer will benefit U.S. households through increased labor income and lower prices overall for imported goods—such that the benefits of LNG exports will outweigh any potential increase to the marginal cost of supplying natural gas.[161]

b. DOE/FE Response

Consistent with DOE/FE's prior studies, DOE believes that the public interest generally favors authorizing proposals to export natural gas that have been shown to lead to net benefits to the U.S. economy. DOE has observed in previous export authorizations that, although there could be circumstances in which the distributional consequences of an authorizing decision could be shown to be so negative as to outweigh net positive benefits to the U.S. economy as a whole, DOE had not been presented with sufficiently compelling evidence that those circumstances were present.

The 2018 Study describes how different households could be affected by increased levels of LNG exports. In terms of direct benefits, the 2018 Study states that, ''[i]f U.S. households, or their retirement funds, hold stock in natural gas producers, they will benefit from the increase in the value of their investment.'' [162] The 2018 Study noted indirect benefits of increased LNG exports accruing to households through the additional wealth transferred into the United States, ''which increases the value of the dollar and reduces prices of other imported goods.'' [163] Overall, ''[l]ike other trade measures, LNG exports will cause shifts in industrial output, employment, and in sources of income.'' [164] However, the effects on different households from increased LNG exports will depend on their income sources.

As described previously, with respect to consumer well-being, the 2018 Study found that all scenarios within the more likely range of results are welfare-improving for the average U.S. household. This result is driven by households' receipt of additional income from export revenues and take-or-pay tolling charges for LNG exports, and this additional income outweighs the income lost from higher energy prices.[165]

Finally, we note that in the consolidated *Sierra Club II* case, the D.C. Circuit rejected—in all three cases—Sierra Club's argument that DOE ''erred by failing to consider distributional impacts'' when evaluating the public interest under NGA section 3(a).[166] The Court upheld DOE/FE's conclusion that ''given that exports will benefit the economy as a whole and *absent stronger record evidence on the distributional consequences,* [DOE/FE] could not say that . . . exports were inconsistent with the public interest on these grounds.'' [167] On this basis, the Court held that DOE/FE had ''adequately addressed'' Sierra Club's concerns regarding distributional impacts.[168]

None of the commenters advancing this argument have provided a quantitative analysis of the distributional consequences of authorizing LNG exports at the household level. Absent stronger record evidence on these alleged distributional consequences, we cannot say that increased LNG exports are inconsistent with the public interest on these grounds.

D. Regional Impacts

1. Comments

Some commenters, including Jody McCaffree and the Evans Schaaf Family, address the negative regional impacts potentially associated with LNG exports. They argue that local communities near shale gas production areas, pipelines, and/or LNG export terminals could be adversely affected by increases in natural gas production and LNG exports. They cite loss of property through eminent domain, property devaluation, degradation of infrastructure, environmental and public health issues (including local air pollution and poisoned drinking water), and harm to local economies, among other issues.

Other commenters seek to rebut these concerns by identifying the positive regional benefits associated with LNG exports, both in regions where shale development and production occur, and the regions in which LNG export terminals may be located. For example, the Marcellus Shale Coalition (comprised of nearly 200 producing, midstream, transmission, and supply chain members committed to the development of natural gas resources in the Marcellus, Utica, and related geological formations) cites the economic benefits of LNG exports to Pennsylvania's economy. The Coalition further asserts that increasing LNG exports is crucial to stabilizing domestic natural gas markets—particularly in the Appalachian Basin—and positioning these markets for continued growth.[169]

2. DOE/FE Response

A general consideration of regional impacts is outside of the scope of the 2018 LNG Export Study. DOE/FE believes regional impacts are appropriately considered on a case-by-case basis during the review of each non-FTA application, consistent with DOE/FE's longstanding practice.

E. Estimates of Domestic Natural Gas Supply

1. Comments

Jody McCaffree points to DOE/FE's total approved volume of exports to both FTA and non-FTA countries in alleging that DOE ''has already approved LNG exports in excess of projected U.S. production'' of natural gas.[170]

Other commenters, including API, CLNG, and the Marcellus Shale Coalition, assert that the United States has abundant domestic natural gas reserves. Pointing to the 2018 Study, CLNG asserts that ''[t]he scenarios where the U.S. reaps the most economic gains at the lowest price from exporting LNG are those where our supply of natural gas is highest.'' [171] CLNG further asserts that the United States is more than capable of continuing to meet high production and supply expectations, citing the growth of U.S. natural gas

[158] *Id.*

[159] Comment of NextDecade Corp. at 5.

[160] *Id.*

[161] Comment of JCEP at 5 (citing 2018 LNG Export Study at 64–65).

[162] 2018 LNG Export Study at 64.

[163] *Id.*

[164] *Id.* at 64–65.

[165] *Id.* at 66–67.

[166] *See Sierra Club* v. *U.S. Dep't of Energy,* Nos. 16–1186, 16–1252, 16–1253, 703 Fed. Appx. 1, at *3 (DC Cir. Nov. 1, 2017) (*Sierra Club II*), discussed *infra* at § I.C.

[167] *Id.* (emphasis added, internal quotations omitted, and alteration in original).

[168] *Id.*

[169] Comment of Marcellus Shale Coalition at 1–2.

[170] Comment of Jody McCaffree at 4.

[171] Comment of CLNG at 3.

production, the growth in total natural gas resource estimates, and improvements in the ability to detect and extract natural gas.

Commenters, such as API and the Pennsylvania Chamber of Business and Industry, likewise point to the conclusions of the 2018 Study in arguing that the vast resources of U.S. natural gas can provide affordable supplies to meet domestic demand, while simultaneously providing for an increase in LNG exports. The Pennsylvania Chamber of Business and Industry maintains that authorizing LNG exports results in a stable, affordable supply of natural gas to residential, commercial, and industrial customers. In the Chamber's view, the market development of natural gas, both domestically and abroad, promotes natural gas production and the build-out of natural gas transmission and LNG infrastructure in the United States.[172]

2. DOE/FE Response

First, DOE/FE notes that the volumes authorized for export to FTA and non-FTA countries are not additive to one another. Ms. McCaffree's argument does not appear to recognize this fact, which is reflected in DOE's orders. Rather, each authorization grants authority to export the entire volume of a facility to FTA or non-FTA countries, respectively, to provide the authorization holder with maximal flexibility in determining its export destinations. According to EIA data, U.S. domestic dry natural gas production for the year 2017 averaged a rate of 74.77 Bcf/d, well in excess of current long-term FTA and non-FTA authorizations (in non-additive volumes of 59.33 Bcf/d and 23.05 Bcf/d, respectively).[173]

DOE/FE takes note of the natural gas production projections in EIA's AEO 2018, which show significant increases over the forecast period. In the Reference case, dry natural gas production is projected to increase by 49% from 2016 to 2040 (26.94 Tcf to 40.15 Tcf).[174] In the High Oil and Gas Resource and Technology case, the growth from 2016 to 2040 in dry natural gas production is even larger at 85% (26.94 Tcf to 49.98 Tcf).[175]

F. Cost of Environmental Externalities

1. Comments

Several commenters, including Sierra Club, Oregon Wild, Jody McCaffree, and the Evans Schaaf Family, maintain that LNG exports will increase demand for natural gas, thereby increasing negative environmental and economic consequences associated with natural gas production. Sierra Club adds that every stage of the LNG lifecycle has important environmental impacts. These commenters assert that the 2018 Study failed to consider the cost of environmental externalities associated with LNG exports. The externalities identified by these commenters include, but are not limited to, the following:

- Environmental costs associated with producing more natural gas to support LNG exports, including the costs, risks, and impacts associated with hydraulic fracturing and drilling to produce natural gas; and costs associated with increased water scarcity to support hydraulic fracturing;
- Environmental costs associated with the life cycle of U.S. LNG (hydraulic fracturing of shale gas, liquefaction, and export) in the form of increased emissions of GHGs and other global warming pollution, climate change and climate instability (including droughts and other extreme weather events), and ocean acidification;
- Local and regional costs associated with LNG exports, including impacts on local communities and industries;
- The costs associated with eminent domain, which may be necessary to build new pipelines to transport natural gas; and
- The potential regulatory costs and impacts of environmental regulations governing hydraulic fracturing and natural gas drilling.

According to Sierra Club, ''DOE has demonstrated that it plainly has the tools needed to consider these issues,'' [176] yet the 2018 Study failed to consider them. The Evans Schaaf Family also urges DOE to clarify what emissions are being calculated and whether a cost of those emissions has been included in the results of the 2018 Study.[177]

2. DOE/FE Response

Analysis of environmental impacts from the export of U.S. LNG was not part of the scope of the 2018 Study. Consistent with DOE/FE practice, all environmental issues will be analyzed in the final order issued in each of the pending and future non-FTA proceedings.

G. Natural Gas Price Impacts

1. Comments

Several commenters, such as IECA and Sierra Club, address potential natural gas price impacts associated with LNG exports. They contend that increases in LNG exports will increase demand for natural gas, driving up prices in the United States and adversely affecting electric and natural gas utility consumers, EITE industries, and residential consumers. In particular, IECA asserts that the 2018 Study's ''most likely'' scenario—LNG exports up to 30.7 Bcf/d by 2040—could increase prices 117% above today's Henry Hub prices by 2040, and 44% above EIA's AEO 2018 price in 2040 (which assumes 14.5 Bcf/d of LNG exports).[178] IECA alleges that such price hikes would threaten the domestic supply of natural gas at reasonable prices, such that exports of this magnitude would not be in the public interest.[179]

IECA further warns that ''excessive LNG exports'' may result in domestic prices for natural gas becoming tied to global demand-driven pricing.[180] According to IECA, when global demand increases, so will U.S. natural gas prices—to the detriment of U.S. consumers.

On the other hand, commenters such as API, NextDecade, and the Pennsylvania Chamber of Business and Industry dispute the likelihood of price increases due to LNG exports. For example, NextDecade points to the finding of the 2018 Study that U.S. natural gas prices are more dependent on both the availability of natural gas and extraction technology than on U.S. LNG export policy—which, it states, demonstrates the importance of policies that continue to support natural gas infrastructure, including LNG export authorizations. For this reason, NextDecade asserts, the 2018 Study shows that higher LNG exports cause only ''very small'' increases in U.S. natural gas prices, if any.[181]

These commenters contend that, in fact, there have been no significant price increases since exports of U.S. LNG began in 2016, contrary to warnings

[172] Comment of Pennsylvania Chamber of Business and Industry at 1–2.

[173] U.S. Energy Information Administration, ''Short-Term Energy Outlook,'' *available at: https://www.eia.gov/outlooks/steo/data/browser/#/?v=15&f=A&s=0&maptype=0&ctype=linechart* (Table 5a, U.S. Natural Gas Supply, Consumption, and Inventories, ''Total Dry Gas Production'').

[174] *See* AEO 2018, *supra* note 84, *https://www.eia.gov/outlooks/aeo/data/browser/#/?id=13-AEO2018&cases=ref2018&sourcekey=0;0* (link to table: Natural Gas Supply, Disposition, and Prices, ''Dry Gas Production'').

[175] *Id.*

[176] Comment of Sierra Club at 2.

[177] Comment of Evans Schaaf Family at 6.

[178] Comment of IECA at 2–3.

[179] *Id.* at 2 (citing *Fed. Power Comm'n* v. *Hope Gas Co.,* 320 U.S. 591, 610 (1944)).

[180] *Id.* at 1.

[181] Comment of NextDecade Corp. at 5–6 (citing 2018 LNG Export Study at 55).

made by commenters on DOE's prior LNG export studies. They point to the 2018 Study in arguing that domestic natural gas prices are unlikely to increase to a level that would impair manufacturing cost competitiveness or hurt consumers. According to API, the 2018 Study clearly shows that even at high levels of LNG exports, the impact on domestic prices is minimal because these exports are generating incremental new natural gas production that otherwise would not have a domestic market.[182] CLNG further argues that allowing U.S. Henry Hub indexed exports will help sustain lower pricing over the long-term and provide an alternative to oil-linked natural gas contracts.[183]

NextDecade states that, even in New England (which experiences frequent natural gas price spikes), the 2018 Study shows that the average base differential between New England and Henry Hub prices is unlikely to be affected by increases in LNG exports in the long run. As NextDecade explains, NERA found that these price spikes in New England are the result of the region's limited natural gas pipeline infrastructure and localized weather events. Therefore, NextDecade asserts, the prices spikes will continue regardless of the level of LNG exports.[184]

2. DOE/FE Response

The 2018 Study described two relationships between U.S LNG exports and U.S. natural gas prices based on the modeling results:

- ''Increasing U.S. LNG exports under any given set of assumptions about U.S. natural gas resources and their production leads to only small increases in U.S. natural gas prices;'' and
- ''Available natural gas resources have the largest impact on natural gas prices. Therefore, U.S. natural gas prices are far more dependent on available resources and technologies to extract available resources than on U.S. policies surrounding LNG exports.'' [185]

In the 2018 Study results, natural gas prices range from $5 to $6.50 per MMBtu in 2040 for all the Reference supply scenarios in the more likely range with a combined probability of 47%. In the high resource supply scenarios, natural gas prices range from $3.50 to $4 per MMBtu in 2040 with a combined probability of 22%.[186]

As an initial matter, IECA incorrectly identified the ''most likely'' scenario of LNG exports from the 2018 Study. ''Table 4'' in the Study provides the scenario probabilities for the more likely scenarios.[187] The most likely scenario has a probability of 14.5% and is the ''Ref_Ref_Ref_High'' case with exports of 24.0 Bcf/d in 2040.[188] This scenario is somewhat more likely than the Reference case (''Ref_Ref_Ref_Ref''), which has a probability of 13.1% and exports of 12.9 Bcf/d.[189] The 30.7 Bcf/d scenario (''High_Ref_Ref_High'') identified by IECA is the third most likely at 7.9%.[190]

Table 4 below shows modeled Henry Hub natural gas prices in 2040 for these three scenarios:'' [191]

TABLE 4—EXPORTS AND HENRY HUB PRICES FOR THREE MOST LIKELY SCENARIOS

Scenario	LNG exports in 2040 (Bcf/d)	Henry Hub in 2040 2016$/MMBtu
Ref_Ref_Ref_High	24.0	6.0
Ref_Ref_Ref_Ref	12.9	5.6
High_Ref_Ref_High	30.7	3.9

These Henry Hub prices in the 2018 Study are somewhat higher than those projected in EIA's AEO 2018. AEO 2018 projects LNG exports at a rate of 14.5 Bcf/d in the Reference case in 2040 with a corresponding Henry Hub price of $4.50 (in constant 2017 dollars). In the High Oil and Gas Resource and Technology (HOGR) case, LNG exports are larger at 21.9 Bcf/d with a Henry Hub price of $3.02.[192]

The price projections in the 2018 Study and in EIA's AEO 2018 are consistent with average annual Henry Hub spot prices over the past two decades. Between 2000 and 2009, annual average Henry Hub spot prices ranged from $3.38 to $8.86 per MMBtu; between 2010 and 2017, prices ranged from $2.52 to $4.37 per MMBtu.[193]

In response to comments noting that increased global demand for natural gas will increase domestic natural gas prices, several scenarios in the 2018 Study analyze this relationship and its domestic macroeconomic impact. Within a domestic natural gas supply scenario, increased ROW demand for natural gas increases domestic natural gas prices, all else being equal.[194] This increased ROW demand also causes prices throughout the world to increase.[195] The 2018 Study discusses this through an ''international demand pull'' scenario, quantifying the differences between the High_Ref_Ref_Low and High_Ref_Ref_High cases (where the only assumption changed is the ROW demand for natural gas). When moving from low to high ROW demand, the 2018 Study shows an increase in the Henry Hub price of $0.50 and an increase of $2.70 in the wellhead price outside of North America.[196] While domestic and ROW natural gas prices both increase, the increased ROW demand drives a larger increase in ROW prices than domestically. In this way, the 2018 Study shows that U.S. natural gas prices will not rise to the same levels as global natural gas prices as a result of increased LNG exports. This result is consistent with the 2015 Study's analysis of the linkages between U.S. and global natural gas prices, as DOE/FE previously discussed.[197]

As noted previously, the 2018 Study consistently shows macroeconomic benefits to the U.S. economy in every scenario at the projected Henry Hub

[182] Comment of API at 1.

[183] Comment of CLNG at 5.

[184] Comment of NextDecade Corp. at 6 (citing 2018 LNG Export Study at 54 n.47).

[185] 2018 LNG Export Study at 55.

[186] *Id.* at 54.

[187] *Id.* at 50–51.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] 2018 LNG Export Study at Appendix E (pages unnumbered).

[192] AEO 2018, *supra* note 84, *https://www.eia.gov/outlooks/aeo/data/browser/#/?id=13-AEO2018&region=0-0&cases=highrt&start=2016&end=2050&f=A&sourcekey=0* (link to table: Natural Gas Supply, Disposition, and Prices, ''High resource and technology case,'' ''Natural gas spot price at Henry Hub'').

[193] *See* EIA, Henry Hub Natural Gas Spot Price (Annual), *available at: https://www.eia.gov/dnav/ng/hist/rngwhhda.htm* (Dec. 12, 2018).

[194] 2018 LNG Export Study at 57–58.

[195] *Id.* at 59.

[196] *Id.* at 57–60.

[197] *See, e.g., Golden Pass Products LLC,* DOE/FE Order No. 3978, at 91–92.

natural gas prices, as well as positive annual growth across the energy-intensive sectors.[198]

H. Benefits to U.S. Trade Balance

1. Comments

API and JCEP point to the conclusion of the 2018 LNG Export Study that increased exports of natural gas will improve the U.S. balance of trade. API further argues that LNG exports have helped to position the United States as an ''energy superpower,'' changing the ''energy equation'' to the benefit of the United States.[199]

NextDecade maintains that, with estimated export revenues of up to $129 billion per year by 2040, LNG exports present a significant opportunity to close the U.S. trade gap. NextDecade further states that, within the range of the Henry Hub price scenarios, the 2018 Study demonstrates that the United States is and will be a net exporter of natural gas—and, indeed, may ''emerge as the world's largest supplier of LNG in the coming years.'' [200] According to NextDecade, the 2018 Study also demonstrates that, even though natural gas supply and demand shocks both inside and outside of the United States have different impacts on natural gas prices, they result in similar levels of net LNG exports. Accordingly, NextDecade states that increased LNG exports will benefit the trade balance regardless of the volume exported.[201]

The Pennsylvania Chamber of Business and Industry agrees that the 2018 Study affirms the significant benefits that global trade can bring to the United States—specifically, through both LNG exports and in attracting new investment in manufacturing assets reliant on affordable natural gas.[202]

2. DOE/FE Response

Consistent with the observations on the benefits of trade made by the commenters, the 2018 Study notes that ''[i]ncreased exports of natural gas will improve the U.S. balance of trade and result in a wealth transfer into the U.S.'' [203]

I. Procedural Arguments

1. Compliance With Data Quality Act

a. Comments

IECA argues that the 2018 LNG Export Study violates the Data Quality Act (DQA) because: (i) NERA used a ''proprietary and non-reproducible economic model,'' and (ii) the Study's peer reviewers allegedly have a financial interest in LNG exports, such that they could not be independent in their views.[204] For these reasons, IECA contends that the 2018 Study ''cannot be used in decision-making by DOE.'' [205]

i. Background on Data Quality Act

In December 2000, Congress passed and the President signed the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554). Section 515 of that bill is commonly referred to as the ''Data Quality Act'' or the ''Information Quality Act.'' [206] Section 515 directed the Office of Management and Budget (OMB) to issue government-wide guidelines that ''provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies . . . .'' [207]

Between 2001 and 2002, OMB published a series of guidelines and supplementary information implementing the Data Quality Act.[208] In final guidelines issued in February 2002, OMB instructed federal agencies to issue their own implementing guidelines by October 1, 2002. In its Guidelines, OMB observed that the Data Quality Act ''denotes four substantive terms regarding information disseminated by Federal agencies: quality, utility, objectivity, and integrity.'' [209] In October 2002, in response to OMB's Guidelines, DOE issued a document entitled *Final Report Implementing Office of Management and Budget Information Dissemination Quality Guidelines.*[210] DOE explained that it modeled its Guidelines on the OMB Guidelines with modifications specific to DOE.[211]

ii. IECA's Arguments

IECA argues that the 2018 Study violates three standards set forth in the DOE Guidelines: reproducibility, objectivity, and integrity.[212] The DOE Guidelines define these terms as follows:

- *Reproducibility:* ''means capability of being substantially reproduced, subject to an acceptable degree of imprecision, and with respect to analytical results, 'capable of being substantially reproduced' means that independent analysis of the original or supporting data using identical methods would generate similar analytic results . . . .'' [213]
- *Objectivity:* ''means the information is presented in an accurate, clear, complete, and unbiased manner and the substance of the information is accurate, reliable, and unbiased.'' [214]
- *Integrity:* ''means the information has been secured and protected from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification.[215]

IECA also asserts that the 2018 Study is ''influential'' under the DOE Guidelines, which is defined as:

> [W]hen used in the context of scientific, financial, or statistical information, information (1) that is subject to embargo until the date of its dissemination . . . because of potential market effects; (2) that is the basis for a DOE action that may result in an annual effect on the economy of $100 million or more; and (3) that is designated by a DOE Element as 'influential.' [216]

Information qualifying as ''influential'' is generally subject to a ''high degree of transparency of data and methods . . . to facilitate the reproducibility of [the] information by qualified third parties,'' unless it falls within a stated exemption.[217]

First, addressing reproducibility, IECA states that the 2018 Study uses a ''NERA proprietary economic model,'' such that ''third party economists have concluded that the results of the study

[198] 2018 LNG Export Study at 67, 70.

[199] Comment of API at 2.

[200] Comment of NextDecade Corp. at 4.

[201] *Id.* at 8.

[202] Comment of Pennsylvania Chamber of Business and Industry at 1–2.

[203] 2018 LNG Export Study at 64.

[204] Comment of IECA at 4.

[205] *Id.*

[206] Most federal agencies (including DOE) refer to section 515 as the ''Information Quality Act,'' but because IECA uses the ''Data Quality Act'' terminology, we will do so here.

[207] Section 515, Treasury & General Gov't Appropriations Act for Fiscal Year 2001 (Pub.L. 106–554; 114 Stat. 2763A–154)). The Data Quality Act amended the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 35).

[208] Office of Mgmt. & Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 FR 8452, 8452–8454 (Feb. 22, 2002) (summarizing OMB's procedural history in implementing section 515) [hereinafter OMB Guidelines].

[209] *Id.* (''quality'' is ''the encompassing term, of which 'utility,' 'objectivity,' and 'integrity' are the constituents); *see also id.* at 8459 (definition of ''quality'').

[210] U.S. Dep't of Energy, *Final Report Implementing Office of Management and Budget Info. Dissemination Quality Guidelines,* 67 FR 62446 (Oct. 7, 2002), *available at: https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-DOE-67FR6244 6OMBquality.pdf* [hereinafter DOE Guidelines].

[211] *Id.* at 62446–47.

[212] *See* Comment of IECA at 4–5.

[213] DOE Guidelines, 67 FR 62451 (Definition #9, ''Reproducibility'').

[214] *Id.* (Definition #7, ''Objectivity'').

[215] *Id.* (Definition #6, ''Integrity'').

[216] *Id.* (Definition #3, ''Influential'').

[217] *Id.* at 62452.

are not reproducible.'' [218] IECA also claims that the 2018 Study qualifies as ''influential'' under the DQA because ''it may result in an annual effect on the economy of $100 million or more.'' [219] IECA thus appears to suggest that the 2018 Study is subject to a ''high degree of transparency'' for purposes of reproducibility by ''qualified third parties.'' [220]

Second, IECA alleges that the 2018 Study is not ''objective'' and lacks ''integrity'' within the meaning of the DQA due to alleged personal bias on the part of NERA's external peer review panel. IECA claims that ''it is likely that every one of the individuals [involved in the peer review]—with the exception of peer reviewer John Staub of EIA—''have or will receive financial benefits from the oil and natural gas industries.'' [221] IECA contends that ''[i]ndependent objectivity and integrity is [sic] needed to validate the economic model and whether its assumptions are sound regardless of [the peer reviewers'] understanding of the oil and gas business, and not slanted to support the views of those who desire to export substantial volumes of LNG.'' [222] On this basis, IECA asks DOE whether the peer reviewers ''disclosed their financial association with the oil and gas industry.'' [223] The Evans Schaaf Family similarly questions the basis for the 2018 Study, given that (in their view) the data inputs for the Study ''are coming entirely from industry leaders who would likely have something to gain in developing LNG as a global commodity.'' [224]

b. DOE/FE Response

i. Reproducibility

DOE has carefully considered IECA's arguments and determined that the 2018 LNG Export Study satisfies the DQA's standard for ''reproducibility,'' as discussed below.

DOE/FE has determined that the 2018 Study fulfills the DQA's objectives in both providing transparency about the Study and ensuring the quality of information disseminated to the public. As discussed above, NERA relies on publicly available data for input into its models, including EIA's AEO 2017, EIA's IEO 2017, and the IEA's WEO 2016. The AEO and IEO projections are published pursuant to the Department of Energy Organization Act of 1977, which requires the EIA Administrator to prepare annual reports on trends and projections for energy use and supply.[225]

In the Study, NERA explains that it developed the possible choices for each uncertainty beginning with EIA's AEO 2017 Reference case—a DOE requirement of the Study. In addition, the 2018 Study discusses the U.S. and Rest of World natural gas market assumptions, including the linkages between the scenarios and publicly available projections from EIA and IEA. Appendix B to the Study describes the N_{ew}Era model and provides a detailed discussion of the natural gas supply elasticity estimates used in the U.S. supply scenarios, which were based on an analysis of four recent studies.[226] Appendix C provides the supply and demand ranges and probability scenarios.[227] Appendix E provides the detailed GNGM model results for the 54 scenarios considered in the 2018 Study, including levels of LNG exports, export revenues, natural gas production, natural gas consumption, Henry Hub prices, U.S. LNG destinations, and North American pipeline trade.[228] DOE/FE believes the incorporation of this extensive information about the data, assumptions, and models used in the 2018 Study satisfies the requirements of the DQA and the corresponding DOE guidelines. In short, DOE has ''disclose[d] the specific data sources that have been used and the specific quantitative methods and assumptions that have been employed.'' [229]

We note that IECA has not provided any evidence to support its claim that ''[t]hird party economists have concluded that the results of the study are not reproducible.'' [230] The public comment procedures followed by DOE/FE in this proceeding (as with its prior LNG export studies) allow IECA and other commenters to provide differing analyses about LNG exports—including third-party economic projections using EIA data—should they choose to do so. IECA elected not to submit any rebuttal studies, projections, or other evidence to counter the conclusions of the 2018 Study.

Next, even if the 2018 Study were ''influential'' under the DQA as IECA claims, the DOE Guidelines ''do not direct that all disseminated original and supporting data be subjected to the reproducibility requirement applicable to influential information.'' [231] The DOE Guidelines acknowledge that certain types of data are not practicably subject to replication due to ''confidentiality, privacy, trade secret, security, and intellectual property constraints,'' among others.[232] We further note that, in the DOE Guidelines, DOE declined to ''adopt a general prohibition against use of . . . 'third party proprietary models.' '' [233] DOE reasoned that such a prohibition was not required by the OMB Guidelines and ''would be too restrictive.'' [234]

Consistent with the DOE Guidelines, DOE/FE finds that, although NERA's proprietary GNGM and N_{ew}ERA models are intellectual property subject to trade secret and confidentiality constraints, the incorporation of the information about the data, assumptions, and models used in the 2018 Study satisfies the DQA and DOE's guidelines. For all of these reasons, we disagree with IECA's position that the 2018 Study fails to meet the reproducibility standard of the DOE Guidelines.[235]

ii. Objectivity

IECA acknowledges that the 2018 Study involved peer review by a panel of experts, but it attempts to discredit the Study by suggesting that the peer reviewers are financially self-interested in the outcome of the Study—specifically, in promoting the ''export of substantial volumes of LNG.'' [236] On this basis, IECA argues that the 2018 Study fails to meet the ''objectivity'' and ''integrity'' standards of the DOE Guidelines for this reason.[237] As explained below, however, IECA provides no evidence to support these allegations of bias, other than pointing to the professional affiliations of the peer review panel.

NERA explained the peer review process for the 2018 Study as follows:

> Nine experts on international LNG supply and demand, listed in the acknowledgement, agreed to review and comment on the proposed forecast assumptions and propose

[218] Comment of IECA at 4.

[219] *Id.* at 5.

[220] DOE Guidelines, 67 FR 62452.

[221] Comment of IECA at 5.

[222] *Id.*

[223] *Id.*

[224] Comment of Evans Schaaf Family at 1.

[225] *See* 2018 LNG Export Study at 80–95.

[226] *Id.* at 84–96 (Appx. B).

[227] *Id.* at 97–106 (Appx. C).

[228] *Id.* at 111 (Appx. E, with attached spreadsheet).

[229] DOE Guidelines, 67 FR 62452.

[230] Comment of IECA at 4.

[231] DOE Guidelines, 67 FR 62446, 62452.

[232] *Id.* at 62452.

[233] *Id.* at 62448.

[234] *Id.*

[235] We note that ''[t]he DOE Guidelines do not purport to impose legally binding substantive policies on DOE Elements.'' *Id.* at 62449. Additionally, ''neither section 515 [the DQA] nor the OMB Guidelines nor DOE's Guidelines create private rights or contemplate judicial oversight of its directives through judicial review.'' *Id.* at 62450.

[236] Comment of IECA at 5; *see also* Comment of Evans Schaaf Family at 1 (stating that the 2018 Study's probabilities are ''problematic'' because ''they are coming entirely from industry leaders who would likely have something to gain in developing LNG as a global commodity'').

[237] Comment of IECA at 5.

modifications to the probabilities assigned to each case. The reviewers were provided with a brief written report describing the proposed probabilities and assumptions. KeyLogic Systems, Inc. gathered the individual reviewer's responses and provided them to the study team for consideration.[238]

Each of these experts' names and institutional affiliations are identified in the Study.[239] Their invitation to participate as peer reviewers came directly from DOE/FE, consistent with standard protocols for peer review. In the Study (and as discussed above), NERA identified both the probability assumptions and any changes made to those assumptions based on input from the peer reviewers.[240]

IECA alleges that eight of the nine peer reviewers ''have or will receive financial benefits from the oil and natural gas industries.'' IECA expressly omits John Staub of EIA from this allegation—presumably because he works for the U.S. Government, whereas the other eight peer reviewers work for entities including universities, independent research firms, and consulting firms.[241]

IECA suggests that the peer reviewers' input to the 2018 Study is self-interested and lacking objectivity, such that NERA's modifications to the Study based upon the peer reviewers' feedback are likewise tainted. However, IECA fails to demonstrate how the professional affiliations of the peer reviewers create bias or how that alleged bias impacted the design or results of the 2018 Study.

IECA also does not acknowledge that NERA selected the peer reviewers because they are ''experts on the topic of global LNG supply and demand.'' [242] This is consistent with the DOE Guidelines, which note that, under OMB policy, peer reviewers should ''be selected primarily on the basis of necessary technical expertise.'' [243] In the Study, NERA explained its determination that these peer reviewers would assist in providing the ''broadest possible perspective on the potential range of natural gas supply and demand outcomes during the review period.'' [244] The participation of the peer reviewers thus enhanced, rather than undermined, both the objectivity and the integrity of the Study.

Finally, although IECA invokes the ''integrity'' standard under the DOE Guidelines, that standard pertains to ensuring that ''information has been secured and protected from unauthorized access or revision.'' [245] IECA has not presented any argument or evidence to suggest that the security of the 2018 Study was compromised, and therefore we decline to address this point.

2. Reliance on NERA's Analysis

a. Comments

John Young does not expressly oppose the 2018 Study, but he questions DOE's reliance on NERA's work in the 2018 Study for reasons independent of the Data Quality Act. Mr. Young asks whether DOE has examined NERA's ''track record in retrospect''—and, specifically, whether DOE has attempted to square NERA's ''optimism'' for U.S. LNG exports given that some proposed LNG projects have not yet moved forward or achieved revenue flow. He urges DOE to hire Synapse Energy Economics (Synapse) as a third party contractor to critique the 2018 Study. According to Mr. Young, Synapse has published critiques of LNG exports and natural gas projects, which he suggests would allow Synapse to critique the 2018 Study.

b. DOE/FE Response

In response, DOE/FE notes that the scenarios evaluated by NERA were based on four different uncertainties affecting natural gas markets, with three different cases for U.S. natural gas supply based on EIA's AEO 2017. As explained above, NERA enlisted external peer review of the Study's scenario design and probability assignments, and made modifications based on feedback from the peer reviewers. NERA also made clear that ''[its] findings . . . may contain projections based on current data and historical trends,'' and that ''[a]ny such predictions are subject to inherent risks and uncertainties.'' [246] Additionally, consistent with its past practice, DOE/FE has made the 2018 Study available for public comment. Commenters were free to submit a third-party critique of the 2018 Study by Synapse or other firms, although none did.

J. Potential Impact on DOE/FE's Regulatory Process

1. Pending Non-FTA Applications

a. Comments

The Evans Schaaf Family states that, ''given the 68% probability [in the 2018 Study] that U.S. LNG exports will be between 9.0 and 30.7 Bcf/d in 2040,'' DOE ''has an obligation to look closely at individual proposed projects, including where the gas is sourced, to determine whether or not projects are consistent with the public interest . . . .'' [247] In the Family's view, the 2018 Study implies that FE ''[should] approve all 55.04 Bcf/d LNG export projects for non-FTA export.'' [248] The Family disagrees with this implication, and urges DOE against assuming that ''all LNG projects are equal.'' [249]

Other commenters argue that, given the results of the 2018 Study and DOE's prior macroeconomic studies, DOE/FE should proceed expeditiously in reviewing and approving all pending applications to export LNG to non-FTA countries. API asserts that any unnecessary delay in approving non-FTA applications will put U.S. projects at ''a competitive disadvantage in the global race to construct LNG facilities,'' such that the United States will miss out on the economic and foreign policy gains associated with market-determined levels of U.S. LNG exports.[250] JCEP states that DOE/FE should promptly approve the pending applications following the completion of the environmental review for each facility.[251] CLNG similarly contends that, on the basis of the 2018 Study and DOE's LNG export regulatory program to date, ''DOE is fully armed to approve the remaining applications for export and should do so without delay.'' [252] LNG Allies states that DOE can now ''safely shift its policy perspective to grant approvals to all . . . export applications to non-FTA countries without the need for any further macroeconomic studies (at least for the next four to five years).'' [253] Citing the 2018 Study, NextDecade asserts that ''DOE should continue approving export applications so that regulatory barriers do not distort the proper functioning of the marketplace.'' [254] Finally, JCEP maintains that any opponent of LNG exports would need to make an

[238] 2018 LNG Export Study at 41.

[239] *Id.* at 1 (Acknowledgment).

[240] *See id.* 42–44.

[241] *See id.* at 1 (identifying the peer reviewers, besides John Staub of EIA, as: Kevin Book (ClearView Energy Partners, LLC); Dr. Fereidun Fesharaki (Facts Global Energy); Dr. Hillard G. Huntington (Stanford University, Dep't. of Management Science and Engineering); Vello A. Kuuskraa (Advanced Resources International, Inc.); Majed Limam and Mike Reimers (Poten and Partner's Americas LNG & Natural Gas Consulting); and Dr. Scott Tinker (University of Texas, Bureau of Economic Geology)).

[242] *Id.* at 1, 42.

[243] DOE Guidelines, 67 FR 62352 (citation omitted).

[244] 2018 LNG Export Study at 24.

[245] DOE Guidelines, 67 FR 62451.

[246] *Id.* at 1–2.

[247] Comment of Evans Schaaf Family at 8.

[248] *Id.*

[249] *Id.*

[250] Comment of API at 2.

[251] Comment of JCEP at 5–6.

[252] Comment of CLNG at 2; *see also id.* at 6.

[253] Comment of LNG Allies at 2.

[254] Comment of NextDecade Corp. at 4.

''overwhelming showing'' that an individual export proposal is inconsistent with the public interest, so as to overcome both the presumption in favor of exports codified in section 3(a) of the NGA and the findings of the 2018 LNG Export Study.[255]

b. DOE/FE Response

As mentioned above, the 2018 Study found a ''positive correlation between GDP and LNG exports for the more likely scenarios in 2040.'' [256] Under the NGA section 3(a), DOE examines each pending non-FTA application to determine whether the proposed exports are in the public interest.

As discussed in prior non-FTA orders, DOE/FE reviews a substantial administrative record for each application proceeding under NGA section 3(a). That record typically includes (but is not limited to) the following: The application; any motions to intervene, protests, and/or comments submitted in response to the notice of application; DOE's environmental studies (*i.e.,* the Addendum [257] and the Life Cycle Greenhouse Gas Report); [258] public comments received on DOE/FE's various analyses; any final environmental document for the export facility issued by FERC or the U.S. Maritime Administration (MARAD) under NEPA (such as a final environmental impact statement or environmental assessment); [259] and any order by FERC or MARAD granting or denying authorization for the applicant to site, construct, and operate the export facility. Accordingly, DOE/FE does not prejudge any of the pending non-FTA applications on the basis of the 2018 LNG Export Study alone. For the reasons discussed herein, the 2018 LNG Export provides significant supporting evidence in DOE/FE's public interest analysis under NGA section 3(a), but the 2018 Study is one of many considerations in DOE/FE's decision-making. Consistent with its past practice, DOE/FE will evaluate each pending non-FTA application as required under the NGA and NEPA, based on the administrative record compiled in each individual proceeding.

2. Extended Term of Non-FTA Authorizations

a. Comments

LNG Allies and Cheniere assert that the design of the 2018 Study will allow for greater flexibility for DOE/FE's regulatory process going forward. They point out that, whereas DOE's prior studies had a horizon of 20 years, the 2018 Study extends 30 years into the future (*i.e.,* through December 31, 2050). Therefore, Cheniere asserts, ''[t]he findings establish an evidentiary basis for DOE/FE to make public interest determinations and [issue] export authorizations for 30-year terms.'' [260] On this basis, these commenters urge DOE/FE to: (i) Grant new non-FTA authorizations for a term of 30 years, and (ii) initiate a consolidated proceeding to add an additional 10-year term to the existing 20-year LNG export authorizations for both FTA and non-FTA countries. They assert that the LNG industry would receive substantial benefits from extended 30-year authorizations—particularly since, for foreign buyers deciding between U.S. LNG and alternative long-term sources, longer authorization periods may prove decisive.

b. DOE/FE Response

A request to extend the term for existing or future non-FTA authorizations goes beyond the scope of this proceeding. If, in the future, DOE/FE decides to propose an extended export term for existing or future non-FTA orders, DOE/FE will commence a new docket proceeding and publish notice of the proposal in the **Federal Register.** Insofar as any authorization holder wishes to request a longer export term for an existing FTA authorization, it is free to do so at any time under NGA section 3(c).[261]

3. Policy Recommendations

a. Comments

IECA recommends that DOE/FE implement two policy changes to ensure that the U.S. economy benefits from LNG exports. First, IECA states that DOE/FE should ensure that price levels for U.S. LNG are not dictated by global demand, as is currently happening with prices for U.S. crude oil (in IECA's view). IECA states that DOE's policy should be ''to export LNG volumes to levels where demand in China, Japan, South Korea, India, and the EU [European Union] will not determine [U.S.] prices.'' [262] According to IECA, such a policy is especially important during the winter heating season because the largest LNG importing countries have winter at the same time as the United States—potentially resulting in global price spikes for heating and electricity.[263]

Second, IECA asks DOE/FE to ''issue an order that would specify that it is unlawful for U.S. LNG exports to be shipped to countries that subsidize natural gas to their manufacturing industry.'' [264] As discussed above, IECA argues that allowing exports of U.S. LNG to ''subsidizing'' countries damages the competitiveness of U.S. manufacturing and threatens U.S. jobs.

b. DOE/FE Response

The policy recommendations offered by IECA go beyond the scope of this proceeding. DOE/FE takes no position on the proposed policy recommendations at this time.

VII. Discussion and Conclusions

DOE/FE commissioned the 2018 LNG Export Study and invited the submission of responsive comments on the Study. DOE/FE has analyzed this material and determined that the 2018 Study provides substantial support for the pending non-FTA applications identified in this docket, as well as future non-FTA applications within the export volumes considered by the 2018 Study (0.1 to 52.8 Bcf/d of natural gas). Specifically, the conclusion of the 2018 LNG Export Study is that the United States will experience net economic benefits from issuance of authorizations to export domestically produced LNG. Other key findings of the 2018 Study include:

- ''Increasing U.S. LNG exports under any given set of assumptions about U.S. natural gas resources and their production leads to only small increases in U.S. natural gas prices.'' [265]

[255] Comment of JCEP at 6.

[256] 2018 LNG Export Study at 67.

[257] *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States,* 79 FR 48132 (Aug. 15, 2014). The Addendum and related documents are available at: *https://www.energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf.*

[258] *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States,* 79 FR 32260 (June 4, 2014). The Life Cycle Greenhouse Gas Report is available at: *http://energy.gov/fe/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states.*

[259] Typically, the Federal agency responsible for permitting the export facility—usually either FERC or MARAD—serves as the lead agency in the NEPA review process, and DOE serves as a cooperating agency. Where no other Federal agency is responsible for permitting the export facility, DOE serves as the lead agency in the NEPA review process.

[260] Comment of Cheniere at 2.

[261] 15 U.S.C. 717b(c) (requiring DOE to grant applications for FTA authorizations, including applications to amend such authorizations, ''without modification or delay'').

[262] Comment of IECA at 1 (defining ''subsidize'' as ''a foreign government and/or foreign government related entities that in whole or part, are either owned, controlled or regulated by such government entities, provide natural gas to their industrial and or electric generating sectors at prices that are below the market or purchased costs.'').

[263] *Id.*

[264] *Id.* at 7.

[265] 2018 LNG Export Study at 55.

• ''Increased exports of natural gas will improve the U.S. balance of trade and result in a wealth transfer into the United States.'' [266]

• ''Overall [U.S.] GDP improves as LNG exports increase for all scenarios with the same U.S. natural gas supply condition.[267]

• ''There is no support for the concern that LNG exports would come at the expense of domestic natural gas consumption.'' [268]

• ''[A] large share of the increase in LNG exports is supported by an increase in domestic natural gas production.'' [269]

• ''Natural gas intensive [industries] continue to grow robustly at higher levels of LNG exports, albeit at slightly lower rates of increase than they would at lower levels.'' [270]

We have evaluated the public comments submitted in response to the 2018 Study. None of the eight comments opposing the 2018 Study have provided sufficient evidence to rebut or otherwise undermine these findings.

Specifically, the opposing comments criticize aspects of the models, assumptions, and design of the 2018 Study. As discussed above, however, EIA's most recent projections in AEO 2018 continue to show market conditions that will accommodate increased exports of natural gas. When compared to prior AEO Reference cases (including AEO 2017's Reference case used in the 2018 Study), the AEO 2018 Reference case projects increases in domestic natural gas production—well in excess of what is required to meet projected increases in domestic consumption. Accordingly, DOE/FE finds that the 2018 LNG Export Study is fundamentally sound and supports the proposition that exports of LNG from the lower-48 states, in volumes up to and including 52.8 Bcf/d of natural gas, will not be inconsistent with the public interest.[271]

As stated above, DOE will consider each application as required under the NGA and NEPA based on the administrative record compiled in each individual proceeding.

Signed in Washington, DC, on December 20, 2018.

Steven E. Winberg,

Assistant Secretary, Office of Fossil Energy.

[FR Doc. 2018–28238 Filed 12–27–18; 8:45 am]

BILLING CODE 6450–01–P

[266] *Id.* at 64.

[267] *Id.* at 67.

[268] *Id.* at 77.

[269] *Id.* at 77.

[270] *Id.* at 70.

[271] 2018 LNG Export Study at 63 & Appx F.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL19–16–000]

Michigan Electric Transmission Company, LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On December 20, 2018, the Commission issued an order in Docket No. EL19–16–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2012), instituting an investigation into whether the transmission formula rate of Michigan Electric Transmission Company, LLC may be unjust, unreasonable, or unduly discriminatory or preferential. *Int'l Transmission Co., et al.,* 165 FERC 61,236 (2018).

The refund effective date in Docket No. EL19–16–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL19–16–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214, within 21 days of the date of issuance of the order.

Dated: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–28253 Filed 12–27–18; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

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

Docket Numbers: ER10–1276–008; ER10–1287–007; ER10–1292–007; ER10–1303–007; ER10–1319–009; ER10–1353–009.

Applicants: Consumers Energy Company, CMS Energy Resource Management Company, Grayling Generating Station Limited Partnership, Genesee Power Station Limited Partnership, CMS Generation Michigan Power, LLC, Dearborn Industrial Generation, L.L.C.

Description: Supplement to May 31, 2018 Notice of Non-Material Change-In-Status of Consumer Energy Company, et al.

Filed Date: 12/20/18.

Accession Number: 20181220–5208.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER10–2390–004.

Applicants: Bicent (California) Malburg LLC.

Description: Updated Market Power Analysis for the Southwest Region of Bicent (California) Malburg LLC.

Filed Date: 12/20/18.

Accession Number: 20181220–5190.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER12–1946–012; ER10–1333–012; ER13–2387–006; ER15–190–009; ER17–543–006; ER18–1343 003.

Applicants: Duke Energy Beckjord, LLC, Duke Energy Florida, LLC, Duke Energy Commercial Enterprises, Inc., Duke Energy Renewable Services, LLC, Duke Energy SAM, LLC, Carolina Solar Power, LLC.

Description: Notice of Change in Status of the Duke MBR Sellers.

Filed Date: 12/20/18.

Accession Number: 20181220–5192.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER18–920–001.

Applicants: Marco DM Holdings, L.L.C.

Description: Triennial Market Power Update for the Southwest Power Pool Region of Marco DM Holdings, L.L.C.

Filed Date: 12/20/18.

Accession Number: 20181220–5218.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER18–1646–001.

Applicants: Electric Energy, Inc.

Description: eTariff filing per 1450: Amended Show Cause Response to be effective 3/21/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5125.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–132–001.

Applicants: Niagara Mohawk Power Corporation, New York Independent System Operator, Inc.

Description: Compliance filing: NMPC Compliance: Depreciation Rates to be effective 4/1/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5127.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–329–001.

Applicants: AEP Texas Inc.

Description: Tariff Amendment: AEPTX-Shakes Solar Interconnection Agreement First Amend & Restated to be effective 12/14/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5106.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–627–000.

Applicants: Florida Power & Light Company.

Description: § 205(d) Rate Filing: FPL–FMPA Revision to Transmission Service Agreement No. 274 to be effective 12/17/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5126.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–628–000.

Applicants: Community Wind North 9 LLC.

Description: § 205(d) Rate Filing: Category 1 Seller Status Notification & Revised MBR Tariff to be effective 12/21/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5172.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–629–000.

Applicants: Community Wind North 10 LLC.

Description: § 205(d) Rate Filing: Category 1 Seller Status Notification & Revised MBR Tariff to be effective 12/21/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5188.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–630–000.

Applicants: Community Wind North 11 LLC

Description: § 205(d) Rate Filing: Category 1 Seller Status Notification & Revised MBR Tariff to be effective 12/21/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5206.

Comments Due: 5 p.m. ET 1/10/19.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–28256 Filed 12–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–13–000]

Algonquin Gas Transmission, LLC; Notice of Intent To Prepare an Environmental Assessment for the Proposed Yorktown M&R Replacement & Reliability Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Yorktown M&R Replacement & Reliability Project involving construction and operation of facilities by Algonquin Gas Transmission, LLC (Algonquin) in Westchester County, New York. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies about issues regarding the project. The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from its action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires the Commission to discover concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. To ensure that your comments are timely and properly recorded, please submit your comments so that the Commission receives them in Washington, DC on or before 5:00 pm Eastern Time on January 22, 2019.

You can make a difference by submitting your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Commission staff will consider all filed comments during the preparation of the EA.

If you sent comments on this project to the Commission before the opening of this docket on November 5, 2018, you will need to file those comments in Docket No. CP19–13–000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable easement agreement. You are not required to enter into an agreement. However, if the Commission approves the project, that approval conveys with it the right of eminent domain. Therefore, if you and the company do not reach an easement agreement, the pipeline company could initiate condemnation proceedings in court. In such instances, compensation would be determined by a judge in accordance with state law.

Algonquin provided landowners with a fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC website (*www.ferc.gov*) at *https://www.ferc.gov/resources/guides/gas/gas.pdf.*

Public Participation

The Commission offers a free service called eSubscription which makes it easy to stay informed of all issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. To sign up go to *www.ferc.gov/docs-filing/esubscription.asp.*

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

(1) You can file your comments electronically using the *eComment* feature, which is located on the

Commission's website (*www.ferc.gov*) under the link to *Documents and Filings.* Using eComment is an easy method for submitting brief, text-only comments on a project;

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

(3) You can file a paper copy of your comments by mailing them to the following address. Be sure to reference the project docket number (CP19–3–000) with your submission: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426.

Summary of the Proposed Project

Algonquin proposes to replace its existing facilities at the Yorktown Meter and Regulator (M&R) Station in Westchester County, New York, with upgraded facilities to allow for increased capacity and reliability to Consolidated Edison, Inc. (Con Edison), an existing shipper on the Algonquin system. The project would increase the capacity of the Yorktown M&R Station to approximately 31.2 million cubic feet of natural gas per day (MMcf/d) from the current capacity at the Yorktown M&R Station of approximately 9.522 MMcf/d. Algonquin states that the project would respond to Con Edison's request for additional capacity at the Yorktown M&R Station.

Algonquin proposes the following construction activities:

- Install temporary bypass facilities within Algonquin's existing pipeline right-of-way;
- remove an approximately 1,300 square foot residential-style brick building that houses the existing M&R facilities and related appurtenances;
- install a new approximately 1,800 square foot residential-style building to house a portion of the replacement facilities;
- remove the existing gas-fired heater and other appurtenant facilities, and install two new natural gas catalytic heaters, one new filter/separator, and one new natural gas-fired emergency generator;
- install an approximately 500 square foot residential-style building to house the over-pressure-protection facilities and related appurtenances;
- tie-in and commission into service the new M&R facilities; and
- remove the temporary bypass facilities, concrete foundations, and other related appurtenances.

The general location of the project is shown in appendix 1.[1]

Land Requirements for Construction

The project would temporarily disturb up to 2.5 acres of land during construction activities. This includes approximately 0.7 acre on Con Edison's property, upon which the Yorktown M&R Station is located, and 1.8 acres within and adjacent to Algonquin's pipeline right-of-way for temporary workspace. Algonquin would use temporary workspace for temporary bypass facilities, equipment staging, and construction vehicle access to the Yorktown M&R Station property. No land would be acquired to expand the existing facility footprint or permanently maintained for operations and maintenance of the project facilities.

The EA Process

The EA will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- water resources and wetlands;
- vegetation and wildlife;
- threatened and endangered species;
- cultural resources;
- land use;
- air quality and noise;
- public safety; and
- cumulative impacts

Commission staff will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present Commission staffs' independent analysis of the issues. The EA will be available in electronic format in the public record through eLibrary [2] and the Commission's website (*https://www.ferc.gov/industries/gas/enviro/eis.asp*). If eSubscribed, you will receive instant email notification when the EA is issued. The EA may be issued for an allotted public comment period. Commission staff will consider all comments on the EA before making recommendations to the Commission. To ensure Commission staff have the opportunity to address your comments, please carefully follow the instructions in the Public Participation section, beginning on page 2.

With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate in the preparation of the EA.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultation Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, the Commission is using this notice to initiate consultation with the applicable State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] Commission staff will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). The EA for this project will document findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries.

[1] The appendices referenced in this notice will not appear in the *Federal Register.* Copies of appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE, Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[2] For instructions on connecting to eLibrary, refer to the last page of this notice.

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, part 1501.6.

[4] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. Commission staff will update the environmental mailing list as the analysis proceeds to ensure that Commission notices related to this environmental review are sent to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If the Commission issues the EA for an allotted public comment period, a *Notice of Availability* of the EA will be sent to the environmental mailing list and will provide instructions to access the electronic document on the FERC's website (*www.ferc.gov*). If you need to make changes to your name/address, or if you would like to remove your name from the mailing list, please return the attached ''Mailing List Update Form'' (appendix 2).

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the eLibrary link. Click on the eLibrary link, click on General Search and enter the docket number in the Docket Number field, excluding the last three digits (*i.e.,* CP19–13). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

Public sessions or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–28257 Filed 12–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

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

Docket Numbers: ER10–1355–006.
Applicants: Southern California Edison Company.
Description: Triennial Market Power Analysis for the CAISO BAA Market of Southern California Edison Company.
Filed Date: 12/19/18.
Accession Number: 20181219–5260.
Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER10–1790–017; ER10–2595–004; ER10–276–005; ER12–1400–005.
Applicants: BP Energy Company, Flat Ridge Wind Energy, LLC, Flat Ridge 2 Wind Energy LLC, Rolling Thunder I Power Partners, LLC.
Description: Updated Market Power Analysis for Southwest Power Pool Region of BP Energy Company, et. al.
Filed Date: 12/19/18.
Accession Number: 20181219–5264.
Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER10–2434–008; ER10–2436–008; ER10–2467 008; ER17–1666–005.
Applicants: Fenton Power Partners I, LLC, Hoosier Wind Project, LLC, Red Pine Wind Project, LLC, Wapsipinicon Wind Project LLC.
Description: Notice of Change in Status of the EDFR MISO Sellers.
Filed Date: 12/19/18.
Accession Number: 20181219–5265.
Comments Due: 5 p.m. ET 1/9/19.

Docket Numbers: ER10–3125–013; ER10–3102–013; ER15–1447–005; ER10–3100–013; ER10–3107–013.
Applicants: AL Sandersville, LLC, Effingham County Power, LLC, Mid-Georgia Cogen L.P., MPC Generating, LLC, Walton County Power, LLC.
Description: Notice of Non-Material Change in Status of AL Sandersville, LLC, et al.
Filed Date: 12/19/18.
Accession Number: 20181219–5208.
Comments Due: 5 p.m. ET 1/9/19.

Docket Numbers: ER11–2105–002.
Applicants: Oklahoma Gas and Electric Company.
Description: Supplement to June 20, 2018 Updated Market Power Analysis for Southwest Power Pool, Inc. Balancing Area Authority of Oklahoma Gas and Electric Company.
Filed Date: 12/19/18.
Accession Number: 20181219–5270.
Comments Due: 5 p.m. ET 1/9/19.

Docket Numbers: ER18–1169–005.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2018–12–19 Commitment Cost Enhancements Phase 3 Gas Price Indices Compliance to be effective 4/1/2019.
Filed Date: 12/19/18.
Accession Number: 20181219–5132.
Comments Due: 5 p.m. ET 1/9/19.

Docket Numbers: ER18–1169–006.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2018–12–19 Commitment Cost Enhancements Phase 3 Omitted Record Compliance to be effective 4/1/2019.
Filed Date: 12/19/18.
Accession Number: 20181219–5135.
Comments Due: 5 p.m. ET 1/9/19.

Docket Numbers: ER19–90–001.
Applicants: Clean Energy Future—Lordstown, LLC.
Description: Compliance filing: Informational Filing Pursuant to Schedule 2 of the PJM OATT & Request for Waiver to be effective N/A.
Filed Date: 12/19/18.
Accession Number: 20181219–5190.
Comments Due: 5 p.m. ET 1/9/19.

Docket Numbers: ER19–357–000.
Applicants: KCE NY 1, LLC.
Description: Supplement to November 16, 2018 KCE NY 1, LLC tariff filing.
Filed Date: 12/20/18.
Accession Number: 20181220–5115.
Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–610–000.
Applicants: Marengo Battery Storage, LLC.
Description: Baseline eTariff Filing: Application for Market Based Rate to be effective 12/20/2018.
Filed Date: 12/19/18.
Accession Number: 20181219–5152.
Comments Due: 5 p.m. ET 1/9/19.

Docket Numbers: ER19–611–000.
Applicants: Lockhart Power Company.
Description: Compliance filing: Compliance Filing to November 27, 2018 Order to be effective 2/18/2019.
Filed Date: 12/19/18.
Accession Number: 20181219–5191.
Comments Due: 5 p.m. ET 1/9/19.

Docket Numbers: ER19–612–000.
Applicants: NorthWestern Corporation.
Description: § 205(d) Rate Filing: SA 290 10th Rev—NITSA with GCC Three Forks, LLC to be effective 3/1/2019.
Filed Date: 12/20/18.
Accession Number: 20181220–5000.
Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–613–000.
Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 305 13th Rev—NITSA with Stillwater Mining Company to be effective 3/1/2019.

Filed Date: 12/20/18.

Accession Number: 20181220–5001.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–614–000.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: § 205(d) Rate Filing: ISO–NE and NEPOOL; Price Response Demand Implementation Revisions to be effective 2/19/2019.

Filed Date: 12/20/18.

Accession Number: 20181220–5060.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–615–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2018–12–20_SA 3014 Woodstock Hills-NSP 1st Revised GIA (J558) to be effective 12/11/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5073.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–616–000.

Applicants: Community Wind North 1 LLC.

Description: § 205(d) Rate Filing: Category 1 Seller Status Notification & Revised MBR Tariff to be effective 12/21/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5074.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–618–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2018–12–20_SA 3223 Richland Wind Energy-MidAmerican GIA (J535) to be effective 12/11/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5076.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–619–000.

Applicants: Community Wind North 2 LLC.

Description: § 205(d) Rate Filing: Category 1 Seller Status Notification & Revised MBR Tariff to be effective 12/21/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5099.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–620–000.

Applicants: Community Wind North 3 LLC.

Description: § 205(d) Rate Filing: Category 1 Seller Status Notification & Revised MBR Tariff to be effective 12/21/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5105.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–621–000.

Applicants: Community Wind North 5 LLC.

Description: § 205(d) Rate Filing: Category 1 Seller Status Notification & Revised MBR Tariff to be effective 12/21/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5107.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–622–000.

Applicants: Community Wind North 6 LLC.

Description: § 205(d) Rate Filing: Category 1 Seller Status Notification & Revised MBR Tariff to be effective 12/21/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5108.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–623–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 299 6th Rev—NITSA with REC Advanced Silicon Materials, LLC to be effective 3/1/2019.

Filed Date: 12/20/18.

Accession Number: 20181220–5109.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–624–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 243 15th Rev—NITSA with CHS Inc. to be effective 3/1/2019.

Filed Date: 12/20/18.

Accession Number: 20181220–5110.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–625–000.

Applicants: Community Wind North 7 LLC.

Description: § 205(d) Rate Filing: Category 1 Seller Status Notification & Revised MBR Tariff to be effective 12/21/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5112.

Comments Due: 5 p.m. ET 1/10/19.

Docket Numbers: ER19–626–000.

Applicants: Community Wind North 8 LLC.

Description: § 205(d) Rate Filing: Category 1 Seller Status Notification & Revised MBR Tariff to be effective 12/21/2018.

Filed Date: 12/20/18.

Accession Number: 20181220–5121.

Comments Due: 5 p.m. ET 1/10/19.

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

Docket Numbers: ES19–6–000.

Applicants: Mid-Atlantic Interstate Transmission, LLC.

Description: Application for Extension of Authorization under Section 204 of the Federal Power Act to Issue Securities of Mid-Atlantic Interstate Transmission, LLC.

Filed Date: 12/18/18.

Accession Number: 20181218–5467.

Comments Due: 5 p.m. ET 1/8/19.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–28254 Filed 12–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–24–000]

Equitrans, L.P.; Notice of Request Under Blanket Authorization

Take notice that on December 10, 2018, Equitrans, L.P. (Equitrans), 2200 Energy Drive, Canonsburg, PA 15317, filed in Docket No. CP19–24–000, a Prior Notice Request pursuant to sections 157.205 and 157.216 of the Commission's regulations under the Natural Gas Act (NGA), and Equitrans' blanket certificate issued in Docket No. CP96–532–000, requesting authorization to plug and abandon one injection/withdrawal (I/W) well (Hunters Cave 3675) and abandon in place approximately 800 feet of six-inch-diameter associated pipeline due to safety concerns from an observed corrosion anomaly within the well casing. The facilities are located in the Hunters Cave Storage Field in Greene County, Pennsylvania, all as more fully described in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://*

www.ferc.gov using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this prior notice should be directed to Matthew Eggerding, Senior Counsel, Midstream at Equitrans, L.P., 2200 Energy Drive, Canonsburg, PA 15317; by phone at (412) 553–5786; or by email to *MEggerding@eqitransmidstream.com.*

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list and will be notified of any meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 3 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

Dated: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–28259 Filed 12–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL19–24–000]

Exelon Generation Company, LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On December 20, 2018, the Commission issued an order in Docket No. EL19–24–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2012), instituting an investigation into the continued justness and reasonableness of Exelon Generation Company, LLC's rate for providing Reactive Supply and Voltage Control Service. *Exelon Generation Company, LLC,* 165 FERC 61,245 (2018).

The refund effective date in Docket No. EL19–24–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL19–24–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214, within 21 days of the date of issuance of the order.

Dated: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–28255 Filed 12–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER19–610–000]

Marengo Battery Storage, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Marengo Battery Storage, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 9, 2019.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC

Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–28261 Filed 12–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2246–081]

Yuba County Water Agency; Notice of Application Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Federal Energy Regulatory Commission and is available for public inspection:

a. *Application Type*: Exhibit R Recreation Plan Amendment.

b. *Project No:* 2246–081.

c. *Date Filed:* December 10, 2018.

d. *Applicant:* Yuba County Water Agency.

e. *Name of Project:* Yuba River Development Project.

f. *Location:* The project is located on the Yuba River, and its tributaries, North Yuba River, Middle Yuba River, and Oregon Creek, in the counties of Yuba, Nevada, and Sierra, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Curt Aikens, General Manager, Yuba County Water Agency, 1220 F Street, Marysville, CA 95901; phone (530) 741–5015

i. *FERC Contact:* David Rudisail at (202) 502–6376, or *david.rudisail@ferc.gov*.

j. Deadline for filing comments, motions to intervene, and protests: January 19, 2019.

The Commission strongly encourages electronic filing. Please file motions to intervene, protests, and comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–2246–081. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The licensee has requested to amend its Exhibit R Recreation Plan to include the following revisions: Redevelopment of Cottage Creek Picnic Area which was destroyed by fire in 2010; reorganization and expansion of the Dark Day and Cottage Creek Boat Launch facilities; and renaming of four recreation areas based on U.S. Forest Service guidelines. The amended Exhibit R also provides updated descriptions, operation and maintenance, and layouts of recreation facilities and amenities.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE, Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's website at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene: Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title COMMENTS, PROTEST, or MOTION TO INTERVENE as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–28251 Filed 12–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP19–294–002.

Applicants: Centra Pipelines Minnesota Inc.

Description: eTariff filing per 1430: Form 501G Revised to be effective N/A.

Filed Date: 12/19/18.

Accession Number: 20181219–5031.

Comments Due: 5 p.m. ET 12/27/18.

Docket Numbers: RP19–473–000.

Applicants: Florida Gas Transmission Company, LLC.

Description: Compliance filing Annual Accounting Report filed on 12–19–18 to be effective N/A.

Filed Date: 12/19/18.

Accession Number: 20181219–5001.

Comments Due: 5 p.m. ET 12/31/18.

Docket Numbers: RP19–474–000.

Applicants: Sea Robin Pipeline Company, LLC.

Description: Compliance filing Annual Flowthrough Crediting Mechanism Filing on 12–19–18 to be effective N/A.

Filed Date: 12/19/18.

Accession Number: 20181219–5002.

Comments Due: 5 p.m. ET 12/31/18.

Docket Numbers: RP19–475–000.

Applicants: NGO Transmission, Inc.

Description: § 4(d) Rate Filing: Negotiated Rate Filing to be effective 1/1/2019.

Filed Date: 12/19/18.

Accession Number: 20181219–5028.

Comments Due: 5 p.m. ET 12/31/18.

Docket Numbers: RP19–476–000.

Applicants: Florida Gas Transmission Company, LLC.

Description: Compliance filing New Service Agreement JERA filed 12–19–18 to be effective 2/1/2019.

Filed Date: 12/19/18.

Accession Number: 20181219–5112.

Comments Due: 5 p.m. ET 12/31/18.

Docket Numbers: RP19–477–000.

Applicants: Florida Gas Transmission Company, LLC.

Description: Compliance filing Compliance with CP17–8–000 East-West Project Phase 2 to be effective 2/1/2019.

Filed Date: 12/19/18.

Accession Number: 20181219–5113.

Comments Due: 5 p.m. ET 12/31/18.

Docket Numbers: RP19–478–000.

Applicants: Transcontinental Gas Pipe Line Company.

Description: § 4(d) Rate Filing: Negotiated Rates—Gulf Connector—Early In-Svc to be effective 12/21/2018.

Filed Date: 12/19/18.

Accession Number: 20181219–5189.

Comments Due: 5 p.m. ET 12/31/18.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–28262 Filed 12–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CD19–3–000]

Upcountry LLC; Notice of Preliminary Determination of a Qualifying Conduit Hydropower Facility and Soliciting Comments and Motions To Intervene

On December 20, 2018, the Upcountry LLC filed a notice of intent to construct a qualifying conduit hydropower facility, pursuant to section 30 of the Federal Power Act (FPA), as amended by section 4 of the Hydropower Regulatory Efficiency Act of 2013 (HREA). The proposed Mill Pressure Reducing Device Project would have a total installed capacity up to 72 kilowatts (kW), and would be located on the existing raw water supply pipeline. The project would be located near the City of Portland in Hood River County, Oregon.

Applicant Contact: Jonathon Munk, Upcountry LLC, 1675 Country Club Road, Hood River, OR 97031, Phone No (503) 460–7220, email: *jonmunk4@gmail.com.*

FERC Contact: Robert Bell, Phone No. (202) 502–6062; Email: *robert.bell@ferc.gov.*

Qualifying Conduit Hydropower Facility Description: The proposed project would consist of: (1) A 72-kW turbine-generator connected to an existing raw water supply pipeline and (2) appurtenant facilities. The proposed project would have an estimated annual generation of up to 630 megawatt-hours.

A qualifying conduit hydropower facility is one that is determined or deemed to meet all of the criteria shown in the table below.

TABLE 1—CRITERIA FOR QUALIFYING CONDUIT HYDROPOWER FACILITY

Statutory provision	Description	Satisfies (Y/N)
FPA 30(a)(3)(A), as amended by HREA ..	The conduit the facility uses is a tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.	Y
FPA 30(a)(3)(C)(i), as amended by HREA	The facility is constructed, operated, or maintained for the generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit.	Y
FPA 30(a)(3)(C)(ii), as amended by HREA.	The facility has an installed capacity that does not exceed 5 megawatts	Y
FPA 30(a)(3)(C)(iii), as amended by HREA.	On or before August 9, 2013, the facility is not licensed, or exempted from the licensing requirements of Part I of the FPA.	Y

Preliminary Determination: The proposed Mill Pressure Reducing Device Project will not interfere with the primary purpose of the conduit, which is to transport water for irrigation by filling an equalizing reservoir, which in turn provides pressure for an irrigation zone in its service area. Therefore, based upon the above criteria, Commission staff preliminarily determines that the proposal satisfies the requirements for a qualifying conduit hydropower facility, which is not required to be licensed or exempted from licensing.

Comments and Motions To Intervene: Deadline for filing comments contesting whether the facility meets the qualifying

criteria is 30 days from the issuance date of this notice.

Deadline for filing motions to intervene is 30 days from the issuance date of this notice.

Anyone may submit comments or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210 and 385.214. Any motions to intervene must be received on or before the specified deadline date for the particular proceeding.

Filing and Service of Responsive Documents: All filings must (1) bear in all capital letters the COMMENTS CONTESTING QUALIFICATION FOR A CONDUIT HYDROPOWER FACILITY or MOTION TO INTERVENE, as applicable; (2) state in the heading the name of the applicant and the project number of the application to which the filing responds; (3) state the name, address, and telephone number of the person filing; and (4) otherwise comply with the requirements of sections 385.2001 through 385.2005 of the Commission's regulations.[1] All comments contesting Commission staff's preliminary determination that the facility meets the qualifying criteria must set forth their evidentiary basis.

The Commission strongly encourages electronic filing. Please file motions to intervene and comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Locations of Notice of Intent: Copies of the notice of intent can be obtained directly from the applicant or such copies can be viewed and reproduced at the Commission in its Public Reference Room, Room 2A, 888 First Street NE, Washington, DC 20426. The filing may also be viewed on the web at *http://www.ferc.gov/docs-filing/elibrary.asp* using the eLibrary link. Enter the docket number (*i.e.,* CD19–3) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659.

[1] 18 CFR 385.2001–2005 (2018).

Dated: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–28258 Filed 12–27–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5697–002]

Lassen Research; Notice of Application for Surrender of Exemption, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Proceeding:* Application for surrender of conduit exemption.

b. *Project No.:* P–5697–002.

c. *Date Filed:* April 19, 2018.

d. *Exemptee:* Lassen Research.

e. *Name of Project:* Nikola I Powerhouse Project.

f. *Location:* The project is located on the Lower Boole Ditch Pipeline, a diversion of Diggar Creek, in Tehama County, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Licensee Contact:* Mr. Robert W. Lee, Project Owner, 31695 Forward Road, Manton, California 96059, Telephone: (530) 474–3966 or (530) 954–3761, *rlee@lassen.com.*

i. *FERC Contact:* Ashish Desai, (202) 502–8370, *Ashish.Desai@ferc.gov.*

j. Deadline for filing comments, interventions, and protests is 30 days from the issuance date of this notice by the Commission. The Commission strongly encourages electronic filing. Please file motions to intervene, protests and comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–5697–002.

k. *Description of Request:* Lassen Research, exemptee for the Nikola I Powerhouse Project No. 5697, filed a request to surrender its exemption. The project consists of the existing Lower Boole Ditch Pipeline and a powerhouse containing one 35-kilowatt turbine generating unit. The project has not operated since approximately 2007 and has had issues maintaining power generation since 2003 due to unregulated water use upstream of the project. As a result, the exemptee has determined it would like to surrender the exemption. The connection between the project and the power grid has been locked out. No ground disturbance is associated with the proposed surrender and project features will remain in place.

l. This filing may be viewed on the Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–5697–002) excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction in the Commission's Public Reference Room located at 888 First Street NE, Room 2A, Washington, DC 20426.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .212 and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title COMMENTS, PROTEST, or MOTION TO INTERVENE

as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to the surrender application that is the subject of this notice. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: December 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–28263 Filed 12–27–18; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9043–1]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa/*

Weekly receipt of Environmental Impact Statements

Filed 12/17/2018 Through 12/20/2018 Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search*

EIS No. 20180320, Final, BLM, WY, Lost Creek Uranium In-Situ Recover Project Modifications, Review Period Ends: 01/28/2019, Contact: Annette Treat 307–328–4314

EIS No. 20180321, Final, DOE, CA, Remediation of Area IV and the Northern Buffer Zone of the Santa Susana Field Laboratory, Review Period Ends: 01/28/2019, Contact: Stephanie Jennings 805–842–3864

EIS No. 20180322, Draft, APHIS, PRO, Rangeland Grasshopper and Mormon Cricket Suppression Program, Comment Period Ends: 02/11/2019, Contact: Jim Warren 202–316–3216

EIS No. 20180323, Draft Supplement, DOE, KY, Disposition of Depleted Uranium Oxide Conversion Product Generated from DOE's Inventory of Depleted Uranium Hexafluoride, Comment Period Ends: 02/11/2019, Contact: Jaffet Ferrer-Torres 202–586–0730

EIS No. 20180324, Draft, BLM, AK, Coastal Plain Oil and Gas Leasing Program, Comment Period Ends: 02/11/2019, Contact: Nicole Hayes 907–271–4354

Amended Notices

EIS No. 20180272, Draft, USN, NV, Fallon Range Training Complex Modernization, Comment Period Ends: 02/14/2019, Contact: Sara Goodwin 619–532–4463 Revision to FR Notice Published 11/16/2018; Extending the Comment Period from 01/15/2019 to 02/14/2019.

Dated: December 21, 2018.

Robert Tomiak,

Director, Office of Federal Activities.

[FR Doc. 2018–28208 Filed 12–27–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0879; FRL–9987–26]

Environmental Modeling Public Meeting; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: An Environmental Modeling Public Meeting (EMPM) will be held on Wednesday, January 30, 2019. This Notice announces the location and time for the meeting and provides tentative agenda topics. The EMPM provides a public forum for EPA and its stakeholders to discuss current issues related to modeling pesticide fate, transport, exposure, and ecotoxicity for pesticide risk assessments in a regulatory context.

DATES: The meeting will be held on January 30, 2019 from 9:00 a.m. to 4:30 p.m.

Requests to participate in the meeting must be received on or before January 7, 2019.

To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at the Environmental Protection Agency, Office of Pesticide Programs (OPP), One Potomac Yard (South Building), First Floor Conference Center (S–1200), 2777 S. Crystal Drive, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Rebecca Lazarus or Andrew Shelby, Environmental Fate and Effects Division (7507P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 347–0520 and (703) 347–0119; fax number: (703) 305–0204; email address: *lazarus.rebecca@epa.gov* and *shelby.andrew@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 required to conduct testing of chemical substances under the Toxic Substances Control Act (TSCA), the Federal Food, Drug, and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. 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:

- Agriculture, Forestry, Fishing and Hunting NAICS code 11.
- Utilities NAICS code 22.
- Professional, Scientific and Technical NAICS code 54.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2009–0879, 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.*

II. Background

On a biannual interval, an EMPM is held for presentation and discussion of current issues related to modeling pesticide fate, transport, and exposure for risk assessment in a regulatory context. Meeting dates and abstract requests are announced through the ''empmlist'' forum on the LYRIS list server at *https://lists.epa.gov/read/all_forums/.*

III. How can I request to participate in this meeting?

You may submit a request to participate in this meeting to the person listed under **FOR FURTHER INFORMATION CONTACT**. Do not submit any information in your request that is considered CBI. Requests to participate in the meeting, identified by docket ID number EPA–HQ–OPP–2009–0879, must be received on or before January 7, 2019.

IV. Tentative Theme for the Meeting

Offsite Exposure from Vapor-Phase Pesticides: The 2019 Winter EMPM will provide a forum for presentations on data and methods for conducting risk assessments on vapor-phase pesticides. Potential topics include quantitative use of vapor-phase pesticide data in exposure/risk assessment, calibration of vapor-phase pesticide models, and comparisons of monitoring and modeling data. Updates on ongoing topics will also be provided.

Authority: 7 U.S.C. 136 *et seq.*

Dated: December 4, 2018.

Marietta Echeverria,

Director, Environmental Fate and Effects Division, Office of Pesticide Programs.

[FR Doc. 2018–28308 Filed 12–27–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2003–0004; FRL–9987–71]

Access to Confidential Business Information by Science Applications International Corporation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor Science Applications International Corporation (SAIC) of Reston, VA, to access information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data occurred on or about November 9, 2018.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Scott M. Sherlock, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001; telephone number: (202) 564–8257; email address: *sherlock.scott@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to all who manufacture, process, or distribute industrial chemicals. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2003–0004, is available at *http://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What action is the Agency taking?

Under EPA contract number 47QTCK18D0001, order number 47QFPA19F0004, contractor SAIC of 12010 Sunset Hills Rd, Reston, VA is assisting the Office of Pollution Prevention and Toxics (OPPT) by providing support of the eChemView and New ChemRev Program; providing IT support for the development, maintenance and operation of EPA's Digital Analytics Program (EDAP); geospatial, analytic, and visualization tools; databases and data management; and application interfaces and services.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 47QTCK18D0001, order number 47QFPA19F0004, SAIC required access to sensitive but unclassified (SBU) information. The particular SBU that has been accessed is information identified as TSCA CBI. EPA has determined that SAIC will need access to TSCA CBI submitted to EPA under all sections of TSCA to perform successfully the duties specified under the contract. SAIC's personnel were given access to information claimed or determined to be CBI information submitted to EPA under all sections of TSCA.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA has provided SAIC access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract is taking place at EPA Headquarters, in accordance with EPA's *TSCA CBI Protection Manual.*

Access to TSCA data, including CBI, will continue until October 31, 2019. If the contract is extended, this access will also continue for the duration of the extended contract without further notice.

SAIC's personnel have signed nondisclosure agreements and have been briefed on specific security procedures for TSCA CBI.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 12, 2018.

Pamela S. Myrick,

Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2018–28293 Filed 12–27–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2003–0004; FRL–9986–77]

Access to Confidential Business Information by Chemical Abstracts Service

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, Chemical Abstracts Service (CAS) of Columbus, OH, to access information which has been submitted to EPA under sections 5 and 8 of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data occurred on or about 1 November 2018.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Recie Reese, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–8276; email address: *reese.recie@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to all who manufacture, process, or distribute industrial chemicals. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2003–0004, is available at *http://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What action is the Agency taking?

Under EPA contract number 68HERH19C0002, contractor CAS of 2540 Olentangy River Rd., P.O. Box 3012, Columbus, OH, is assisting the Office of Pollution Prevention and Toxics (OPPT) by providing technical assistance in developing and operating the TSCA Chemical Substance Inventory. They will also assist in determining whether the substances described in the submissions received are already found on the TSCA Inventory; and review and/or provide the chemical names for the substances being reviewed. This is a new contract that continues work initiated under Contract Number EP–W–13–008. This is a renewal of a long existing contract with CAS.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 68HERH19C0002, CAS required access to CBI submitted to EPA under sections 5 and 8 of TSCA to perform successfully the duties specified under the contract. CAS personnel were given access to information submitted to EPA under sections 5 and 8 of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under sections 5 and 8 of TSCA that EPA has provided CAS access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract is taking place at EPA Headquarters and CAS' site located at 2540 Olentangy River Rd., Columbus, OH, in accordance with EPA's *TSCA CBI Protection Manual.*

Access to TSCA data, including CBI, will continue until October 31, 2023. If the contract is extended, this access will also continue for the duration of the extended contract without further notice.

CAS personnel have signed nondisclosure agreements and were briefed on appropriate security procedures before they were permitted access to TSCA CBI.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: November 30, 2018.

Pamela S. Myrick,

Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2018–28302 Filed 12–27–18; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 22, 2019.

A. Federal Reserve Bank of Dallas (Robert L. Triplett III, Senior Vice President) 2200 North Pearl Street Dallas, Texas 75201–2272:

1. *First Bancshares of Texas, Inc., Midland, Texas;* to acquire 100 percent of the voting shares of FB Bancshares, Inc., and thereby indirectly acquire shares of Fidelity Bank, both of Wichita Falls, Texas.

Board of Governors of the Federal Reserve System, December 21, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–28297 Filed 12–27–18; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank

Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 22, 2019.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Lisa K. Haines, Dallas, Texas, as trustee of the Lisa K. Haines Financial Services Trust, Horseshoe Bay, Texas; the Lisa K. Haines Financial Services Trust; Julee S. Thummel, Yukon, Oklahoma, as trustee of the Julee S. Thummel Financial Services Trust, Horseshoe Bay, Texas; and the Julee S. Thummel Financial Services Trust;* to retain voting shares of Bank7 Corp and thereby indirectly retain shares of Bank 7, both of Oklahoma City, Oklahoma.

Board of Governors of the Federal Reserve System, December 21, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–28299 Filed 12–27–18; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, with revision, the Complex Institution Liquidity Monitoring Report (FR 2052a; OMB No. 7100–0361).

DATES: Comments must be submitted on or before February 26, 2019.

ADDRESSES: You may submit comments, identified by *FR 2052a,* by any of the following methods:

- *Agency Website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include OMB number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street NW (between 18th and 19th Streets NW), Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, if approved. These documents will also be made available on the Board's public website at: *http://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, With Revision, the Following Information Collection

Report title: Complex Institution Monitoring Report.

Agency form number: FR 2052a.

OMB control number: 7100–0361.

Frequency: Monthly, each business day (daily).

Respondents: Certain U.S. bank holding companies, U.S. savings and loan holding companies, and foreign banking organizations with U.S. assets.

Estimated number of respondents: Monthly, 40; Daily, 12.

Estimated average hours per response: Monthly, 120; Daily, 220.

Estimated annual burden hours: 717,600.

General description of report: The FR 2052a is filed by U.S. bank holding companies (BHCs) and savings and loan holding companies (SLHCs) that are subject to the Liquidity Coverage Ratio rule (LCR rule) as a ''covered depository institution holding company,'' as defined in section 249.3 of the Board's Regulation WW (12 CFR 249.3) (collectively, U.S. firms),[1] with total consolidated assets of $50 billion or more and foreign banking organizations, as defined by section 211.21(o) of the Board's Regulation K and including any U.S. bank holding company that is a subsidiary of a foreign banking organization (collectively, FBOs), with combined U.S. assets of $50 billion or more.[2] Reporting frequency is based on the asset size of the firm and whether it has been identified as a firm supervised through the Large Institution Supervision Coordinating Committee of the Board.

The FR 2052a is used to monitor the overall liquidity profile of certain institutions supervised by the Board. These data provide detailed information on the liquidity risks within different business lines (*e.g.,* financing of securities positions, prime brokerage activities). In particular, these data serve as part of the Board's supervisory surveillance program in its liquidity risk management area and provide timely information on firm-specific liquidity risks during periods of stress. Analyses of systemic and idiosyncratic liquidity risk issues are then used to inform the Board's supervisory processes, including the preparation of analytical reports that detail funding vulnerabilities.

Proposed revisions: On September 12, 2018, the Board temporarily approved [3] certain revisions to the FR 2052a relating to the Economic, Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) and Board's related interim final rule amending the LCR Rule.[4] As required by section 403 of EGRRCPA, the Board amended the LCR rule within 90 days of the enactment of EGRRCPA to treat investment grade municipal obligations that are liquid and readily-marketable as level 2B HQLA for purposes of their liquidity regulations. Therefore, the Board temporarily revised the asset categories in the FR 2052a to enable institutions to report certain municipal obligations that meet all the requirements for inclusion as HQLA under section 20 of the LCR rule, as amended.[5] Specifically, the Board amended the Assets Category Table in Appendix III of the FR 2052a such that the description of the asset classification code ''IG2–Q'' is sufficiently inclusive of municipal obligations that may qualify as HQLA under the LCR rule. The Board is now proposing to extend for three years these temporary revisions to the FR 2052a.

Legal authorization and confidentiality: The FR 2052a report is authorized to be collected from BHCs pursuant to section 5(c) of the Bank Holding Company Act (''BHC Act''), 12 U.S.C. 1844(c); from FBOs pursuant to section 8(a) of the International Banking Act, 12 U.S.C. 3106(a); from certain BHCs and FBOs pursuant to section 165 of the Dodd-Frank Act, 12 U.S.C. 5365; and from SLHCs pursuant to section 10(b)(2) and (g) of the Home Owners' Loan Act (''HOLA''), 12 U.S.C. 1467a(b)(2) and (g). Section 5(c) of the BHC Act authorizes the Board to require BHCs to submit reports to the Board regarding their financial condition, and section 8(a) of the International Banking Act subjects FBOs to the provisions of the BHC Act. Section 165 of the Dodd-Frank Act requires the Board to establish prudential standards, including liquidity requirements, for certain BHCs and FBOs. Section 10(g) of HOLA authorizes the Board to collect reports from SLHCs. The FR 2052a report is mandatory for covered institutions.

The information required to be provided on the FR 2052a is collected as part of the Board's supervisory process. Accordingly, such information is afforded confidential treatment under exemption 8 of the Freedom of Information Act (''FOIA''), which protects information from disclosure that is contained in or related to the examination or supervision of a financial institution. 5 U.S.C. 552(b)(8). In addition, the information may also be kept confidential under exemption 4 for the FOIA, which protects trade secrets or confidential commercial or financial information. 5 U.S.C. 552(b)(4). In limited circumstances, aggregate data for multiple respondents, which does not reveal the identity of any individual respondent, may be released.

Consultation outside the agency: The Board consulted with other U.S. regulatory authorities, including the Office of the Comptroller of the Currency and Federal Deposit Insurance Corporation, in determining to propose revisions to the FR 2052a.

Board of Governors of the Federal Reserve System, December 20, 2018.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2018–28204 Filed 12–27–18; 8:45 am]

BILLING CODE 6210–01–P

[1] BHCs that are subsidiaries of a foreign banking organization are excluded from the definition of ''U.S. firm.''

[2] The Board has stated that it will not take action to require bank holding companies or savings and loan holding companies with less than $100 billion in total consolidated assets to comply with certain existing regulatory requirements, including the requirements to report the 2052a. *See* Statement regarding the impact of the Economic Growth, Regulatory Relief, and Consumer Protection Act (July 6, 2018), available at *https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180706b1.pdf.* Subsequently, the Board invited comment on a proposal that would more closely match the regulations for large banking organizations with their risk profiles, which included proposals that would affect the scope of application of the FR 2052a. The press release is available at *https://www.federalreserve.gov/newsevents/pressreleases/bcreg20181031a.htm.*

[3] See 83 FR 46163 (September 12, 2018).

[4] See 83 FR 44451 (August 31, 2018).

[5] See 12 CFR part 249.20.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Office on Trafficking in Persons; Notice of Meeting

AGENCY: Administration for Children and Families (ACF), Department of Health and Human Services.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the Federal Advisory Committee Act (FACA) and the Preventing Sex Trafficking and Strengthening Families Act, that a meeting of the National Advisory Committee (NAC) on the Sex Trafficking of Children and Youth in the United States (Committee) will be held on January 9, 2019. The purpose of the meeting is for the Committee to finalize its outline of preliminary recommendations of best practices for States to follow in combating the sex trafficking of children and youth based on multidisciplinary research and promising, evidence-based models and programs.

DATES: The meeting will be held on Thursday, January 9, 2019, from 1:00 p.m. to 3:00 p.m. EST.

ADDRESSES: The committee will convene virtually.

To attend the meeting virtually, please register for this event online: *https://www.acf.hhs.gov/otip/resource/nacagenda0109.*

FOR FURTHER INFORMATION CONTACT: Katherine Chon, Director, Office on Trafficking in Persons, Designated Federal Officer (DFO) at *EndTrafficking@acf.hhs.gov* or (202) 205–4554 or 330 C Street SW,

Washington, DC 20201. Additional information is available at *https://www.acf.hhs.gov/otip/partnerships/the-national-advisory-committee.*

SUPPLEMENTARY INFORMATION: The formation and operation of the NAC are governed by the provisions of Public Law 92–463, as amended (5 U.S.C. App. 2), which sets forth standards for the formation and use of federal advisory committees.

Purpose of the NAC: The purpose of the NAC is to advise the Secretary and the Attorney General on practical and general policies concerning improvements to the nation's response to the sex trafficking of children and youth in the United States. The NAC is established pursuant to Section 121 of the Preventing Sex Trafficking and Strengthening Families Act of 2014 (Pub. L. 113–183).

Tentative Agenda: The agenda can be found at *https://www.acf.hhs.gov/otip/partnerships/the-national-advisory-committee.*

To submit written statements or RSVP to attend, email *Ava.Donald@acf.hhs.gov* by January 2, 2019. Please include your name, organization, and phone number. More details on these options are below.

Public Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of space, this meeting is open to the public. Seating is on a first to arrive basis. Security screening and a photo ID are required. The building is fully accessible to individuals with disabilities. Note: The January 9, 2019 meeting will only be held virtually.

Written Comments or Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the FACA, the public or interested organizations may submit written comments or statements to the NAC in response to the stated agenda of the meeting or in regard to the committee's mission in general. Organizations with recommendations on best practices are encouraged to submit their comments or resources (hyperlinks preferred). Written comments or statements received after January 2, 2019 may not be provided to the Committee until its next meeting.

Verbal Comments or Statements: Pursuant to 41 CFR 102–3.140d, the Committee is not obligated to allow a member of the public to speak or otherwise address the Committee during the meeting. Members of the public are invited to provide verbal statements during the Committee meeting only at the time and manner described in the agenda. The request to speak should include a brief statement of the subject matter to be addressed and should be relevant to the stated agenda of the meeting or the Committee's mission in general.

Minutes: The minutes of this meeting will be available for public review and copying within 90 days at: *https://www.acf.hhs.gov/otip/partnerships/the-national-advisory-committee.*

Dated: December 20, 2018.

Lynn A. Johnson,

Acting Assistant Secretary for Children and Families.

[FR Doc. 2018–28264 Filed 12–27–18; 8:45 am]

BILLING CODE 4184–40–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0536]

Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device User Fee Cover Sheet, Form FDA 3601

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 Form FDA 3601, entitled ''Medical Device User Fee Cover Sheet,'' which must be submitted along with certain medical device product applications, supplements, and fee payment of those applications.

DATES: Submit either electronic or written comments on the collection of information by February 26, 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 26, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 26, 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–2012–N–0536 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device User Fee Cover Sheet, Form FDA 3601.'' 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, 10A–12M, 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.

Medical Device User Fee Cover Sheet, Form FDA 3601

OMB Control Number 0910–0511—Extension

The Federal Food, Drug, and Cosmetic Act, as amended by the Medical Device User Fee and Modernization Act of 2002 (Pub. L. 107–250), and the Medical Device User Fee Amendments of 2007 (title II of the Food and Drug Administration Amendments Act of 2007), authorizes FDA to collect user fees for certain medical device applications. Under this authority, companies pay a fee for certain new medical device applications or supplements submitted to the Agency for review. Because the submission of user fees concurrently with applications and supplements is required, the review of an application cannot begin until the fee is submitted. Form FDA 3601, the ''Medical Device User Fee Cover Sheet,'' is designed to provide the minimum necessary information to determine whether a fee is required for review of an application, to determine the amount of the fee required, and to account for and track user fees. The form provides a cross-reference between the fees submitted for an application with the actual submitted application by using a unique number tracking system. The information collected is used by FDA's Center for Devices and Radiological Health and the Center for Biologics Evaluation and Research to initiate the administrative screening of new medical device applications and supplemental applications.

The total number of annual responses is based on the average number of cover sheet submissions received by FDA in recent years. The number of received annual responses includes cover sheets for applications that were qualified for small businesses and fee waivers or reductions. The estimated hours per response are based on past FDA experience with the various cover sheet submissions, and range from 5 to 30 minutes. The hours per response are based on the average of these estimates (18 minutes).

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

FDA form No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
3601	6,379	1	6,379	0.30 (18 minutes)	1,914

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimated burden for the information collection reflects an overall increase of 350 hours and a corresponding increase of 1,165 responses/records. We attribute this adjustment to an increase in the number of submissions we received over the last few years.

Dated: December 20, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–28220 Filed 12–27–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–D–4662]

International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products; Stability Testing of New Veterinary Drug Substances and Medicinal Products in Climatic Zones III and IV; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry (GFI) #259 entitled ''Stability Testing of New Veterinary Drug Substances and Medicinal Products in Climatic Zones III and IV'' (VICH GL58). This draft guidance has been developed for veterinary use by the International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products (VICH). This VICH draft guidance document is an annex to the VICH parent stability guidance, GFI #73/VICH GL3(R), ''Stability Testing of New Veterinary Drug Substances and Medicinal Products (Revision),'' and provides guidance regarding the stability data package for a new veterinary drug substance and medicinal product to be included in a registration or application submitted within the regions in climatic zones III and IV.

DATES: Submit either electronic or written comments on the draft guidance by February 26, 2019 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2018–D–4662 for ''Stability Testing of New Veterinary Drug Substances and Medicinal Products in Climatic Zones III and IV.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

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

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

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Mai Huynh, Center for Veterinary Medicine (HFV–140), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–0669, *Mai.Huynh@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft GFI #259 entitled ''Stability Testing of New Veterinary Drug Substances and Medicinal Products in Climatic Zones III and IV'' (VICH GL58). In recent years, many important initiatives have been undertaken by regulatory authorities and industry associations to promote the international harmonization of regulatory requirements. FDA has participated in efforts to enhance harmonization and has expressed its commitment to seek scientifically based, harmonized technical procedures for the development of pharmaceutical products. One of the goals of harmonization is to identify, and then reduce, differences in technical requirements for drug development among regulatory agencies in different

countries. FDA has actively participated in the International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use to develop harmonized technical requirements for the approval of human pharmaceutical and biological products among the European Union, Japan, and the United States. The VICH is a parallel initiative for veterinary medicinal products. The VICH is concerned with developing harmonized technical requirements for the approval of veterinary medicinal products in the European Union, Japan, and the United States, and includes input from both regulatory and industry representatives.

The VICH Steering Committee is composed of member representatives from the European Commission and European Medicines Agency, International Federation for Animal Health—Europe; FDA; the U.S. Department of Agriculture; the U.S. Animal Health Institute; the Japanese Ministry of Agriculture, Forestry, and Fisheries; and the Japanese Veterinary Products Association. Six observers are eligible to participate in the VICH Steering Committee: One representative from the government of Australia/New Zealand, one representative from the industry in Australia/New Zealand, one representative from the government of Canada, one representative from the industry in Canada, one representative from the government of South Africa, and one representative from the industry in South Africa. The VICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation for Animal Health.

II. Draft Guidance for Industry on Stability Testing of New Veterinary Drug Substances and Medicinal Products in Climatic Zones III and IV

The VICH Steering Committee held a meeting in June 2018 and agreed that the draft guidance document entitled ''Stability Testing of New Veterinary Drug Substances and Medicinal Products in Climatic Zones III and IV'' (VICH GL58) should be made available for public comment. This draft guidance document is an annex to the VICH parent stability guidance, GFI #73/VICH GL3(R), ''Stability Testing of New Veterinary Drug Substances and Medicinal Products (Revision),'' [1] and provides guidance regarding the stability data package for a new veterinary drug substance and medicinal product to be included in a registration or application submitted within the regions in climatic zones III and IV. This guidance provides additional guidance on the storage conditions for stability testing in countries located in Climatic Zones III (hot and dry) and IVB (hot and very humid), which are not covered by GFI #73/VICH GL3(R). This draft guidance document seeks to exemplify the core stability data package for new veterinary drug substances and medicinal products, but leaves flexibility to encompass the variety of different practical situations that may be encountered due to specific scientific considerations and characteristics of the materials being evaluated.

FDA and the VICH Expert Working Group will consider comments about the draft guidance document.

III. Significance of Guidance

This level 1 draft guidance, developed under the VICH process, is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). For example, the document has been designated ''guidance'' rather than ''guideline.'' In addition, guidance documents do not include mandatory language such as ''shall,'' ''must,'' ''require,'' or ''requirement,'' unless FDA is using these words to describe a statutory or regulatory requirement.

The draft guidance, when finalized, will represent the current thinking of FDA on this topic. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 514 have been approved under OMB control number 0910–0032.

V. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm* or *https://www.regulations.gov.*

[1] *https://www.fda.gov/downloads/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/UCM052387.pdf.*

Dated: December 20, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–28219 Filed 12–27–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–E–6002]

Determination of Regulatory Review Period for Purposes of Patent Extension; RUBRACA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for RUBRACA 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 26, 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 26, 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 26, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 26, 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–6002 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; RUBRACA.'' 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, RUBRACA (rucaparib). RUBRACA is indicated as monotherapy for the treatment of patients with deleterious *BRCA* mutation (germline and/or somatic) associated advanced ovarian cancer who have been treated with two or more chemotherapies. Select patients for therapy based on an FDA-approved companion diagnostic for RUBRACA. This indication is approved under accelerated approval based on objective response rate and duration of response. Continued approval for this indication may be contingent upon verification and description of clinical benefit in confirmatory trials. Subsequent to this approval, the USPTO received a patent term restoration application for RUBRACA (U.S. Patent No. 6,495,541) from Agouron Pharmaceuticals, LLC 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 RUBRACA 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 RUBRACA is 2,644 days. Of this time, 2,464 days occurred during the testing phase of the regulatory review period, while 180 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:* September 25, 2009. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on September 25, 2009.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* June 23, 2016. FDA has verified the applicant's claim that the new drug application (NDA) for RUBRACA (NDA 209115) was initially submitted on June 23, 2016.

3. *The date the application was approved:* December 19, 2016. FDA has verified the applicant's claim that NDA 209115 was approved on December 19, 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 1,412 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 20, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–28217 Filed 12–27–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2007–D–0369]

Product-Specific Guidance for Linaclotide; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing the availability of a draft guidance for industry on generic linaclotide oral capsules, entitled ''Draft Guidance on Linaclotide.'' The draft guidance, when finalized, will provide product-specific recommendations on, among other things, the design of bioequivalence (BE) studies to support abbreviated new drug applications (ANDAs) for linaclotide oral capsules.

DATES: Submit either electronic or written comments on the draft guidance by February 26, 2019 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2007–D–0369 for ''Draft Guidance on Linaclotide.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' will be publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff office between 9 a.m. and 4 p.m., Monday through Friday.

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

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the

heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Wendy Good, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 4714, Silver Spring, MD 20993–0002, 240–402–1146.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of June 11, 2010 (75 FR 33311), FDA announced the availability of a guidance for industry entitled ''Bioequivalence Recommendations for Specific Products,'' which explained the process that would be used to make product-specific guidances available to the public on FDA's website at *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm.*

As described in that guidance, FDA adopted this process to develop and disseminate product-specific guidances and to provide a meaningful opportunity for the public to consider and comment on the guidances. This notice announces the availability of a draft guidance for generic linaclotide oral capsules.

FDA initially approved new drug application 202811 for LINZESS (linaclotide) oral capsules in August 2012. We are now issuing a draft guidance for industry on linaclotide oral capsules (''Draft Guidance on Linaclotide'').

In July 2016, Hyman, Phelps & McNamara, PC (''Hyman Phelps''), on behalf of Allergan plc submitted a citizen petition requesting, among other things, that FDA refuse to receive and refuse to approve any ANDAs seeking approval to market a generic version of LINZESS unless, among other things, certain BE criteria are met. (Docket No. FDA–2016–P–1962, available at *https://www.regulations.gov*). FDA is separately responding to Hyman Phelps's citizen petition today as well.

The draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on the design of BE studies to support ANDAs for linaclotide oral capsules. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

II. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: December 19, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–28213 Filed 12–27–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2017–E–6003, FDA–2017–E–6016, and FDA–2017–E–6017]

Determination of Regulatory Review Period for Purposes of Patent Extension; PARSABIV

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for PARSABIV and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications 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 26, 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 26, 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 26, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 26, 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 Nos. FDA–2017–E–6003; FDA–2017–E–6016; and FDA–2017–E–6017, for ''Determination of Regulatory Review Period for Purposes of Patent Extension; PARSABIV.'' 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, PARSABIV (etelcalcetide). PARSABIV is indicated for secondary hyperparathyroidism in adult patients with chronic kidney disease (CKD) on hemodialysis. (Limitations of Use: PARSABIV has not been studied in adult patients with parathyroid carcinoma, primary hyperparathyroidism, or with CKD who are not on hemodialysis and is not recommended for use in these populations). Subsequent to this approval, the USPTO received patent term restoration applications for PARSABIV (U.S. Patent Nos. 8,377,880; 8,999,932; and 9,278,995) from KAI Pharmaceuticals, Inc. 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 PARSABIV 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 PARSABIV is 2,335 days. Of this time, 1,801 days occurred during the testing phase of the regulatory review period, while 534 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:* September 19, 2010. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on September 19, 2010.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* August 24, 2015. FDA has verified the applicant's claim that the new drug application (NDA) for PARSABIV (NDA 208325) was initially submitted on August 24, 2015.

3. *The date the application was approved:* February 7, 2017. FDA has verified the applicant's claim that NDA 208325 was approved on February 7, 2017.

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 applications for patent extension, this applicant seeks 193 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 20, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–28221 Filed 12–27–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2017–E–6700, FDA–2017–E–6708, and FDA–2017–E–6701]

Determination of Regulatory Review Period for Purposes of Patent Extension; RYDAPT

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for RYDAPT and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications 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 26, 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 26, 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 26, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 26, 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 Nos. FDA–2017–E–6700; FDA–2017–E–6708; and FDA–2017–E–6701 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; RYDAPT.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the dockets 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, RYDAPT (midostaurin). RYDAPT is indicated for treatment of adult patients with:

- Newly diagnosed acute myeloid leukemia (AML) that is FLT3 mutation-positive as detected by an FDA-approved test, in combination with standard cytarabine and daunorubicin induction and cytarabine consolidation. (Limitations of Use: RYDAPT is not indicated as a single-agent induction therapy for the treatment of patients with AML.)
- Aggressive systemic mastocytosis, systemic mastocytosis with associated hematological neoplasm, or mast cell leukemia.

Subsequent to this approval, the USPTO received patent term restoration applications for RYDAPT (U.S. Patent Nos. 7,973,031; 8,222,244; and 8,575,146) from Novartis AG and Dana-Farber Cancer Institute Inc., and the USPTO requested FDA's assistance in determining the patent's eligibility for patent term restoration. In a letter dated January 9, 2018, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of RYDAPT 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 RYDAPT is 6,737 days. Of this time, 6,494 days occurred during the testing phase of the regulatory review period, while 243 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:* November 19, 1998. The applicants claim October 19, 1988, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was on November 19, 1998, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* August 29, 2016. FDA has verified the applicants' claims that the new drug application (NDA) for RYDAPT (NDA 207997) was initially submitted on August 29, 2016.

3. *The date the application was approved:* April 28, 2017. FDA has verified the applicants' claims that NDA 207997 was approved on April 28, 2017.

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 applications for patent extension, these applicants seek 147 days, 994 days, and 1,183 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 20, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–28216 Filed 12–27–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–E–6736]

Determination of Regulatory Review Period for Purposes of Patent Extension; XERMELO

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for XERMELO 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 26, 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 26, 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 26, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 26, 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–6736 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; XERMELO.'' 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, XERMELO (telotristat ethyl hippurate). XERMELO is indicated for treatment of carcinoid syndrome diarrhea in combination with somatostatin analog (SSA) therapy in adults inadequately controlled by SSA therapy. Subsequent to this approval, the USPTO received a patent term restoration application for XERMELO (U.S. Patent No. 7,709,493) from Lexicon Pharmaceuticals, Inc., and the USPTO requested FDA's assistance in determining the patent's eligibility for patent term restoration. In a letter dated January 9, 2018, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of XERMELO 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 XERMELO is 3,329 days. Of this time, 2,993 days occurred during the testing phase of the regulatory review period, while 336 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:* January 20, 2008. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on January 20, 2008.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* March 30, 2016. FDA has verified the applicant's claim that the new drug application (NDA) for XERMELO (NDA 208794) was initially submitted on March 30, 2016.

3. *The date the application was approved:* February 28, 2017. FDA has verified the applicant's claim that NDA 208794 was approved on February 28, 2017.

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 1,175 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 20, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–28218 Filed 12–27–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0197]

Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Devices; Shortages Data Collection System

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 reinstatement 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 Shortages Data Collection System for certain medical devices.

DATES: Submit either electronic or written comments on the collection of information by February 26, 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 26, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 26, 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–2012–N–0197 for ''Shortages Data Collection System.'' 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, 10A–12M, 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 reinstatement 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.

Shortages Data Collection System

OMB Control Number 0910–0491—Reinstatement

Under section 1003(d)(2) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 393(d)(2)), the Commissioner of Food and Drugs is authorized to implement general powers (including conducting research) to carry out effectively the mission of FDA.

After the events of September 11, 2001, and as part of broader counterterrorism and emergency preparedness activities, FDA's Center for Devices and Radiological Health (CDRH) began developing operational plans and interventions that would enable CDRH to anticipate and respond to medical device shortages that might arise in the context of federally declared disasters/emergencies or regulatory actions. In particular, CDRH identified the need to acquire and maintain detailed data on domestic inventory, manufacturing capabilities, distribution plans, and raw material constraints for medical devices that would be in high demand, and/or would be vulnerable to shortages in specific disaster/emergency situations or following specific regulatory actions. Such data could support prospective risk assessment, help inform risk mitigation strategies, support real-time decision making by the Department of Health and Human Services during actual emergencies or emergency preparedness exercises, and mitigate or prevent harm to the public health.

The data collection process will consist of an initial telephone call to firms who have been identified as producing an essential medical device. In this initial call, the intent and goals of the data collection effort will be described, and the specific data request made. Data will be collected, using least burdensome methods, in a structured manner to answer specific questions. After the initial outreach, we will request updates to the information on a quarterly basis to keep the data current and accurate. Additional followup correspondence may occasionally be needed to verify/validate data, confirm receipt of followup correspondence(s), and/or request additional details to further inform FDA's public health response.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Shortages Data Collection	500	4	2,000	0.5 (30 minutes)	1,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA based the burden estimates in table 1 on past experience with direct contact with the medical device manufacturers and anticipated changes in the medical device manufacturing patterns for the specific devices being monitored. FDA estimates that approximately 500 manufacturers would be contacted by telephone and/or electronic mail 4 times per year either to obtain primary data or to verify/validate data. Because the requested data represent data elements that are monitored or tracked by manufacturers as part of routine inventory management activities, it is anticipated that for most manufacturers, the estimated time required of manufacturers to complete the data request will not exceed 30 minutes per request cycle.

We adjusted our estimated burden for the information collection to reflect an increase in the number of submissions over the last few years. This adjustment results in an increase of 750 hours to the total burden estimate.

Dated: December 21, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–28235 Filed 12–27–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–3037]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Generic Clearance for Quantitative Testing for the Development of Food and Drug Administration Communications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (PRA).

DATES: Fax written comments on the collection of information by January 28, 2019.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, Fax: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–New and title ''Generic Clearance for Quantitative Testing for the Development of FDA Communications.'' Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Generic Clearance for Quantitative Testing for the Development of FDA Communications

OMB Control Number 0910—NEW

This notice announces the FDA information collection request from OMB for a generic clearance that will allow FDA to use quantitative social/behavioral science data collection techniques (*i.e.,* surveys and experimental studies) to test consumers' reactions to FDA communications or educational messaging about FDA-regulated food and cosmetic products, dietary supplements, and animal food and feed. To ensure that communications activities and educational campaigns have the highest potential to be received, understood, and accepted by those for whom they are intended, it is important to assess communications while they are under development. Understanding consumers' attitudes, motivations, and behaviors in response to potential communications and education messaging plays an important role in improving FDA's communications.

If the following conditions are not met, FDA will submit an information collection request to OMB for approval through the normal PRA process:

- The collections are voluntary;
- The collections are low burden for participants (based on considerations of total burden hours, total number of participants, or burden hours per participant) and are low cost for both the participants and the Federal Government;
- The collections are noncontroversial;
- Personally identifiable information (PII) is collected only to the extent necessary [1] and is not retained;
- Information gathered will not be used for the purpose of substantially informing influential policy decisions; [2] and
- Information gathered will yield qualitative findings; the collections will not be designed or expected to yield statistical data or used as though the results are generalizable to the population of study.

To obtain approval for a collection that meets the conditions of this generic clearance, an abbreviated supporting statement will be submitted to OMB along with supporting documentation (*e.g.,* a copy of the survey or experimental design and stimuli for testing).

FDA will submit individual quantitative collections under this generic clearance to OMB. Individual quantitative collections will also undergo review by FDA's Research Involving Human Subjects Committee, senior leadership in the Center for Food Safety and Applied Nutrition, and PRA specialists.

Respondents to this collection of information may include a wide range of consumers and other FDA stakeholders such as producers and manufacturers who are regulated under FDA-regulated food and cosmetic products, dietary supplements, and animal food and feed.

In the **Federal Register** of September 4, 2018 (83 FR 44888), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received no comments.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN, BY ANTICIPATED DATA COLLECTION METHODS

Survey type	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Cognitive Interviews Screener	720	1	720	0.083 (5 minutes)	60
Cognitive Interviews	144	1	144	1	144
Pre-test study screener	2,400	1	2,400	0.083 (5 minutes)	199
Pre-testing study	480	1	480	.25 (15 minutes)	120
Self-administered surveys/experimental Studies Screener	75,000	1	75,000	0.083 (5 minutes)	6,225
Self-Administered Surveys/Experimental Studies	15,000	1	15,000	.25 (15 minutes)	3,750

[1] For example, collections that collect PII to provide remuneration for participants of focus groups and cognitive laboratory studies will be submitted under this request. All Privacy Act requirements will be met.

[2] As defined in OMB and agency Information Quality Guidelines, ''influential'' means that ''an agency can reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector decisions.''

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN, BY ANTICIPATED DATA COLLECTION METHODS—Continued

Survey type	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Total					10,498

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The total estimated annual burden is 10,498 hours. Current estimates are based on both historical numbers of participants from past projects as well as estimates for projects to be conducted in the next 3 years. The number of participants to be included in each new survey will vary, depending on the nature of the compliance efforts and the target audience.

Dated: December 21, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–28252 Filed 12–27–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the National Advisory Council on Nurse Education and Practice

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: National Advisory Council on Nurse Education and Practice (NACNEP) has scheduled a public meeting. Information about NACNEP and the agenda for this meeting can be found on the NACNEP website at *https://www.hrsa.gov/advisory-committees/nursing/index.html.*

DATES: January 28, 2019, 8:30 a.m.–4:30 p.m. and January 29, 2019, 8:30 a.m.–2:30 p.m. ET.

ADDRESSES: This meeting will be held in-person and by teleconference and webinar. The address for the meeting is 5600 Fishers Lane, Rockville, Maryland 20857.

- Conference call-in number: 1–888–455–0640; passcode: HRSA COUNCIL.
- Webinar link: *https://hrsa.connectsolutions.com/nacnep/.*

FOR FURTHER INFORMATION CONTACT: Deitra W. Scott, MSN, RN, Nurse Consultant, Division of Nursing and Public Health, Bureau of Health Workforce, HRSA, 5600 Fishers Lane, 11N112, Rockville, Maryland 20857; 301–945–3113; or *DScott1@hrsa.gov.*

SUPPLEMENTARY INFORMATION: NACNEP provides advice and recommendations to the Secretary of HHS (Secretary) and Congress on policy issues related to the activities carried out under Title VIII of the Public Health Service (PHS) Act, including issues related to the nurse workforce, education, and practice improvement. NACNEP also prepares and submits an annual report to the Secretary and Congress describing its activities, including NACNEP's findings and recommendations concerning activities under Title VIII, as required by the PHS Act.

During the January 28–29, 2019, meeting, NACNEP will finalize the 15th Report (topic is Promoting Nursing Leadership in the Transition to Value-Based Care) and continue discussions on potential topics for its 16th Report. Agenda items are subject to change as priorities dictate. The meeting agenda will be available at the NACNEP website at least 14 days prior to the meeting. Refer to the NACNEP website for any updated information concerning the meeting.

Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting. Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to NACNEP should be sent to Deitra W. Scott, Nurse Consultant, using the contact information above at least 3 business days prior to the meeting.

Individuals who plan to attend and need special assistance or another reasonable accommodation should notify Deitra W. Scott at the address and phone number listed above at least 10 business days prior to the meeting. Since this meeting occurs in a federal government building, attendees must go through a security check to enter the building. Non-U.S. Citizen attendees must notify HRSA of their planned attendance at least 10 business days prior to the meeting in order to facilitate their entry into the building. All attendees are required to present government-issued identification prior to entry.

Amy P. McNulty,

Acting Director, Division of the Executive Secretariat.

[FR Doc. 2018–28292 Filed 12–27–18; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HRSA is publishing this notice of petitions received under the National Vaccine Injury Compensation Program (the Program), as required by the Public Health Service (PHS) Act, as amended. While the Secretary of HHS is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact Lisa L. Reyes, Clerk of Court, United States Court of Federal Claims, 717 Madison Place NW, Washington, DC 20005, (202) 357–6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 08N146B, Rockville, MD 20857; (301) 443–6593, or visit our website at: *http://www.hrsa.gov/vaccinecompensation/index.html.*

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa–10 *et seq.,* provides that those seeking compensation are to file a petition with

the U.S. Court of Federal Claims and to serve a copy of the petition on the Secretary of HHS, who is named as the respondent in each proceeding. The Secretary has delegated this responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the Table) set forth at 42 CFR 100.3. This Table lists for each covered childhood vaccine the conditions that may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested outside the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that ''[w]ithin 30 days after the Secretary receives service of any petition filed under section 2111 the Secretary shall publish notice of such petition in the **Federal Register**.'' Set forth below is a list of petitions received by HRSA on November 1, 2018, through November 30, 2018. This list provides the name of petitioner, city and state of vaccination (if unknown then city and state of person or attorney filing claim), and case number. In cases where the Court has redacted the name of a petitioner and/or the case number, the list reflects such redaction.

Section 2112(b)(2) also provides that the special master ''shall afford all interested persons an opportunity to submit relevant, written information'' relating to the following:

1. The existence of evidence ''that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition,'' and

2. Any allegation in a petition that the petitioner either:

a. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by'' one of the vaccines referred to in the Table, or

b. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine'' referred to in the Table.

In accordance with Section 2112(b)(2), all interested persons may submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the U.S. Court of Federal Claims at the address listed above (under the heading **FOR FURTHER INFORMATION CONTACT**), with a copy to HRSA addressed to Director, Division of Injury Compensation Programs, Healthcare Systems Bureau, 5600 Fishers Lane, 08N146B, Rockville, MD 20857. The Court's caption (*Petitioner's Name* v. *Secretary of HHS*) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the Program.

Dated: December 20, 2018.

George Sigounas,

Administrator.

List of Petitions Filed

1. Ruth Gear, Grimes, Iowa, Court of Federal Claims No: 18–1684V
2. Carol Constantine, Buffalo, New York, Court of Federal Claims No: 18–1685V
3. Victor Garcia, Boscobel, Wisconsin, Court of Federal Claims No: 18–1688V
4. Anthony Partee, Waupun, Wisconsin, Court of Federal Claims No: 18–1689V
5. Kimberly Duke, Keller, Texas, Court of Federal Claims No: 18–1691V
6. Amy Sullivan on behalf of L.S., Templeton, California, Court of Federal Claims No: 18–1692V
7. Daphne Jones on behalf of R.E., Towson, Maryland, Court of Federal Claims No: 18–1694V
8. Marisol Torres-Sandlin, Forest Hills, New York, Court of Federal Claims No: 18–1696V
9. Jodi Clesen, West Bend, Wisconsin, Court of Federal Claims No: 18–1698V
10. Anne Doetkott, Dallas, Texas, Court of Federal Claims No: 18–1700V
11. Kellie S. Campbell, Butler, Pennsylvania, Court of Federal Claims No: 18–1701V
12. Tara Scherner De La Fuente, North Bend, Washington, Court of Federal Claims No: 18–1702V
13. Gregory Seei, Naperville, Illinois, Court of Federal Claims No: 18–1703V
14. Christopher Lucas, Bakersfield, California, Court of Federal Claims No: 18–1704V
15. Justin Fisher on behalf of A.F., Middleton, Wisconsin, Court of Federal Claims No: 18–1705V
16. Ellen Joy Driesel, Jerome, Idaho, Court of Federal Claims No: 18–1706V
17. Charles J. Street, Ft. Stewart, Georgia, Court of Federal Claims No: 18–1707V
18. Miguel Brito, Miami, Florida, Court of Federal Claims No: 18–1710V
19. Michael Gresham and Allison Gresham on behalf of A.K.G., Atlanta, Georgia, Court of Federal Claims No: 18–1711V
20. Lisa K. Mathis, Greensboro, North Carolina, Court of Federal Claims No: 18–1713V
21. Rita Anderson, Glasgow, Kentucky, Court of Federal Claims No: 18–1716V
22. Justine Amato, Philadelphia, Pennsylvania, Court of Federal Claims No: 18–1718V
23. Emily Brawner, Hutchinson, Kansas, Court of Federal Claims No: 18–1719V
24. Kristen Ammerman, Raleigh, North Carolina, Court of Federal Claims No: 18–1721V
25. Amy Hansen, Golden, Colorado, Court of Federal Claims No: 18–1722V
26. Camila do Espirito Santo, San Jose, California, Court of Federal Claims No: 18–1725V
27. Ramona Miranda Baez, Atlanta, Georgia, Court of Federal Claims No: 18–1727V
28. Kathleen Mahardy, Liverpool, New York, Court of Federal Claims No: 18–1728V
29. Erin Jensen, Holdrege, Nebraska, Court of Federal Claims No: 18–1729V
30. Karen Thomas, Lakewood, Colorado, Court of Federal Claims No: 18–1733V
31. William Goodwin, Atlanta, Georgia, Court of Federal Claims No: 18–1735V
32. Joyce Gruszka, Thornton, Pennsylvania, Court of Federal Claims No: 18–1736V
33. Lindsay Robert, Greenwood Village, Colorado, Court of Federal Claims No: 18–1737V
34. Michelle DePinto, Grand Rapids, Michigan, Court of Federal Claims No: 18–1738V
35. Astou Gueye, New York, New York, Court of Federal Claims No: 18–1739V
36. Jennifer Wood, Los Angeles, California, Court of Federal Claims No: 18–1740V
37. Jacqueline Weaver, Ahoskie, North Carolina, Court of Federal Claims No: 18–1742V
38. John Seidel, San Juan Capistrano, California, Court of Federal Claims No: 18–1743V
39. Elaine Ward Pruett, Rock Spring, Georgia, Court of Federal Claims No: 18–1744V
40. Melanie Henry, Wellesley Hills, Massachusetts, Court of Federal Claims No: 18–1745V
41. Tiffany Lee Drake, St. Petersburg, Florida, Court of Federal Claims No: 18–1747V
42. Rondi Johnson on behalf of James Christian Johnson, Deceased, Santa Ana, California, Court of Federal Claims No: 18–1749V
43. Michael Civatte, Leland, North Carolina, Court of Federal Claims No: 18–1750V
44. Hans Hofer, Boston, Massachusetts, Court of Federal Claims No: 18–1752V
45. Brenda Hutton, Happy Valley, Oregon, Court of Federal Claims No: 18–1753V
46. Carmen Ramirez on behalf of Luis

Arroyo, San Diego, California, Court of Federal Claims No: 18–1754V
47. Jennifer R. Bussier, Maple Grove, Minnesota, Court of Federal Claims No: 18–1756V
48. Brandon Richardson, Ruston, Louisiana, Court of Federal Claims No: 18–1757V
49. Elizabeth Lampman, Moscow, Idaho, Court of Federal Claims No: 18–1759V
50. George Phillip Rivera, San Juan, Puerto Rico, Court of Federal Claims No: 18–1761V
51. Suzanne B. Kenyon, East Rochester, New York, Court of Federal Claims No: 18–1762V
52. Teneisha C. Davis, Raleigh, North Carolina, Court of Federal Claims No: 18–1763V
53. Monica Berry, Bridgeport, West Virginia, Court of Federal Claims No: 18–1765V
54. Paula F. Peterson, North Bend, Washington, Court of Federal Claims No: 18–1766V
55. Reginald L. Adams, Danville, Virginia, Court of Federal Claims No: 18–1767V
56. Regina Sarcone, West Chester, Ohio, Court of Federal Claims No: 18–1771V
57. Hatim M. Salah, Belleville, Illinois, Court of Federal Claims No: 18–1772V
58. Martha Jane Ritchie, Irvine, Kentucky, Court of Federal Claims No: 18–1773V
59. Wilber Walker, Farmington, Missouri, Court of Federal Claims No: 18–1775V
60. Shawna Haskins, Rio Rancho, New Mexico, Court of Federal Claims No: 18–1776V
61. Terri Ortegon, Litchfield Park, Arizona, Court of Federal Claims No: 18–1777V
62. Christine McGee, Tucson, Arizona, Court of Federal Claims No: 18–1778V
63. Lisa L. Arredondo, San Antonio, Texas, Court of Federal Claims No: 18–1782V
64. Edward Francis Upton, Reno, Nevada, Court of Federal Claims No: 18–1783V
65. Geetha Menon, Baltimore, Maryland, Court of Federal Claims No: 18–1785V
66. Lisa V. Adams, Washington, District of Columbia, Court of Federal Claims No: 18–1787V
67. Bethany Koorsen, Ann Arbor, Michigan, Court of Federal Claims No: 18–1788V
68. Kathey Phelps on behalf of James T. Phelps, Deceased, Columbia, Tennessee, Court of Federal Claims No: 18–1789V
69. Anthony Arbona, Washington, District of Columbia, Court of Federal Claims No: 18–1790V
70. Steven Lewis, Ann Arbor, Michigan, Court of Federal Claims No: 18–1792V
71. Saad Arshad, Washington, District of Columbia, Court of Federal Claims No: 18–1793V
72. Anita Kaplan, Washington, District of Columbia, Court of Federal Claims No: 18–1794V
73. Ashley Corn, Washington, District of Columbia, Court of Federal Claims No: 18–1795V
74. Armand Dabbon, Washington, District of Columbia, Court of Federal Claims No: 18–1796V
75. Wendy Siefert, Washington, District of Columbia, Court of Federal Claims No: 18–1797V
76. Michelle Brassington, Washington, District of Columbia, Court of Federal Claims No: 18–1799V
77. Mitchell Zuckerman, Lambertville, New Jersey, Court of Federal Claims No: 18–1800V
78. Geneva Wilson, Washington, District of Columbia, Court of Federal Claims No: 18–1802V
79. Barbara Ann Bustillos, Irving, Texas, Court of Federal Claims No: 18–1807V
80. Donald Orr, San Leandro, California, Court of Federal Claims No: 18–1808V
81. Susan Little, Boston, Massachusetts, Court of Federal Claims No: 18–1809V
82. Daisy M. Honaker, Chester, Virginia, Court of Federal Claims No: 18–1810V
83. Darrell W. Morgan, Concord, North Carolina, Court of Federal Claims No: 18–1812V
84. Chad Lonsford, Dallas, Texas, Court of Federal Claims No: 18–1814V
85. Suzanne DeGeorge, Charlotte, North Carolina, Court of Federal Claims No: 18–1815V
86. Susan Anderson, Naples, Florida, Court of Federal Claims No: 18–1816V
87. Debra Falk, New Boston, Ohio, Court of Federal Claims No: 18–1817V
88. Arthur Lytle, Jr., Mt. Pleasant, Michigan, Court of Federal Claims No: 18–1818V
89. Janis F. Holsman, Overland Park, Kansas, Court of Federal Claims No: 18–1819V
90. Robert Uhl, Ormond Beach, Florida, Court of Federal Claims No: 18–1823V
91. Sandra Sary, Sausalito, California, Court of Federal Claims No: 18–1825V
92. Harry L. McCarthy, Richmond, Virginia, Court of Federal Claims No: 18–1826V
93. Carol Wilkinson, Portland, Maine, Court of Federal Claims No: 18–1829V
94. Jadyn Roylance, West Jordan, Utah, Court of Federal Claims No: 18–1831V
95. Barry Lanford, Spartanburg, South Carolina, Court of Federal Claims No: 18–1832V
96. Lisa Hejna, Upper Marlboro, Maryland, Court of Federal Claims No: 18–1833V
97. Eugene Montgomery, Washington, District of Columbia, Court of Federal Claims No: 18–1834V
98. Lourdes Osorio, Bronx, New York, Court of Federal Claims No: 18–1835V
99. Cristina Insumran, Staten Island, New York, Court of Federal Claims No: 18–1836V
100. Mark Mueller, Austin, Texas, Court of Federal Claims No: 18–1837V
101. Gwendolyn Love, Savannah, Georgia, Court of Federal Claims No: 18–1840V
102. Lori Winn, Beverly Hills, California, Court of Federal Claims No: 18–1843V
103. James Rivers, Salisbury, North Carolina, Court of Federal Claims No: 18–1844V
104. Randy Marts, Beverly Hills, California, Court of Federal Claims No: 18–1845V.
105. Dolores De Alatorre Perez and Antonino Alatorre Gutierrez on behalf of D. A., Beverly Hills, California. Court of Federal Claims No: 18–1846V
106. Hormozan Rashidi, Los Angeles, California, Court of Federal Claims No: 18–1855V

[FR Doc. 2018–28280 Filed 12–27–18; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HRSA is publishing this notice of petitions received under the National Vaccine Injury Compensation Program (the Program), as required by the Public Health Service (PHS) Act, as amended. While the Secretary of HHS is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact Lisa L. Reyes, Clerk of Court, United States Court of Federal Claims, 717 Madison Place NW, Washington, DC 20005, (202) 357–6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 08N146B, Rockville, MD 20857; (301) 443–6593, or visit our website at: *http://www.hrsa.gov/vaccinecompensation/index.html.*

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa–10 *et seq.,* provides that those seeking compensation are to file a petition with the U.S. Court of Federal Claims and to serve a copy of the petition on the Secretary of HHS, who is named as the respondent in each proceeding. The Secretary has delegated this responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the Table) set forth at 42 CFR 100.3. This Table lists for each covered childhood vaccine the conditions that

may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested outside the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that ''[w]ithin 30 days after the Secretary receives service of any petition filed under section 2111 the Secretary shall publish notice of such petition in the **Federal Register**.'' Due to an administrative delay, set forth below is a list of petitions received by HRSA on September 1, 2018, through September 30, 2018. This list provides the name of petitioner, city and state of vaccination (if unknown then city and state of person or attorney filing claim), and case number. In cases where the Court has redacted the name of a petitioner and/or the case number, the list reflects such redaction.

Section 2112(b)(2) also provides that the special master ''shall afford all interested persons an opportunity to submit relevant, written information'' relating to the following:

1. The existence of evidence ''that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition,'' and

2. Any allegation in a petition that the petitioner either:

a. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by'' one of the vaccines referred to in the Table, or

b. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine'' referred to in the Table.

In accordance with Section 2112(b)(2), all interested persons may submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the U.S. Court of Federal Claims at the address listed above (under the heading ''For Further Information Contact''), with a copy to HRSA addressed to Director, Division of Injury Compensation Programs, Healthcare Systems Bureau, 5600 Fishers Lane, 08N146B, Rockville, MD 20857. The Court's caption (*Petitioner's Name* v. *Secretary of Health and Human Services*) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the Program.

Dated: December 20, 2018.

George Sigounas,

Administrator.

List of Petitions Filed

1. Audrey Green, Aiken, South Carolina, Court of Federal Claims No: 18–1348V
2. Jennifer A. Brooks, Miami, Florida, Court of Federal Claims No: 18–1349V
3. Sherrill Cote, Keene, New Hampshire, Court of Federal Claims No: 18–1350V
4. Pauline Martinez, Kyle, Texas, Court of Federal Claims No: 18–1352V
5. Cheryl deWit, Painesville, Ohio, Court of Federal Claims No: 18–1353V
6. Charles Sheppard, Boscobel, Wisconsin, Court of Federal Claims No: 18–1354V
7. Katherine Jinkerson, Farmington Hills, Michigan, Court of Federal Claims No: 18–1355V
8. William C. Finney on behalf of Jean Finney, Deceased, Round Rock, Texas, Court of Federal Claims No: 18–1356V
9. John Silva, Boston, Massachusetts, Court of Federal Claims No: 18–1357V
10. Rebecca Gosselink, Phoenix, Arizona, Court of Federal Claims No: 18–1358V
11. Stephanie Bennett on behalf of The Estate of Shawn Gessner, Kansas City, Kansas, Court of Federal Claims No: 18–1359V
12. Chaneice Thompson, Voorhees, New Jersey, Court of Federal Claims No: 18–1360V
13. Norma Blanco, Oakhurst, New Jersey, Court of Federal Claims No: 18–1361V
14. Elizabeth Schnarr, Pittsburgh, Pennsylvania, Court of Federal Claims No: 18–1362V
15. Emerson Davis, Allen, Texas, Court of Federal Claims No: 18–1364V
16. Robert Stoll, Clearwater, Florida, Court of Federal Claims No: 18–1365V
17. Lori Phelan on behalf of A.P., Islandia, New York, Court of Federal Claims No: 18–1366V
18. Bobbie Sholdebrande, Carrollton, Kentucky, Court of Federal Claims No: 18–1368V
19. Gregory Cress, Jerseyville, Illinois, Court of Federal Claims No: 18–1369V
20. April Keib, Wallingford, Connecticut, Court of Federal Claims No: 18–1370V
21. Jennifer Williford and Charles Edward Williford, III on behalf of R.W., Garner, North Carolina, Court of Federal Claims No: 18–1371V
22. Edward Crisileo, Boston, Massachusetts, Court of Federal Claims No: 18–1372V
23. Janice Richardson, Denver, Colorado, Court of Federal Claims No: 18–1373V
24. Paul Rehbein, Birmingham, Alabama, Court of Federal Claims No: 18–1374V
25. Kelly Clark, South Elgin, Illinois, Court of Federal Claims No: 18–1381V
26. Laurent Jones, Waupun, Wisconsin, Court of Federal Claims No: 18–1382V
27. Ruth Thompson, Huntsville, Alabama, Court of Federal Claims No: 18–1383V
28. Neil Joshi, Burlington, Massachusetts, Court of Federal Claims No: 18–1384V
29. Linda Gardner, Forest Hills, New York, Court of Federal Claims No: 18–1385V
30. Evelin Lopes, West Reading, Pennsylvania, Court of Federal Claims No: 18–1388V
31. Jodie Prouty, Middle Granville, New York, Court of Federal Claims No: 18–1389V
32. Torrell M. Johnson, Honolulu, Hawaii, Court of Federal Claims No: 18–1390V
33. Mary Newcomb on behalf of Andrew Tidd, Deceased, Mt. Laurel, New Jersey, Court of Federal Claims No: 18–1393V
34. Benjamin Gay, Richmond, Virginia, Court of Federal Claims No: 18–1394V
35. Stefano Gelardi, Palm Beach, Florida, Court of Federal Claims No: 18–1396V
36. John Agate, Williamsville, New York, Court of Federal Claims No: 18–1397V
37. Sasha Weiser-Freedman, Oyster Bay, New York, Court of Federal Claims No: 18–1398V
38. Amy Link, North Miami, Florida, Court of Federal Claims No: 18–1399V
39. Mary Moon, Desoto, Texas, Court of Federal Claims No: 18–1403V
40. Mary H. Cramer, Philadelphia, Pennsylvania, Court of Federal Claims No: 18–1404V
41. Zoila Lopez, Ivins, Utah, Court of Federal Claims No: 18–1405V
42. James Victor Grant, The Woodlands, Texas, Court of Federal Claims No: 18–1406V
43. Alanna K. Infinger, Fryeburg, Maine, Court of Federal Claims No: 18–1407V
44. Alicia Holtzer, Newport News, Virginia, Court of Federal Claims No: 18–1408V
45. Mohamed Mohamed on behalf of Salah Hamad, Deceased, Woodbridge, Virginia, Court of Federal Claims No: 18–1409V
46. Benjamin Gonzales, Austin, Texas, Court of Federal Claims No: 18–1410V
47. Kenya Sample, Middletown, Delaware, Court of Federal Claims No: 18–1412V
48. Margaret Schwarck, Marshalltown, Iowa, Court of Federal Claims No: 18–1413V
49. Janet Muscari, Plantation, Florida, Court of Federal Claims No: 18–1414V
50. Cindy Cox, Fort Lupton, Colorado, Court of Federal Claims No: 18–1415V
51. Richard Brantley, Chicago, Illinois, Court of Federal Claims No: 18–1416V
52. Tricia Switzer on behalf of Richard Feider, Sr., Deceased, Phoenix, Arizona, Court of Federal Claims No: 18–1418V
53. Bryson Liberty, Phoenix, Arizona, Court of Federal Claims No: 18–1419V
54. Arnulfo Pantoja, San Antonio, Texas, Court of Federal Claims No: 18–1420V
55. Jacqueline Staggers, Uniontown, Pennsylvania, Court of Federal Claims No: 18–1423V
56. Jennifer Mitchell, Montgomery, Alabama,

Court of Federal Claims No: 18–1424V
57. Deborah Ryan, San Pedro, California, Court of Federal Claims No: 18–1427V
58. Matthew Morales, Newark, New Jersey, Court of Federal Claims No: 18–1428V
59. Angela Malar, Cape May, New Jersey, Court of Federal Claims No: 18–1429V
60. Tatiana Dautkhanova and Ruslan Dautkhanova on behalf of E.D., Louisville, Colorado, Court of Federal Claims No: 18–1430V
61. Charlotte Dunn, Clovis, California, Court of Federal Claims No: 18–1431V
62. Brian Walker, Farmington Hills, Michigan, Court of Federal Claims No: 18–1433V
63. Thomas Creely, Pittsburgh, Pennsylvania, Court of Federal Claims No: 18–1434V
64. Staci Broadway, Rome, Georgia, Court of Federal Claims No: 18–1435V
65. Mary Ann Deubel, Millburn, New Jersey, Court of Federal Claims No: 18–1436V
66. Lissette Limonta, Palm Springs, Florida, Court of Federal Claims No: 18–1437V
67. Alyce Romines, Arab, Alabama, Court of Federal Claims No: 18–1440V
68. Maddison Rowlett, Portland, Oregon, Court of Federal Claims No: 18–1441V
69. Jay Zimmer, Dublin, California, Court of Federal Claims No: 18–1442V
70. Chey Lewis, Kernersville, North Carolina, Court of Federal Claims No: 18–1443V
71. Mary Priscilla Egan, Washington, District of Columbia, Court of Federal Claims No: 18–1444V
72. Tammy S. Gold, Dover, Ohio, Court of Federal Claims No: 18–1445V
73. Kesha Joseph on behalf of M. J. H., Deceased, Greenville, North Carolina, Court of Federal Claims No: 18–1447V
74. Rosie Estrada, Palm Springs, California, Court of Federal Claims No: 18–1448V
75. Maritza Serrano, Vega Alta, Puerto Rico, Court of Federal Claims No: 18–1449V
76. Vahan Eloyan, Thousand Oaks, California, Court of Federal Claims No: 18–1450V
77. Donna Bauer on behalf of William Bauer, Deceased, Burlington, Kansas, Court of Federal Claims No: 18–1451V
78. Vickie Ray, Fayetteville, Georgia, Court of Federal Claims No: 18–1452V
79. Donnette Giza, Washington, District of Columbia, Court of Federal Claims No: 18–1453V
80. Lisa Schwartz, Boston, Massachusetts, Court of Federal Claims No: 18–1454V
81. Gailmarie Hanna, Washington, District of Columbia, Court of Federal Claims No: 18–1455V
82. Calandra Harps, Washington, District of Columbia, Court of Federal Claims No: 18–1456V
83. Dale Jacoby, Washington, District of Columbia, Court of Federal Claims No: 18–1457V
84. Mary Jensen, Washington, District of Columbia, Court of Federal Claims No: 18–1458V
85. Jenelyn Sagala and Michael Sagala on behalf of J.S., Cambridge, Massachusetts, Court of Federal Claims No: 18–1459V
86. Jeffrey Smith, Vienna, Virginia, Court of Federal Claims No: 18–1460V
87. Catherine M. Freund, Fayetteville, New York, Court of Federal Claims No: 18–1461V
88. Pearl Webbe, Boston, Massachusetts, Court of Federal Claims No: 18–1462V
89. Lisa Neuss-Guillen, Phoenix, Arizona, Court of Federal Claims No: 18–1463V
90. Heidi Levisee, Minneapolis, Minnesota, Court of Federal Claims No: 18–1464V
91. Anntoinette Reynolds on behalf of Michael Reynolds, Deceased, Mountain Home, Idaho, Court of Federal Claims No: 18–1465V
92. Tammy Copping, St. Louis, Missouri, Court of Federal Claims No: 18–1466V
93. Tim L. Lisk, Albemarle, North Carolina, Court of Federal Claims No: 18–1467V
94. Cheryl Powers, Indianapolis, Indiana, Court of Federal Claims No: 18–1468V
95. Megan Lucas, Marysville, Washington, Court of Federal Claims No: 18–1470V
96. Alexandra Soto, Lakewood, New Jersey, Court of Federal Claims No: 18–1471V
97. Jeremy Price and Gina Price on behalf of J.P., Linwood, New Jersey, Court of Federal Claims No: 18–1472V
98. Kayleen Crump Weed, Bountiful, Utah, Court of Federal Claims No: 18–1473V
99. Judith Day, Layton, Utah, Court of Federal Claims No: 18–1475V
100. Karen Goldie, Franklin, Ohio, Court of Federal Claims No: 18–1476V
101. Paul Christensen, Bellevue, Washington, Court of Federal Claims No: 18–1477V
102. Mark Crosby, Evendale, Ohio, Court of Federal Claims No: 18–1478V
103. Melissa Zielinski, Schaumburg, Illinois, Court of Federal Claims No: 18–1479V
104. Tajuana Perkins, Davenport, Florida, Court of Federal Claims No: 18–1480V
105. Mary Riviere, Jacksonville, Florida, Court of Federal Claims No: 18–1482V
106. Hope Johnson, Boston, Massachusetts, Court of Federal Claims No: 18–1486V
107. Keith A. Miller, Memphis, Tennessee, Court of Federal Claims No: 18–1487V
108. Ryan Spangler and Courtney Spangler on behalf of J.S., Chico, California, Court of Federal Claims No: 18–1488V
109. Constance Connor, Durham, North Carolina, Court of Federal Claims No: 18–1489V
110. Barbara Bowie, Upper Marlboro, Maryland, Court of Federal Claims No: 18–1490V
111. Gayzelle Thomas, Midlothian, Virginia, Court of Federal Claims No: 18–1491V
112. Matthew A. O'Brien, Maui, Hawaii, Court of Federal Claims No: 18–1492V
113. Melissa Hardin, Spartanburg, North Carolina, Court of Federal Claims No: 18–1493V
114. Rae Jean Leonard, Des Moines, Idaho, Court of Federal Claims No: 18–1495V
115. Teresa Landrum, Ocean City, New Jersey, Court of Federal Claims No: 18–1497V
116. Sheri L. Berrier, West Des Moines, Idaho, Court of Federal Claims No: 18–1498V
117. Carrie A. Newcomer, Bloomington, Indiana, Court of Federal Claims No: 18–1501V
118. Elizabeth Conner Wood, Columbia, South Carolina, Court of Federal Claims No: 18–1503V
119. Pattie Patriquin, Washington, District of Columbia, Court of Federal Claims No: 18–1504V
120. Jennifer Kappre, Washington, District of Columbia, Court of Federal Claims No: 18–1505V
121. Kelly Caven, Oklahoma City, Oklahoma, Court of Federal Claims No: 18–1506V
122. Maura McAuliffe, Washington, District of Columbia, Court of Federal Claims No: 18–1507V
123. Mary Rendon, Lewisville, Texas, Court of Federal Claims No: 18–1508V
124. Flordelisa Pascual, Vallejo, California, Court of Federal Claims No: 18–1509V
125. Anita Plouffe, Seattle, Washington, Court of Federal Claims No: 18–1510V
126. Michelle Roy, Hillsborough, New Hampshire, Court of Federal Claims No: 18–1511V
127. Terry Pitts, Washington, District of Columbia, Court of Federal Claims No: 18–1512V
128. Julia Randazzo, Washington, District of Columbia, Court of Federal Claims No: 18–1513V
129. Cheree Dowdell, Wellesley Hills, Massachusetts, Court of Federal Claims No: 18–1514V

[FR Doc. 2018–28136 Filed 12–27–18; 8:45 am]

BILLING CODE 4165–15–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 on the part of Venkata Sudheer Kumar Ramadugu, Ph.D. (Respondent), former postdoctoral scientist in the Department of Chemistry, University of Michigan (UM). Dr. Ramadugu engaged in research misconduct in research supported by National Institute of General Medical Sciences (NIGMS), National Institutes of Health (NIH), grant R01 GM084018 and National Institute on Aging (NIA), NIH, grant R01 AG048934. The administrative actions, including debarment for a period of five (5) years, were implemented beginning on December 4, 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:

Venkata Sudheer Kumar Ramadugu, Ph.D., University of Michigan: Based on the report of an assessment conducted by UM, the Respondent's admission,

and analysis conducted by ORI in its oversight review, ORI found that Dr. Venkata Sudheer Kumar Ramadugu, former postdoctoral scientist in the Department of Chemistry, UM, engaged in research misconduct in research supported by NIGMS, NIH, grant R01 GM084018 and NIA, NIH, grant R01 AG048934.

ORI found that Respondent engaged in research misconduct by knowingly and intentionally falsifying and/or fabricating data reported in the following published papers and poster presentation:

• *Chemical Communications* 53(78):10824–10826, 2017 (hereafter referred to as ''*Chem. Comm.* 2017'').

• *Angewandte Chemie-International Edition* 56(38):11466–11470, 2017 (hereafter referred to as ''*Angewandte Chemie-International Edition* 2017'').

• *Angewandte Chemie-International Edition* 57(5):1342–1345, 2018 (hereafter referred to as ''*Angewandte Chemie-International Edition* 2018'').

• Polymer macrodiscs for solid-state NMR structural studies on aligned lipid bilayers.'' Presented at the 58th Experimental Nuclear Magnetic Resonance Conference in Pacific Grove (Asilomar), California, March 25–30, 2017 (hereafter referred to as the ''ENMRC Poster 2017'').

ORI found that Respondent intentionally and knowingly falsified and/or fabricated NMR spectroscopy data for structure and dynamics of nanodiscs in thirteen (13) figure panels included in three (3) published papers and one (1) poster presentation by manipulating previously generated NMR data from unrelated experiments to falsely represent NMR spectra for completely different experiments. Specifically, Respondent falsified and/or fabricated NMR spectra in:

• *Chem. Comm.* 2017.

— Figure 2A.

— Figure 2B, top and bottom panels.

— Figure 3, bottom two panels of the right most column.

— Figure S4, second, third, and the bottom panels from the top.

• *Angewandte Chemie-International Edition* 2017.

— Figures 4E and 4F.

• *Angewandte Chemie-International Edition* 2018.

— Figure 4B.

• ENMRC Poster 2017.

— Figure labelled ''Magnetic Alignment of Macrodiscs,'' bottom two panels of the right most column.

Dr. Ramadugu entered into a Voluntary Exclusion Agreement (Agreement) and voluntarily agreed for a period of five (5) years, beginning on December 4, 2018:

(1) Because he also made a false statement in his first admission that no other data were affected in his papers, to exclude himself from any contracting or subcontracting with any agency of the United States Government and from eligibility for or involvement in nonprocurement programs of the United States Government referred to as ''covered transactions'' pursuant to HHS' Implementation (2 CFR part 376) of OMB Guidelines to Agencies on Governmentwide Debarment and Suspension, 2 CFR part 180 (collectively the ''Debarment Regulations''); and

(2) to exclude himself 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.

Wanda K. Jones,

Interim Director, Office of Research Integrity.

[FR Doc. 2018–28139 Filed 12–27–18; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0460]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before January 28, 2019.

ADDRESSES: Submit your comments to *OIRA_submission@omb.eop.gov* or via facsimile to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Sherrette Funn, *Sherrette.Funn@hhs.gov* or (202) 795–7714. When submitting comments or requesting information, please include the document identifier 0990–0460–30D and project title for reference.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Office of Adolescent Health Pregnancy Assistance Fund (PAF) Performance Measures Data Collection, FY2018–FY2020.

Type of Collection: Revision.

OMB No.: 0990–0460.

Abstract: The Office of Adolescent Health seeks a revision of the Pregnancy Assistance Fund (PAF) performance measures data collection. A new cohort of 23 PAF grantees was funded in 2018. PAF provides funding to States and Tribes to provide expectant and parenting teens, women, fathers and their families with a seamless network of supportive services to help them complete high school or postsecondary degrees; and to help states improve services to expectant females who experience intimate partner violence or stalking, Additional measures have been proposed for addition to the existing menu of approved measures. A 3 year clearance period is requested. The respondents would be the 23 state and tribal entities receiving PAF awards in 2018. Data would be collected annually.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
All PAF Grant Recipients (Training Form)	23	1	15/60	6
All PAF Grant Recipients (Partners Sustainability Form)	23	1	210/60	81
All PAF Grant Recipients (Reach Demographics Form)	23	1	637/60	244
All PAF Grant Recipients (Core Services)	23	1	9	207
All PAF Grant Recipients ( )	23	1	5	115

ESTIMATED ANNUALIZED BURDEN TABLE—Continued

Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
PAF Grantees (Form for Grantees funding State Attorney General offices) ..	2	1	2	4
Total	23	1	.....	657

Terry Clark,
Office of the Secretary, Asst. Paperwork Reduction Act Reports Clearance Officer.
[FR Doc. 2018–28227 Filed 12–27–18; 8:45 am]
BILLING CODE 4168–11–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Office of Urban Indian Health Programs; 4-in-1 Grant Programs

Key Dates

Application Deadline Date: February 15, 2019.

Earliest Anticipated Start Date: April 1, 2019.

Proof of Non-Profit Status Due Date: February 15, 2019.

I. Funding Opportunity Description

Statutory Authority

The Indian Health Service (IHS) Office of Urban Indian Health Programs (OUIHP) is accepting applications for competitive grants for the Fiscal Year (FY) 2019 4-in-1 for Urban Indian Organizations. This program is authorized under the Snyder Act, 25 U.S.C. 13, Public Law 67–85, and Title V of the Indian Health Care Improvement Act (IHCIA), Public Law 94–437, as amended, specifically the provisions codified at 25 U.S.C. 1653(c)–(e) (authorizing grants for health promotion and disease prevention services, immunization services and mental health services), and § 1660a (authorizing grants for alcohol and substance abuse related services). This program is described in the Catalog of Federal Domestic Assistance (CFDA) under 93.193.

Background

In the late 1960s, Urban Indian community leaders began advocating at the local, State and Federal levels to address the unmet health care needs of Urban Indians, and requested health care services and programs. These efforts resulted in an increase of preventative, medical, and behavioral health services, but there was growing recognition of challenges preventing Urban Indians in seeking health care services. To address these barriers, advocacy focused on the development of culturally appropriate activities that were unique to the social, cultural and spiritual needs of American Indians and Alaska Natives residing in urban settings. Programs developed at that time were staffed by volunteers in storefront settings with limited budgets offering primary care and outreach and referral-type services.

In response to efforts of the Urban Indian community leaders, Congress appropriated funds in 1966, through the IHS, for a pilot urban clinic in Rapid City, South Dakota. In 1973, Congress appropriated funds to study unmet Urban Indian health needs in Minneapolis, Minnesota. The findings of this study documented cultural, economic, and access barriers to health care and led to congressional appropriations under the Snyder Act to support emerging Urban Indian clinics in several Bureau of Indian Affairs relocation cities, *e.g.,* Seattle, San Francisco, Tulsa, and Dallas. In 1976, Congress passed the IHCIA, Public Law 94–437, establishing the Urban Indian health program under Title V. Congress reauthorized the IHCIA in 2010 under Public Law 111–148 (2010). This law is considered health care reform legislation to improve the health and well-being of all American Indians and Alaska Natives, including Urban Indians. Title V-specific funding is authorized for the development of programs for Urban Indians residing in urban areas. These areas include health promotion and disease prevention (HP/DP) services, immunization services, alcohol and substance abuse related services, and mental health services, hereafter referred to as ''4-in-1,'' health programs or services.

Purpose

The purpose of this IHS grant announcement is to award funding to Urban Indian Organizations to ensure the highest possible health status for Urban Indians. Funding will be used to support the 4-in-1 health program objectives. Specifically, the four health programs are: (1) HP/DP services, (2) immunization services, (3) alcohol and substance abuse related services, and (4) mental health services. These programs are integral components of the IHS health care delivery system. Funds from this effort will ensure that comprehensive, culturally acceptable personal and public health services are available and accessible to Urban Indians.

II. Award Information

Type of Awards

Grants.

Estimated Funds Available

The total amount of funding identified for FY 2019 is approximately $8.3 million. Individual award amounts are anticipated to be between $50,000 and $650,000. Total funding available for competitive new and competing continuation awards issued under this announcement is subject to the availability of appropriations and budgetary priorities of the Agency. The IHS is under no obligation to make awards that are selected for funding under this announcement.

New applicants are eligible to apply for funding, up to $200,000, under this funding announcement. Current 4-in-1 grantees are eligible to apply for competing continuation funding under this announcement and must demonstrate that they have complied with previous terms and conditions of the 4-in-1 grant in order to receive funding under this announcement. Current 4-in-1 grantees may request annual funds up to the total cost amount approved in the last noncompeting award.

Anticipated Number of Awards

Approximately 39 grants will be issued under this program announcement.

Project Period

The project period is for three years.

III. Eligibility Information

1. Eligibility

To be eligible for this New and Competing Continuation Funding Opportunity, applicants must be an Urban Indian Organization (UIO) administering a contract or grant under 25 U.S.C. 1653. Urban Indian Organizations are defined by 25 U.S.C. 1603(29) as a nonprofit corporate body situated in an urban center, governed by an Urban Indian controlled board of directors, and providing for the maximum participation of all interested Indian groups and individuals, which body is capable of legally cooperating with other public and private entities for the purpose of performing the activities described in 25 U.S.C. 1653(a). Applicants must provide proof of nonprofit status with the application such as 501(c)(3) Certificate.

Note: Please refer to Section IV (Application and Submission Information/ Subsection 2, Content and Form of Application Submission) for additional proof of applicant status documents required, such as, 501(c)(3) Certificate, copy of current Negotiated Indirect Cost Rate agreement, etc.

2. Cost Sharing or Matching

The IHS does not require matching funds or cost sharing for grants or cooperative agreements.

3. Other Requirements

Application budget requests that exceed the highest dollar amount outlined under the ''Estimated Funds Available'' section will be considered nonresponsive and will not be reviewed. The applicant will be notified by the IHS Division of Grants Management (DGM).

Each grantee shall provide health care services to eligible Urban Indians living within the urban center in which the UIO is situated. An ''Urban Indian'' eligible for services, as codified at 25 U.S.C. 1603(13), (27), and (28), includes any individual who:

1. Resides in an urban center, which is any community that has a sufficient Urban Indian population with unmet health needs to warrant assistance under the IHCIA, as determined by the Secretary, HHS; and who meets one or more of the following criteria:

a. Irrespective of whether he or she lives on or near a reservation, is a member of a Tribe, band, or other organized group of Indians, including:

i. Those Tribes, bands, or groups terminated since 1940, and

ii. those recognized now or in the future by the State in which they reside, or

b. Is a descendant, in the first or second degree, of any such member described in 1.a.; or

c. Is an Eskimo, or Aleut, or other Alaska Native; or

d. Is a California Indian; [1] or

e. Is considered by the Secretary of the Department of the Interior to be an Indian for any purpose; or

f. Is determined to be an Indian under regulations pertaining to Urban Indian health that are promulgated by the Secretary, HHS.

Each grantee is responsible for taking reasonable steps to confirm that the individual is eligible for IHS services as an Urban Indian.

Documentation of Support

The UIO must submit a letter of support from their organization's board of directors.

Proof of Non-Profit Status

The UIO claiming nonprofit status must submit proof. A copy of the 501(c)(3) Certificate must be submitted with the application by the Application Deadline Date.

IV. Application and Submission Information

1. Obtaining Application Materials

The application package and detailed instructions for this announcement are found online at *http://www.Grants.gov* or *http://www.ihs.gov/dgm/funding/.*

Questions regarding the electronic application process, please contact the Grant Systems Coordinator listed under Agency Contacts in Section VII.

2. Content and Form of Application Submission

The application must include the project narrative as an attachment to the application package. Mandatory documents for all applicants include:

- Table of contents.
- Abstract (one page) summarizing the project.
- Application forms:
  - SF–424, Application for Federal Assistance.
  - SF–424A, Budget Information—Non-Construction Programs. Each of the 4 health program objectives (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services), should be addressed in a separate Grant Program Function or Activity row/column in the SF–424A.
  - SF–424B, Assurances—Non-Construction Programs.
- Project Narrative (not to exceed 20 pages).
  - Includes the statement of need, proposed scope of work, required objectives, activities that provide a description of what will be accomplished, and evaluation and performance measurement plan.
- Budget Justification and Narrative (not to exceed 5 pages).
- 501(c)(3) Certificate.
- Letters of support from the UIO's board of directors.
- Biographical sketches for all Key Personnel (not to exceed one page each).
- Contractor/Consultant proposed scope of work and letter of commitment (not to exceed one page each, if applicable).
- Disclosure of Lobbying Activities (SF–LLL).
- Certification Regarding Lobbying (GG-Lobbying Form).
- Copy of current Negotiated Indirect Cost (IDC) Rate agreement (required in order to receive indirect costs).
- Organizational chart or written information that shows where the HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services fit into the larger organization.
- Documentation of current Office of Management and Budget (OMB) Financial Audit (if applicable).

Acceptable forms of documentation include:

- Email confirmation from Federal Audit Clearinghouse (FAC) that audits were submitted; or
- Face sheets from audit reports.

These can be found on the FAC website at *https://harvester.census.gov/facdissem/Main.aspx.*

Public Policy Requirements

All Federal-wide public policies apply to IHS grants, with exception of the Discrimination policy.

Requirements for Project and Budget Narratives

The project narrative (Parts A through D listed below) should be a separate document not to exceed 20 pages that must: (1) Have consecutively numbered pages; (2) use black text no smaller than 12-point font; (3) and be formatted to fit standard letter paper (8-1/2 x 11 inches).

Be sure to succinctly answer all questions listed under the evaluation criteria (refer to Section V.1, Evaluation

[1] Consistent with 25 U.S.C. 1603(3), (13), (28), and 1679, eligibility of California Indians may be demonstrated by documentation that the individual:

1. Is a descendant of an Indian who was residing in the State of California on June 1, 1852;

2. Holds trust interests in public domain, national forest, or Indian reservation allotments; or

3. Is listed on the plans for distribution of assets of California Rancherias and reservations under the Act of August 18, 1958 (72 Stat. 619), or is the descendant of such an individual.

criteria in this announcement) and place all responses and required information in the correct section. Applications not organized as noted below will not be considered or scored. These narratives will assist the Objective Review Committee (ORC) in becoming familiar with the applicant's activities. Applications with narratives exceeding the page limit may be deemed nonresponsive. The 20-page limit for the project narrative does not include the table of contents, abstract, standard forms, and/or other appendix items.

A. Project Narrative

There are four parts to the project narrative:

Part A—Statement of Need;

Part B—Program Information/Proposed Approach;

Part C—Organizational Capacity and Staffing/Administration; and,

Part D—Performance Measurement Plan and Evaluation.

See below for additional details about the content for inclusion in the project narrative.

Part A: Statement of Need—Corresponds to Evaluation Criteria (Section V.1.A.)

The statement of need describes the history and urban center currently served by the applicant. The statement of need provides the facts and evidence that support the need for these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services) and establishes that the UIO understands the problems and can reasonably address them.

- Describe the current service gaps, including disconnection between available services and unmet needs of Urban Indians. This should include services at the UIO and in communities where Urban Indians reside.
- Describe the need for an enhanced infrastructure to increase the capacity to implement, sustain, and improve effective health care services offered to Urban Indians and any other service gaps and problems related to the need for infrastructure development within the UIO.

Part B: Program Information/Proposed Approach—Corresponds to Evaluation Criteria (Section V.1.B.)

State the purpose, goals, and objectives of your proposed projects. Clearly state how proposed activities address the needs detailed in the statement of need. Describe fully and clearly plans to meet these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services) of this funding announcement. Each objective should be addressed with a corresponding time frame. Provide a work plan for year one budget period that details expected key activities, accomplishments, and includes responsible staff for each of these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services).

Part C: Organizational Capacity and Staffing/Administration—Corresponds to Evaluation Criteria (Section V.1.C.)

This section should describe your organizational capacity for each of these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services). Current staff and future positions for the four program components should also be outlined.

- Identify qualified professionals who will implement and administer the proposed grant activities, including progress and financial reports.
- Identify contact person to maintain open and consistent communication with the IHS program official on any financial or programmatic barriers to meeting the requirements of the award.
- Describe the organization's current system and ability to develop partnerships with service providers and community programs, including families and support systems of Urban Indians.
- Describe potential project partners and community resources in the urban center.

Part D: Performance Measurement Plan and Evaluation—Corresponds to Evaluation Criteria (Section V.1.D.)

This section of the application should describe efforts to collect and report project data that will support and demonstrate grant activities for each of these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services). Grantees will be required to participate in a national evaluation of the 4-in-1 grant program. Grantees will also be required to collect and report data pertaining to activities, processes, and outcomes. Data collection activities should capture and document actions conducted throughout awarded years, including activities that will contribute to relevant project impact. This section should also describe the applicant's plan to evaluate program activities, including any evidence-based prevention or treatment programs implemented. The evaluation plan should describe expected results and any identified metrics to support program effectiveness. Evaluation plans should incorporate questions related to outcomes and processes, including documentation of lessons learned.

- Describe in a brief narrative a plan to monitor activities under each of these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services) to demonstrate progress towards program outcomes and inform future program decisions over the three-year project period.
- Describe proposed evaluation methods, including performance measures and other data relevant to evaluation outcomes, including intended results (*e.g.,* impact and outcomes). Include any partners who will assist in evaluation efforts if separate from the primary applicant.

B. Budget and Budget Narrative—Corresponds to Evaluation Criteria (Section V.1.E.)

This narrative must include a line item budget for these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services) with a narrative justification for all expenditures identifying reasonable allowable, allocable costs necessary to accomplish the goals and objectives as outlined in the project narrative. The budget should match the scope of work described in the project narrative. The budget and budget narrative should be no longer than five pages. For subsequent budget years, the narrative should highlight the changes from year one, or clearly indicate that there are no substantive budget changes during the period of performance. Do not use the budget narrative to expand the project narrative.

This section must succinctly but completely address the items listed under the Evaluation criteria in Section V.1.E. Budget and Budget Narrative.

3. Submission Dates and Times

Applications must be submitted through *Grants.gov* by 11:59 p.m., Eastern Standard Time (EST) on the Application Deadline Date. Any application received after the application deadline will not be accepted for review. *Grants.gov* will notify the applicant via email if the application is rejected.

If technical challenges arise and assistance is required with the application process, contact *Grants.gov* Customer Support (see contact information at *https://www.grants.gov*). If problems persist, contact the Grant Systems Coordinator listed under Agency Contacts in Section VII. Please

contact at least 10 days prior to the application deadline. Please do not contact the DGM until you have received a *Grants.gov* tracking number. In the event you are not able to obtain a tracking number, call the DGM as soon as possible.

The IHS will not acknowledge receipt of applications.

4. Intergovernmental Review

Executive Order 12372 requiring intergovernmental review is not applicable to this program.

5. Funding Restrictions

- The available funds are inclusive of direct and indirect costs.
- Only one grant will be awarded per applicant.

6. Application Submission Requirements

All applications must be submitted via the *Grants.gov* website at *http://www.Grants.gov.* Find the application by selecting the ''Search Grants'' link on the homepage.

Application submission instructions can be found under the Package Tab. No other method of application submission is acceptable.

If the applicant cannot submit an application through *Grants.gov*, a waiver must be requested. Prior approval must be requested and obtained from Mr. Robert Tarwater, Director, DGM, IHS, (see Section IV.6 described above for additional information). A written waiver request must be sent to *GrantsPolicy@ihs.gov* with a copy to *Robert.Tarwater@ihs.gov.* The waiver must: (1) Be documented in writing (emails are acceptable) before submitting an application by some other method, and (2) include clear justification for the need to deviate from the required application submission process.

If the waiver request is approved, the applicant will receive a confirmation of approval by email containing submission instructions. A copy of the written approval must be included with the application that is submitted to the DGM. Applications that are submitted without a copy of the signed waiver from Mr. Robert Tarwater, Director of the DGM will not be reviewed. The applicant will be notified via email of this decision by the DGM. Applications submitted under waiver must be received by the DGM no later than 5:00 p.m., EST, on the Application Deadline. Late applications will not be accepted for processing. Applicants that do not register with both the System for Award Management (SAM) and *Grants.gov* and/or fail to request timely assistance with technical issues will not be considered for a waiver to submit an application via alternative method.

Please be aware of the following:

- Please search for the application package in *http://www.Grants.gov* by entering the CFDA number or the Funding Opportunity Number. Both numbers are located in the header of this announcement.
- If you experience technical challenges while submitting your application, please contact *Grants.gov* Customer Support (see contact information at *https://www.grants.gov*).
- Upon contacting *Grants.gov*, obtain a tracking number as proof of contact. The tracking number is helpful if there are technical issues that cannot be resolved and a waiver from the agency must be obtained.
- Applicants are strongly encouraged not to wait until the deadline date to begin the application process through *Grants.gov*, as the registration process for SAM and *Grants.gov* could take up to 20 working days.
- Please follow the instructions on *Grants.gov* to include additional documentation that may be requested by the funding announcement.
- Applicants must comply with any applicable page limits described in this funding announcement.
- After submitting the application, the applicant will receive an automatic acknowledgement from *Grants.gov* that contains a *Grants.gov* tracking number. The IHS will not notify the applicant whether the application has been received.

Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS)

Applicants and grantee organizations are required to obtain a DUNS number and maintain an active registration in the SAM database. The DUNS number is a unique 9-digit identification number provided by D&B that uniquely identifies each entity. The DUNS number is site-specific; therefore, each distinct performance site may be assigned a DUNS number. Obtaining a DUNS number is easy, and there is no charge. To obtain a DUNS number, please access the Government Customer support center request service through *http://fedgov.dnb.com/webform,* or call toll-free (866) 705–5711.

All HHS recipients are required by the Federal Funding Accountability and Transparency Act of 2006 (, as amended (''Transparency Act), to report information on sub-awards. Accordingly, all IHS grantees must notify potential first-tier sub-recipients that no entity may receive a first-tier sub-award unless the entity has provided its DUNS number to the prime grantee organization This requirement ensures the use of a universal identifier to enhance the quality of information available to the public pursuant to the Transparency Act.

System for Award Management (SAM)

Organizations that are not registered with SAM will need to obtain a DUNS number first and then access the SAM online registration through the SAM home page at *https://www.sam.gov* (U.S. organizations will also need to provide an Employer Identification Number from the Internal Revenue Service that may take an additional 2–5 weeks to become active. Please see *SAM.gov* for details on the registration process and timeline. Registration with the SAM is free of charge, but can take several weeks to process. Applicants may register online at *https://www.sam.gov*.

Additional information on implementing the Transparency Act, including the specific requirements for DUNS and SAM, can be found on the IHS Grants Management, Grants Policy website at *http://www.ihs.gov/dgm/policytopics/*.

V. Application Review Information

Weights assigned to each section are noted in parentheses. The 20-page project narrative and 5-page budget and budget narrative should include only the first year activities; information for multiyear projects should be included as an appendix. See ''Multiyear Project Requirements'' at the end of this section for more information. The narrative section should be written in a manner that is clear to outside reviewers unfamiliar with prior related activities of the applicant. It should be well organized, succinct, and contain all information necessary for reviewers to understand the project fully. Points will be assigned to each evaluation criteria adding up to a total of 100 points. Points are assigned as follows:

1. Evaluation Criteria

Applications will be reviewed and scored according to the quality of responses to the required application components in Sections A–E outlined below. In developing the required sections of this application, use the instructions provided for each section, which have been tailored to this program. The application must use the five sections (Sections A–E) listed below in developing the narratives. The applicant must place the required information in the correct section or it will not be considered for review. The application will be scored according to how well the applicant addresses the

requirements for each section listed below. The number of points after each section heading is the maximum number of points the review committee may assign to that section. Although scoring weights are not assigned to individual bullets, each bullet is assessed deriving the overall section score.

A. Statement of Need (25 points)

Applications will be evaluated based on following criteria:

1. Identify the proposed urban center and provide demographic information on the population(s) to receive services. Describe the stakeholders and resources in the urban center that can help implement activities for these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services).

2. Based on the information and/or data currently available, document the need to implement, sustain, and improve health care services offered to Urban Indians.

3. Based on available data, describe the service gaps and other problems related to the needs of Urban Indians. Identify the source of the data. Documentation of need may come from a variety of qualitative and quantitative sources. Examples of data sources for the quantitative data that could be used are local epidemiologic data such as Tribal Epidemiology Centers or IHS Area Offices, state data from state needs assessments, and/or national data from the Substance Abuse and Mental Health Services Administration's National Survey on Drug Use and Health or from the National Center for Health Statistics/Centers for Disease Control, and census data. This list is not exhaustive. Applicants may submit other valid data, as appropriate for the applicant's programs.

B. Program Information/Proposed Approach (30 points)

Applications will be evaluated based on following criteria:

- Describe the purpose of the proposed project, including a clear statement of goals and objectives. The proposed project narrative is required to address all four projects of the 4-in-1 grant program, including: (1) HD/DP services, (2) immunization services, (3) alcohol and substance abuse related services, and (4) mental health.
  - *HP/DP:* Applicants are encouraged to use evidence-based and promising strategies which can be found at the IHS best practice database *http://www.ihs.gov/hpdp/,* the National Registry for Effective Programs at *http://www.nrepp.samhsa.gov/,* and the Guide to Community Preventive Services at *http://www.thecommunityguide.org/about/conclusionreport.html.* Applicants are encouraged to work collaboratively with their assigned Area HP/DP Coordinator.
  - *Immunization:* Applicants are encouraged to participate in the Vaccines for Children program (if applicable). Applicants are encouraged to research capability with State/regional immunization registry (where applicable). For sites using the IHS Resource and Patient Measurement System (RPMS), provide training sessions to providers and data entry clerks on the RPMS Immunization package. Establish a process for immunization data entry into RPMS (*e.g.,* point of service or through standard data entry). Utilize RPMS Immunization package to identify 3- to 27-month-old children whose immunization records are not up to date that generates reminder/recall letters. Applicants are encouraged to work collaboratively with their assigned Area Immunization Coordinator.
  - *Alcohol and Substance Abuse:* Describe services to be provided, *e.g.,* residential, detox, halfway house, counseling, outreach and referral, etc. Describe substance abuse prevention and education efforts to increase access to services, outreach, education, prevention, and treatment of substance abuse-related issues. Applicants are encouraged to work collaboratively with their assigned Area Behavioral Health Consultant.
  - *Mental Health:* Identify services to be provided, *e.g.,* community outreach and referral, prevention, training sessions, evaluations, schools, domestic violence programs, child abuse programs, etc. Describe mental health prevention and education program efforts to increase access to services, outreach, referral, education, prevention, and treatment of mental health related issues. Applicants are encouraged to work collaboratively with their assigned Area Behavioral Health Consultant.
- Describe how project activities will increase the capacity of the UIO to improve access to and quality of care for Urban Indians.
- Describe anticipated barriers and how these barriers will be addressed.
- Describe how the proposed project will address issues of diversity for Urban Indians, including race/ethnicity, gender, culture/cultural identity, language, sexual orientation, disability, and literacy.
- Describe how Urban Indians may receive services in these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services) and how they will be involved in the planning and implementation of the grant.
- Describe how the efforts of the proposed project will be coordinated with any other related Federal grants, including IHS, SAMHSA, or Health Resources and Services Administration, etc. (if applicable).
- Provide a work plan for year one project period that details expected key activities, accomplishments, and includes responsible staff for each of these projects (HD/DP services, immunization services, alcohol and substance abuse services, and mental health services).

C. Organizational Capacity and Staffing/Administration (15 points)

Applications will be evaluated based on following criteria:

- Describe the management capability of the UIO and other participating organizations in administering similar projects.
- Identify staff to maintain open and consistent communication with the IHS program official on any financial or programmatic barriers to meeting the requirements of the award.
- Identify the department(s) and/or division(s) that will administer these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services). Include a description of these department(s) and/or division(s), their functions, and their placement within the UIO and their direct link to management.
- Discuss the UIO's experience and capacity to provide culturally appropriate and competent services to the community and specific populations of focus.
- Describe the resources available for the proposed project (*e.g.,* facilities, equipment, information technology systems, and financial management systems).
- Identify other organization(s) that will participate in the proposed project. Describe their roles and responsibilities and demonstrate their commitment to these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services).
- Describe how project continuity will be maintained if there is a change in the operational environment (*e.g.,* staff turnover, change in project leadership, etc.) to ensure project stability over the life of the grant.
- Provide a list of staff positions for the project and other key personnel,

showing the role of each and their level of effort and qualifications for these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services). Key personnel include the Chief Executive Officer or Executive Director, Chief Financial Officer, Medical Director, and Information Officer.

- Demonstrate successful project implementation for the level of effort budgeted for the project staff and other key staff.
- Include position descriptions as attachments to the application for all key personnel. Position descriptions should not exceed one page each. Reviewers will not consider information past one page. *Note:* Attachments will not count against the 20-page maximum.
- For individuals who are currently on staff, include a biographical sketch with their name (do not include personally identifiable information such as social security number or date and place of birth) for each individual that will be listed as the project staff and other key positions. Describe the experience of identified staff in these projects (HD/DP services, immunization services, alcohol and substance abuse related services, and mental health services). Include each biographical sketch as attachments to the project proposal/application. Biographical sketches should not exceed one page per staff member. Reviewers will not consider information past one page. *Note:* The attachment will not count as part of the 20-page limit. Do not include any of the following:
  - Personally Identifiable Information (social security number and date and place or birth);
  - Resumes; or
  - Curriculum Vitae.

D. Performance Measurement Plan and Evaluation (20 points)

Describe plans to monitor activities under each of these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services), demonstrate progress towards program outcomes, and inform future program decisions over the 3-year project period. Applications will be evaluated based on following criteria and should address the following points:

- Describe proposed data collection efforts (performance measures and associated data) and how you will use the data to answer evaluation questions. This should include (data collection method, data source, data measurement tool, identified staff for data management, and data collection timeline).
- Identify key program partners and describe how they will participate in the implementation of the evaluation plan (*e.g.,* Tribal Epidemiology Centers, universities, etc.).
- Describe data collection and evaluation of any proposed evidence-based care programs implemented throughout awarded years.
- Describe how evaluating findings will be used at the applicant level. Discuss how data collected (*e.g.,* performance measurement data) will be used and shared by the key program partners.
- Discuss any barriers or challenges expected for implementing the plan, collecting data (*e.g.,* responding to performance measures), and reporting on evaluation results. Describe how these potential barriers would be overcome. In addition, applicants may also describe other measures to be developed or additional data sources and data collection methods that applicants will use.

E. Budget and Budget Narrative (10 Points)

Applications will be evaluated based on following criteria:

- Include a line item budget for each of these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services) for all expenditures identifying reasonable and allowable costs necessary to accomplish the goals and objectives as outlined in the project narrative for Budget year one only.
- Provide a categorized budget for each of these projects (HP/DP services, immunization services, alcohol and substance abuse related services, and mental health services).
- Applicants should ensure that the budget and budget narrative are aligned with the project narrative. The budget and budget narrative the applicant provides will be considered by reviewers in assessing the applicant's submission, along with the material in the project narrative. Questions to address include: What resources are needed to successfully carry out and manage the project? What other resources are available from the organization? Will new staff be recruited? Will outside consultants be required?
- For any outside consultants, include the total cost broken down by activity.
- If indirect costs are claimed, indicate and apply the current negotiated rate to the budget. Include a copy of the current negotiated IDC rate agreement in the appendix.

Multi-Year Project Requirements

Applications must include a brief project narrative and budget (one additional page per year) addressing the developmental plans for each additional year of the project. The attachment will not count as part of the 20-page Project Narrative and 5-page Budget/Budget Narrative.

Additional Documents Can Be Uploaded as Appendix Items in *Grant.gov*

- Work Plan, logic model, and/or time line for proposed objectives.
- Position descriptions for key staff (not to exceed one page each).
- Biographical sketches for key staff (not to exceed one page each).
- Consultant or contractor proposed scope of work and letter of commitment (if applicable).
- Current Negotiated Indirect Cost Rate Agreement.
- Organizational chart.
- Additional documents to support narrative (data tables, key news articles, etc.).

2. Review and Selection

Each application will be screened for eligibility and completeness as outlined in the funding announcement. Applications that meet the eligibility criteria shall be reviewed for merit by the ORC based on the evaluation criteria. Incomplete applications and applications that are nonresponsive to not just administrative thresholds will not be referred to the ORC and will not be funded. The applicant will be notified of this determination.

Applicants must address all program requirements and provide all required documentation.

3. Notifications of Disposition

All applicants will receive an Executive Summary Statement from the IHS OUIHP within 30 days of the conclusion of the ORC outlining the strengths and weaknesses of their application. The summary statement will be sent to the Authorizing Official identified on the face page (SF–424) of the application.

A. Award Notices for Funded Applications

The Notice of Award (NoA) is the authorizing document for which funds are dispersed to the approved entities and reflects the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the award, the effective date of the award, and the

budget/project period. Each entity approved for funding must have a user account in GrantSolutions in order to retrieve the NoA. Please see the Agency Contacts list in Section VII for the systems contact information.

B. Approved but Unfunded Applications

Approved applications not funded due to lack of available funds will be held for 1 year. If funding becomes available during the course of the year, the application may be reconsidered.

Note: Any correspondence other than the official NoA executed by an IHS grants management official announcing to the project director that an award has been made to their organization is not an authorization to implement their program on behalf of the IHS.

VI. Award Administration Information

1. Administrative Requirements

Grants are administered in accordance with the following regulations and policies:

A. The criteria as outlined in this program announcement.

B. Administrative Regulations for Grants:

- Uniform Administrative Requirements for HHS Awards, located at 45 CFR part 75.

C. Grants Policy:

- HHS Grants Policy Statement, Revised 01/07.

D. Cost Principles:

- Uniform Administrative Requirements for HHS Awards, ''Cost Principles,'' located at 45 CFR part 75, subpart E.

E. Audit Requirements:

- Uniform Administrative Requirements for HHS Awards, ''Audit Requirements,'' located at 45 CFR part 75, subpart F.

2. Indirect Costs

This section applies to all recipients requesting reimbursement of indirect costs (IDC) in their application budget. In accordance with HHS Grants Policy Statement, Part II–27, the IHS requires applicants to obtain a current negotiated IDC rate agreement prior to award. The rate agreement must be prepared in accordance with the applicable cost principles and guidance as provided by the cognizant agency or office. A current rate covers the applicable grant activities under the current award's budget period. If the current rate is not on file with the DGM at the time of award, the IDC portion of the budget will be restricted. The restrictions remain in place until the current rate agreement is provided to the DGM.

Generally, IDC rates for grantees are negotiated with the Division of Cost Allocation (DCA) *https://rates.psc.gov/*. For questions regarding the indirect cost policy, please call the Grants Management Specialist listed under Agency Contacts in Section VII or the main DGM office at (301) 443–5204.

3. Reporting Requirements

The grantee must submit required reports consistent with the applicable deadlines. Failure to submit required reports within the time allowed may result in suspension or termination of an active grant, withholding of additional awards for the project, or other enforcement actions, such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in one or both of the following: (1) The imposition of special award provisions; and (2) the non-funding or non-award of other eligible projects or activities. This requirement applies whether the delinquency is attributable to the failure of the grantee organization or the individual responsible for preparation of the reports. Per DGM policy, all reports are required to be submitted electronically by attaching them as a ''Grant Note'' in GrantSolutions at *https://home.grantsolutions.gov/home/*. Personnel responsible for submitting reports will be required to obtain a login and password for GrantSolutions. Please see the Agency Contacts list in Section VII for the systems contact information.

The reporting requirements for this program are noted below.

A. Progress Reports

The grantee shall, consistent with 25 U.S.C. 1655 and 1657, submit quarterly reports demonstrating compliance with the grant, including an explanation of activities conducted pursuant to the grant, information gathered, a brief comparison of actual accomplishments to the goals established for the period, a summary of progress to date, justification for the lack of progress (if applicable), and an accounting for the amounts and purposes for which Federal funds were expended, and such other information as the Government may request. The quarters are based on the start of the budget period. Quarterly reports are due 30 days after the end of each quarter. A final report must be submitted within 90 days of expiration of each budget period.

B. Financial Reports

Federal Financial Report (FFR) (SF–425), Cash Transaction Reports are due 30 days after the close of every calendar quarter to the Payment Management Services, HHS, at *https://pms.psc.gov*. The applicant is also requested to upload a copy of the FFR SF–425 report into the grants management system, GrantSolutions. Failure to submit timely reports may result in adverse award actions blocking access to funds.

Grantees are responsible and accountable for accurate information being reported on all required reports: The Progress Reports and Federal Financial Report.

C. Government Performance and Results Act and Uniform Data System Reporting

Government Performance and Results Act (GPRA) data shall be submitted electronically to the National Data Warehouse (NDW). All GPRA data submitted shall be verifiable and based upon criteria set forth for each GPRA performance standard. The GPRA data period shall be the Federal fiscal year of October 1 through September 30. Monthly registration and workload data shall be exported to the NDW. All data shall be exported by the cutoff date for that fiscal year. A GPRA Developmental Report shall be run at the end of the second and fourth quarters and sent to the National GPRA Support Team at *caogpra@ihs.gov* by the required due dates.

Uniform Data System (UDS) reporting period shall be by calendar year. The UDS reports shall be due in January for the previous calendar year.

D. Quarterly Immunization Report

Quarterly Immunization Reports are required and submitted to the online National Immunization Reporting System (NIRS). Grantees are required to submit immunization coverage reports on children 3 to 27-month-old, 2-year-old, Adolescent, and Adult and Influenza on a quarterly basis. For sites not using the IHS RPMS, visit the Division of Epidemiology and Disease Prevention (DEDP), Vaccine—Preventable Diseases Reports website to access non-RPMS quarterly reporting forms. An EXCEL spreadsheet with the required data elements can be found under the ''Non-RPMS Quarterly Reporting Forms'' section at: *https://www.ihs.gov/epi/vaccine/reports/*.

E. Quarterly Unmet Needs Report

The grantee shall, consistent with 25 U.S.C. 1653(a), 1655, and 1657(a), submit an unmet needs report quarterly. The report includes information gathered by the grantee to: (1) Identify gaps between unmet health needs of Urban Indians and the resources available to meet such needs; and (2) make recommendations to the Secretary

and Federal, State, local, and other resource agencies on methods of improving health services to meet the needs of Urban Indians. The grantee shall upload the unmet needs report 30 days after the end of the quarter into GrantSolutions at *https://home.grantsolutions.gov/home/*.

F. Federal Sub-Award Reporting System (FSRS)

This award may be subject to the Transparency Act sub-award and executive compensation reporting requirements of 2 CFR part 170.

The Transparency Act requires the OMB to establish a single searchable database, accessible to the public, with information on financial assistance awards made by Federal agencies. The Transparency Act also includes a requirement for recipients of Federal grants to report information about first-tier sub-awards and executive compensation under Federal assistance awards.

The IHS has implemented a Term of Award into all IHS Standard Terms and Conditions, NoAs, and funding announcements regarding the FSRS reporting requirement. This IHS Term of Award is applicable to all IHS grant and cooperative agreements issued on or after October 1, 2010, with a $25,000 subaward obligation dollar threshold met for any specific reporting period. Additionally, all new (discretionary) IHS awards will be required to address FSRS reporting (when the project period is comprised of more than one budget period) and: (1) The project period's start date was October 1, 2010, or later; and (2) the primary awardee will have a $25,000 subaward obligation dollar threshold during any specific reporting period.

For the full IHS award term implementing this requirement and additional award applicability information, visit the DGM Policy Topics web page at *http://www.ihs.gov/dgm/policytopics/*.

G. Compliance With Executive Order 13166 Implementation of Services Accessibility Provisions for All Grant Application Packages and Funding Opportunity Announcements

Recipients of Federal financial assistance (FFA) from the HHS must administer their programs in compliance with Federal civil rights law. This means that recipients of HHS funds must ensure equal access to their programs without regard to a person's race, color, national origin, disability, age and, in some circumstances, sex and religion. This includes ensuring your programs are accessible to persons with limited English proficiency. The HHS provides guidance to recipients of FFA on meeting their legal obligation to take reasonable steps to provide meaningful access to their programs by persons with limited English proficiency. Please see *http://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/guidance-federal-financial-assistance-recipients-title-VI/*.

The HHS Office for Civil Rights (OCR) also provides guidance on complying with civil rights laws enforced by the HHS. Please see *http://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html*; and *http://www.hhs.gov/civil-rights/index.html*. Recipients of FFA also have specific legal obligations for serving qualified individuals with disabilities. Please see *http://www.hhs.gov/civil-rights/for-individuals/disability/index.html*. Please contact the HHS OCR for more information about obligations and prohibitions under Federal civil rights laws at *https://www.hhs.gov/ocr/about-us/contact-us/index.html* or call toll-free at (800) 368–1019 or TDD (800) 537–7697. Also note it is an HHS Departmental goal to ensure access to quality, culturally competent care, including long-term services and support, for vulnerable populations. For further guidance on providing culturally and linguistically appropriate services, recipients should review the National Standards for Culturally and Linguistically Appropriate Services in Health and Health Care at *https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=2&lvlid=53*.

Pursuant to 45 CFR 80.3(d), an individual shall not be deemed subjected to discrimination by reason of his or her exclusion from benefits limited by Federal law to individuals eligible for benefits and services from the IHS.

Recipients will be required to sign the HHS–690 Assurance of Compliance Form, which can be obtained from the following website *http://www.hhs.gov/sites/default/files/forms/hhs-690.pdf*. Please send completed form by postal mail directly to the: U.S. Department of Health and Human Services Office of Civil Rights, 200 Independence Avenue SW, Washington, DC 20201.

H. Federal Awardee Performance and Integrity Information System (FAPIIS)

The IHS is required to review and consider any information about the applicant that is in the Federal Awardee Performance and Integrity Information System (FAPIIS) at *https://www.fapiis.gov,* before making any award in excess of the simplified acquisition threshold (currently $150,000) over the period of performance. An applicant may review and comment on any information about itself that a Federal awarding agency previously entered. The IHS will consider any comments by the applicant, in addition to other information in FAPIIS in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants as described in 45 CFR 75.205.

As required by 45 CFR part 75 Appendix XII of the Uniform Guidance, non-Federal entities (NFEs) are required to disclose in FAPIIS any information about criminal, civil, and administrative proceedings, and/or affirm that there is no new information to provide. This applies to NFEs that receive Federal awards (currently active grants, cooperative agreements, and procurement contracts) greater than $10 million for any period of time during the period of performance of an award/project.

Mandatory Disclosure Requirements

As required by 2 CFR part 200 of the Uniform Guidance and the HHS implementing regulations at 45 CFR part 75, effective January 1, 2016, the IHS must require a non-Federal entity or an applicant for a Federal award to disclose, in a timely manner, in writing to the IHS or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratutity violations potentially affecting the Federal award.

Each applicant must submit in writing all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award Submission is required for all applicants and recipients, in writing, to the IHS and to the HHS Office of Inspector General (45 CFR 75.113).

Disclosures must be sent in writing to: U.S. Department of Health and Human Services, Indian Health Service, Division of Grants Management, ATTN: Robert Tarwater, Director, 5600 Fishers Lane, Mailstop: 09E70, Rockville, Maryland 20857.

(Include ''Mandatory Grant Disclosures'' in the subject line.)

Office: (301) 443–5204.

Fax: (301) 594–0899.

Email: robert.tarwater@ihs.gov, and

U.S. Department of Health and Human Services, Office of Inspector General, ATTN: Mandatory Grant Disclosures, Intake Coordinator, 330 Independence Avenue SW, Cohen

Building, Room 5527, Washington, DC 20201.

Website address: https://oig.hhs.gov/fraud/report-fraud/.

(Include ''Mandatory Grant Disclosures'' in the subject line.)

Fax: (202) 205–0604 (Include ''Mandatory Grant Disclosures'' in subject line) or

Email: MandatoryGrantee Disclosures@oig.hhs.gov.

Failure to make required disclosures can result in any of the remedies described in 45 CFR 75.371, Remedies for noncompliance, including suspension or debarment (See 2 CFR parts 180 & 376 and 31 U.S.C. 3321).

VII. Agency Contacts

1. Questions on programmatic issues may be directed to: Shannon Beyale, Health Information Specialist, Office of Urban Indian Health Programs, 5600 Fishers Lane, Mail Stop: 08E65D, Rockville, MD 20857, Telephone: (301) 945–3657, Fax: (301) 443–4794, Email: *shannon.beyale@ihs.gov.*

2. Questions on grants management and fiscal matters may be directed to: Pallop Chareonvootitam, Grants Management Specialist, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857, Telephone: (301) 443–5204, Fax: (301) 594–0899, Email: *pallop.chareonvootitam@ihs.gov.*

3. Questions on systems matters may be directed to: Paul Gettys, Grant Systems Coordinator, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857, Telephone: (301) 443–2114; or the DGM main line (301) 443–5204, Fax: (301) 594–0899, Email: *paul.gettys@ihs.gov.*

VIII. Other Information

The U.S. Public Health Service strongly encourages all grant, cooperative agreement, and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, the Pro-Children Act of 1994, (Pub. L. 103–227), prohibits smoking in certain facilities (or in some cases, any portion of the facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the HHS mission to protect and advance the physical and mental health of the American people.

Chris Buchanan,

RADM, Assistant Surgeon General, U.S. Public Health Service, Deputy Director, Indian Health Service.

[FR Doc. 2018–28301 Filed 12–27–18; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Genomics and Animal/Biological Resource Facilities.

Date: January 18, 2019.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Luis Dettin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2208, Bethesda, MD 20892, 301–451–1327, *dettinle@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Cellular Signaling and Regulatory Systems Study Section.

Date: January 28, 2019.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: David Balasundaram, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5189, MSC 7840, Bethesda, MD 20892, 301–435–1022, *balasundaramd@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Biochemistry and Biophysics of Membranes Study Section.

Date: January 30, 2019.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Nuria E. Assa-Munt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4164, MSC 7806, Bethesda, MD 20892, (301) 451–1323, *assamunu@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Caregiving in Alzheimer's Disease.

Date: January 31, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Martha L. Hare, RN, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3154, MSC 7770, Bethesda, MD 20892, (301) 451–8504, *harem@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Behavioral/Social Science Methods and Measurement.

Date: February 1, 2019.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Unja Hayes, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–827–6830, *unja.hayes@nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Biomedical Computing and Health Informatics Study Section.

Date: February 4–5, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Xin Yuan, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3141, Bethesda, MD 20892, 301–827–7245, *yuanx4@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Clinical Neuroimmunology and Brain Tumors Study Section.

Date: February 7–8, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Argonaut Hotel, 495 Jefferson Street, San Francisco, CA 94109.

Contact Person: Wei-Qin Zhao, Ph.D. Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5181, MSC 7846, Bethesda, MD 20892–7846, 301–435–1236, *zhaow@csr.nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Community Influences on Health Behavior Study Section.

Date: February 7–8, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: New Orleans Marriott, 555 Canal Street, New Orleans, LA 70130.

Contact Person: Tasmeen Weik, DRPH, MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3141, Bethesda, MD 20892, 301–827–6480, *weikts@mail.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Hypersensitivity, Autoimmune, and Immune-Mediated Diseases Study Section.

Date: February 7–8, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bahia Resort Hotel, 998 West Mission Bay Drive, San Diego, CA 92109.

Contact Person: Deborah Hodge, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4207, MSC 7812, Bethesda, MD 20892, (301) 435–1238, *hodged@mail.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Chronic Dysfunction and Integrative Neurodegeneration Study Section.

Date: February 7–8, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Bayside, 4875 North Harbor Drive, San Diego, CA 92106.

Contact Person: Pat Manos, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892, (301) 408–9866, *manospa@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Biomaterials and Biointerfaces Study Section.

Date: February 7–8, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Villa Florence Hotel, 225 Powell Street, San Francisco, CA 94102.

Contact Person: Joseph D. Mosca, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5158, MSC 7808, Bethesda, MD 20892, (301) 408–9465, *moscajos@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function A Study Section.

Date: February 7–8, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Spero, 405 Taylor Street, San Francisco, CA 94102.

Contact Person: David R. Jollie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, (301) 408–9072, *jollieda@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Psychosocial Development, Risk and Prevention Study Section.

Date: February 7–8, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Palomar, 2121 P Street NW, Washington, DC 20037.

Contact Person: Anna L. Riley, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759, Bethesda, MD 20892, 301–435–2889, *rileyann@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Child Psychopathology and Developmental Disabilities Study Section.

Date: February 7–8, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Katherine Colona Morasch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3170, Bethesda, MD 20892, *moraschkc@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Nanotechnology Study Section.

Date: February 7–8, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: James J. Li, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7849, Bethesda, MD 20892, 301–806–8065, *lijames@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Interventions to Prevent and Treat Addictions Study Section.

Date: February 7–8, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westgate Hotel, 1055 Second Avenue, San Diego, CA 92101.

Contact Person: Miriam Mintzer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 3108, Bethesda, MD 20892, (301) 523–0646, *mintzermz@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Neurological, Aging and Musculoskeletal Epidemiology Study Section.

Date: February 7–8, 2019.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Guest Suites Santa Monica, 1707 Fourth Street, Santa Monica, CA 90401.

Contact Person: Heidi B. Friedman, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1012A, MSC 7770, Bethesda, MD 20892, 301–435–1721, *hfriedman@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 21, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28342 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of meetings of the National Advisory Council for Human Genome Research.

The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Human Genome Research.

Date: February 11–12, 2019.

Closed: February 11, 2019, 8:00 a.m. to 10:00 a.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Open: February 11, 2019, 10:00 a.m. to 4:00 p.m.

Agenda: To discuss matters of program relevance.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Closed: February 11, 2019, 4:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Closed: February 12, 2019, 8:00 a.m. to Adjournment.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Contact Person: Rudy O. Pozzatti, Ph.D., Scientific Review Officer Scientific Review Branch, National Human Genome Research Institute, 5635 Fishers Lane, Suite 4076, MSC 9306, Rockville, MD 20852, (301) 402–0838, *pozzattr@mail.nih.gov.*

Name of Committee: National Advisory Council for Human Genome Research.

Date: May 20–21, 2019.

Closed: May 20, 2019, 8:00 a.m. to 10:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Open: May 20, 2019, 10:00 a.m. to 4:00 p.m.

Agenda: To discuss matters of program relevance.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Closed: May 20, 2019, 4:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Closed: May 21, 2019, 8:30 a.m. to Adjournment.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Contact Person: Rudy O. Pozzatti, Ph.D., Scientific Review Officer, Scientific Review Branch, National Human Genome Research Institute, 5635 Fishers Lane, Suite 4076, MSC 9306, Rockville, MD 20852, (301) 402–0838, *pozzattr@mail.nih.gov.*

Name of Committee: National Advisory Council for Human Genome Research.

Date: September 16–17, 2019.

Closed: September 16, 2019, 8:00 a.m. to 10:00 a.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Open: September 16, 2019, 10:00 a.m. to 4:00 p.m.

Agenda: To discuss matters of program relevance.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Closed: September 16, 2019, 4:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Closed: September 17, 2019, 8:30 a.m. to Adjournment.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20817.

Contact Person: Rudy O. Pozzatti, Ph.D., Scientific Review Officer Scientific Review Branch, National Human Genome Research Institute, 5635 Fishers Lane, Suite 4076, MSC 9306, Rockville, MD 20852, (301) 402–0838, *pozzattr@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://www.genome.gov/11509849,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: December 21, 2018.

Sylvia L. Neal,

Program Analyst,

Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28330 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Literature Selection Technical Review Committee.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The portions of the meeting devoted to the review and evaluation of journals for potential indexing by the National Library of Medicine will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended. Premature disclosure of the titles of the journals as potential titles to be indexed by the National Library of Medicine, the discussions, and the presence of individuals associated with these publications could significantly frustrate the review and evaluation of individual journals.

Name of Committee: Literature Selection Technical Review Committee.

Date: February 21–22, 2019.

Open: February 21, 2019, 8:30 a.m. to 10:45 a.m.

Agenda: Administrative.

Place: National Library of Medicine, Building 38, 2nd Floor, The Lindberg Room, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: February 21, 2019, 10:45 a.m. to 5:00 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, 2nd Floor, The Lindberg Room, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: February 22, 2019, 8:30 a.m. to 2:00 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, 2nd Floor, The Lindberg Room, 8600 Rockville Pike, Bethesda, MD 20894.

Contact Person: Joyce Backus, M.S.L.S., Associate Director, Division of Library Operations, National Library of Medicine, 8600 Rockville Pike, Building 38, Room 2W04A, Bethesda, MD 20894, 301–827–4281, *joyce.backus@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS).

Dated: December 21, 2018.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28334 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C.,

as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Xenobiotic and Nutrient Disposition and Action Study Section.

Date: February 6, 2019.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Martha Garcia, Ph.D., Scientific Reviewer Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2186, Bethesda, MD 20892, 301–435–1243, *garciamc@nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Pathophysiological Basis of Mental Disorders and Addictions Study Section.

Date: February 6–7, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Boris P. Sokolov, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217A, MSC 7846, Bethesda, MD 20892, 301–408–9115, *bsokolov@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group; Hypertension and Microcirculation Study Section.

Date: February 6–7, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Le Meridien Delfina Santa Monica, 530 Pico Blvd., Santa Monica, CA 90405.

Contact Person: Ai-Ping Zou, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–408–9497, *zouai@mail.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Mechanisms of Sensory, Perceptual, and Cognitive Processes Study Section.

Date: February 6–7, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton La Jolla Hotel, 3299 Holiday Court, La Jolla, CA 92037.

Contact Person: Kirk Thompson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7844, Bethesda, MD 20892, 301–435–1242, *kgt@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–18–744: Clinical Pilot Studies in Kidney Diseases.

Date: February 6, 2019.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Julia Spencer Barthold, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–402–3073, *julia.barthold@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 21, 2018.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28333 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; SBIR Topic 106.

Date: January 18, 2019.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7178, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: William J. Johnson, Ph.D., Scientific Review Officer, Chief, Cardiac and Pulmonary Review Branch, Office of Scientific Review, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7178, Bethesda, MD 20892, 301–827–7938, *johnsonw@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 21, 2018.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28340 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Neurological Sciences Training Initial Review; Group NST–1 Subcommittee.

Date: January 28–29, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Marriott Georgetown, 1221 22nd Street NW, Washington, DC 20037.

Contact Person: William C. Benzing, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH/DHHS, NSC, 6001 Executive Blvd., Suite 3204, MSC 9529, Bethesda, MD 20892–9529, (301) 496–0660, *Benzingw@mail.nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Neuroscience Development for Advancing the Careers of a Diverse Research Workforce.

Date: February 4, 2019.

Time: 11:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Deanna Lynn Adkins, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH/DHHS, NSC, 6001 Executive Blvd., Bethesda, MD 20892–9529, (301) 496–9223, *deanna.adkins@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: December 21, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28327 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Family Study and Healthy Aging.

Date: February 13, 2019.

Time: 1:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892.

Contact Person: Anita H. Undale, M.D., Ph.D., Scientific Review Branch, National Institute on Aging, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, 240–747–7825, *anita.undale@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 20, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28335 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders; Special Emphasis Panel Clinical Trial Review.

Date: January 15, 2019.

Time: 1:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Shiguang Yang, DVM, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Room 8349, Bethesda, MD 20892, 301–496–8683, *yangshi@nidcd.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders; Special Emphasis Panel Temporal Bone Registry Application.

Date: January 24, 2019.

Time: 12:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Sheo Singh, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, 6001 Executive Blvd., Room 8351, Bethesda, MD 20892, 301–496–8683, *singhs@nidcd.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders; Special Emphasis Panel P50 Review.

Date: January 30, 2019.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Sheo Singh, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, 6001 Executive Blvd., Room 8351, Bethesda, MD 20892, 301–496–8683, *singhs@nidcd.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders; Special Emphasis Panel P50 Review.

Date: January 31, 2019.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Shiguang Yang, DVM, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Room 8349, Bethesda, MD 20892, 301–496–8683, *yangshi@nidcd.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: December 20, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28329 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Sleep Disorders Research Advisory Board.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Sleep Disorders Research Advisory Board.

Date: January 17–18, 2019.

Time: January 17, 2019, 1:00 p.m. to 5:00 p.m.

Agenda: Evaluate sleep and circadian research activities; discussion of NIH Sleep Disorders Research Plan Revision.

Place: National Institutes of Health, Two Rockledge Center, Conference Room 9100–9104, 6701 Rockledge Drive, Bethesda, MD 20892.

Time: January 18, 2019, 8:30 a.m. to 3:00 p.m.

Agenda: Coordination of inter-agency sleep research activities; discussion of NIH Sleep Disorders Research Plan Revision.

Place: National Institutes of Health, Two Rockledge Center, Conference Room 9100–9104, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Michael J. Twery, Ph.D., Director, National Center on Sleep Disorders Research, Division of Lung Diseases, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Suite 10042, Bethesda, MD 20892, 301–435–0199, *twerym@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 21, 2018.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28328 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; PAR–18–633: NIAID Clinical Trial Implementation Cooperative Agreement (U01 Clinical Trial Required).

Date: January 22, 2019.

Time: 2:30 p.m. to 4:00 p.m..

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Lee G Klinkenberg, Ph.D., Scientific Review Program, DEA/NIAID/NIH/DHHS, 5601 Fishers Lane, MSC–9823 Bethesda, MD 20892–9834, 301–761–7749, *lee.klinkenberg@nih.gov*.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01).

Date: January 30–31, 2019.

Time: 10:30 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Julio C. Aliberti, Ph.D., Scientific Review Officer, Immunology Review Branch, DEA/SRP RM 3G53A, National Institutes of Health, NIAID, 5601 Fishers Lane, MSC 9823, Rockville, MD 20892–9823, 301–761–7322, *julio.aliberti@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 20, 2018.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28341 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; P41 National Resource Review (2019/05).

Date: February 7–9, 2019.

Time: 3:00 p.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn by Marriott Redwood City San Carlos, 800 E. San Carlos Ave, San Carlos, CA.

Contact Person: Ruixia Zhou, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Boulevard., Suite 957, Bethesda, MD 20892, 301–496–4773, *zhour@mail.nih.gov*.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; P41 BTRC Review (2019/05).

Date: February 8, 2019.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of Biomedical Imaging and Bioengineering, Two Democracy Plaza, Suite 920, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Manana Sukhareva, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Blvd., Suite 959, Bethesda, MD 20892, (301) 451–3397, *sukharem@mail.nih.gov*.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; P41 BTRC Review Meeting (2019/05).

Date: February 13–15, 2019.

Time: 12:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Shelburne Hotel & Suites by Affinia, 303 Lexington Avenue, New York, NY 10016.

Contact Person: Dennis Hlasta, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Blvd., Suite 952, Bethesda, MD 20892, (301) 451–3397, *dennis.hlasta@mail.nih.gov*.

Dated: December 21, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28337 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections

552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Epidemiology, Prevention and Behavior Research Review Subcommittee.

Date: March 4, 2019.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of Alcohol Abuse and Alcoholism, Conference Rooms A & B, 6700B Rockledge Drive, Bethesda, MD 20817.

Contact Person: Anna Ghambaryan, M.D, Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700 B Rockledge Drive, Room 2120, MSC 6902, Bethesda, MD 20892 301–443–4032, *anna.ghambaryan@nih.gov*.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Neuroscience Review Subcommittee.

Date: March 5, 2019.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of Alcohol Abuse and Alcoholism, Conference Room A & B, 6700 A Rockledge Drive, Bethesda, MD 20892.

Contact Person: Beata Buzas, Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700 B Rockledge Drive, Room 2116, MSC 6902, Bethesda, MD 20892 301–443–0800, *bbuzas@mail.nih.gov*.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Biomedical Research Review Subcommittee.

Date: March 12, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health National Institute of Alcohol Abuse and Alcoholism, Conference Room A & B, 6700 A Rockledge Drive, Bethesda, MD 20892.

Contact Person: Philippe Marmillot, Ph.D., Scientific Review Officer, Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700 B Rockledge Drive, Room 2118, MSC 6902, Bethesda, MD, 20892, 301–443–2861, *marmillotp@mail.nih.gov*.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; Review of Fellowship Grant Applications.

Date: March 15, 2019.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Conference Rooms B & C, Bethesda, MD 20817.

Contact Person: Richard A. Rippe, Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700 B Rockledge Drive, Room 2109, MSC 6902, Bethesda, MD 20892, 301–443–8599, *rippera@mail.nih.gov*.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Clinical Treatment and Health Services Research Review Subcommittee.

Date: March 29, 2019.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of Alcohol Abuse and Alcoholism, Conference Rooms B & C, 6700B Rockledge Drive, Bethesda, MD 20817.

Contact Person: Ranga V. Srinivas, Ph.D., Chief, Extramural Project Review Branch, Extramural Project Review Branch, National Institutes of Health National Institute on Alcohol Abuse and Alcoholism, 6700 B Rockledge Drive, Room 2114, MSC 6902, Bethesda, MD 20892, (301) 451–2067, *srinivar@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: December 21, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28332 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the National Advisory Neurological Disorders and Stroke Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Neurological Disorders and Stroke Council.

Date: February 14–15, 2019.

Open: February 14, 2019, 12:30 p.m. to 6:00 p.m.

Agenda: Report by the Director, NINDS; Report by the Director, Division of Extramural Activities; and Administrative and Program Developments.

Place: National Institutes of Health, Porter Neuroscience Research Center, Building 35A, Convent Drive, Bethesda, MD 20892.

Closed: February 15, 2019.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Porter Neuroscience Research Center, Building 35A, Convent Drive, Bethesda, MD 20892.

Contact Person: Robert Finkelstein, Ph.D., Director, Division of Extramural Activities, National Institute of Neurological Disorders and Stroke, NIH, 6001 Executive Blvd., Suite 3309, MSC 9531, Bethesda, MD 20892, (301) 496–9248, *finkelsr@ninds.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance into Federal buildings. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page:

http://www.ninds.nih.gov, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS).

Dated: December 20, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28339 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health (NIMH); Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of an Interagency Autism Coordinating Committee (IACC or Committee) meeting.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Type of Meeting: Open Meeting.

Date: Wednesday, January 16, 2019.

Time: 9:00 a.m. to 5:00 p.m.* Eastern Time

* Approximate end time.

Agenda: To discuss business, updates, and issues related to ASD research and services activities.

Place: Hilton Washington DC/Rockville Hotel and Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852.

Webcast Live: https://videocast.nih.gov.

Conference Call Access: Dial: 1–888–829–8668, Access code: 1308901.

Cost: The meeting is free and open to the public.

Registration: A registration web link will be posted on the IACC website (*www.iacc.hhs.gov*) prior to the meeting. Pre-registration is recommended to expedite check-in. Seating in the meeting room is limited to room capacity and on a first come, first served basis. Onsite registration will also be available.

Deadlines: Notification of intent to present oral comments: Friday, January 4, 2019 by 5:00 p.m. ET. Submission of written/electronic statement for oral comments: Tuesday, January 8, 2019 by 5:00 p.m. ET. Submission of written comments: Tuesday, January 8, 2019 by 5:00 p.m. ET. Webcast Live Feedback Public comments: No preregistration required. For instructions, see *https://iacc.hhs.gov/meetings/iacc-meetings/2019/full-committee-meeting/january16/live-feedback.shtml.* For IACC Public Comment guidelines please see: *https://iacc.hhs.gov/meetings/public-comments/guidelines/.*

Access: Twinbrook Metro Station (Red Line).

Contact Person: Ms. Angelice Mitrakas, Office of Autism Research Coordination, National Institute of Mental Health, NIH, 6001 Executive Boulevard, Room 6182A, Bethesda, MD 20892–9669, Phone: 301–435–9269, Email: *IACCPublicInquiries@mail.nih.gov.*

Public Comments: Any member of the public interested in presenting oral comments to the Committee must notify the Contact Person listed on this notice by 5:00 p.m. ET on Friday, January 4, 2019 with their request to present oral comments at the meeting, and a written/electronic copy of the oral presentation/statement must be submitted by 5:00 p.m. ET on Tuesday, January 8, 2019.

A limited number of slots for oral comments are available, and to ensure that as many different individuals can present throughout the year as possible, any given individual only will be permitted to present oral comments once per calendar year (2019). Only one representative of an organization will be allowed to present oral comments in any given meeting; other representatives of the same group may provide written comments. If the oral comment session is full, individuals who could not be accommodated are welcome to provide written comments instead. Comments to be read or presented in the meeting will be assigned a 3–5 minutes time slot depending on the number of comments, but a longer version may be submitted in writing for the record. Commenters going beyond their allotted time in the meeting may be asked to conclude immediately to allow other comments and presentations to proceed on schedule.

Any interested person may submit written public comments to the IACC prior to the meeting by emailing the comments to *IACCPublicInquiries@mail.nih.gov* or by submitting comments at the web link: *https://iacc.hhs.gov/meetings/public-comments/submit/index.jsp* by 5:00 p.m. ET on Tuesday, January 8, 2019. The comments should include the name, address, telephone number, and when applicable, the business or professional affiliation of the interested person. NIMH anticipates written public comments received by 5:00 p.m. ET on Tuesday, January 8, 2019, will be presented to the Committee prior to the meeting for the Committee's consideration. Any written comments received after the 5:00 p.m. ET, January 8, 2019 deadline through January 16, 2019, will be provided to the Committee either before or after the meeting, depending on the volume of comments received and the time required to process them in accordance with privacy regulations and other applicable Federal policies. All written public comments and oral public comment statements received by the deadlines for both oral and written public comments will be provided to the IACC for their consideration and will become part of the public record. Attachments of copyrighted publications are not permitted, but web links or citations for any copyrighted works cited may be provided.

Individuals may also submit public comments to the IACC via a Live Feedback Form accessible from the webcast page on the day of the meeting from 9:00 a.m. ET to 11:00 a.m. ET. No pre-registration required. The link will be accessible on the NIH Videocast website and instructions are available on the IACC website: *https://iacc.hhs.gov/meetings/iacc-meetings/2019/full-committee-meeting/january16/live-feedback.shtml.* This format is best suited for brief questions and comments for the committee. Submissions will be provided to the IACC and will become a part of the public record.

In the 2016–2017 IACC Strategic Plan, the IACC listed the ''Spirit of Collaboration'' as one of its core values, stating that, ''We will treat others with respect, listen with open minds to the diverse views of people on the autism spectrum and their families, thoughtfully consider community input, and foster discussions where participants can comfortably where participants can comfortably offer opposing opinions.'' In keeping with this core value, the IACC and the NIMH Office of Autism Research Coordination (OARC) ask that members of the public who provide public comments or participate in meetings of the IACC also seek to treat others with respect and consideration in their communications and actions, even when discussing issues of genuine concern or disagreement.

Remote Access: The meeting will be open to the public through a conference call phone number and webcast live on the internet. Members of the public who participate using the conference call phone number will be able to listen to the meeting but will not be heard. If you experience any technical problems with the webcast or conference call, please send an email to *IACCPublicInquiries@mail.nih.gov* or call 240–668–0302.

Disability Accommodations: All IACC Full Meetings provide Closed Captioning through the NIH videocast website. Remote CART is provided through a web application and will be available at all meetings; the application can be used on a laptop computer or mobile device. For details please inquire with the Contact Person listed on the notice.

Individuals whose full participation in the meeting will require special accommodations (*e.g.,* sign language, or interpreting services, etc.) must submit a request to the Contact Person listed on the notice at least seven (7) business days prior to the meeting. Such requests should include a detailed description of the accommodation needed and a way for the IACC to contact the requester if more information is needed to fill the request. Special requests should be made as early as possible; last minute requests may be made but may not be possible to accommodate.

Security: Visitors will be asked to sign in and show one form of identification (for example, a government-issued photo ID, driver's license, or passport) at the meeting registration desk during the check-in process. Pre-registration is recommended. Seating will be limited to the room capacity and seats will be on a first come, first served basis, with expedited check-in for those who are pre-registered.

Meeting schedule subject to change.

Information about the IACC is available on the website: *http://www.iacc.hhs.gov.*

Dated: December 20, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28331 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Eye Institute Special Emphasis Panel; BRAIN Initiative R21: New Concepts and Early-Stage Research for Large-Scale Recording and Modulation in the Nervous System.

Date: January 30, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Brian Hoshaw, Ph.D., Scientific Review Officer, National Eye Institute, National Institutes of Health, Division of Extramural Research, 5635 Fishers Lane, Suite 1300, Rockville, MD 20892, 301–451–2020, *hoshawb@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: December 20, 2018.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–28338 Filed 12–27–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: Community Mental Health Services Block Grant and Substance Abuse Prevention and Treatment Block Grant FY 2020–2021 Plan and Report Guidance and Instructions (OMB No. 0930–0168)—Extension

The Substance Abuse and Mental Health Services Administration (SAMHSA) is requesting approval from the Office of Management and Budget (OMB) for an extension of the 2018–19 Community Mental Health Services Block Grant (MHBG) and Substance Abuse Prevention and Treatment Block Grant (SABG) Plan and Report Guidance and Instructions.

Currently, the SABG and the MHBG differ on a number of their practices (*e.g.,* data collection at individual or aggregate levels) and statutory authorities (*e.g.,* method of calculating MOE, stakeholder input requirements for planning, set asides for specific populations or programs, etc.). Historically, the Centers within SAMHSA that administer these block grants have had different approaches to application requirements and reporting. To compound this variation, states have different structures for accepting, planning, and accounting for the block grants and the prevention set aside within the SABG. As a result, how these dollars are spent and what is known about the services and clients that receive these funds varies by block grant and by state.

SAMHSA has conveyed that block grant funds must be directed toward four purposes: (1) To fund priority treatment and support services for individuals without insurance or who cycle in and out of health insurance coverage; (2) to fund those priority treatment and support services not covered by Medicaid, Medicare or private insurance offered through the exchanges and that demonstrate success in improving outcomes and/or supporting recovery; (3) to fund universal, selective and targeted prevention activities and services; and (4) to collect performance and outcome data to determine the ongoing effectiveness of behavioral health prevention, treatment and recovery support services and to plan the implementation of new services on a nationwide basis.

To help states meet the challenges of 2020 and beyond, and to foster the implementation and management of an integrated physical health, mental health and addiction service system, SAMHSA has established standards and expectations that will lead to an improved system of care for individuals with or at risk of mental and substance use disorders. Therefore, this application package continues to fully exercise SAMHSA's existing authority regarding states', territories' and the Red Lake Band of the Chippewa Tribe's (subsequently referred to as ''states'') use of block grant funds as they fully integrate behavioral health services into the broader health care continuum.

Consistent with previous applications, the FY 2020–2021 application has sections that are required and other sections where additional information is requested. The FY 2020–2021 application requires states to submit a face sheet, a table of contents, a behavioral health assessment and plan, reports of expenditures and persons served, an executive summary, and funding agreements and certifications. In addition, SAMHSA is requesting information on key areas that are critical to the states success in addressing health care integration. Therefore, as part of this block grant planning process, SAMHSA is asking states to identify both their promising or effective strategies as well as their technical assistance needs to implement the strategies they identify in their plans for FYs 2020 and 2021.

To facilitate an efficient application process for states, SAMHSA utilized the questions and requests for clarification from representatives from SMHAs and SSAs to inform the proposed changes to the block grants. Based on these discussions with states, SAMHSA is proposing de minimis changes to the block grant program, consisting of updated dates and clarification to instructions.

While the statutory deadlines and block grant award periods remain unchanged, SAMHSA encourages states to turn in their application as early as possible to allow for a full discussion and review by SAMHSA. Applications for the MHBG-only is due no later than September 3, 2019. The application for SABG-only is due no later than October 1, 2019. A single application for MHBG *and* SABG combined is due no later than September 3, 2019.

Estimates of Annualized Hour Burden

The estimated annualized burden for the uniform application remains unchanged at 33,374 hours. Burden estimates are broken out in the following tables showing burden separately for Year 1 and Year 2. Year 1 includes the estimates of burden for the uniform application and annual reporting. Year 2 includes the estimates of burden for the recordkeeping and

annual reporting. The reporting burden remains constant for both years.

TABLE 1—ESTIMATES OF APPLICATION AND REPORTING BURDEN FOR YEAR 1

	Authorizing legislation SABG	Authorizing legislation MHBG	Implementing regulation	Number of respondent	Number of responses per year	Number of hours per response	Total hours
Substance Abuse Prevention and Treatment and Community Mental Health Services Block Grants							
Reporting:	Standard Form and Content.	.....	.....	.....	.....	.....	.....
	42 U.S.C. § 300x-32(a)	.....	.....	.....	.....	.....	.....
SABG	Annual Report	.....	.....	.....	.....	.....	11,160
	42 U.S.C. 300x-52(a)	.....	45 CFR 96.122(f).	60	1	.....	.....
	42 U.S.C. 300x-30-b	.....	.....	5	1	.....	.....
	42 U.S.C. 300x-30(d)(2)	.....	45 CFR 96.134(d).	60	1	.....	.....
MHBG	Annual Report	.....	.....	.....	.....	.....	10,974
	.....	42 USC § 300x-6(a).	.....	59	1	.....	.....
	.....	42 U.S.C. 300x-52(a).	.....	.....	.....	.....	.....
	.....	42 U.S.C. 300x-4(b)(3)B.	.....	59	1	.....	.....
	State Plan (Covers 2 years).	.....	.....	.....	.....	.....	.....
SABG elements.	42 U.S.C. 300x-22(b)	.....	45 CFR 96.124 (c)(1).	60	1	.....	.....
	42 U.S.C. 300x-23	.....	45 CFR 96.126(f).	60	1	.....	.....
	42 U.S.C. 300x-27	.....	45 CFR 96.131(f).	60	1	.....	.....
	42 U.S.C. 300x-32(b)	.....	45 CFR 96.122(g).	60	1	120	7,200
MHBG elements.	.....	42 U.S.C. 300x-1(b).	.....	59	1	120	7,080
	.....	42 U.S.C. 300x-1(b)(2).	.....	59	1	.....	.....
	.....	42 U.S.C. 300x-2(a).	.....	59	1	.....	.....
	Waivers	.....	.....	.....	.....	.....	3,240
	42 U.S.C. 300x-24(b)(5)(B)	.....	.....	20	1	.....	.....
	42 U.S.C. 300x-28(d)	.....	45 CFR 96.132(d).	5	1	.....	.....
	42 U.S.C. 300x-30(c)	.....	45 CFR 96.134(b).	10	1	.....	.....
	42 U.S.C. 300x-31(c)	.....	.....	1	1	.....	.....
	42 U.S.C. 300x-32(c)	.....	.....	7	1	.....	.....
	42 U.S.C. 300x-32(e)	.....	.....	10	.....	.....	.....
	.....	42 U.S.C. 300x-2(a)(2).	.....	10	.....	.....	.....
	.....	42 U.S.C 300x-4(b)(3).	.....	10	.....	.....	.....
	.....	42 U.S.C 300x-6(b).	.....	7	.....	.....	.....
Recordkeeping.	42 U.S.C. 300x-23	42 U.S.C. 300x-3.	45 CFR 96.126(c).	60/59	1	20	1200
	42 U.S.C. 300x-25	.....	45 CFR 96.129 (a)(13).	10	1	20	200
	42 U.S.C 300x-65	.....	42 CFR Part 54.	60	1	20	1200
Combined Burden.	.....	.....	.....	.....	.....	.....	42,254

Report

300x-52(a)—Requirement of Reports and Audits by States—Report
300x-30(b)—Maintenance of Effort Regarding State Expenditures—Exclusion of Certain Funds (SABG)
300x-30(d)(2)—Maintenance of Effort—Noncompliance—Submission of Information to Secretary (SABG)
State Plan—SABG
300x-22(b)—Allocations for Women
300x-23—Intravenous Substance Abuse
300x-27—Priority in Admissions to Treatment
300x-29—Statewide Assessment of Need
300x-32(b)—State Plan
State Plan—MHBG
42 U.S.C. 300x-1(b)—Criteria for Plan
42 U.S.C. 300x-1(b)(2)—State Plan for Comprehensive Community Mental Health Services for Certain Individuals—Criteria for Plan—Mental Health System Data and Epidemiology
42 U.S.C. 300x-2(a)—Certain Agreements—Allocations for Systems Integrated Services for Children
Waivers—SABG
300x-24(b)(5)(B)—Human Immunodeficiency Virus—Requirement regarding Rural Areas
300x-28(d)—Additional Agreements
300x-30(c)—Maintenance of Effort
300x-31(c)—Restrictions on Expenditure of Grant—Waiver Regarding Construction of Facilities
300x-32(c)—Certain Territories
300x-32(e)—Waiver amendment for 1922, 1923, 1924 and 1927
Waivers—MHBG
300x-2(a)(2)—Allocations for Systems Integrated Services for Children
300x-6(b)—Waiver for Certain Territories

Recordkeeping

300x-23—Waiting list
300x-25—Group Homes for Persons in Recovery from Substance Use Disorders
300x-65—Charitable Choice

TABLE 2—ESTIMATES OF APPLICATION AND REPORTING BURDEN FOR YEAR 2

	Number of respondent	Number of responses per year	Number of hours per response	Total hours
Reporting:				
SABG	60	1	186	11.160
MHBG	59	1	186	10,974
Recordkeeping	60/59	1	40	2360
Combined Burden				24,494

The total annualized burden for the application and reporting is 33,374 hours (42,254 + 24,494 = 66,748/2 years = 33,374).

Link for the application: http://www.samhsa.gov/grants/block-grants.

Written comments and recommendations concerning the proposed information collection should be sent by January 28, 2019 to the SAMHSA Desk Officer at the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). To ensure timely receipt of comments, and to avoid potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov.* Although commenters are encouraged to send their comments via email, commenters may also fax their comments to: 202–395–7285. Commenters may also mail them to: Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building, Room 10102, Washington, DC 20503.

Summer King,

Statistician.

[FR Doc. 2018–28278 Filed 12–27–18; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2009–0973]

Random Drug Testing Rate for Covered Crewmembers for 2019

AGENCY: Coast Guard, DHS.

ACTION: Notice of minimum random drug testing rate.

SUMMARY: The Coast Guard has set the calendar year 2019 minimum random drug testing rate at 50 percent of covered crewmembers.

DATES: The minimum random drug testing rate is effective January 1, 2019 through December 31, 2019.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Patrick Mannion, Drug and Alcohol Prevention and Investigation Program Manager, Office of Investigations and Casualty Analysis (CG–INV), U.S. Coast Guard Headquarters, *DAPI@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard requires marine employers to establish random drug testing programs for covered crewmembers in accordance with 46 CFR 16.230. Every marine employer is required by 46 CFR 16.500 to collect and maintain a record of drug testing data for each calendar year, and submit this data by 15 March of the following year to the Coast Guard in an annual MIS report.

Each year, the Coast Guard will publish a notice reporting the results of random drug testing for the previous calendar year's MIS data and the minimum annual percentage rate for random drug testing for the next calendar year. The purpose of setting a minimum random drug testing rate is to promote maritime safety by establishing an effective deterrent to drug misuse within the maritime workforce. Intoxicated operations poses a serious threat to life, property and the environment in the maritime commons. As such, the minimum random drug testing rate is intended to deter and detect illegal drug misuse in the maritime industry.

The Coast Guard announces that the minimum random drug testing rate for calendar year 2019 is 50 percent. The Coast Guard has increased the minimum random drug testing rate for 2019 as a result of MIS data for the most recent reporting year indicating that the positive rate is greater than one percent. 46 CFR part 16.230(f)(2) requires the Commandant to set the minimum random drug testing rate at 50 percent when the positivity rate for drug use is greater than 1 percent.

For 2019, the minimum random drug testing rate will be 50 percent of covered employees for the period of January 1,

2019 through December 31, 2019 in accordance with 46 CFR 16.230(e).

Dated: December 19, 2018.

Jennifer F. Williams,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2018–28231 Filed 12–27–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4406–DR; Docket ID FEMA–2018–0001]

Alabama; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–4406–DR), dated November 5, 2018, and related determinations.

DATES: This amendment was issued December 4, 2018.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Alabama is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of November 5, 2018.

Dale County for emergency protective measures (Category B), including direct federal assistance, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Brock Long,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2018–28166 Filed 12–27–18; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2018–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *https://msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

David I. Maurstad,

Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Alabama:					
Lee (FEMA Docket No.: B–1855).	City of Smiths Station (18–04–3883P).	The Honorable F.L. 'Bubba' Copeland, Mayor, City of Smiths Station, 2336 Lee Road 430, Smiths Station, AL 36877.	City Hall, 2336 Lee Road 430, Smiths Station, AL 36877.	December 3, 2018	010491
Lee (FEMA Docket No.: B–1855).	Unincorporated areas of Lee County (18–04–3883P).	The Honorable Bill English, Chairman, Lee County Board of Commissioners, P.O. Box 666, Opelika, AL 36803.	Lee County Building Department, 100 Orr Avenue, Opelika, AL 36801.	December 3, 2018	010250
Russell (FEMA Docket No.: B–1855).	City of Phenix City (18–04–3883P).	The Honorable Eddie N. Lowe, Mayor, City of Phenix City, 601 12th Street, Phenix City, AL 36867.	City Hall, 601 12th Street, Phenix City, AL 36867.	December 3, 2018	010184
Florida:					
Leon (FEMA Docket No.: B–1852).	City of Tallahassee (18–04–4528P).	The Honorable Andrew Gillum, Mayor, City of Tallahassee, 300 South Adams Street, Tallahassee, FL 32301.	Growth Management Department, 300 South Adams Street, Tallahassee, FL 32301.	November 27, 2018	120144
Polk (FEMA Docket No.: B–1852).	Unincorporated areas of Polk County (18–04–0571P).	The Honorable R. Todd Dantzler, Chairman, Polk County Board of Commissioners, P.O. Box 9005, Drawer BC01, Bartow, FL 33831.	Polk County Planning and Development Department, P.O. Box 9005, Drawer GM01, Bartow, FL 33831.	November 29, 2018	120261
Sarasota (FEMA Docket No.: B–1848).	Unincorporated areas of Sarasota County (18–04–3612P).	The Honorable Nancy Detert, Chair, Sarasota County Board of Commissioners, 1660 Ringling Boulevard, Sarasota, FL 34236.	Sarasota County Planning and Development Services Department, 1001 Sarasota Center Boulevard, Sarasota, FL 34240.	November 14, 2018	125144
Kentucky: Hopkins (FEMA Docket No.: B–1855).	City of Madisonville (18–04–2820P).	The Honorable David Jackson, Mayor, City of Madisonville, 67 North Main Street, Madisonville, KY 42431.	Engineering Department, 604 McCoy Avenue, Madisonville, KY 42431.	November 28, 2018	210115
Maine: Penobscot (FEMA Docket No.: B–1852).	Town of Howland (17–01–1189P).	The Honorable Joshua McNally, Chairman, Town of Howland Planning Board, P.O. Box 386, Howland, ME 04448.	Town Hall, 8 Main Street, Howland, ME 04448.	November 23, 2018	230391
Maryland: Worcester (FEMA Docket No.: B–1852).	Town of Ocean City (18–03–1304P).	The Honorable Richard W. Meehan, Mayor, Town of Ocean City, 301 Baltimore Avenue, Ocean City, MD 21842.	Department of Planning and Community Development, 301 Baltimore Avenue, Ocean City, MD 21842.	November 30, 2018	245207
Massachusetts: Bristol (FEMA Docket No.: B–1852).	Town of Freetown (18–01–1582P).	The Honorable Robert P. Jose, Chairman, Town of Freetown Board of Selectmen, P.O. Box 438, Assonet, MA 02702.	Building Department, 3 North Main Street, Assonet, MA 02702.	December 4, 2018	250056
New Mexico:					
Bernalillo (FEMA Docket No.: B–1848).	City of Albuquerque (18–06–2124P).	The Honorable Timothy M. Keller, Mayor, City of Albuquerque, P.O. Box 1293, Albuquerque, NM 87103.	Planning Department, 600 2nd Street Northwest, Albuquerque, NM 87102.	November 20, 2018	350002
Taos (FEMA Docket No.: B–1852).	Unincorporated areas of Taos County (18–06–2137P).	Mr. Leandro Cordova, Manager, Taos County, 105 Albright Street, Taos, NM 87571.	Taos County Planning Department, 105 Albright Street, Taos, NM 87571.	November 30, 2018	350078
North Carolina:					
Alleghany (FEMA Docket No.: B–1863).	Town of Sparta (18–04–0634P).	The Honorable Wes Brinegar, Mayor, Town of Sparta, P.O. Box 99, Sparta, NC 28675.	Sparta Town Hall, 304 South Main Street, Sparta, NC 28675.	December 6, 2018	370005
Macon (FEMA Docket No.: B–1848).	Unincorporated areas of Macon County (17–04–8013P).	The Honorable James P. Tate, Chairman, Macon County, Board of Commissioners, 5 West Main Street, Franklin, NC 28734.	Macon County Planning Department, 5 West Main Street, Franklin, NC 28734.	November 8, 2018	370150
Ohio:					
Warren (FEMA Docket No.: B–1848).	Unincorporated areas of Warren County (18–05–0549P).	The Honorable Tom Grossmann, Chairman, Warren County Board of Commissioners, 406 Justice Drive, Lebanon, OH 45036.	Warren County Building Department, 406 Justice Drive, Lebanon, OH 45036.	November 15, 2018	390757
Warren (FEMA Docket No.: B–1848).	Village of Corwin (18–05–0549P).	The Honorable Dennis R Oszakiewski, Mayor, Village of Corwin, 946 Corwin Avenue, Corwin, OH 45068.	Zoning Department, 6050 North Clarksville Road, Waynesville, OH 45068.	November 15, 2018	390555
Warren (FEMA Docket No.: B–1848).	Village of Waynesville (18–05–0549P).	The Honorable Dave Stubbs, Mayor, Village of Waynesville, 1400 Lytle Road, Waynesville, OH 45068.	Municipal Building, 1400 Lytle Road, Waynesville, OH 45068.	November 15, 2018	390565
Pennsylvania: Montgomery (FEMA Docket No.: B–1852).	Township of Lower Merion (18–03–0847P).	Mr. Ernie B. McNeely, Manager, Township of Lower Merion, 75 East Lancaster Avenue, Ardmore, PA 19003.	Township Hall, 75 East Lancaster Avenue, Ardmore, PA 19003.	December 3, 2018	420701
Rhode Island:					
Bristol (FEMA Docket No.: B–1852).	Town of Bristol (18–01–0901P).	The Honorable Nathan T. Calouro, Chairman, Town of Bristol Council, 10 Court Street, Bristol, RI 02809.	Building Department, 9 Court Street, Bristol, RI 02809.	November 16, 2018	445393
Washington (FEMA Docket No.: B–1848).	Town of Narragansett (18–01–0820P).	The Honorable Susan Cicilline-Buonanno, President, Town of Narragansett Council, 25 5th Avenue, Narragansett, RI 02882.	Department of Community Development, 25 5th Avenue, Narragansett, RI 02882.	November 19, 2018	445402

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
South Carolina: York (FEMA Docket No.: B–1852).	Unincorporated areas of York County (18–04–4067P).	The Honorable Britt Blackwell, Chairman, York County Council, P.O. Box 66, Rock Hill, SC 29745.	York County Planning and Development Department, 1070 Heckle Boulevard, Suite 107, Rock Hill, SC 29732.	November 15, 2018	450193
Tennessee: Knox (FEMA Docket No.: B–1852).	City of Knoxville (18–04–2049P).	The Honorable Madeline Rogero, Mayor, City of Knoxville, 400 Main Street, Room 691, Knoxville, TN 37902.	Stormwater Engineering Department, 400 West Main Street, Suite 480, Knoxville, TN 37901.	November 16, 2018	475434
Texas:					
Bexar (FEMA Docket No.: B–1852).	City of San Antonio (18–06–0790P).	The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Storm Water Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	December 3, 2018	480045
Bexar (FEMA Docket No.: B–1852).	City of San Antonio (18–06–1177P).	The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Storm Water Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	November 19, 2018	480045
Bexar (FEMA Docket No.: B–1852).	City of Schertz (18–06–1177P).	The Honorable Michael Carpenter, Mayor, City of Schertz, 1400 Schertz Parkway, Schertz, TX 78154.	Floodplain Management Department, 10 Commercial Place, Schertz, TX 78154.	November 19, 2018	480269
Bexar (FEMA Docket No.: B–1852).	Unincorporated areas of Bexar County (18–06–0652P).	The Honorable Nelson W. Wolff, Bexar County Judge, 101 West Nueva Street, 10th Floor, San Antonio, TX 78205.	Bexar County Public Works Department, 233 North Pecos-La Trinidad Street, Suite 420, San Antonio, TX 78207.	November 19, 2018	480035
Denton (FEMA Docket No.: B–1848).	Town of Bartonville (18–06–0630P).	Mr. Michael Montgomery, Town of Bartonville Administrator, 1941 East Jeter Road, Bartonville, TX 76226.	Town Hall, 1941 East Jeter Road, Bartonville, TX 76226.	November 26, 2018	481501
Denton (FEMA Docket No.: B–1848).	Town of Flower Mound (18–06–0630P).	The Honorable Steve Dixon, Mayor, Town of Flower Mound, 2121 Cross Timbers Road, Flower Mound, TX 75028.	Town Hall, 1001 Cross Timbers Road, Suite 2330, Flower Mound, TX 75028.	November 26, 2018	480777
Parker (FEMA Docket No.: B–1855).	Unincorporated areas of Parker County (18–06–1021P).	The Honorable Mark Riley, Parker County Judge, 1 Courthouse Square, Weatherford, TX 76086.	Parker County Emergency Management Department, 215 Trinity Street, Weatherford, TX 76086.	November 30, 2018	480520
Travis (FEMA Docket No.: B–1852).	City of Austin (17–06–3386P).	The Honorable Steve Adler, Mayor, City of Austin, P.O. Box 1088, Austin, TX 78767.	Watershed Protection Department, 505 Barton Springs Road, Austin, TX 78767.	November 26, 2018	480624
Travis (FEMA Docket No.: B–1852).	Unincorporated areas of Travis County (17–06–3386P).	The Honorable Sarah Eckhardt, Travis County Judge, P.O. Box 1748, Austin, TX 78767.	Travis County Transportation and Natural Resources Division, 700 Lavaca Street, Suite 540, Austin, TX 78701.	November 26, 2018	481026
Wilson (FEMA Docket No.: B–1848).	Unincorporated areas of Wilson County (18–06–2146P).	The Honorable Richard L. Jackson, Wilson County Judge, 1420 3rd Street, Suite 101, Floresville, TX 78114.	Wilson County Emergency Management Division, 800 10th Street, Building B, Floresville, TX 78114.	November 23, 2018	480230
Virginia:					
Loudoun (FEMA Docket No.: B–1852).	Town of Leesburg (18–03–0622P).	The Honorable Kelly Burk, Mayor, Town of Leesburg, 25 West Market Street, Leesburg, VA 20176.	Town Hall, 25 West Market Street, Leesburg, VA 20176.	December 3, 2018	510091
Prince William (FEMA Docket No.: B–1848).	Unincorporated areas of Prince William County (18–03–0611P).	Mr. Christopher E. Martino, Prince William County Executive, 1 County Complex Court, Prince William, VA 22192.	Prince William County Department of Public Works, Watershed Management Branch, 5 County Complex Court, Prince William, VA 22192.	November 15, 2018	510119

[FR Doc. 2018–28150 Filed 12–27–18; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4410–DR; Docket ID FEMA–2018–0001]

Connecticut; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Connecticut (FEMA–4410–DR), dated December 5, 2018, and related determinations.

DATES: The declaration was issued December 5, 2018.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 5, 2018, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Connecticut resulting from severe storms and flooding during the period of September 25–26, 2018, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Connecticut.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to section 428 of the Stafford Act.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, James N. Russo, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Connecticut have been designated as adversely affected by this major disaster:

Middlesex and New London Counties, including the Mashantucket Pequot Indian Tribe and Mohegan Tribe of Indians of Connecticut located within New London County for Public Assistance.

All areas within the State of Connecticut are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Brock Long,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2018–28148 Filed 12–27–18; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4407–DR; Docket ID FEMA–2018–0001]

California; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of California (FEMA–4407–DR), dated November 12, 2018, and related determinations.

DATES: This amendment was issued December 11, 2018.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of California is hereby amended to include permanent work under the Public Assistance program for those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of November 12, 2018.

Butte, Los Angeles, and Ventura Counties for Public Assistance [Categories C–G] (already designated for Individual Assistance and assistance for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Brock Long,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2018–28144 Filed 12–27–18; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2018–0014; OMB No. 1660–0073]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; National Urban Search and Rescue Response System

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

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

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *dhsdeskofficer@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C Street SW, Washington, DC 20472, email address *FEMA-Information-Collections-Management@fema.dhs.gov* or Wanda Casey, Chief, Program Management Section, US&R Branch, FEMA, Response Directorate, Operations Division, at (202) 646–4013.

SUPPLEMENTARY INFORMATION: This proposed information collection previously published in the **Federal Register** on October 1, 2018 at 83 FR 49407 with a 60-day public comment period. Two comments were received, but neither were related to this collection. The purpose of this notice is to notify the public that FEMA will

submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: National Urban Search and Rescue Response System.

Type of information collection: Revision of a currently approved information collection.

OMB Number: 1660–0073.

Form Titles and Numbers: FEMA Form 089–0–10, Urban Search Rescue Response System Narrative Statement Workbook; FEMA Form 089–0–11, Urban Search Rescue Response System Semi-Annual Performance Report; FEMA Form 089–0–12, Urban Search Rescue Response System Amendment Form; FEMA Form 089–0–14, Urban Search Rescue Response System Task Force Self-Evaluation Scoresheet; FEMA Form 089–0–15, Urban Search Rescue Response System Task Force Deployment Data; FEMA Form 089–0–26, Vehicle Support Unit Purchase/Replacement/Disposal Justification.

Abstract: The information collection activity is the collection of financial, program and administrative information for US&R Sponsoring Agencies relating to readiness and response for Cooperative Agreement awards.

Affected Public: State, Local or Tribal Government.

Estimated Number of Respondents: 154.

Estimated Number of Responses: 210.

Estimated Total Annual Burden Hours: 392.

Estimated Total Annual Respondent Cost: $20,654.48.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $121,403.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (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.

William H . Holzerland,

Sr. Director, Information Management Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2018–28353 Filed 12–27–18; 8:45 am]

BILLING CODE 9111–54–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3410–EM; Docket ID FEMA–2018–0001]

Alaska; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Alaska (FEMA–3410–EM), dated November 30, 2018, and related determinations.

DATES: The declaration was issued November 30, 2018.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated November 30, 2018, the President issued an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the emergency conditions in certain areas of the State of Alaska resulting from an earthquake on November 30, 2018, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (''the Stafford Act''). Therefore, I declare that such an emergency exists in the State of Alaska.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act, to save lives and to protect property and public health and safety, and to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide assistance for emergency protective measures (Category B), limited to direct Federal assistance, under the Public Assistance program.

Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs. In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, Department of Homeland Security, under Executive Order 12148, as amended, Willie G. Nunn, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

The following areas of the State of Alaska have been designated as adversely affected by this declared emergency:

The Anchorage Municipality, Kenai Peninsula Borough, and Matanuska-Susitna Borough for emergency protective measures (Category B), limited to direct federal assistance, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Brock Long,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2018–28147 Filed 12–27–18; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2018–0002; Internal Agency Docket No. FEMA–B–1873]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

DATES: Comments are to be submitted on or before March 28, 2019.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://www.fema.gov/preliminaryfloodhazarddata* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–1873, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP and are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://www.fema.gov/preliminaryfloodhazarddata* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

David I. Maurstad,

Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

Community	Community map repository address
Monroe County, Michigan (All Jurisdictions) Project: 13–05–1801S Preliminary Date: August 13, 2018	
Charter Township of Berlin	Berlin Charter Township Hall, 8000 Swan View Road, Newport, MI 48166.
Charter Township of Frenchtown	Frenchtown Charter Township Hall, 2744 Vivian Road, Monroe, MI 48162.
Charter Township of Monroe	Township Hall, 4925 East Dunbar Road, Monroe, MI 48161.
City of Luna Pier	City Hall, 4357 Buckeye Street, Luna Pier, MI 48157.
City of Monroe	City Hall, 120 East First Street, Monroe, MI 48161.
Township of Erie	Township Hall, 2065 Erie Road, Erie, MI 48133.
Township of LaSalle	Township Hall, 4111 LaPlaisance Road, LaSalle, MI 48145.
Village of Estral Beach	Estral Beach Village Hall, 7194 Lakeview Boulevard, Newport, MI 48166.

Community	Community map repository address
St. Charles County, Missouri and Incorporated Areas Project: 15–07–1679S Preliminary Date: June 29, 2018	
City of St. Charles	City Hall, 200 North 2nd Street, St. Charles, MO 63301.
Unincorporated Areas of St. Charles County	County Administration Building, 201 North 2nd Street, Suite 420, St. Charles, MO 63301.

[FR Doc. 2018–28168 Filed 12–27–18; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2018–0002; Internal Agency Docket No. FEMA–B–1872]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes, the currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov*; or visit the FEMA Map Information eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

David I. Maurstad,

Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Arizona:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Maricopa	City of Scottsdale (18–09–1514P).	The Honorable W.J. ''Jim'' Lane, Mayor, City of Scottsdale, City Hall, 3939 North Drinkwater Boulevard, Scottsdale, AZ 85251.	Planning Records, 7447 East Indian School Road, Suite 100, Scottsdale, AZ 85251.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 15, 2019	045012
Maricopa	Town of Paradise Valley (18–09–1514P).	The Honorable Michael Collins, Mayor, Town of Paradise Valley, 6401 East Lincoln Drive, Paradise Valley, AZ 85253.	Town Hall, 6401 East Lincoln Drive, Paradise Valley, AZ 85253.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 15, 2019	040049
Florida: St. Johns ..	Unincorporated Areas of St. Johns County (18–04–6389P).	Mr. Henry Dean, Chairman, St. Johns County Board of Commissioners, 500 San Sebastian View, St. Augustine, FL 32084.	St. Johns County Administration Building, 4020 Lewis Speedway, St. Augustine, FL 32084.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 20, 2019	125147
Idaho: Ada	City of Boise (18–10–0336P).	The Honorable David Bieter, Mayor, City of Boise, P.O. Box 500, Boise, ID 83701.	Planning and Development Services, City Hall, 150 North Capital Boulevard, Boise, ID 83701.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 11, 2019	160002
Illinois:						
Cook	Village of Northbrook (18–05–5952P).	The Honorable Sandra E. Frum, Village President, Village of Northbrook, 1225 Cedar Lane, Northbrook, IL 60062.	Public Works Department, Engineering Division, 655 Huehl Road, Northbrook, IL 60062.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 1, 2019	170132
McHenry	Unincorporated Areas of McHenry County (18–05–5951P).	The Honorable Jack D. Franks, Chairman, McHenry County Board, McHenry County Government Center, 2200 North Seminary Avenue, Woodstock, IL 60098.	McHenry County Government Center, 2200 North Seminary Avenue, Woodstock, IL 60098.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 20, 2019	170732
Indiana:						
Madison	City of Anderson (17–05–5967P).	The Honorable Thomas J. Broderick, Jr., Mayor, City of Anderson, Anderson City Building, 120 East 8th Street, Anderson, IN 46016.	City Hall, 120 East 8th Street, Anderson, IN 46018.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 15, 2019	180150
Madison	Town of Country Club Heights (17–05–5967P).	The Honorable Carey McLaughlin, Town Manager, Town of County Club Heights, 30 Overlook Drive, Anderson, IN 46011.	Administrative Building 1202 North Madison Avenue, Anderson, IN 46011.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 15, 2019	180451
Madison	Town of Woodlawn Heights (17–05–5967P).	The Honorable Steve Murphy, Town Manager, Town of Woodlawn Heights, P.O. Box 888, Anderson, IN 46015.	Town Hall, 1625 Van Buskirk Road, Anderson, IN 46015.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 15, 2019	180495
Madison	Unincorporated Areas of Madison County (17–05–5967P).	The Honorable John Richwine, President, Madison County Board of Commissioners, Government Center, 16 East 9th Street, Anderson, IN 46016.	Madison County Government Center, 16 East 9th Street, Room 200, Anderson, IN 46016.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 15, 2019	180442
Kansas: Lyon	City of Emporia (18–07–1531P).	The Honorable Danny Giefer, Mayor, City of Emporia, P.O. Box 928, Emporia, KS 66801.	Water Department, 104 East 5th Avenue, Emporia, KS 66801.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 12, 2019	200203
Minnesota: Carver	City of Waconia (18–05–4974P).	The Honorable Jim Sanborn, Mayor, City of Waconia, Waconia City Hall, 201 South Vine Street, Waconia, MN 55387.	City Hall, 201 South Vine Street Waconia, MN 55387.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 26, 2018	270055
Nevada: Clark	City of North Las Vegas (18–09–0886P).	The Honorable John J. Lee, Mayor, City of North Las Vegas, 2250 Las Vegas Boulevard North, North Las Vegas, NV 89030.	Public Works Department, 2200 Civic Center Drive, North Las Vegas, NV 89030.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 12, 2019	320007
New Jersey:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Monmouth	Borough of Atlantic Highlands (18–02–1965P).	The Honorable Rhonda Le Grice, Mayor, Borough of Atlantic Highlands, Borough Hall, 100 1st Avenue, Atlantic Highlands, NJ 07716.	Borough Hall, 100 1st Avenue, Atlantic Highlands, NJ 07716.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 21, 2019	340286
Monmouth	Borough of Highlands (18–02–1965P).	The Honorable Rick O'Neil, Mayor, Borough of Highlands, Administrative Offices, 42 Shore Drive, Highlands, NJ 07732.	Municipal Office, 42 Shore Drive, Highlands, NJ 07732.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 21, 2019	345297
New York: Westchester.	City of Rye (18–02–1994P).	The Honorable Josh Cohn, Mayor, City of Rye, 1051 Boston Post Road, Rye, NY 10580.	City Hall, 1051 Boston Post Road, Rye, NY 10580.	*https://msc.fema.gov/portal/advanceSearch.*	May 2, 2019	360931
Washington: Spokane.	City of Spokane Valley (18–10–1264P).	The Honorable Rod Higgins, Mayor, City of Spokane Valley, Spokane Valley City Hall, 10210 East Sprague Avenue, Spokane Valley, WA 99206.	City Hall, 10210 East Sprague Avenue, Spokane Valley, WA 99206.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 15, 2019	530342
Wisconsin: Dodge	City of Watertown (18–05–4306P).	The Honorable John David, Mayor, City of Watertown, P.O. Box 477, Watertown, WI 53094.	City Hall, 106 Jones Street, Watertown, WI 53094.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 26, 2019	550107

[FR Doc. 2018–28149 Filed 12–27–18; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7009–N–06]

Privacy Act of 1974; Matching Program

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner and Office of the Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development (HUD).

ACTION: Notice of a re-established matching program.

SUMMARY: Pursuant to the Computer Matching and Privacy Protection Act of 1988, as amended, HUD is providing notice of its intent to execute a new computer matching agreement with the U.S. Department of Health and Human Services (HHS) for a recurring matching program with HUD's Office of Public and Indian Housing (PIH) and Office of Housing, involving comparisons of information provided by participants in any authorized HUD rental housing assistance program with the independent sources of income information available through the National Directory of New Hires (NDNH) maintained by HHS. HUD will obtain HHS data and make the results available to: (1) Program administrators such as public housing agencies (PHAs) and private owners and management agents (O/As) (collectively referred to as POAs) to enable them to verify the accuracy of income reported by the tenants (participants) of HUD rental assistance programs, and (2) contract administrators (CAs) overseeing and monitoring O/A operations as well as independent public auditors (IPAs) that audit both PHAs and O/As. The most recent renewal of the current matching agreement expired on October 24, 2018.

DATES:

Applicability Date: The applicability date of this matching program shall be January 11, 2019 or 30 days from the date that the Computer Matching Agreement, signed by HUD and HHS Date Integrity Boards, are sent to OMB and Congress, whichever is later, provided no comments that would cause a contrary determination are received. The matching program will continue for 18 months after the applicable date and may be extended for an additional 12 months, if the respective agency Data Integrity Boards (DIBs) determine that the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

Comment Due Date: January 28, 2019.

ADDRESSES: Interested persons are invited to submit comments regarding this notice electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically. Comments may also be submitted to the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, Room 10110, SW, Washington, DC 20410. Communications should refer to the above docket number. A copy of each communication submitted will be available for public inspection and copying between 8:00 a.m. and 5:00 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: John Bravacos, Senior Agency Official for Privacy, Department of Housing and Urban Development, 451 Seventh Street SW, Room 10139, Washington, DC 20410, telephone number (202) 402–3053 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: On March 11, 2009, Section 239 of HUD's 2009 Appropriations Act modified Section 904 of the Stewart B. McKinney Act of 1988, as amended, to include the Disaster Housing Assistance Program (DHAP) as a ''program'' of HUD for the purpose of income verifications and

computer matching. As such, pursuant to the Computer Matching and Privacy Protection Act (CMPPA) of 1988, as amended; OMB's guidance on this statute entitled, ''Final Guidance Interpreting the Provisions of Public Law 100–503''; OMB Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act;'' and OMB Circular No. A–130, ''Managing Information as a Strategic Resource''; HUD is providing the public with notice of a new computer matching agreement with HHS (previous notice of a computer matching program between HUD and HHS was previously published at 81 FR 13403 on March 14, 2016). The first HUD–HHS computer matching program was conducted in September 2005, with HUD's Office of Public and Indian Housing (PIH). The scope of the HUD–HHS computer matching program was extended to include HUD's Office of Housing in December 2007, and to HUD's Disaster Housing Assistance Program (DHAP) in January 2011.

The matching program will be carried out only to the extent necessary to: (1) Verify the employment and income of participants in certain rental assistance programs to correctly determine the amount of their rent and assistance, (2) identify, prevent, and recover improper payments made on behalf of tenants, and (3) after removal of personal identifiers, to conduct analyses of the employment and income reporting of individuals participating in any HUD authorized rental housing assistance program.

HUD will make the results of the computer matching program available to public housing agencies (PHAs), private housing owners and management agents (O/As) administering HUD rental assistance programs to enable them to verify employment and income and correctly determine the rent and assistance levels for individuals participating in those programs, and contract administrators (CAs) overseeing and monitoring O/A operations. This information also may be disclosed to the HUD Office of Inspector General (HUD/OIG) and the United States Attorney General in detecting and investigating potential cases of fraud, waste, and abuse within HUD rental assistance programs.

In addition to the above noted information disclosures, limited redisclosure of reports containing NDNH information may be redisclosed to the following persons and/or entities: (1) Independent auditors for the sole purpose of performing an audit of whether these HUD authorized entities verified tenants' employment and/or income and calculated the subsidy and rent correctly; and (2) entities and/or individuals associated with grievance procedures and judicial proceedings (*i.e.* lawyers, court personnel, agency personnel, grievance hearing officers, etc.) relating to independently verified unreported income identified through this matching program.

HUD and its third-party administrators (PHAs, O/As, and CAs) will use this matching authority to identify, reduce or eliminate improper payments in HUD's rental housing assistance programs, while continuing to ensure that HUD rental housing assistance programs serve and are accessible by its intended program beneficiaries.

I. Participating Agencies

Department of Housing and Urban Development and the Department of Health and Human Services.

II. Authority for Conducting the Matching Program

This matching program is being conducted pursuant to Section 217 of the Consolidated Appropriation Act of 2004 (Pub. L. 108–199, Approved January 23, 2004), which amended Section 453(j) of the Social Security Act (42 U.S.C. 653(j)), Sections 3003 and 13403 of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66, approved August 10, 1993); Section 542(b) of the 1998 Appropriations Act (Pub. L. 105–65); Section 904 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, as amended by Section 239 of HUD's 2009 Appropriations, effective March 11, 2009 (42 U.S.C. 3544); Section 165 of the Housing and Community Development Act of 1987 (42 U.S.C. 3543); the National Housing Act (12 U.S.C. 1701–1750g); the United States Housing Act of 1937 (42 U.S.C. 1437–1437z); Section 101 of the Housing and Community Development Act of 1965 (12 U.S.C. 1701s); the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*); and the Quality Housing and Work Responsibility Act of 1998 (42 U.S.C. 1437a(f)).

The Housing and Community Development Act of 1987 authorizes HUD to require applicants and participants (as well as members of their household 6 years of age and older) in HUD-administered programs involving rental housing assistance to disclose to HUD their Social Security Numbers (SSNs) as a condition of initial or continuing eligibility for participation in the programs. Effective January 31, 2010, all applicants and participants under the age of 6, are required to disclose their SSN to HUD, in accordance with regulatory revisions made to 24 CFR 5.216, as published at 74 FR 68924, on December 29, 2009.

Section 217 of the Consolidated Appropriations Act of 2004 (Pub. L. 108–199, approved January 23, 2004) authorizes HUD to provide to HHS information on persons participating in any programs authorized by:

(i) The United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*);

(ii) Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q);

(iii) Section 221(d)(3), 221(d)(5) or 236 of the National Housing Act (12 U.S.C. 17151(d) and 1715z–1); (iv) Section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013); or (v) Section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s);

The Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Implementation of the Enterprise Income Verification (EIV) System—Amendments; Final rule published at 74 FR 68924 on December 29, 2009, requires program administrators to use HUD's EIV system to verify tenant employment and income information during mandatory re-examinations or recertifications of family composition and income and reduce administrative and subsidy payment errors in accordance with HUD administrative guidance (HUD regulation at 24 CFR 5.233).

This matching program also assists HUD in complying with the following Federal laws, requirements, and guidance related to identifying and reducing improper payments:

1. Improper Payments Elimination and Recovery Act of 2010 (IPERA) (Pub. L. 111–204) (July 22, 2010);

2. Presidential Memorandum on Enhancing Payment Accuracy Through a ''Do Not Pay List'' (June 18, 2010);

3. Office of Management and Budget M–18–20, Transmittal of Appendix C to OMB Circular A–123, Requirements for Payment Integrity Improvement'' (June 26, 2018);

4. Presidential Memorandum on Finding and Recapturing Improper Payments (March 10, 2010);

5. Reducing Improper Payments and Eliminating Waste in Federal Programs (Executive Order 13520, November 2009);

6. Improper Payments Information Act of 2002 (Pub. L. 107–300);

7. Office of Management and Budget M–03–13, Improper Payments Information Act of 2002;

8. Improper Payments Elimination and Recovery Improvement Act (IPERIA) of 2012, (Pub. L. 112–248) (January 10, 2013); and

9. Office of Management and Budget M–13–20, Protecting Privacy while Reducing Improper Payments with the Do Not Pay Initiative (August 16, 2013).

This matching program is also authorized by subsections 453(j)(7)(A), (C)(i), and (D)(i) of the Social Security Act (as amended and authorized by Section 217 of the Consolidated Appropriations Act of 2004 (Pub. L. 108–199)). Specifically, the aforementioned law authorizes HHS to compare information provided by HUD with data contained in the NDNH and report the results of the data match to HUD. The Social Security Act gives HUD the authority to disclose this information to CAs, O/As, and PHAs for the purpose of verifying the employment and income of individuals receiving benefits in the above programs. HUD shall not seek, use or disclose information relating to an individual without the prior written consent of that individual, and HUD has the authority to require consent as a condition of participating in HUD rental housing assistance programs.

The NDNH contains new hire, quarterly wage, and unemployment insurance information furnished by state and Federal agencies and is maintained by HHS' Office of Child Support Enforcement (OCSE) in its system of records ''OCSE National Directory of New Hires,'' No. 09–80–0381, published in the **Federal Register** at 80 FR 17894 (specifically pages 17906–17909) on April 2, 2015. This system of records notice authorizes disclosure of NDNH information to HUD pursuant to Routine Use (12) ''for the purpose of verifying the employment and income of the individuals and, after removal of personal identifiers, for the purpose of conducting analyses of the employment and income reporting of such individuals.''

The HUD records used in the information comparison are retrieved from the Tenant Rental Assistance Certification System (TRACS) covered under HUD's Tenant Rental Assistance Certification System (HSNG/MF.HTS.02), published on August 22, 2016 (81 FR 56684); and the Inventory Management System (IMS), also known as the Public and Indian Housing (PIH) Information Center (PIC) (HUD/PIH.01), published on April 13, 2012 (77 FR 22337). The results of the information comparison are maintained within, the HUD system of records, Enterprise Income Verification System (EIV), No. HUD/PIH–5, last published in the **Federal Register** at 71 FR 45066 on August 8, 2006, and updated on September 1, 2009, at 74 FR 45235. ''Routine use'' (1) of the system of records authorizes disclosure of HUD records to HHS.

III. Purposes

HUD's primary objective of the computer matching program is to verify the employment and income of participants in certain rental assistance programs to determine the appropriate level of rental assistance, and to detect, deter and correct fraud, waste, and abuse in rental housing assistance programs. In meeting these objectives, HUD also is carrying out a responsibility under 42 U.S.C. Sec. 1437f(K) to ensure that income data provided to PHAs, and O/As, by household members is complete and accurate. HUD's various rental housing assistance programs require that participants meet certain income and other criteria to be eligible for rental assistance. In addition, tenants generally are required to report and recertify the amounts and sources of their income at least annually. However, under the Quality Housing and Work Responsibility Act (QHWRA) of 1998, PHAs operating Public Housing programs may offer tenants the option to pay a flat rent, or an income-based rent. Those tenants who select a flat rent will be required to recertify income at least every three years. In addition, the changes to the Admissions and Occupancy final rule (March 29, 2000 (65 FR 16692)) specified that household composition must be recertified annually for tenants who select a flat rent or income-based rent.

IV. Categories of Individuals

This notice of computer matching program applies to individuals receiving services from the following rental assistance programs:

A. Disaster Housing Assistance Program (DHAP)
B. Public Housing
C. Section 8 Housing Choice Vouchers (HCV)
D. Project-Based Vouchers
E. Section 8 Moderate Rehabilitation
F. Project-Based Section 8
  1. New Construction
  2. State Agency Financed
  3. Substantial Rehabilitation
  4. Sections 202/8
  5. Rural Housing Services Section 515/8
  6. Loan Management Set-Aside (LMSA)
  7. Property Disposition Set-Aside (PDSA)
G. Section 101 Rent Supplement
H. Section 202/162 Project Assistance Contract (PAC)
I. Section 202 Project Rental Assistance Contract (PRAC)
J. Section 811 Project Rental Assistance Contract (PRAC)
K. Section 236 Rental Assistance Program
L. Section 221(d)(3) Below Market Interest Rate (BMIR)

Note: This notice does not apply to the Low-Income Housing Tax Credit (LIHTC) or the Rural Housing Services Section 515 without Section 8 programs.

V. Categories of Records

The following are the categories of record in this matching agreement:

A. HUD Input File

- First name
- Last name
- Date of birth
- Social Security number

B. New Hire File

- New hire processed date
- Employee name
- Employee address
- Employee date of hire
- Employee state of hire
- Federal Employer Identification Number
- State Employer Identification Number
- Department of Defense status code
- Employer name
- Employer address
- Transmitter agency code
- Transmitter state code
- Transmitter state or agency name

C. Quarterly Wage File

- Quarterly wage processed date
- Employee name
- Federal Employer Identification Number
- State Employer Identification Number
- Department of Defense code
- Employer name
- Employer address
- Employee wage amount
- Quarterly wage reporting period
- Transmitter agency code
- Transmitter state code
- Transmitter state or agency name

D. Unemployment Insurance File

- Unemployment insurance processed date
- Claimant name
- Claimant address
- Claimant benefit amount
- Unemployment insurance reporting period
- Transmitter state code
- Transmitter state or agency name

VI. System(s) of Records

OCSE NDNH contains new hire, quarterly wage, and unemployment insurance information furnished by

state and federal agencies and is maintained by OCSE in its system of records ''OCSE National Directory of New Hires,'' No. 09–80–0381, published in the **Federal Register** at 80 FR 17906 on April 2, 2015, and updated on February 14, 2018, at 83 FR 6591. The disclosure of NDNH information by OCSE to HUD constitutes a ''routine use,'' as defined by the Privacy Act. 5 U.S.C. 552a(b)(3). Routine use (12) of the system of records authorizes the disclosure of NDNH information to HUD. 80 FR 17906, 17907 (April 2, 2015).

The HUD records used in the information comparison are retrieved from, and the results of the information comparison are maintained within, the HUD system of records ''Enterprise Income Verification'' (EIV), No. HUD/PIH–5, last published in the **Federal Register** at 71 FR 45066 on August 8, 2006, and updated on September 1, 2009, at 74 FR 45235. ''Routine use'' (1) of the system of records authorizes disclosure of HUD records to OCSE.

Dated: December 21, 2018.

John Bravacos,

Senior Agency Official for Privacy.

[FR Doc. 2018–28361 Filed 12–27–18; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[18X.LLAK930000.LXSSL0120000.L13 1000.DP0000]

Notice of Availability of the Draft Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program and Announcement of Public Subsistence-Related Hearings

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM), Alaska State Office, is issuing the Draft Environmental Impact Statement (EIS) for the Coastal Plain Oil and Gas Leasing Program and by this notice is announcing the opening of the public comment period. The BLM is also announcing that it will hold public meetings on the Draft EIS and subsistence-related hearings to receive comments on the Draft EIS and the program's potential to impact subsistence resources and activities.

DATES: Comments on the Draft EIS may be submitted in writing until 45 days after the Environmental Protection Agency's publication of Notice of Availability of the Draft EIS in the **Federal Register**. The BLM will hold public meetings in: Anchorage, Arctic Village, Fairbanks, Fort Yukon, Kaktovik, Utqiaġvik, and Venetie, Alaska, and Washington, DC A public hearing on subsistence resources and activities will occur in conjunction with the public meeting for the Draft EIS in the potentially affected community of Kaktovik. The dates, times, and locations, of the meetings will be announced through local news media, newspapers, and the BLM website.

ADDRESSES: You may submit comments by any of the following methods:

- *Website: https://www.blm.gov/programs/planning-and-nepa/plans-in-development/alaska/coastal-plain-eis.*
- *Mail to:* BLM, Alaska State Office, Attention—Coastal Plain EIS, 222 West 7th Avenue, #13, Anchorage, AK 99513–7599.
- *Hand Delivery:* BLM Alaska Public Information Center (Public Room), 222 W. 8th Avenue (First Floor), Anchorage, Alaska.

FOR FURTHER INFORMATION CONTACT: Nicole Hayes, 907–271–4354; by mail: Bureau of Land Management, 222 West 7th Avenue, #13, Anchorage, AK 99513–7599. You may also request to be added to the mailing list for the EIS. Documents pertaining to the EIS may be examined at *http://www.blm.gov/alaska* or at the BLM Alaska State Office, BLM Alaska Public Information Center (Public Room), 222 West 8th Avenue (First Floor), Anchorage, Alaska.

People who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM is undertaking this Leasing EIS to implement the leasing program consistent with Public Law 115–97. The Leasing EIS will serve to inform BLM's implementation of Public Law 115–97, Section 20001(c)(1), which is the requirement to hold multiple lease sales. It may also inform post-lease activities, including seismic and drilling exploration, development, and transportation of oil and gas in and from the Coastal Plain. Specifically, the Leasing EIS considers and analyzes the environmental impact of various leasing alternatives, including the areas to offer for sale, and the indirect impacts that could result in consideration of the hypothetical development scenario. The alternatives analyze various terms and conditions (*i.e.,* lease stipulations and required operating procedures) to be applied to leases and associated oil and gas activities, to properly balance oil and gas development with protection of surface resources. The lands comprising the Coastal Plain include approximately 1.6 million acres within the approximately 19.3 million-acre Arctic National Wildlife Refuge.

The purpose of the public comment period is to inform the public of the availability of the Draft EIS and solicit comment from the public. Information received during the public comment period will be used to develop the Final EIS.

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.

The BLM has worked with interested parties to identify the management decisions best suited to local, regional, and national needs and concerns, as well as to develop a proposed action and alternatives consistent with the following criteria:

- The EIS considers all Federal lands and waters within the Coastal Plain;
- The EIS used scoping to identify issues; impacts and potential alternatives to be addressed;
- Under Public Law 115–97, not fewer than two lease sales, each to include not fewer than 400,000 acres area-wide of the areas with the highest potential of hydrocarbons, must occur by December 2024;
- The BLM considers subsistence resources and users, as well as potential actions to minimize adverse impacts to subsistence in accordance with section 810 of the Alaska National Interest Lands Conservation Act (ANILCA); and
- The EIS considers the surface management of the Coastal Plain.

Future on-the-ground actions requiring BLM approval, including potential exploration and development proposals, would require further NEPA analysis based on the site-specific proposal. Potential applicants would be subject to the terms of the lease; however, the BLM Authorized Officer may require additional site-specific terms and conditions before authorizing any oil and gas activity based on the project level NEPA analysis.

Section 810 of ANILCA requires BLM to evaluate the effects of the alternatives

presented in the Draft EIS on subsistence activities, and to hold public hearings if it finds that any alternative may significantly restrict subsistence uses. The preliminary evaluation of subsistence impacts indicates that certain alternatives analyzed in the Draft EIS and the associated cumulative impacts may significantly restrict subsistence uses. Therefore, the BLM will hold a public hearing on subsistence resources and activities in conjunction with the public meeting on the Draft EIS in the potentially affected community of Kaktovik.

Upon completion of a Final EIS and Record of Decision, the BLM intends to conduct lease sales in accordance with Public Law 115–97.

Authority: 40 CFR 1506.6(b).

Ted A. Murphy,

Acting State Director, Alaska.

[FR Doc. 2018–28049 Filed 12–27–18; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[19X R4079V4 RX.12255301.3000000 AZA25613]

Notice of Proposed Withdrawal Extension and Opportunity for the Public Meeting, Lake Pleasant Expansion Area, Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary—Land and Minerals Management proposes to extend the duration of Public Land Order (PLO) No. 7384 for an additional 20-year term. PLO No. 7384 withdrew 1,988.27 acres of public lands from surface entry and mining to protect the Bureau of Reclamation's (BOR) Lake Pleasant expansion area. This Notice advises the public of an opportunity to comment on the proposed withdrawal extension and to request a public meeting. The lands have been and will remain open to mineral leasing.

DATES: Comments and requests for a public meeting must be received by March 28, 2019.

ADDRESSES: All comments and meeting requests should be mailed to the Bureau of Land (BLM) Arizona State Office, One North Central, Suite 800, Phoenix, Arizona 85004 or faxed to 602–417–9452. The BLM will not consider comments received via telephone calls.

FOR FURTHER INFORMATION CONTACT: Sara Ferreira, Land Law Examiner, BLM, at 602–417–9598 or by email at *sferreir@blm.gov,* or contact the BLM Arizona State Office, One North Central, Suite 800, Phoenix, Arizona 85004. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BOR has filed an application to extend, for an additional 20-year term, a withdrawal established by PLO No. 7384 (64 FR 19386) which will expire on April 19, 2019. The legal descriptions written in PLO No. 7384 are revised to reflect the Cadastral Survey's Specifications for Descriptions of Land:

Gila and Salt River Meridian

T. 6 N., R. 1 E.,
sec. 3, a portion of lot 10;
sec. 10, S½NW¼;
sec. 15, SW¼NE¼.
T. 6 N., R. 1 W.,
sec. 1, lots 1, 2, 3, 5, 6, and 7, SW¼NE¼, E½NW¼SE¼, and E½SW¼SE¼;
sec. 12, lot 1 and E½NW¼NE¼;
sec. 13, lots 1 thru 4, W½NE¼, W½SE¼, and that portion of the W½ lying east of the east right-of-way of the Castle Hot Springs Road.
T. 7 N., R. 1 E.,
sec. 12, a portion of lot 2.
T. 7 N., R. 1 W.,
sec. 13, W½SW¼SE¼ and SW¼NW¼SE¼;
sec. 23, E½NE¼, E½NW¼NE¼, E½SW¼NE¼, NE¼SE¼, E½NW¼SE¼, and S½SE¼;
sec. 24, W½NW¼NE¼, W½SW¼NE¼, and NW¼;
sec. 25, NE¼ and W½.

The areas described aggregate 1,988.27 acres in Maricopa and Yavapai Counties.

The proposed withdrawal would continue with the purpose established by PLO No. 7384 to protect the capital investments and dispersed recreation in the BOR's Lake Pleasant Expansion area.

The use of a right-of-way, interagency agreement, or cooperative agreement would not provide adequate protection for the capital improvement investment that the BOR has made to the Lake Pleasant expansion area.

No additional water rights are needed to fulfill the purpose of the requested withdrawal extension.

There are no suitable alternative sites since the land described contain the developed Lake Pleasant expansion area.

All persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal extension may present their views in writing to the BLM.

Comments, including name and street address of respondents, will be available for public review stated in the **ADDRESSES** section above during regular business hours 08:00 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

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.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal extension. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal extension must submit written request to the State Director, BLM Arizona State Office at the address in the **ADDRESSES** section, within 90 days from the publication of this Notice. If the authorized officer determines that a public meeting will be held, a Notice of the date, time, and place will be published in the **Federal Register** and local newspapers and post on the BLM website at *www.blm.gov* at least 30 days before the scheduled date of the meeting.

The withdrawal application will be processed in accordance with the regulations set forth in 43 CFR 2310.4.

Authority: 43 CFR 2310.3–1 and 43 CFR 2310.4.

Dated: December 20, 2018.

Joseph R. Balash,

Assistant Secretary, Land and Minerals Management.

[FR Doc. 2018–28287 Filed 12–27–18; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO220000.L63100000.PH0000; OMB Control Number 1004–0058]

Agency Information Collection Activities; Forest Management Decision Protest Process and Log Export and Substitution

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Land Management (BLM), are proposing to renew an information collection with revisions.

DATES: Interested persons are invited to submit comments on or before February 26, 2019.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to the U.S. Department of the Interior, Bureau of Land Management, 1849 C Street NW, Room 2134LM, Washington, DC 20240, Attention: Jean Sonneman; or by email to *jesonnem@blm.gov.* Please reference OMB Control Number 1004–0058 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Christian Schumacher by email at *c1schuma@blm.gov,* or by telephone at 202–912–7433.

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.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comments addressing the following issues: (1) Is the collection necessary to the proper functions of the BLM; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the BLM enhance the quality, utility, and clarity of the information to be collected; and (5) how might the BLM 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. We will include or summarize each comment in our request to OMB to approve this ICR. 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: Control number 1004–0058, as currently approved, authorizes the collection of information that assists the BLM in enforcing timber export and substitution prohibitions.

The BLM now requests that control number 1004–0058 be renewed and revised by adding 2 information collection activities that have been in use without a control number.

One addition, ''Log Scale and Disposition of Timber Removed Report,'' requires purchasers of Federal timber to report volumes of timber removed from Federal lands, and to identify processors of timber. Like the previously approved information collection activities, this activity assists the BLM in enforcing timber export and substitution prohibitions.

The other addition, ''Protests,'' provides an opportunity to seek administrative remedies for forest management decisions.

Title of Collection: Forest Management Decision Protest Process and Log Export and Substitution.

OMB Control Number: 1004–0058.

Form Numbers: 5450–17, 5460–15, and 5460–17.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Purchasers of Federal timber, their affiliates, and any person who wishes to protest a BLM forest management decision.

Total Estimated Number of Annual Respondents: 325.

Total Estimated Number of Annual Responses: 325.

Estimated Completion Time per Response: Varies from 1 to 10 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 550.

Respondent's Obligation: Required to Obtain or Retain a Benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: $0.

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*).

Jean Sonneman,

Information Collection Clearance Officer, Bureau of Land Management.

[FR Doc. 2018–28288 Filed 12–27–18; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–26990; PPWOCRADN0–PCU00RP15.R50000]

Native American Graves Protection and Repatriation Review Committee: Notice of Nomination Solicitation

AGENCY: National Park Service, Interior.

ACTION: Request for nominations.

SUMMARY: The National Park Service is soliciting nominations for one member of the Native American Graves Protection and Repatriation Review Committee (Review Committee). The Secretary of the Interior will appoint one member from nominations submitted by Indian tribes, Native Hawaiian organizations, or traditional Native American religious leaders. The nominee must be a traditional Indian religious leader. The Review Committee was established by the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), and is regulated by the Federal Advisory Committee Act (FACA).

DATES: Nominations must be received by March 28, 2019.

ADDRESSES: Melanie O'Brien, Designated Federal Officer, Native American Graves Protection and Repatriation Review Committee, National NAGPRA Program (2253), National Park Service, 1849 C Street NW, Room 7360, Washington, DC 20240, (202) 354–2201 or via email *nagpra_info@nps.gov.*

FOR FURTHER INFORMATION CONTACT: Melanie O'Brien, Designated Federal Officer, Native American Graves Protection and Repatriation Review Committee, National NAGPRA Program (2253), National Park Service, 1849 C Street NW, Room 7360, Washington, DC 20240, (202) 354–2201 or via email *nagpra_info@nps.gov.*

SUPPLEMENTARY INFORMATION: The Review Committee is responsible for:

1. Monitoring the NAGPRA inventory and identification process;

2. Reviewing and making findings related to the identity or cultural affiliation of cultural items, or the return of such items;

3. Facilitating the resolution of disputes;

4. Compiling an inventory of culturally unidentifiable human remains and developing a process for disposition of such remains;

5. Consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of

the work of the Review Committee affecting such tribes or organizations;

6. Consulting with the Secretary of the Interior in the development of regulations to carry out NAGPRA; and

7. Making recommendations regarding future care of repatriated cultural items.

The Review Committee consists of seven members appointed by the Secretary of the Interior. The Secretary may not appoint Federal officers or employees to the Review Committee. Three members are appointed from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders. At least two of these members must be traditional Indian religious leaders. Three members are appointed from nominations submitted by national museum or scientific organizations. One member is appointed from a list of persons developed and consented to by all of the other members.

Members serve as Special Government Employees, and are required to complete annual ethics training. Members are appointed for 4-year terms, and incumbent members may be reappointed for 2-year terms. The Review Committee's work is completed during public meetings. The Review Committee attempts to meet in person twice a year and meetings normally last two or three days. In addition, the Review Committee may also meet by public teleconference one or more times per year.

Review Committee members serve without pay, but are reimbursed for each day of meeting attendance. Review Committee members are also reimbursed for travel expenses incurred in association with Review Committee meetings (25 U.S.C. 3006(b)(4)). Additional information regarding the Review Committee, including the Review Committee's charter, meeting protocol, and dispute resolution procedures, is available on the National NAGPRA Program website, at *https://www.nps.gov/NAGPRA/REVIEW/.*

Individuals who are federally registered lobbyists are ineligible to serve on all FACA and non-FACA boards, committees, or councils in an individual capacity. The term ''individual capacity'' refers to individuals who are appointed to exercise their own individual best judgment on behalf of the government, such as when they are designated Special Government Employees, rather than being appointed to represent a particular interest.

Nominations must:

1. If submitted by an Indian tribe or Native Hawaiian organization, be submitted on the official letterhead of the Indian tribe or Native Hawaiian organization.

2. If submitted by an Indian tribe or Native Hawaiian organization, affirm that the signatory is the official authorized by the Indian tribe or Native Hawaiian organization to submit the nomination.

3. If submitted by a Native American traditional religious leader, affirm that the signatory meets the definition of traditional Native American religious leader.

4. Provide the nominator's original signature, daytime telephone number, and email address.

5. Include the nominee's full legal name, home address, home telephone number, and email address.

6. Include the nominee's resume or a brief biography of the nominee, and address the nominee's NAGPRA experience and ability to work as a member of a Federal advisory committee. Where the original nominator is renominating the incumbent, this information need not be included in the renomination.

Nominations should include a resume providing an adequate description of the nominee's qualifications, including information that would enable the Department of the Interior to make an informed decision regarding meeting the membership requirements of the Committee and permit the Department of the Interior to contact a potential member.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information with your nomination, you should be aware that your entire nomination—including your personal identifying information—may be made publicly available at any time. While you can ask us in your nomination to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. Appendix 2; 25 U.S.C. 3006.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2018–28274 Filed 12–27–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NERO–PAGR–26988; PX.PR166532I.00.1]

Paterson Great Falls National Historical Park Advisory Commission; Notice of Public Meeting

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act of 1972, the National Park Service (NPS) is hereby giving notice that the Paterson Great Falls National Historical Park Advisory Commission will meet as indicated below.

DATES: Thursday, January 17, 2019, 2 p.m. to 5 p.m. (Eastern); (snow date: January 24, 2019, 2 p.m. to 5 p.m.), and Tuesday, March 19, 2019, 5 p.m. to 7 p.m. (Eastern).

ADDRESSES: Both meetings will be held at the Rogers Meeting Center, 32 Spruce Street, Paterson, NJ 07501.

FOR FURTHER INFORMATION CONTACT: Darren Boch, Superintendent and Designated Federal Officer, Paterson Great Falls National Historical Park, 72 McBride Avenue, Paterson, NJ 07501, telephone (973) 523–2630, or email *darren_boch@nps.gov.*

SUPPLEMENTARY INFORMATION: The Commission is authorized by the Omnibus Public Land Management Act, (16 U.S.C. 410lll), ''to advise the Secretary in the development and implementation of the management plan.'' Final agendas for these meetings will be provided on the Commission website at *https://www.nps.gov/pagr/parkmgmt/federal-advisory-commission.htm.*

Purpose of the Meeting: Topics to be discussed during the upcoming meetings include: Status of the Paterson Great Falls National Historical Park General Management Plan; review of the schematic design for the new park visitor experience center; review of design alternatives for new ''quarry lawn'' park; overview of the Commission's work since its inception, and ways to stay involved in park planning after the Commission ends on March 30, 2019.

The meetings will be open to the public and time will be reserved during each meeting for public comment. Oral comments will be summarized for the record. If individuals wish to have their comments recorded verbatim, they must submit them in writing. Written comments and requests for agenda items may be sent to: Federal Advisory

Commission, Paterson Great Falls National Historical Park, 72 McBride Avenue, Paterson, NJ 07501.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your written 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 comments will be made part of the public record and will be electronically distributed to all Commission members.

Authority: 5 U.S.C. Appendix 2; 16 U.S.C. 410lll.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2018–28275 Filed 12–27–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–26989; PPWOCRADN0–PCU00RP16.R50000]

Native American Graves Protection and Repatriation Review Committee; Notice of Public Meeting

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: The National Park Service is hereby giving notice that the Native American Graves Protection and Repatriation Review Committee (Review Committee) will hold one meeting via teleconference. All meetings are open to the public.

DATES: The Review Committee will meet via teleconference on January 16, 2019, from 2 p.m. until approximately 4 p.m. (Eastern).

FOR FURTHER INFORMATION CONTACT: Melanie O'Brien, Designated Federal Officer, National Native American Graves Protection and Repatriation Act Program (2253), National Park Service, telephone (202) 354–2201, or email *nagpra_info@nps.gov.*

SUPPLEMENTARY INFORMATION: The Review Committee was established in section 8 of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).

The purpose of the Meeting: The agenda will include the discussion of the Review Committee Report to Congress. Information on joining the teleconference will be available on the National NAGPRA Program website at *https://www.nps.gov/nagpra.*

Background

Information about NAGPRA, the Review Committee, and Review Committee meetings is available on the National NAGPRA Program website at *https://www.nps.gov/nagpra.*

Review Committee members are appointed by the Secretary of the Interior. The Review Committee is responsible for monitoring the NAGPRA inventory and identification process; reviewing and making findings related to the identity or cultural affiliation of cultural items, or the return of such items; facilitating the resolution of disputes; compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum, and recommending specific actions for developing a process for disposition of such human remains; consulting with Indian tribes and Native Hawaiian organizations and museums on matters affecting such tribes or organizations lying within the scope of work of the Review Committee; consulting with the Secretary of the Interior on the development of regulations to carry out NAGPRA; and making recommendations regarding future care of repatriated cultural items. The Review Committee's work is carried out during the course of meetings that are open to the public.

Public Disclosure of Comments: Before including your address, telephone 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.

Authority: 5 U.S.C. Appendix 2; 25 U.S.C. 3006.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2018–28276 Filed 12–27–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–27136; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before December 8, 2018, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by January 14, 2019.

ADDRESSES: Comments may be sent via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C St. NW, MS 7228, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before December 8, 2018. Pursuant to Section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

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.

Nominations submitted by State Historic Preservation Officers:

COLORADO

Larimer County

Patterson House, 121 N. Grant Ave., Fort Collins, SG100003319

NEW JERSEY

Camden County

McGuire, Peter J., Memorial and Gravesite, Arlington Cemetery, 1620 Cove Rd., Pennsauken Township, SG100003321

PENNSYLVANIA

Philadelphia County

William Brown Company Hosiery Mill, 3400–3412 J St., Philadelphia, SG100003320

SOUTH CAROLINA

Orangeburg County

McCoy Farmstead, 307 Boyer Rd., Holly Hill vicinity, SG100003315

Richland County

Evans, Dr. Matilda A., House, 2027 Taylor St., Columbia, SG100003317

VIRGINIA

Carroll County

Woodlawn School, 745 Woodlawn Rd., Woodlawn, SG100003322

Additional documentation has been received for the following resource:

SOUTH CAROLINA

Orangeburg County

Orangeburg Downtown Historic District (Orangeburg MRA). Along sections of Russell, Broughton, Middleton, Church, Meeting, St. John, Hampton & Amelia Sts. around the public square. Orangeburg, AD85002317

Authority: Section 60.13 of 36 CFR part 60.

Dated: December 10, 2018.

Christopher Hetzel,

Acting Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2018–28236 Filed 12–27–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–27189; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before December 15, 2018, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by January 14, 2019.

ADDRESSES: Comments may be sent via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C St. NW, MS 7228, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before December 15, 2018. Pursuant to Section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

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.

Nominations submitted by State Historic Preservation Officers:

ARIZONA

Maricopa County

Celebrity Theatre, 440 N 32nd St., Phoenix, SG100003323

ARKANSAS

Benton County

Rogers Milk Plant Building, 218 W Birch St., Rogers, SG100003324

Cleveland County

Magnolia Petroleum Company Filling Station, (Arkansas Highway History and Architecture MPS), SW of intersection of Larch & 1st Sts., Kingsland, MP100003325

Garland County

Tribble, Dr. Albert H., House, 100 Trivista Right, Hot Springs, SG100003327

Independence County

Batesville Commercial Historic District (Boundary Increase III), Roughly Main between State & 5th Sts., Broad between Main & Boswell Sts., Central Ave., between College Ave. & RR., Batesville, BC100003328

Jefferson County

Pine Bluff Arsenal Access Road Bridge No. 2280, AR 256 over Caney Cr., White Hall, SG100003330

Lafayette County

Gulf Oil Company Filling Station, (Arkansas Highway History and Architecture MPS), 131 Main St., Stamps, MP100003331

Mississippi County

Wilson Motor Company, (Arkansas Highway History and Architecture MPS), 42 Cortez Kennedy Ave., Wilson, MP100003332

Phillips County

Lakeview Resettlement Project Historic District, Near the jct. of AR 85 & AR 44, Lake View, SG100003357

Pulaski County

Blass, Noland, Jr., House, 217 Normandy Rd., Little Rock, SG100003333

Ross Building, 700 S Schiller St., Little Rock, SG100003334

Rush, Gene, House, 9515 Barrett Rd., Roland, SG100003335

Towbin, Dr. Eugene, House, 16 Broadview Dr., Little Rock, SG100003336

Winchester Auto Store, 323 W 8th St., Little Rock, SG100003337

Randolph County

Pocahontas Federal Savings and Loan, 201 W Broadway St., Pocahontas, SG100003338

Searcy County

Oak Hill School House (Searcy County MPS), 151 Little Oak Hill Rd., Marshall, MP100003339

Union County

Oakland, 3800 Calion Rd., El Dorado, SG100003358

MISSISSIPPI

Adams County

Concord Quarters, 301 Gayosa St., Natchez, SG100003342

Covington County

Carver Central High School, 104 Carver Dr., Collins, SG100003344

Hinds County

Spengler's Corner Historic District (Boundary Increase and Additional Documentation), 400 blk. E Capitol, 100–300 blks N State & 100 blk. N & S President Sts., Jackson, BC100003351

Jefferson County

Jefferson Chapel A.M.E. Church and Cemetery, 291 Chapel Hill Rd., Natchez vicinity, SG100003343

Pearl River County

Shaw Homestead, 1214 Barth Rd., Poplarville vicinity, SG100003345

Sharkey County

Georgianna, SW of jct. of Powell & Cary-Blanton Rds., Cary vicinity, SG100003353

Tallahatchie County

Harrison, Dr. Tandy and Sarah, House, 112 S Panola St., Charleston, SG100003346

Warren County

Tri-State Motor Coach Station, 1511 Walnut St., Vicksburg, SG100003347

TEXAS

Bandera County

River Oaks Courts, 14349 TX 16, Medina, SG100003354

VIRGINIA

Halifax County

Vaughan House, 1014 Washington Ave., South Boston, SG100003348

Rappahannock County

Washington School (Rosenwald Schools in Virginia MPS), 267 Piedmont Ave., Washington, MP100003349

Salem Independent City

Peacock-Salem Launderers and Cleaners, 231 S Colorado St., Salem (Independent City), SG100003350

In the interest of preservation, a SHORTENED comment period has been requested for the following resources:

COLORADO

Rio Blanco County

Meeker Historic District, Main, 4th, 5th, 6th, 7th & 8th Sts., Meeker, SG100003359, Comment period: 3 days

GEORGIA

Chatham County

Carver Village Historic District, Bounded by W Gwinnett & Endley Sts., Allen Blun, & Collat Aves., Savannah, SG100003340, Comment period: 3 days

A request for removal has been made for the following resources:

ARKANSAS

Crawford County

Lee Creek Bridge (Historic Bridges of Arkansas MPS), AR 59, over Lee Creek, Natural Dam, OT90000508

Jefferson County

Gracie House (Thompson, Charles L., Design Collection TR), Off AR 88, New Gascony, OT82000846

Additional documentation has been received for the following resource:

ARKANSAS

Benton County

Siloam Springs Downtown Historic District (Additional Documentation) (Benton County MRA), Roughly bounded by Sager Cr., Ashley St., Madison Ave. and Twin Springs St., Siloam Springs, AD94001338

Nomination submitted by Federal Preservation Officer:

The State Historic Preservation Officer reviewed the following nomination and responded to the Federal Preservation Officer within 45 days of receipt of the nomination and supports listing the property in the National Register of Historic Places.

MICHIGAN

Keweenaw County

Minong, Isle Royale NP, Isle Royale NP, SG100003341

Authority: Section 60.13 of 36 CFR part 60.

Dated: December 17, 2018.

Christopher Hetzel,

Acting Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2018–28229 Filed 12–27–18; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[Docket ID: BSEE–2018–0017; 190E1700D2 ET1SF0000.PSB000 EEEE500000]

Oil and Gas and Sulfur Operations in the Outer Continental Shelf—Request for Information Regarding Potential Impacts of Decommissioning-in-Place of Pipeline-Related Infrastructure in Deepwater

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice of Request for Information.

SUMMARY: The Bureau of Safety and Environmental Enforcement (BSEE) is soliciting information and public comments regarding potential impacts (including impacts on future use of the Outer Continental Shelf (OCS)) related to decommissioning-in-place (DIP) of certain pipeline-related infrastructure in deepwater (*i.e.,* depths of at least 600 feet) on the OCS. Responses to this Request for Information (RFI) will help identify technical, safety and environmental factors, as well as potential impacts to other uses of the OCS, that will inform BSEE's consideration of requests to allow DIP of such pipeline-related infrastructure in deepwater in lieu of decommissioning by removal. BSEE intends to make any written comments or other information submitted in response to this RFI publicly available on *www.regulations.gov.*

DATES: Written comments and other information in response to this RFI must be submitted on or before February 26, 2019.

ADDRESSES: You may submit comments and other information in response to this RFI by the following methods. Please use docket number BSEE–2018–0017 as an identifier in your message.

○ *Federal eRulemaking Portal: http://www.regulations.gov.* In the entry entitled, ''Enter Keyword or ID,'' enter BSEE–2018–0017 then click search. Follow the instructions to submit public comments and view supporting and related materials available for this rulemaking. BSEE may post all submitted comments.

○ Mail or hand-carry comments or other information to the Department of the Interior; Bureau of Safety and Environmental Enforcement; Attention: Regulations Development Section, 45600 Woodland Road, Sterling, Virginia 20166. Please reference ''Request for Information Regarding Potential Impacts of Decommissioning-in-place of Pipeline-related Infrastructure in Deepwater, BSEE–2018–0017'' in your submission and include your name and return address.

• Before including your address, phone number, email address, or other personal identifying information in your response, you should be aware that your entire response—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public view, we cannot guarantee that we will be able to do so. If you want BSEE to withhold from disclosure your personal identifying information, you must identify the information that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe any possible harmful consequence(s) of the disclosure of such information.

FOR FURTHER INFORMATION CONTACT: Lakeisha Harrison, Chief, Regulations and Standards Branch, at (703) 787–1552 or by email: *regs@bsee.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.* and its implementing regulations (30 CFR part 250), BSEE is responsible for regulating many activities on the OCS in order to ensure the orderly and expeditious development of oil and natural gas resources in a safe and environmentally responsible manner. Among other responsibilities, BSEE enforces regulations for decommissioning of pipelines and related infrastructure on the OCS seabed, as well as regulations for decommissioning of wells, platforms and other facilities. (*See* 30 CFR part 250, subpart Q (§§ 250.1700—250.1754).)

The Subpart Q regulations require that an operator decommission and remove pipelines, wells, platforms and other facilities when they are no longer useful for operations. (*See* 30 CFR 250.1703.) The operator must conduct these decommissioning activities in a manner that is ''safe, does not unreasonably interfere with other uses of the OCS, and does not cause undue or serious harm or damage to the human, marine or coastal environment.'' (*Id.* § 250.1703(g).) Among other things, the decommissioning regulations require the removal of all ''facilities.'' (*See, e.g., id.* §§ 250.1703(c), 250.1725.) Section 250.1700(c) defines ''facility'' to include pipeline risers and any other

equipment (*e.g.,* umbilicals) that constitute an obstruction.

The Subpart Q decommissioning regulations also require lessees, owners of operating rights, and holders of rights-of-way to clear from the seafloor all ''obstructions'' created by a lease or pipeline right-of-way operations. (*See id.* § 250.1703(e).)[1] Section 250.1700(b) defines ''obstructions'' as including ''structures, equipment or objects'' (*e.g.,* umbilicals, pipelines, and pipeline valves and risers) that, ''if left in place, would hinder other users of the OCS.'' Other uses of the OCS may include, but are not limited to, future oil and gas operations, U.S. military activities, renewable energy activities, transportation and communication projects, commercial and recreational fishing, and possibly other recreational uses.

Pursuant to § 250.1750, however, a pipeline may be decommissioned-in-place (*i.e.,* without removal), *provided that* the Regional Supervisor determines (upon application) that leaving the pipeline in place would ''not constitute a hazard (obstruction) to navigation and commercial fishing operations, unduly interfere with other uses of the OCS, or have adverse environmental effects.'' Section 250.1751 then specifies the process for applying for BSEE's approval to decommission a pipeline in place and the requirements for decommissioning in place (DIP). Consistent with this process, § 250.1751(g) requires the removal of ''pipeline valves and other fittings that could unduly interfere with other uses of the OCS.'' Thus, § 250.1751(g) permits DIP of pipeline valves and other fittings that do not ''unduly interfere'' with other uses of the OCS.

In addition, BSEE has broad authority under 30 CFR 250.142 to grant departures from the operating requirements of its regulations, under appropriate circumstances, upon written request to the District Manager or the Regional Supervisor. Such departure requests may include requests to the Regional Supervisor to decommission–in-place certain pipeline-related infrastructure beyond pipeline valves and other fittings. Pipeline-related infrastructure includes umbilicals, subsea production manifolds, pipeline end terminations (PLETs), pipeline end manifolds (PLEMs), subsea umbilical termination assemblies, pumps, and electrical or hydraulic flying leads.[2]

Deepwater developments, in particular, often involve extensive networks of pipeline-related infrastructure including, but not limited to, umbilicals, subsea production manifolds, PLETs, and PLEMs. Of the approximately 80 deepwater developments in the Gulf of Mexico, some are at—or are nearing—the end of their service lives. BSEE has received an increasing number of applications to allow DIP of certain pipeline-related infrastructure in such deepwater operations. Currently, BSEE's Gulf of Mexico Region has at least 10 such requests now pending, some of which include more than one piece of pipeline-related infrastructure. In general, such requests assert that, although technically feasible, removal is either unnecessary or less safe than DIP, on the grounds that leaving the pipeline-related infrastructure in place would not pose safety or environmental hazards or obstruct the OCS by hindering other uses.

Although BSEE does not anticipate any changes to its longstanding policies for the approval of requests to decommission pipelines (*i.e.,* the line pipe) in place pursuant to § 250.1751, BSEE is considering whether—and under what circumstances—DIP of pipeline valves and fittings and other pipeline-related infrastructure in deepwater could be considered appropriate. In particular, to determine whether it is appropriate for pipeline valves and fittings to be decommissioned-in-place in accordance with § 250.1751(g), BSEE must assess whether the valves and fittings would unduly interfere with other uses of the OCS. Similarly, to determine whether it is appropriate to grant departure requests to allow DIP of other pipeline-related infrastructure in deepwater pursuant to § 250.142, BSEE must assess whether the pipeline-related infrastructure would constitute a hazard (obstruction) or otherwise unduly interfere with other uses of the OCS, or would have adverse safety or environmental consequences if left in place.

BSEE is also identifying technical considerations that may be relevant to BSEE's determinations as to whether it would be appropriate to approve requests to allow DIP of pipeline valves and fittings (pursuant to § 250.1751(g)) and other pipeline-related infrastructure (pursuant to § 250.142) in deepwater. For instance, BSEE has determined that water depth is an important technical factor in making such determinations; *i.e.,* the greater the water depth, the less chance that DIP of pipeline valves and fittings or other pipeline-related infrastructure would cause obstructions or interfere with present or future uses of the OCS. Accordingly, BSEE is considering whether to apply a tiered approach to consideration of requests to approve DIP in deepwater based on water depth (*e.g.,* in depths from 600 feet/182 meters) to 2625 feet/800 meters) and in depths greater than 2625 feet), with justifications for approvals being potentially less stringent in the greatest depths (*i.e.,* where obstructions to navigation or commercial fishing or other activities are significantly less likely to occur than at shallower depths).[3]

However, many variables and site-specific factors—in addition to water depth—can affect whether DIP is appropriate in a given case. For example, the size and location of pipeline-related infrastructure may also be important technical considerations. Some pipeline-related infrastructure is extremely large (*e.g.,* subsea manifolds may occupy up to about 72,000 cubic feet and reach heights of up to 35 feet), potentially increasing the possibility of obstacles or other interference with use of the OCS. In some cases, especially for very large projects, it is possible that certain pipeline-related infrastructure may abut or cross multiple lease sections. Leaving such equipment in place, even in deepwater, potentially could create obstacles or otherwise interfere with use of the OCS (*e.g.,* by inhibiting bidding on these tracts at

[1] The clearance of obstructions must be verified by means specified in the regulations or approved by BSEE and the verified clearance must then be certified in writing to BSEE. (*See* 30 CFR 250.1740—250.1743)).

[2] A PLEM is generally used to connect multiple pipelines; often serving as a tieback point for jumpers coming from subsea wells. Depending upon sediment conditions, some PLEMs are fastened to the seabed with piles or secured atop suction pile anchors to maintain position. A PLET is usually associated with a single line, providing a connection point to a PLEM, another pipeline/jumper, or a riser assembly coming up to a platform. Most PLETs are fixed atop sleds or other gravity-based foundations.

[3] BSEE does not contemplate approving applications under § 250.1751(g) for DIP of pipeline valves and fittings, or approving departures under § 250.142 for DIP of pipeline-related infrastructure, except in deepwater. BSEE believes that 600 feet/182 meters is an appropriate starting point for consideration of requests to allow DIP of pipeline-related infrastructure because 600 feet is below the depths at which trawling equipment for commercial fishing can typically reach. BSEE also believes that 2625 feet/800 meters) is an appropriate depth at which to consider potentially less stringent requirements for deepwater DIP because that is the depth specified in § 250.1716 at which BSEE may waive the requirement for removal of wellheads. By contrast, given the potential for obstructions or other interference with uses of the OCS in depths of less than 600 feet, BSEE continues to expect that all pipeline-related infrastructure in such shallower water will be removed, and that obstructions will be cleared, as presumptively required by the Subpart Q regulations.

future lease sales or discouraging exploration, development, or production under other leases or by interfering with potential future renewable energy activities).

Thus, the issues related to DIP of pipeline valves and fittings and other pipeline-related infrastructure in deepwater are potentially complex, especially in light of the size and scope of some projects. Accordingly, BSEE invites the public to submit relevant information and comments on such issues in order to help BSEE establish a consistent and reasonable approach to consideration of requests to allow DIP of pipeline valves and fittings and other pipeline-related infrastructure in deepwater.

II. Request for Information

BSEE would appreciate your views, and any relevant technical information you can provide, on whether and under what circumstances it would be appropriate for BSEE to approve DIP of pipeline valves and fittings (pursuant to § 250.1751(g)) and of other pipeline-related infrastructure (pursuant to § 250.142) in deepwater. Among other issues, BSEE would appreciate comments and information related to whether DIP of pipeline valves and fittings or other pipeline-related infrastructure in deepwater: (1) Could increase (or decrease) safety or environmental risks as compared to decommissioning by removal; or (2) could interfere with navigation, create an obstruction, or otherwise unduly interfere with present or future uses of the OCS.

Please be as specific as possible in expressing your views and in the other information you provide. For example, please consider how your views or information could vary depending on specific circumstances, such as the water depth at which decommissioning takes place. Wherever possible, please provide relevant factual support for your views.

Scott A. Angelle,

Director, Bureau of Safety and Environmental Enforcement.

[FR Doc. 2018–28304 Filed 12–27–18; 8:45 am]

BILLING CODE 4310–VH–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1139]

Certain Electronic Nicotine Delivery Systems and Components Thereof; Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Correction of Notice.

SUMMARY: Correction is made to notice 83 FR 64156, which was published on December 13, 2018; the investigation number, ''Investigation No. 337–TA–1139,'' is erroneously missing from the title of the investigation.

By order of the Commission.

Issued: December 20, 2018.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2018–28176 Filed 12–27–18; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1081]

Certain LED Devices, LED Power Supplies, and Components Thereof Notice of Request for Submissions on the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the presiding administrative law judge (''ALJ'') has issued a recommended determination on remedy and bonding should a violation be found in the above-captioned investigation. The Commission is soliciting submissions on public interest issues raised by the recommended limited exclusion order against certain LED devices, LED power supplies, and components thereof, manufactured and imported by respondents Feit Electric Company, Inc. of Pico Rivera, California; Feit Electric Company, Inc. (China) of Xiamen, China; L G Sourcing, Inc. of North Wilkesboro, North Carolina; and Satco Products, Inc. of Brentwood, New York. This notice is soliciting comments from the public only. Parties are to file public interest submissions pursuant to 19 CFR 210.50(a)(4).

FOR FURTHER INFORMATION CONTACT: Robert Needham, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–5468. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and 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 (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: Section 337 of the Tariff Act of 1930 provides that if the Commission finds a violation it shall exclude the articles concerned from the United States:

> unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1).

The Commission is interested in further development of the record on the public interest in these investigations. Accordingly, members of the public are invited to file submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the administrative law judge's recommended determination on remedy and bonding issued in this investigation on December 19, 2018. Comments should address whether issuance of the recommended limited exclusion order in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the recommended limited exclusion order are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the recommended limited exclusion order;

(iii) Identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the

subject articles if they were to be excluded;

(iv) Indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the recommended limited exclusion order within a commercially reasonable time; and

(v) Explain how the recommended limited exclusion order would impact consumers in the United States.

Written submissions must be filed no later than by close of business on January 16, 2019.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (''Inv. No. 1081'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[1] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: December 20, 2018.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2018–28174 Filed 12–27–18; 8:45 am]

BILLING CODE 7020–02–P

[1] All contract personnel will sign appropriate nondisclosure agreements.

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1074]

Certain Industrial Automation Systems and Components Thereof Including Control Systems, Controllers, Visualization Hardware, Motion and Motor Control Systems, Networking Equipment, Safety Devices, and Power Supplies; Commission Determination Not To Review a Final Initial Determination Finding a Section 337 Violation by the Defaulted Respondents

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review a final initial determination (''FID'') of the presiding administrative law judge (''ALJ'') finding a section 337 violation by the Defaulted Respondents. The Commission also requests written submissions, under the schedule set forth below, on remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–4716. Copies of non–confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 16, 2017, based on a complaint filed by Complainant Rockwell Automation, Inc. of Milwaukee, Wisconsin. *See* 82 FR 48113–15 (Oct. 16, 2017). The complaint, as supplemented, alleges violations of section 337 based on the infringement of certain registered trademarks and copyrights and on unfair methods of competition and unfair acts in the importation or sale of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies, the threat or effect of which is to destroy or substantially injure an industry in the United States. *See id.* The Notice of Investigation identifies the following respondents: Can Electric Limited of Guangzhou, China (''Can Electric''); Capnil (HK) Company Limited of Hong Kong (''Capnil''); Fractioni (Hongkong) Ltd. of Shanghai, China (''Fractioni''); Fujian Dahong Trade Co. of Fujian, China (''Dahong''); GreySolution Limited d/b/a Fibica of Hong Kong (''GreySolution''); Huang Wei Feng d/b/a A–O–M Industry of Shenzhen, China (''Huang''); KBS Electronics Suzhou Co, Ltd. of Shanghai, China (''KBS''); PLC–VIP Shop d/b/a VIP Tech Limited of Hong Kong (''PLC–VIP''); Radwell International, Inc. d/b/a PLC Center of Willingboro, New Jersey (''Radwell''); Shanghai EuoSource Electronic Co., Ltd of Shanghai, China (''EuoSource''); ShenZhen T-Tide Trading Co., Ltd. of Shenzhen, China (''T-Tide''); SoBuy Commercial (HK) Co. Limited of Hong Kong (''SoBuy''); Suzhou Yi Micro Optical Co., Ltd., d/b/a Suzhou Yiwei Guangxue Youxiangongsi, d/b/a Easy Microoptics Co. LTD. of Jiangsu, China (''Suzhou''); Wenzhou Sparker Group Co. Ltd., d/b/a Sparker Instruments of Wenzhou, China (''Sparker''); and Yaspro Electronics (Shanghai) Co., Ltd. of Shanghai, China (''Yaspro''). *See id.* In addition, the Office of Unfair Import Investigations is also a party in this investigation. *See id.*

Nine respondents were found in default, namely, Fractioni, GreySolution, KBS, EuoSource, T-Tide, SoBuy, Suzhou, Yaspro and Can Electric (collectively, ''the Defaulted Respondents''). *See* Order No. 17 (Feb. 1, 2018), *unreviewed,* Comm'n Notice

(Feb. 26, 2018); Order No. 32 (June 28, 2018), *unreviewed,* Comm'n Notice (July 24, 2018). Furthermore, five unserved respondents (Capnil, Dahong, Huang, PLC–VIP, and Sparker) were terminated from the investigation, and one respondent (Radwell) was terminated based on the entry of a consent order. *See* Order No. 41 (July 17, 2018), *unreviewed,* Comm'n Notice (Aug. 13, 2018); Order No. 42 (July 20, 2018), *unreviewed,* Comm'n Notice (Aug. 15, 2018).

On October 23, 2018, the ALJ issued the subject FID finding a violation of section 337 by the Defaulted Respondents and recommending that the Commission: (1) Issue a general exclusion order; (2) issue a cease and desist order against Defaulted Respondent Fractioni; and (3) set a bond at 100 percent of the entered value. No petitions for review of the subject FID were filed.

The Commission has determined not to review the subject FID.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843 (Dec. 1994) (Comm'n Op.).

In particular, the written submissions should address any request for a cease and desist order in the context of recent Commission opinions, including those in *Certain Arrowheads with Deploying Blades and Components Thereof and Packaging Therefor,* Inv. No. 337–TA–977, Comm'n Op. (Apr. 28, 2017) and *Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing the Same,* Inv. No. 337–TA–959, Comm'n Op. (Feb. 13, 2017). Specifically, if Complainant seeks a cease and desist order against a defaulting respondent, the written submissions should respond to the following requests:

(1) Please identify with citations to the record any information regarding commercially significant inventory in the United States as to each respondent against whom a cease and desist order is sought. If Complainant also relies on other significant domestic operations that could undercut the remedy provided by an exclusion order, please identify with citations to the record such information as to each respondent against whom a cease and desist order is sought.

(2) In relation to the infringing products, please identify any information in the record, including allegations in the pleadings, that addresses the existence of any domestic inventory, any domestic operations, or any sales-related activity directed at the United States for each respondent against whom a cease and desist order is sought.

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the HTSUS numbers under which the accused products are imported and to supply the names of known importers of the infringing articles.

Written submissions must be filed no later than close of business on January 11, 2019. Reply submissions must be filed no later than the close of business on January 18, 2019. Such submissions should address the ALJ's recommended determinations on remedy and bonding which were made in the FID. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (''Inv. No. 337–TA–1074'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *https://www.usitc.gov/secretary/documents/handbook_on_filing_procedures.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[1] solely for cybersecurity purposes. All non-confidential written submissions will be available for public

[1] All contract personnel will sign appropriate nondisclosure agreements.

inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.
Issued: December 20, 2018.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2018–28175 Filed 12–27–18; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Hearing of the Judicial Conference Advisory Committee on the Federal Rules of Evidence

AGENCY: The Advisory Committee on the Federal Rules of Evidence, Judicial Conference of the United States.

ACTION: Notice of cancellation of public hearing.

SUMMARY: The January 18, 2019 public hearing in Washington, DC, on proposed amendments to the Evidence Rules has been canceled.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Womeldorf, Rules Committee Secretary, Rules Committee Staff, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

SUPPLEMENTARY INFORMATION: Announcements for this hearing were previously published in 83 FR 39463 and 83 FR44305.

Dated: December 20, 2018.

Rebecca A. Womeldorf,

Rules Committee Secretary.

[FR Doc. 2018–28160 Filed 12–27–18; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–488E]

Established Aggregate Production Quotas for Schedule I and II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2019

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final order.

SUMMARY: This final order establishes the initial 2019 aggregate production quotas for controlled substances in schedules I and II of the Controlled Substances Act and the assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine.

DATES: Valid December 28, 2018.

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

SUPPLEMENTARY INFORMATION:

Legal Authority

Section 306 of the Controlled Substances Act (CSA) (21 U.S.C. 826) requires the Attorney General to establish aggregate production quotas for each basic class of controlled substance listed in schedules I and II and for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. The Attorney General has delegated this function to the Administrator of the DEA pursuant to 28 CFR 0.100.

Background

The 2019 aggregate production quotas and assessment of annual needs represent those quantities of schedule I and II controlled substances and the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine that may be manufactured in the United States in 2019 to provide for the estimated medical, scientific, research, and industrial needs of the United States, for lawful export requirements, and for the establishment and maintenance of reserve stocks. These quotas include imports of ephedrine, pseudoephedrine, and phenylpropanolamine, but do not include imports of controlled substances for use in industrial processes.

On August 20, 2018, the DEA published a notice titled ''Proposed Aggregate Production Quotas for Schedule I and II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2019'' in the **Federal Register**. 83 FR 42164. This notice proposed the 2019 aggregate production quotas for each basic class of controlled substance listed in schedules I and II and the 2019 assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. All interested persons were invited to comment on or object to the proposed aggregate production quotas and the proposed assessment of annual needs on or before September 19, 2018.

Comments Received

The DEA received 48 comments from professional organizations, patients, associations, universities, Senators, State Attorneys General, a doctor, DEA registered entities, and non-DEA entities. The comments included concerns about the quota process, shortages, prescriptions, diversion, marihuana, requests for a hearing, requests for increase in specific production quotas, and other comments that are outside the scope of the notice.

Quota Process

There were eight commenters that expressed concerns about the quota process. Some of these commenters requested that the DEA consider information from the Department of Health and Human Services (HHS) and the Food and Drug Administration (FDA) to determine the aggregate production quota. Other commenters stated that the DEA did not consider the factors contained in the Controlled Substances Quotas Final Rule published on July 16, 2018, 83 FR 32784, to determine the 2019 aggregate production quota.

The DEA has obtained and considered relevant information from the FDA. The information the DEA received included the observed and estimated domestic usage of 26 schedule II controlled substances, new drug applications and abbreviated drug application approvals, and clinical trials for schedule I and II controlled substances.

Regarding the Final Rule published on July 16, 2018, 83 FR 32784, the DEA amended the factors set forth in 21 CFR 1303.11 to be considered when setting the aggregate production quotas to include the extent of diversion of the controlled substances in each class, and relevant information obtained from the HHS, the FDA, the Centers for Disease Control and Prevention (CDC), the Centers for Medicare and Medicaid Services (CMS), and the states.

The DEA has solicited the states and federal partners to obtain relevant information to be considered when setting the aggregate production quota pursuant to 21 CFR 1303.11 and this information will be considered for the 2019 proposed adjustments to the aggregate production quota. The DEA will continue to solicit information from the states for the 2020 aggregate production quotas and the years to follow.

However, the DEA is obligated to issue individual production and procurement quotas sufficiently in advance of the upcoming year to allow manufacturers to prepare for the legitimate needs of the United States. The DEA may not issue individual production and procurement quotas until the aggregate production quotas have been established. As a result of these obligations under the CSA, the DEA was not able to obtain and consider the amended factors set forth in Final Rule, 83 FR 32784, for the purpose of issuing the 2019 proposed aggregate production quota.

The DEA has a fluid process for setting quotas which allows the agency to make necessary quota adjustments. The process involves setting the proposed aggregate production quotas for a calendar year, and, following the review of any comments, the issuance of a Final Order to establish the aggregate production quota. Later in the process, the DEA issues a Proposed Adjustment to the aggregate production quota, and following the review of any comments, DEA issues a final order setting the Final Adjusted Aggregate Production Quotas. The DEA will consider the additional information received in the course of preparing proposed amendments and the final 2019 adjusted aggregate production quota.

Shortages

There were 28 commenters that expressed concerns about the decrease in certain aggregate production quotas. These commenters alleged that decreases to the aggregate production quotas have resulted in a shortage of injectable opioid medications and interfere with the treatment of patients. Some of these commenters also suggested that the DEA separate quotas for solid oral controlled substances and injectable controlled substances, and that DEA allow consideration by individual pharmaceutical dosage forms.

The DEA is committed to ensuring an adequate and uninterrupted supply of controlled substances in order to meet legitimate medical, scientific, and export needs of the United States. Although the DEA sets the aggregate production quota, it is possible that manufacturers' business practices may lead to a shortage of controlled substances at the consumer level, despite the adequacy of the aggregate production quota set by DEA. The aggregate production quotas are set by the DEA in a manner to include both injectable opioids and solid oral opioids in order to ensure that the estimated medical needs of the United States are met.

Notably, at the time of the proposed aggregate production quota, 21 U.S.C. 826(a) provided that ''production quotas shall be established in terms of quantities of each basic class of controlled substance and not in terms of individual pharmaceutical dosage forms prepared from or containing such a controlled substance.'' On October 24, 2018, the President signed into law the SUPPORT for Patients and Communities Act of 2018, (Pub. L. 115–271), which now allows but does not require the DEA to grant quotas in terms of dosage forms if the agency determines that doing so will assist in avoiding the overproduction, shortages, or diversion of a controlled substance. DEA will be evaluating these issues over time.

Furthermore, the DEA and the FDA can coordinate efforts to prevent or alleviate drug shortages pursuant to 21 U.S.C. 826a(2). For example, the asserted domestic shortage of injectable controlled substances was alleviated through the FDA and the DEA collaboration to get specific injectable controlled substances imported into the United States.

Transparency

Two Senators submitted a joint comment supporting the DEA's efforts to address the opioid crisis, but expressed concerns that the aggregate production quota for schedule II opioids remains too high. These commenters also requested a transparent explanation of the analysis and specific considerations that the DEA considered when establishing the 2019 quotas for schedule II opioids.

The DEA continues to address the opioid crisis through initiatives such as the President's Safer Prescribing Plan, which seeks to reduce nationwide opioid prescription fills by one-third within three years. The DEA has observed a decline in the number of prescriptions written for schedule II opioids since 2014 and will continue to set aggregate production quotas to meet the medical needs of the United States while combating the opioid crisis.

In determining the aggregate production quota, the DEA took into account the data regarding the number of prescriptions that have been issued and an analysis of the factors as then set forth in 21 CFR 1303.11. The specific information that was obtained and considered included an analysis of sales data from databases such as Automation of Reports and Consolidated Orders System (ARCOS) and IQVIA; in addition to FDA forecasts and projections, historical total market sales data, products entering and exiting the market, expected product development, expected exports, inventory data, theft and loss data, and company forecasts. As a result, the final aggregate production quota for several opioids are decreased from the proposed initial 2019 levels. These decreases take into account the combined efforts of the the DEA, the FDA, and the CDC enforcing regulations and issuing guidance documents as well as many states enacting prescription monitoring database programs to stem the opiate/opioid epidemic.

Quotas and Prescriptions

Eleven State Attorneys General submitted a joint comment recognizing DEA's efforts to combat the opioid epidemic and expressed concerns about excessive quotas for opioids. These commenters also expressed concerns about overprescribing and referenced various studies. The referenced material cited in these comments also discuss patients who divert their prescriptions by sharing their prescriptions with others.

The DEA continues to address the opioid crisis through laws, regulations, and initiatives such as the Safer Prescribing Plan. The Safer Prescribing Plan seeks to reduce nationwide opioid prescription fills by one-third within three years. The DEA has observed a decline for certain prescriptions written for schedule II opioids since 2014 which can be attributed to federal and state government activities and interventions, including the implementation of Prescription Drug Monitoring Programs, enforcement of current regulations, and guidance documents such as the CDC Guidelines for Prescribing Opioids for Chronic Pain—United States, March 2016. The DEA will continue to address the opioid crisis while ensuring an adequate and uninterrupted supply of controlled substances in order to meet the demand of legitimate medical, scientific, and export needs of the United States.

The DEA sets aggregate production quotas in a manner to ensure that all prescriptions that are authorized for legitimate medical purposes can be filled. Prescribers who are authorized to dispense controlled substances are responsible for adhering to the laws and regulations set forth under the CSA, which requires doctors to only write prescriptions for legitimate medical needs. Any practitioner issuing an invalid prescription for controlled substances and any pharmacy filling such a prescription would be in violation of the CSA.

Upon review of the studies, DEA has determined that they are insufficient to support a reduction in the aggregate production quotas. The studies have found, with respect to a variety of medical procedures, that physicians prescribe more controlled substances for post-operative pain than the patients utilize. However, the DEA has concluded that while the referenced studies are concerning, they are insufficient to support a determination as to the level of overprescribing that occurs across the range of the medical procedures that are performed each year on a national basis.

Including Diversion in Quotas

Eleven State Attorneys General and three other commenters expressed concerns about DEA's ability to account for diversion when setting the aggregate production quotas.

The factors that DEA considers in setting the aggregate production quotas were amended in a Final Rule published on July 16, 2018, 83 FR 32784, to include the extent of any diversion of the controlled substances in the class, which will strengthen DEA's ability to reduce the likelihood of the diversion of controlled substances. When setting the established aggregate production quota, the DEA accounted for diversion by analyzing information such as, reports of controlled substance thefts and losses, and seizure data that are captured through internal DEA databases and will continue to do so when setting future aggregate production quotas. The DEA will also consider information obtained from CMS, CDC, FDA, and the states which may include diversion data to be considered for the adjusted aggregate production quota.

Marihuana

Seven commenters expressed their support for the increase in the production quota of marihuana. Three of those commenters expressed concerns about approval of applications for registration to manufacture (grow) marihuana. The DEA increased the production quota for marihuana based solely on increased usage projections for federally approved research projects. The DEA continues to review applications for registration and registers the number of bulk manufacturers of a controlled substance that is necessary to produce an adequate and uninterrupted supply.

Hearings

Two commenters urged DEA to hold a public hearing. One of the commenters stated that the DEA should have a hearing to gather stakeholder feedback on how the DEA can help address the opioid epidemic while ensuring an adequate supply of opioids for clinically appropriate care. The second commenter stated that the DEA should hold a hearing to enable stakeholders to express their views about the proposed reductions.

Under the DEA regulations, the decision of whether to grant this type of a hearing on the issues raised by the commenters lies solely within the discretion of the Administrator. (21 CFR 1303.11(c) and 21 CFR 1303.13 (c)). I find that neither of the foregoing two requests presented any evidence that would lead me to conclude that a hearing is necessary or warranted. Therefore, I decline to order a hearing on the issues presented by the commenters.

Specific Quota for DEA-Registered Manufacturers

The DEA received comments from four DEA-registered manufacturers regarding thirty-three different schedule I and II controlled substances. These commenters stated the proposed aggregate production quotas for 3-methyl fentanyl, 4–ANPP, acetyl fentanyl, acryl fentanyl, beta-hydroxythiofentanyl, butyrl fentanyl, carfentanil, cyclopentyl fentanyl, cyclopropyl fentanyl, d-amphetamine (for sale), d,l-amphetamine, difenoxylate (for sale), fentanyl, fentanyl related substances, furanyl fentanyl, gamma hydroxybutyric acid, isobytyryl fentanyl, levorphanol, methoxyacetyl fentanyl, noroxymorphone (for conversion), ocfentanil, opium (powder), oxycodone (for sale), para-chloroisobutyryl fentanyl, para-fluorofentanyl, para-fluorobutyryl fentanyl, para-methyoxybutyrl fentanyl, remifentanil, sufentanil, tetrahydrofuranyl fentanyl, thebaine, U–47700, and valeryl fentanyl were potentially insufficient to provide for the estimated medical, scientific, research, and industrial needs of the United States, export requirements, and the establishment and maintenance of reserve stocks.

The DEA has considered the comments for specific controlled substances and made adjustments as needed which are described below in the section titled Determination of 2019 Aggregate Production Quotas and Assessment of Annual Needs. The DEA did not receive any comments to the proposed established 2019 assessment of annual needs for ephedrine, pseudoephedrine, and phenylpropanolamine.

Out of Scope

The DEA received seven comments which addressed issues that are outside the scope of this final order. The comments were general in nature and raised issues of specific medical illnesses, medical treatments, and medication costs and, therefore, are outside of the scope of this Final Order, and do not impact the original analysis involved in establishing the 2019 aggregate production quotas.

Determination of 2019 Aggregate Production Quotas and Assessment of Annual Needs

In determining the 2019 aggregate production quotas and assessment of annual needs, the DEA has taken into consideration the above comments along with the factors previously set forth in 21 CFR 1303.11 (as described above) and 21 CFR 1315.11, in accordance with 21 U.S.C. 826(a), and other relevant factors, including the 2018 manufacturing quotas, current 2018 sales and inventories, anticipated 2019 export requirements, industrial use, additional applications for 2019 quotas, as well as information on research and product development requirements.

Based on all of the above, the Administrator is establishing the 2019 aggregate production quotas. These quotas are lower for codeine (for sale), codeine (for conversion), hydrocodone (for sale), morphine (for sale), and oxycodone (for sale); higher for cyclopentyl fentanyl, methoxyacetyl fentanyl, N-ethlypentylone (ephylone), para-methyoxybutyryl fentanyl, and para-chloroisobutyryl fentanyl due to their temporarily controlled status; higher for amphetamine (for conversion) based on increased usage forecasted by the FDA and its use in the treatment of Attention Deficit Hyperactivity Disorder; higher for levorphanol based on manufacturers' ongoing product development activities necessary for the FDA approval process; and higher for opium powder and sufentanil based on manufacturers' projected exports.

Regarding 3-methylfentanyl, 4–ANPP, acetyl fentanyl, acryl fentanyl, beta-hydroxythiofentanyl, butyryl fentanyl, carfentanil, cyclopropyl fentanyl, d-amphetamine (for sale), d,l-amphetamine, difenoxylate (for sale), fentanyl, fentanyl related substances, furanyl fentanyl, gamma hydroxybutyric acid, isobutyryl fentanyl, noroxymorphone (for conversion), ocfentanil, para-fluorofentanyl, para-fluorobutyrl fentanyyl, remifentanil, tetrahydrofuranyl fentanyl, thebaine, U–47700, and valeryl fentanyl, the DEA

has determined the proposed aggregate production quotas and assessment of annual needs are sufficient to provide for the 2019 estimated medical, scientific, research, industrial needs of the United States, export requirements, and the establishment and maintenance of reserve stocks. This final order establishes these aggregate production quotas and assessment of annual needs at the same amounts as proposed.

In accordance with 21 U.S.C. 826, 21 CFR 1303.11, and 21 CFR 1315.11, the Administrator hereby establishes the 2019 aggregate production quotas for the following schedule I and II controlled substances and the 2019 assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine, expressed in grams of anhydrous acid or base, as follows:

Basic class	Established 2019 quotas (g)
Schedule I	
1-[1-(2-Thienyl)cyclohexyl]pyrrolidine	20
1-(1-Phenylcyclohexyl)pyrrolidine	15
1-(2-Phenylethyl)-4-phenyl-4-acetoxypiperidine	10
1-(5-Fluoropentyl)-3-(1-naphthoyl) indole (AM2201)	30
1-(5-Fluoropentyl)-3-(2-iodobenzoyl) indole (AM–694)	30
1-Benzylpiperazine	25
1-Methyl-4-phenyl-4-propionoxypiperidine	10
1-[1-(2-Thienyl)cyclohexyl]piperidine	15
2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C-E)	30
2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C-D)	30
2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C-N)	30
2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine (2C-P)	30
2-(2,5-Dimethoxyphenyl)ethanamine (2C-H)	30
2-(4-Bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine (25B-NBOMe; 2C-B-NBOMe; 25B; Cimbi-36)	30
2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C-C)	30
2-(4-Chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25C-NBOMe; 2C-C-NBOMe; 25C; Cimbi-82)	25
2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C-I)	30
2-(4-Iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine (25I-NBOMe; 2C-I-NBOMe; 25I; Cimbi-5)	30
2,5-Dimethoxy-4-ethylamphetamine (DOET)	25
2,5-Dimethoxy-4-(n)-propylthiophenethylamine	25
2,5-Dimethoxyamphetamine	25
2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-2)	30
2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-4)	30
3,4,5-Trimethoxyamphetamine	30
3,4-Methylenedioxyamphetamine (MDA)	55
3,4-Methylenedioxymethamphetamine (MDMA)	50
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	40
3,4-Methylenedioxy-N-methylcathinone (methylone)	40
3,4-Methylenedioxypyrovalerone (MDPV)	35
3-FMC; 3-Fluoro-N-methylcathinone	25
3-Methylfentanyl	30
3-Methylthiofentanyl	30
4-Bromo-2,5-dimethoxyamphetamine (DOB)	30
4-Bromo-2,5-dimethoxyphenethylamine (2-CB)	25
1-(4-Cyanobutyl)-N-(2-phenylpropan-2-yl)-1H-indazole-3-carboximide	25
4-Fluoroisobutyryl fentanyl	30
4-FMC; Flephedrone	25
4-MEC; 4-Methyl-N-ethylcathinone	25
4-Methoxyamphetamine	150
4-Methyl-2,5-dimethoxyamphetamine (DOM)	25
4-Methylaminorex	25
4-Methyl-N-methylcathinone (mephedrone)	45
4-Methyl-α-pyrrolidinopropiophenone (4-MePPP)	25
5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol	50
5-(1,1-Dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol or CP-47,497 C8-homolog)	40
N-(1-Amino-3-methyl-1-oxobutan-2-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide	25
1-(5-Fluoropentyl)-N-(2-phenylpropan-2-yl)-1H-pyrrolo[2,3-b]pyridine-3-carboxamide	25
5F-ADB; 5F-MDMB-PINACA (methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate)	30
5F-AMB (methyl 2-(1-(5-fluoropentyl)-1*H*-indazole-3-carboxamido)-3-methylbutanoate)	30
5F-APINACA; 5F-AKB48 (*N*-(adamantan-1-yl)-1-(5-fluoropentyl)-1*H*-indazole-3-carboxamide)	30
5-Fluoro-PB-22; 5F-PB-22	20
5-Fluoro-UR144, XLR11 ([1-(5-fluoro-pentyl)-1*H*indol-	
3-yl](2,2,3,3-tetramethylcyclopropyl)methanone	25
5-Methoxy-3,4-methylenedioxyamphetamine	25
5-Methoxy-N-N-diisopropyltryptamine	25
5-Methoxy-N-N-dimethyltryptamine	25
AB-CHMINACA	30
AB-FUBINACA	50
AB-PINACA	30
ADB-FUBINACA (*N*-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1*H*-indazole-3-carboxamide)	30
Acetyl Fentanyl	100

Basic class	Established 2019 quotas (g)
Acetyl-*alpha*-methylfentanyl	30
Acetyldihydrocodeine	30
Acetylmethadol	2
Acryl Fentanyl	25
ADB-PINACA (*N*-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-pentyl-1*H*-indazole-3-carboxamide)	50
AH-7921	30
Allylprodine	2
Alphacetylmethadol	2
alpha-Ethyltryptamine	25
Alphameprodine	2
Alphamethadol	2
alpha-Methylfentanyl	30
alpha-Methylthiofentanyl	30
alpha-Methyltryptamine (AMT)	25
alpha-Pyrrolidinobutiophenone (α-PBP)	25
alpha-Pyrrolidinopentiophenone (α-PVP)	25
Aminorex	25
Anileridine	20
APINACA, AKB48 (*N*-(1-adamantyl)-1-pentyl-1*H*-indazole-3-carboxamide)	25
Benzylmorphine	30
Betacetylmethadol	2
beta-Hydroxy-3-methylfentanyl	30
beta-Hydroxyfentanyl	30
beta-Hydroxythiofentanyl	30
Betameprodine	2
Betamethadol	4
Betaprodine	2
Bufotenine	3
Butylone	25
Butyryl Fentanyl	30
Cathinone	24
Codeine methylbromide	30
Codeine-N-oxide	192
Cyclopentyl Fentanyl	30
Cyclopropyl Fentanyl	20
Desomorphine	25
Diampromide	20
Diethylthiambutene	20
Diethyltryptamine	25
Difenoxin	8,225
Dihydromorphine	753,500
Dimethyltryptamine	50
Dipipanone	5
Etorphine	30
Fenethylline	30
Fentanyl related substances	25
Furanyl Fentanyl	30
gamma-Hydroxybutyric acid	33,417,000
Heroin	45
Hydromorphinol	40
Hydroxypethidine	2
Ibogaine	30
Isobutyryl Fentanyl	25
JWH-018 and AM678 (1-Pentyl-3-(1-naphthoyl)indole)	35
JWH-019 (1-Hexyl-3-(1-naphthoyl)indole)	45
JWH-073 (1-Butyl-3-(1-naphthoyl)indole)	45
JWH-081 (1-Pentyl-3-(1-(4-methoxynaphthoyl))indole)	30
JWH-122 (1-Pentyl-3-(4-methyl-1-naphthoyl)indole)	30
JWH-200 (1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole)	35
JWH-203 (1-Pentyl-3-(2-chlorophenylacetyl)indole)	30
JWH-250 (1-Pentyl-3-(2-methoxyphenylacetyl)indole)	30
JWH-398 (1-Pentyl-3-(4-chloro-1-naphthoyl)indole)	30
Lysergic acid diethylamide (LSD)	40
MAB-CHMINACA; ADB-CHMINACA (*N*-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-1*H*-indazole-3-carboxamide)	30
MDMB-CHMICA; MMB-CHMINACA(methyl 2-(1-(cyclohexylmethyl)-1*H*-indole-3-carboxamido)-3,3-dimethylbutanoate)	30
MDMB-FUBINACA (methyl 2-(1-(4-fluorobenzyl)-1*H*-indazole-3-carboxamido)-3,3-dimethylbutanoate)	30
Methyl2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3-methylbutanoate	25
Marihuana	2,450,000
Mecloqualone	30
Mescaline	25
Methaqualone	60

Basic class	Established 2019 quotas (g)
Methcathinone	25
Methoxyacetyl Fentanyl	30
Methyldesorphine	5
Methyldihydromorphine	2
Morphine methylbromide	5
Morphine methylsulfonate	5
Morphine-N-oxide	150
Naphthalen-1-yl 1-(5-fluorpentyl)-1H-indole-3-carboxylate	25
N,N-Dimethylamphetamine	25
Naphyrone	25
N-Ethyl-1-phenylcyclohexylamine	5
N-Ethyl-3-piperidyl benzilate	10
N-Ethylamphetamine	24
N-Ethylpentylone (ephylone)	30
N-Hydroxy-3,4-methylenedioxyamphetamine	24
Noracymethadol	2
Norlevorphanol	55
Normethadone	2
Normorphine	40
Ocfentanil	25
Ortho-parafluorofentanyl	30
Para-chlorisobutyrl Fentanyl	30
Para-flourobutyryl Fentanyl	25
Para-fluorofentanyl	25
Para-methoxybutyrl Fentanyl	30
Parahexyl	5
PB-22; QUPIC	20
Pentedrone	25
Pentylone	25
Phenomorphan	2
Pholcodine	5
Psilocybin	30
Psilocyn	50
SR-18 and RCS-8 (1-Cyclohexylethyl-3-(2-methoxyphenylacetyl)indole)	45
SR-19 and RCS-4 (1-Pentyl-3-[(4-methoxy)-benzoyl]indole)	30
Tetrahydrocannabinols	384,460
Tetrahydrofuranyl fentanyl	5
Thiofentanyl	25
THJ-2201 ([1-(5-fluoropentyl)-1H-indazol-3-yl](naphthalen-1-yl)methanone)	30
Tilidine	25
Trimeperidine	2
UR-144 (1-pentyl-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone	25
U-47700	30
Valeryl fentanyl	25
Schedule II	
1-Phenylcyclohexylamine	15
1-Piperidinocyclohexanecarbonitrile	25
4-Anilino-N-phenethyl-4-piperidine (ANPP)	1,185,000
Alfentanil	6,200
Alphaprodine	2
Amobarbital	20,100
Amphetamine (for conversion)	12,700,000
Amphetamine (for sale)	42,400,000
Carfentanil	20
Cocaine	92,120
Codeine (for conversion)	12,900,000
Codeine (for sale)	36,114,260
Dextropropoxyphene	35
Dihydrocodeine	238,466
Dihydroetorphine	2
Diphenoxylate (for conversion)	14,100
Diphenoxylate (for sale)	770,800
Ecgonine	88,134
Ethylmorphine	30
Etorphine hydrochloride	32
Fentanyl	1,185,000
Glutethimide	2
Hydrocodone (for conversion)	5,000
Hydrocodone (for sale)	43,027,640
Hydromorphone	4,071,000

Basic class	Established 2019 quotas (g)
Isomethadone	30
Levo-alphacetylmethadol (LAAM)	5
Levomethorphan	4,000
Levorphanol	38,000
Lisdexamfetamine	19,000,000
Meperidine	1,580,000
Meperidine Intermediate-A	30
Meperidine Intermediate-B	30
Meperidine Intermediate-C	30
Metazocine	15
Methadone (for sale)	22,278,000
Methadone Intermediate	24,064,000
Methamphetamine	1,446,754
[846,000 grams of levo-desoxyephedrine for use in a non-controlled, non-prescription product; 564,000 grams for methamphetamine mostly for conversion to a schedule III product; and 36,754 grams for methamphetamine (for sale)].	
Methylphenidate	64,600,000
Morphine (for conversion)	4,089,000
Morphine (for sale)	29,353,676
Nabilone	62,000
Noroxymorphone (for conversion)	19,169,340
Noroxymorphone (for sale)	376,000
Opium (powder)	250,000
Opium (tincture)	530,837
Oripavine	28,705,000
Oxycodone (for conversion)	2,081,000
Oxycodone (for sale)	79,596,606
Oxymorphone (for conversion)	24,525,540
Oxymorphone (for sale)	2,880,000
Pentobarbital	25,850,000
Phenazocine	5
Phencyclidine	35
Phenmetrazine	25
Phenylacetone	40
Racemethorphan	5
Racemorphan	5
Remifentanil	3,000
Secobarbital	172,100
Sufentanil	4,000
Tapentadol	18,388,280
Thebaine	84,600,000
List I Chemicals	
Ephedrine (for conversion)	25
Ephedrine (for sale)	4,136,000
Phenylpropanolamine (for conversion)	14,100,000
Phenylpropanolamine (for sale)	7,990,000
Pseudoephedrine (for conversion)	1,000
Pseudoephedrine (for sale)	174,246,000

The Administrator also establishes aggregate production quotas for all other schedule I and II controlled substances included in 21 CFR 1308.11 and 1308.12 at zero. In accordance with 21 CFR 1303.13 and 21 CFR 1315.13, upon consideration of the relevant factors, the Administrator may adjust the 2019 aggregate production quotas and assessment of annual needs as needed.

Dated: December 20, 2018.

Uttam Dhillon,

Acting Administrator.

[FR Doc. 2018–28108 Filed 12–27–18; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; Transmittal for Unemployment Insurance Materials

ACTION: Notice.

SUMMARY: The Department of Labor's (DOL's), Employment and Training Administration (ETA) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Transmittal for Unemployment Insurance Materials.'' 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: Consideration will be given to all written comments received by February 26, 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 free by contacting Agnes Wells by telephone at (202) 693–2996, TTY 1–877–889–5627 (these are not toll-free numbers), or by email at *Wells.Agnes@dol.gov.*

Submit written comments about or requests for a copy of this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, Room S–4520, 200 Constitution Avenue NW, Washington, DC 20210, by email at *Wells.Agnes@dol.gov,* or by Fax at (202) 693–3975.

FOR FURTHER INFORMATION CONTACT: Thomas Clendenning by telephone at (202) 693–3458 (this is not a toll-free number) or by email at *Clendenning.Thomas.J@dol.gov.*

SUPPLEMENTARY INFORMATION: As part of continuing efforts to reduce paperwork and respondent burden, DOL 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 Office of Management and Budget (OMB) for final approval. This program helps to ensure requested data is 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.

ETA's administrative procedures regulation, found at 20 CFR 601, sets out the collection of information requirements. Sections 601.2 requires states to submit copies of their unemployment compensation (UC) laws for approval by the Secretary of Labor (Secretary) so that the Secretary may determine the status of state laws and plans of operation. Section 601.3 requires states to ''submit all relevant state materials such as statutes, executive and administrative orders, legal opinions, rules, regulations, interpretations, court decisions, etc.''

These materials are used by the Secretary to determine whether the state law contains provisions required by Section 3304(a) of the Internal Revenue Code of 1986. DOL provides grants to states to fund the administration of their employment security laws if their UC laws and their plans of operation for public employment offices meet required conditions of Federal laws. The information transmitted by Form MA 8–7 is used by the Secretary to make findings (as specified in the above cited Federal laws) required for certification to the Secretary of the Treasury for payment to states or for certification of the state law for purposes of providing additional tax credits to employers in states with UC laws conforming to Federal law. If this information is not available, the Secretary cannot make such certifications. To facilitate transmittal of required material, DOL prescribes the use of Form MA 8–7, Transmittal for Unemployment Insurance Materials. This simple check-off form is used by the states to identify material being transmitted to the National Office and allows the material to be routed to appropriate staff for prompt action. 20 CFR 601.2 and 601.3 authorize this information collection.

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 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 OMB control number 1205–0222.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

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.

Agency: DOL–ETA.

Type of Review: Revisions.

Title of Collection: Transmittal for Unemployment Insurance Materials.

Form: MA 8–7.

OMB Control Number: 1205–0222.

Affected Public: State Workforce Agencies.

Estimated Number of Respondents: 53.

Frequency: Varies.

Total Estimated Annual Responses: 301.

Estimated Average Time per Response: 0.25 hour.

Estimated Total Annual Burden Hours: 75 hours.

Total Estimated Annual Other Cost Burden: $0.

Authority: 44 U.S.C. 3506(c)(2)(A).

Molly E. Conway,

Acting Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2018–28224 Filed 12–27–18; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; Unemployment Compensation for Ex-Servicemembers (UCX)

ACTION: Notice.

SUMMARY: The Department of Labor's (DOL's), Employment and Training Administration (ETA) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Unemployment Compensation for Ex-Servicemembers (UCX).'' 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: Consideration will be given to all written comments received by February 26, 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 free by contacting Candace Edens by telephone at (202)

693–3195, TTY 1–877–889–5627 (these are not toll-free numbers), or by email at *Edens.Candace@dol.gov.*

Submit written comments about or requests for a copy of this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, Room S–4520, 200 Constitution Avenue NW, Washington, DC 20210, by email at *Edens.Candace@dol.gov,* or by Fax at (202) 693–3975.

SUPPLEMENTARY INFORMATION: As part of continuing efforts to reduce paperwork and respondent burden, DOL 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 Office of Management and Budget (OMB) for final approval. This program helps to ensure requested data is 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.

The UCX law (5 U.S.C. 8521–8525) requires State Workforce Agencies (SWAs) to administer the UCX program in accordance with the same terms and conditions of the paying state's unemployment insurance law applicable to unemployed claimants who worked in the private sector. Each state agency needs to obtain certain military service information on claimants filing for UCX benefits to enable the state to determine their eligibility for benefits. As needed, most state agencies record required UCX information on the form developed by DOL, ETA 843, Request for Military Document and Information. Without the claimant's military information, a state cannot adequately determine potential UCX eligibility of ex-servicemembers and would not be able to properly administer the program. UCX law (5 U.S.C. 8521–8525) authorizes this information collection. Note: ETA is removing one form, ETA 841, from the list of UCX related forms, as states no longer use the form for data collection.

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 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 OMB control number 1205–0176.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

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.

Agency: DOL–ETA.

Type of Review: Revisions.

Title of Collection: Unemployment Compensation for Ex-Servicemembers (UCX).

Form: ETA 843.

OMB Control Number: 1205–0176.

Affected Public: State Workforce Agencies.

Estimated Number of Respondents: 53.

Frequency: Varies.

Total Estimated Annual Responses: 2711.

Estimated Average Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 226 hours.

Total Estimated Annual Other Cost Burden: $0.

Authority: 44 U.S.C. 3506(c)(2)(A).

Molly E. Conway,

Acting Assistant Secretary.

[FR Doc. 2018–28244 Filed 12–27–18; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; H–1B Technical Skills Training and Jobs and Innovation Accelerator Challenge Grants

ACTION: Notice.

SUMMARY: The Department of Labor's (DOL's), Employment and Training Administration (ETA) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''H–1B Technical Skills Training and Jobs and Innovation Accelerator Challenge Grants.'' 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: Consideration will be given to all written comments received by February 26, 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 free by contacting Evan Burke by telephone at 202–693–2963, TTY 1–877– 889–5627, (these are not toll-free numbers) or by email at *dsi@dol.gov.*

Submit written comments about, or requests for a copy of this ICR by mail or courier to the U.S. Department of Labor, Division of Strategic Investments, Room C–4518, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; by email at *dsi@dol.gov,* or by Fax at 202–693–3890.

FOR FURTHER INFORMATION CONTACT: Evan Burke by telephone at 202–693–2963 (this is not a toll-free number) or by email at *dsi@dol.gov.*

Authority: 44 U.S.C. 3506(c)(2)(A).

SUPPLEMENTARY INFORMATION: 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 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 can be properly assessed.

ETA requires grantees to submit Quarterly Narrative Reports with a narrative summary of progress on activities identified by the grantee in their project work plan. Grantees also submit a Quarterly Performance Report with standardized outcome measures that include data for program participants.

These reports help ETA gauge the effectiveness of the H–1B Ready To Work grants, respond to inquiries about the program's progress and success from Congress and other stakeholders, identify grantees that could serve as useful models, target technical assistance appropriately, and provide data for the national evaluation of the Ready To Work grants. ETA is seeking an extension for the collection of the Quarterly Narrative Report and the Quarterly Performance Report for the period 7/1/2019–6/30/2022. 29 U.S.C. 414(c), American Competitiveness and Workforce Improvement Act of 1998, 29 U.S.C. 3224a(7), Workforce Investment Act authorizes this information collection.

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 OMB control number 1205–0507.

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.

Agency: DOL–ETA.

Type of Review: Extension without changes.

Title of Collection: H–1B Technical Skills Training and Jobs and Innovation Accelerator Challenge Grants.

OMB Control Number: 1205–0507.

Affected Public: Existing H–1B Ready To Work (RTW) grantees, and participants served through these programs.

Estimated Number of Respondents: 14,814.

Frequency: Varies by information collection activity.

Total Estimated Annual Responses: 14,958.

Estimated Average Time per Response: Varies by information collection activity.

Estimated Total Annual Burden Hours: 21,550 hours.

Total Estimated Annual Other Cost Burden: $0.

Molly E. Conway,

Acting Assistant Secretary for the Employment and Training Administration, Labor.

[FR Doc. 2018–28242 Filed 12–27–18; 8:45 am]

BILLING CODE 4510–FP–P

DEPARTMENT OF LABOR

Employment and Training Adminstration

Agency Information Collection Activities; Comment Request; Short-Time Compensation (STC) Grants

ACTION: Notice.

SUMMARY: The Department of Labor's (DOL's) Employment and Training Administration (ETA) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Short-Time Compensation (STC) Grants.'' 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: Consideration will be given to all written comments received by February 26, 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 free by contacting Mohammad Nabulsi by telephone at (202) 693–3483, TTY 1–877–889–5627 (these are not toll-free numbers), or by email at *Nabulsi.Mohammad@dol.gov.*

Submit written comments about or requests for a copy of this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, Room S–4520, 200 Constitution Avenue NW, Washington, DC 20210, by email at *Nabulsi.Mohammad@dol.gov,* or by Fax at (202) 693–3975.

FOR FURTHER INFORMATION CONTACT: Stephanie Garcia by telephone at (202) 693–3207 (this is not a toll-free number) or by email at *Garcia.Stephanie@dol.gov.*

SUPPLEMENTARY INFORMATION: As part of continuing efforts to reduce paperwork and respondent burden, DOL 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 Office of Management Budget (OMB) for final approval. This program helps to ensure requested data is 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.

The enactment of Public Law 112–96 (The Middle Class Tax Relief and Job Creation Act of 2012, referred to hereafter as ''the act'') contains Subtitle D, Short-Time Compensation Program, also known as the ''Layoff Prevention Act of 2012'' (Act). The sections of the law under this subtitle concern states that participate in a layoff aversion program known as STC or work sharing. Section 2164 of the Act covers grants the Federal Government provided to states for the purpose of implementation or improved administration of an STC program or for promotional and enrollment in the program. ETA has principal oversight responsibility for monitoring the STC grants awarded to state workforce agencies (SWAs). As part of the monitoring process, SWAs submit a quarterly progress report (QPR). The QPR serves as a monitoring instrument to track the SWAs' progress toward completing STC grant activities. ETA also needs to allow for this reporting for proper oversight of state STC programs. Section 2164 of the Act authorizes this information collection.

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 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 OMB control number 1205–0499.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

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.

Agency: DOL–ETA.

Type of Review: Extension without changes.

Title of Collection: Short-Time Compensation (STC) Grants.

Form: Short-Time Compensation Quarterly Progress Report.

OMB Control Number: 1205–0499.

Affected Public: State Workforce Agencies.

Estimated Number of Respondents: 11.

Frequency: Quarterly.

Total Estimated Annual Responses: 44.

Estimated Average Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 44 hours.

Total Estimated Annual Other Cost Burden: $0.

Authority: 44 U.S.C. 3506(c)(2)(A).

Molly E. Conway,

Acting Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2018–28243 Filed 12–27–18; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO): Meeting

AGENCY: Veterans' Employment and Training Service (VETS), Department of Labor (DOL).

ACTION: Notice of open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the ACVETEO. The ACVETEO will discuss the DOL core programs and services that assist veterans seeking employment and raise employer awareness as to the advantages of hiring veterans. There will be an opportunity for individuals or organizations to address the committee. Any individual or organization that wishes to do so should contact Mr. Gregory Green at 202–693–4734.

Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.,* interpreting services, assistive listening devices, and/or materials in alternative format) should notify the Advisory Committee no later than Wednesday, January 16, 2019 by contacting Mr. Gregory Green at 202–693–4734. Requests made after this date will be reviewed, but availability of the requested accommodations cannot be guaranteed. The meeting site is accessible to individuals with disabilities. This Notice also describes the functions of the ACVETEO. Notice of this meeting is required under Section 10(a) (2) of the Federal Advisory Committee Act. This document is intended to notify the general public.

DATE AND TIME: Wednesday, January 23, 2019 beginning at 9:00 a.m. and ending at approximately 3:00 p.m. (EST).

ADDRESSES: The meeting will take place at the U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue NW, Washington, DC 20210, Conference Room N–4437 A, B & C. Members of the public are encouraged to arrive early to allow for security clearance into the Frances Perkins Building.

Security Instructions: Meeting participants should use the visitor's entrance to access the Frances Perkins Building, one block north of Constitution Avenue at 3rd and C Streets, NW. For security purposes meeting participants must:

1. Present a valid photo ID to receive a visitor badge.

2. Know the name of the event being attended: The meeting event is the Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO).

3. Visitor badges are issued by the security officer at the Visitor Entrance located at 3rd and C Streets NW. When receiving a visitor badge, the security officer will retain the visitor's photo ID until the visitor badge is returned to the security desk.

4. Laptops and other electronic devices may be inspected and logged for identification purposes.

5. Due to limited parking options, Metro's Judiciary Square station is the easiest way to access the Frances Perkins Building.

Notice of Intent to Attend the Meeting: All meeting participants should submit a notice of intent to attend by Friday, January 11, 2019, via email to Mr. Gregory Green at

green.gregory.b@dol.gov, subject line ''January 2019 ACVETEO Meeting.''

FOR FURTHER INFORMATION CONTACT: Mr. Gregory Green, Designated Federal Official for the ACVETEO, (202) 693–4734.

SUPPLEMENTARY INFORMATION: The ACVETEO is a Congressionally mandated advisory committee authorized under Title 38, U.S. Code, Section 4110 and subject to the Federal Advisory Committee Act, 5 U.S.C. App. 2, as amended. The ACVETEO is responsible for: Assessing employment and training needs of veterans; determining the extent to which the programs and activities of the U.S. Department of Labor meet these needs; assisting to conduct outreach to employers seeking to hire veterans; making recommendations to the Secretary, through the Assistant Secretary for VETS, with respect to outreach activities and employment and training needs of veterans; and carrying out such other activities necessary to make required reports and recommendations. The ACVETEO meets at least quarterly.

Agenda

9:00 a.m. Welcome and remarks, Sam Shellenberger, Deputy Assistant Secretary, Veterans' Employment and Training Service

9:05 a.m. Administrative Business, Gregory Green, Designated Federal Official

9:10 a.m. Discussion and review of the Fiscal Year 2018 Annual Report, Eric Eversole, ACVETEO Chairman

11:10 a.m. Break

11:20 p.m. Veterans' Employment and Training Service plan to answer the Fiscal Year 2018 Report Recommendations, Gregory Green, Designated Federal Official

12:00 p.m. Lunch

1:00 p.m. Veterans' Employment and Training Service year in review

2:00 p.m. Break

2:15 p.m. Public Forum, Gregory Green, Designated Federal Official

3:00 p.m. Adjourn

Signed in Washington, DC, this 19th day of December 2018.

Sam Shellenberger,

Deputy Assistant Secretary, Veterans' Employment and Training Service.

[FR Doc. 2018–28321 Filed 12–27–18; 8:45 am]

BILLING CODE 4510–79–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; The Study of the Great Recession and the Unemployment Insurance (UI) System in the 21st Century, 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 required data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, DOL is soliciting comments concerning the collection of information for the Study of the Great Recession and the Unemployment Insurance (UI) System in the 21st Century. 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 section below on or before February 26, 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 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 *Chief EvaluationOffice@dol.gov* or by phone at (202) 693–5913.

SUPPLEMENTARY INFORMATION:

I. Background: The Chief Evaluation Office (CEO) is sponsoring a study on lessons learned regarding the Unemployment Insurance (UI) system in response to the Great Recession that began in 2007, the economic recovery that followed the Great Recession, and issues relevant to future UI policy and future economic downturns.

The main goal of the study is to identify, analyze, and report on the problems that state UI programs faced during the Great Recession and how they responded to those challenges, and lessons learned. The study will focus on the challenges and adjustments states made with respect to staffing, data, administrative processes and procedures, trigger mechanisms, and trust funds. It will also highlight structural issues that predate the Great Recession and lessons learned from the recession so that state UI programs are better prepared for future recessions and a changing labor market.

This **Federal Register** Notice provides the opportunity to comment on the proposed data collection instruments that will be used in the study: a survey of UI directors in all 50 states and the District of Columbia, and semi-structured interviews.

1. *Online survey.* The online survey of state UI directors will collect information on challenges faced by the states during the Great Recession, as well as the current state of administrative, financial, and programmatic features (if not available in other sources of reported data) that have been identified in previous research as presenting challenges to states during the previous recession.

2. *Semi-structured interviews.* The State UI staff, including UI directors, financial staff, Chief of Benefits staff, appeals staff, benefits determination staff, Human Resources (HR) staff, and Information Technology (IT) staff, in approximately 6 states will be interviewed during site visits. The semi-structured interviews will gather detailed information on challenges and lessons learned from a range of perspectives and will include respondents who were and were not working in UI agencies at the time of the Great Recession.

II. Desired Focus of Comments: Currently, DOL is soliciting comments concerning the above data collection for the Study of the Great Recession and the Unemployment Insurance (UI) System in the 21st Century. DOL is particularly interested in comments that do the following:

○ Evaluate whether the proposed collection of information is necessary

for the proper performance of the functions of the agency related to UI program oversight, including whether the information will have practical utility;

○ Evaluate the accuracy of the agency's estimate of the ICR burden to survey and interview respondents, including the validity of the study approach and assumptions;

○ Enhance the quality, utility, and clarity of the information to be collected; and

○ Minimize the burden of the information collection on respondents, including 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).

III. Current Actions: At this time, DOL is requesting clearance for the survey instrument and semi-structured interview protocols.

Type of review: New information collection request.

OMB Control Number: 1290–0NEW.

Affected Public: Individuals working in state UI agencies.

Comments submitted in response to this request will be summarized and/or included in the request for Office of Management and Budget (OMB) approval; they will also become a matter of public record.

ESTIMATED ANNUAL BURDEN HOURS

Information collection instrument	Number of respondents	Number of responses per respondent	Total number of responses	Average burden per response (hours)	Estimated burden (hours)
Survey— State UI Director	17	1	17	0.75	13
Interview Protocol—UI Directors	6	1	6	1	6
Interview Protocol—Financial Staff	6	1	6	1	6
Interview Protocol—Chief of Benefits	6	1	6	1	6
Interview Protocol—Appeals Staff	6	1	6	1	6
Interview Protocol—Benefits Determination Staff	6	1	6	1	6
Interview Protocol—HR Staff	6	1	6	1	6
Interview Protocol—IT Staff	6	1	6	1	6
Total	59		59		55

Molly Irwin,

Chief Evaluation Officer, U.S. Department of Labor.

[FR Doc. 2018–28310 Filed 12–27–18; 8:45 am]

BILLING CODE 4510–HX–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 with change of the ''Quick Business Survey Operations Test.'' 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 26, 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 also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Carol Rowan, BLS Clearance Officer, at 202–691–7628 (this is not a toll free number). (See **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

The Bureau of Labor Statistics (BLS) intends to conduct a second operations test for a Quick Business Survey (QBS). The BLS will build on the results of a prior test to further evaluate QBS survey processes and operations in a possible production environment. If successful, a QBS would permit BLS to collect information about the U.S. economy more efficiently than is currently possible. In addition, it would allow data users to be able to understand the impact of specific events on the economy in a timely manner that would be relevant to data users.

As with the first operations test, the BLS will test using the Annual Refiling Survey (ARS) as a platform for conducting the QBS. Each year, the Quarterly Census of Employment and Wages (QCEW) Program conducts the ARS by reaching out to approximately 1.2 million establishments requesting verification of their main business activity, and their mailing and physical location addresses. The fully web-based ARS provides a low-cost platform for conducting the QBS. The QBSs accompanying the ARS would have little data collection overhead, leveraging the address refinement, printing, and mailing efforts that are undertaken as part of the production ARS. Respondents already logged into the ARS secure website could be directed to a QBS and asked to answer a limited number of additional survey questions after completing the ARS.

II. Current Action

Office of Management and Budget clearance is being sought for a reinstatement with change of the Quick Business Survey (QBS) Operations Test in order to conduct a second test.

A QBS would allow BLS to leverage the multitude of information already known about the sample units to allow

for targeted sampling. It also would permit BLS to target only the units meeting the specific set of characteristics desired allowing BLS to delve into specific areas of economic interest without burdening establishments which do not meet the specific targeted features. The QBS is designed to encourage a fast response and minimize respondent burden. In this manner, BLS can provide information that is needed quickly and is not collected elsewhere.

Through the second operations test, the BLS will continue to evaluate the following goals: To develop and evaluate a QBS system, to understand the extent to which ARS respondents have access to different types of information in order to provide parameters for future QBS, and to estimate response rates. In addition, the second test will afford further analysis of more refined sampling methodology and efforts to improve response rates, and will allow the development of a detailed cost model for use in potential future production.

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: Quick Business Survey Operations Test.

OMB Number: 1220–0192.

Type of Review: Reinstatement with Change.

Agency: Bureau of Labor Statistics.

Affected Public: Businesses or other for-profit institutions, not-for-profit institutions, and farms.

Total Respondents: 24,230.

Frequency: One time.

Total Responses: 24,230.

Average Time per Response: Three minutes.

Estimated Total Burden Hours: 1,212 hours.

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 20th day of December 2018.

Mark Staniorski,

Division Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 2018–28222 Filed 12–27–18; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Division of Longshore and Harbor Workers' Compensation; Proposed Extension of Existing Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, 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 can be properly assessed. Currently, the Division of Longshore and Harbor Workers' Compensation is soliciting comments concerning the proposed collection: Carrier's Report of Issuance of Policy (LS–570). A copy of the proposed information collection request can be obtained by contacting the office listed below in the **ADDRESSES** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before February 26, 2019.

ADDRESSES: You may submit comments by mail, delivery service, or by hand to Ms. Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW, Room S–3323, Washington, DC 20210; by fax (202) 354–9647; or email to *ferguson.yoon@dol.gov.* Please use only one method of transmission for comments (mail/delivery, fax, or email). Please note that comments submitted after the comment period will not be considered.

SUPPLEMENTARY INFORMATION:

I. Background

Authorized insurance carriers are required to report the issuance of policies and endorsements under the Longshore and Harbor Workers' Compensation Act and its extensions, the Defense Base Act, Outer Continental Shelf Lands Act and Non-Appropriated Fund Instrumentalities Act, to the Department of Labor's Office of Workers' Compensation Programs (OWCP). 20 CFR 703.116. Carriers use the form LS–570 for this purpose. Filing the form LS–570 with OWCP's Division of Longshore and Harbor Workers' Compensation binds the carrier to full liability for the named employer's obligations under the Act or its extensions. 20 CFR 703.118. This information collection is currently approved for use through May 31, 2019.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- 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 submissions of responses.

III. Current Actions

The Department of Labor seeks the approval of the extension of this currently approved information collection. The information is necessary (i) to ensure compliance by employers, (ii) to bind the carrier to the liabilities of the employer under 20 CFR 703.118 and (iii) so that the districts can identify the correct carrier for claims to ensure prompt payment of compensation to injured workers.

Type of Review: Extension.

Agency: Division of Longshore and Harbor Workers' Compensation.

Title: Carrier's Report of Issuance of Policy.

OMB Number: 1240–0004.

Agency Number: LS–570.

Affected Public: Private Sector Business or other for-profits.

Total Respondents: 400.

Total Responses: 1,500.

Time per Response: 1 minute.

Estimated Total Burden Hours: 25.

Total Burden Cost (Capital/Startup): $0.

Total Burden Cost (Operating/Maintenance): $13.

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 will also become a matter of public record.

Dated: December 21, 2018.

Yoon Ferguson,

Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.

[FR Doc. 2018–28248 Filed 12–27–18; 8:45 am]

BILLING CODE 4510–CF–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (18–101)]

Notice of Intent To Grant Partially Exclusive Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of intent to grant partially exclusive patent license.

SUMMARY: NASA hereby gives notice of its intent to grant a partially exclusive patent license in the United States to practice the inventions described and claimed in U.S. Patent Application Serial No. 15/635,011 entitled, ''Ammonia Capture and Recovery System and Method for Removing Ammonia from a Wastewater Stream,'' KSC–13681–CIP, to Aquatecture, LLC, having its principal place of business in Los Angeles, CA. Aquatecture, LLC has requested a partially exclusivity patent license.

DATES: The prospective partially exclusive patent license may be granted unless, NASA receives written objections, including evidence and argument, no later than January 14, 2019 that establish that the grant of the license would not be consistent with the requirements regarding the licensing of federally owned inventions as set forth in the Bayh-Dole Act and implementing regulations. Competing applications completed and received by NASA *no later than* January 14, 2019 will also be treated as objections to the grant of the contemplated partially exclusive license. Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act.

ADDRESSES: Objections relating to the prospective license may be submitted to Patent Counsel, Office of the Chief Counsel, Mail Code CC–A, NASA John F. Kennedy Space Center, Kennedy Space Center, FL 32899. Telephone: 321–867–2076; Facsimile: 321–867–1817; email: *KSC-Patent-Counsel@mail.nasa.gov.*

FOR FURTHER INFORMATION CONTACT: Mark Homer, Patent Counsel, Office of the Chief Counsel, Mail Code CC, NASA John F. Kennedy Space Center, Kennedy Space Center, FL 32899. Telephone: 321–867–2076; Facsimile: 321–867–1817.

SUPPLEMENTARY INFORMATION: This notice of intent to grant a partially exclusive patent license is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). The patent rights in these inventions have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective exclusive license will comply with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Information about other NASA inventions available for licensing can be found online at *http://technology.nasa.gov.*

Mark P. Dvorscak,

Agency Counsel for Intellectual Property.

[FR Doc. 2018–28145 Filed 12–27–18; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

Notice: (18–099).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections.

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Gatrie Johnson, National Aeronautics and Space Administration, 300 E Street SW, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Gatrie Johnson, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546 or email *Gatrie.Johnson@NASA.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a request for authorization to collect information under the NASA Federal Acquisition Regulation Supplement (NFS) Clause, 1852.223–70, Safety and Health Measures and Mishap Reporting, formerly entitled ''Safety and Health.'' While the clause is proposed to be revised to eliminate some information collected requirements, two distinct information collection requirements will remain (1) notification of a Type A, B, C, or D Mishap, or a close call as defined in NASA Procedural Requirements (NPR) 8621.1 Mishap and Close Call Reporting, Investigating and Recordkeeping, and (2) quarterly reports specifying lost-time frequency rate, number of lost-time injuries, exposure, and accident/incident dollar losses.

II. Methods of Collection

Electronic.

III. Data

Title: Safety and Health Measures and Mishap Reporting.

OMB Number: 2700–0160.

Type of review: Renewal.

NSF clause 1852.223–70, Safety and health measures and mishap reporting. Under this clause, NASA contractors are to immediately notify the contracting officer when a mishap (Type A, B, C, D or Close Call) occurs. The data the contractors provide to NASA includes incident location, date and time of incident, number of fatalities if known, number of hospitalized employees if known, type of injury if known, type of damage if known, contact person, contact person phone, number, and brief description of the incident.

NASA estimates that the notification of a mishap will take a contractor approximately 4 hours, counting initial notifications, supervisory notifications, and contracting officer notifications.

The chart below shows the number of mishaps, by category, reported by NASA contractors for Calendar years 2013 and 2014. The Federal Procurement Data System data for fiscal year 2015 shows award of approximately 154 contract actions involved performance on a NASA facility.

Classification	2013	2014
Type A	0	1
Type B	3	1
Type C	125	139
Type D	166	160
Total	294	301

The purpose of tracking mishaps is for oversight of safety measures of current contractors working on Federal facilities and data for future source selections. For purposes of calculating burden, we estimate a given contractor may submit two mishaps notifications in a year and that this will take each notification approximately 4 hours to collect the information needed, review it, and provide it to the contracting officer. Generally, the contractor's supervisory personnel would collect the information. It is likely the firm's safety manager or equivalent position would review the information before submitting it to the contracting officer.

NASA estimates that it will take a contractor approximately 5 hours to prepare and deliver the quarterly report.

A. Annual Information Collection Reporting Burden

1852.223–70, Safety and Health Measures and Mishap Reporting

Reporting requirement	Respondents	Responses per respondent	Total responses	Hours per response	Hours estimated
1. Notification of a Type A, B, C, or D Mishap, or close call	154	2	308	4	1,232
2. Quarterly reports Quarterly reports specifying lost-time frequency rate, number of lost-time injuries, exposure, and accident/incident dollar losses	154	4	616	5	3,080
Total		*6*	*924*	**5*	*4,312*

*This is an average for the total number of hours (4,313) divided by the total number of responses (924) resulting in 4.67 total hours per responses, rounded up to the nearest whole number or 5.

For notifying the contracting officer of a mishap, it is estimated a company supervisor would collect the information, then the company Occupational Health and Safety Specialist would review the information before it is submitted to the Government.

For calculating the quarterly reports, specifying lost-time frequency rate, number of lost-time injuries, exposure, and accident/incident dollar losses, it is estimated to take approximately 5 hours. This includes an Occupational Health and Safety Specialist gathering the records, analyzing the data, and a company official reviewing the data before the report is submitted to the Government.

Labor category	Mishap notification/year					
	Time (hours)	Hourly rate	Total cost	Time (hours)	Hourly rate	Total cost
Occupational Health and Safety Specialist	7	$45.49	$318.43	18	$45.49	$818.82
Manager	1	63.03	63.03	2	63.03	126.06
Total	8		381.46	20		944.88

Generally, two labor categories will be involved in the requirements of this information collection: Occupational Health and Safety Specialist and a company supervisor or manager. The Occupational Health and Safety Specialist is estimated to be equivalent to the mid-point (step 5) of the General Schedule (GS) GS–12 with an hourly rate of $33.39 (from the 2015 OPM GS Salary Table). The manager/supervisor is estimated to be equivalent to the mid-point for a GS–14 at an hourly rate of $46.92. For both labor categories, the overhead/burden rate of 36.25%, based on the OMB-mandated burden rate for A–76 public-private competitions, is added (*e.g.,* GS 12, Step 5 $33.39/hour × 1.3625 = $45.49 burdened hourly rate. For a manager/supervisor at a rate of $46.92, the burdened hourly rate is $63.03).

Estimated Summary of Annual Total Cost to the Public of Information Collection Reporting Burden:

Number of respondents: 154.

Responses per respondent: 6.

Total annual responses: 924.

Average number of hours per response: 4.67.

Total hours: 4,312.

Rate per hour (average): $54.

Total annual cost to public: $232,848.

It is estimated that approximately 154 respondents will provide a total of 308 notifications of Type A, B, C, or D Mishap, or Close Call notifications (approximately 2 notifications per respondent per year). Additionally, each of 154 respondents will submit one quarterly report four times a year. Thus, responses from respondents are estimated to include 2 mishap notifications and 4 quarterly reports for a total of 6 responses annually per respondent. Based on these figures, the combine total number of responses per year for all respondents will be 308 mishap reports and 616 quarterly reports for a total of 924 total responses for all respondents. It is estimated to take a respondent approximately 4 hours to gather the required information and notify the contracting officer of a Type A, B, C, or D Mishap or Close Call.

It is estimated to take respondents approximately 5 hours to prepare and submit each quarterly report specifying lost-time frequency rate, number of lost-time injuries, exposure, and accident/incident dollar losses.

B. Estimated Annual Information Collection Reporting Cost to the Government

Clause requirement	Responses	Hours per response	Gov't hours	$/Hr.	Gov't $
Mishap Notification	308	1	308	$45.49	$14,011
Quarterly Report	616	2	1,232	45.49	56,044
Total annual Gov't. cost	.....	.....	.....	.....	.....

* The Government used a rate equivalent to a GS–12.

Total Estimated Summary of the Annual Cost to the Government for Information Collection Reporting and Recordkeeping Burdens:

Total hours: 1,540.

Total annual Government cost: $70,054.60.

* The Government used a rate equivalent to a GS–12.

Total Estimated Summary of the Annual Cost to the Government for Information Collection Reporting and Recordkeeping Burdens:

Total hours: 1,540.

Total annual Government cost: $70,054.60.

The estimates assume that not all efforts, such as retrieving and retaining records, are attributed solely to this information collection; only those actions resulting from this rule that are not customary to normal business practices are attributed to this estimate.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Gatrie Johnson,

NASA PRA Clearance Officer.

[FR Doc. 2018–28152 Filed 12–27–18; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Submission for OMB Review, Comment Request, Proposed Collection: A Needs Assessment of Programs, Services, and Operations of Tribal Archives, Libraries, and Museums

AGENCY: Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

ACTION: Submission for OMB review, comment request.

SUMMARY: The Institute of Museum and Library Services announces the following information collection has been submitted to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. 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. This notice proposes the clearance of the proposed survey to collect information related to the current program, services and operations needs and activities of USA-based indigenous cultural institutions of tribal archives, libraries, and museums.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Comments must be submitted to the office listed in the Contact section below on or before January 21, 2019.

ADDRESSES: Comments should be sent to Office of Information and Regulatory Affairs, *Attn.:* OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, (202) 395–7316.

FOR FURTHER INFORMATION CONTACT: Dr. Sandra Webb, Director of Grant Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Webb can be reached by Telephone: 202–653–4718 Fax: 202–653–4608, or by email at *swebb@imls.gov,* or by teletype (TTY/TDD) for persons with hearing difficulty at 202–653–4614.

SUPPLEMENTARY INFORMATION:

I. Background

The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

II. Current Actions

The purpose of the Needs Assessment of Programs, Services, and Operations of Tribal Archives, Libraries, and Museums is to gather information related to this group's current activities, challenges, and unmet needs. The data will be collected through an on line survey. Information gathered will provide insights for tribal governments, tribal institutions and the public. A full report of the findings and recommendations will be published by the Association of Tribal Archives, Libraries, and Museums (ATALM). The study is funded by the Institute of Museum and Library Services (IMLS).

Agency: Institute of Museum and Library Services.

Title: A Needs Assessment of Programs, Services, and Operations of Tribal Archives, Libraries, and Museums.

OMB Number: 3137–TBD.

Frequency: Once per year.

Affected Public: The target population is tribal archive, library, and museum centers, as well as leaders of tribal communities without cultural programs.

Number of Respondents: 400.

Estimated Average Burden per Response: 30 minutes.

Estimated Total Annual Burden: 200 hours.

Total Annualized capital/startup costs: n/a.

Total Annual costs: $5,546.

OMB is particularly interested in comments that help the agency to:

- 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).

Dated: December 18, 2018.

Kim Miller,

Grants Management Specialist, Office of Grants Policy and Management.

[FR Doc. 2018–27652 Filed 12–27–18; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

TIME AND DATE: 9:30 a.m., Tuesday, January 15, 2019.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza SW, Washington, DC 20594.

STATUS: The one item is open to the public.

MATTERS TO BE CONSIDERED:

58626 Aircraft Accident Report—Runway Overrun during Rejected Takeoff, Ameristar Air Cargo, Inc., dba Ameristar Charters, flight 9363, Boeing MD–83, N786TW, Ypsilanti, Michigan, March 8, 2017.

NEWS MEDIA CONTACT: Telephone: (202) 314–6100.

The press and public may enter the NTSB Conference Center one hour prior to the meeting for set up and seating.

Individuals requesting specific accommodations should contact Rochelle McCallister at (202) 314–6305 or by email at *Rochelle.McCallister@ntsb.gov* by Wednesday, January 9, 2019.

The public may view the meeting via a live or archived webcast by accessing a link under ''News & Events'' on the NTSB home page at *www.ntsb.gov.*

Schedule updates, including weather-related cancellations, are also available at *www.ntsb.gov.*

FOR MORE INFORMATION CONTACT: Candi Bing at (202) 314–6403 or by email at *bingc@ntsb.gov.*

FOR MEDIA INFORMATION CONTACT: Peter Knudson at (202) 314–6100 or by email at *peter.knudson@ntsb.gov.*

Dated: December 21, 2018.

LaSean McCray,

Assistant Federal Register Liaison Officer.

[FR Doc. 2018–28406 Filed 12–26–18; 4:15 pm]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–219; NRC–2018–0288]

Exelon Generation Company, LLC; Oyster Creek Nuclear Generating Station

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an exemption in response to a letter dated March 29, 2018, as supplemented by a letter dated May 8, 2018, exemption request from Exelon Generation Company, LLC (Exelon or the licensee). The exemption permits Exelon to reduce the minimum coverage limit for onsite property damage insurance from $1.06 billion to $50 million for Oyster Creek Nuclear Generating Station.

DATES: The exemption was issued on December 19, 2018.

ADDRESSES: Please refer to Docket ID NRC–2018–0288 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 Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0288. Address questions about Docket IDs in *Regulations.gov* to Krupskaya Castellon; telephone: 301–287–9221; e-mail: *Krupskaya.Castellon@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *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: John G. Lamb, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3100; e-mail: *John.Lamb@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the exemption is attached.

Dated at Rockville, Maryland, this 21st day of December 2018.

For the Nuclear Regulatory Commission.

John G. Lamb,

Senior Project Manager, Special Projects and Process Branch, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

Attachment—Exemption

NUCLEAR REGULATORY COMMISSION

Docket No. 50–219

Exelon Generation Company, LLC

Oyster Creek Nuclear Generating Station

Exemption

I. Background.

Exelon Generation Company, LLC (Exelon, the licensee), is the holder of Renewed Facility Operating License No. DPR–16 for Oyster Creek Nuclear Generating Station (Oyster Creek). By letter dated February 14, 2018 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML18045A084), Exelon submitted to the U.S. Nuclear Regulatory Commission (NRC) a certification in accordance with Section 50.82(a)(1)(i) of Title 10 of the *Code of Federal Regulations* (10 CFR), indicating that it plans to cease permanent operation no later than October 31, 2018. Exelon permanently ceased operations at Oyster Creek on September 17, 2018. By letter dated September 25, 2018 (ADAMS Accession No. ML18268A258), Exelon certified that all fuel was removed from the Oyster Creek reactor vessel. The facility consists of a permanently shutdown and defueled boiling-water reactor located in the town of Forked River, Ocean County, New Jersey.

II. Request/Action.

Pursuant to 10 CFR 50.12, ''Specific exemptions,'' Exelon requested an exemption from 10 CFR 50.54(w)(1), by letter dated March 29, 2018 (ADAMS Accession No. ML18088A237), as supplemented by a letter dated May 8, 2018 (ADAMS Accession No. ML18128A291). The exemption from the requirements of 10 CFR 50.54(w)(1) would permit the licensee to reduce the required level of onsite property damage insurance from $1.06 billion to $50 million for Oyster Creek.

The regulation at 10 CFR 50.54(w)(1) requires each licensee to have and maintain onsite property damage insurance to stabilize and decontaminate the reactor and reactor site in the event of an accident. The onsite insurance coverage must be either $1.06 billion or whatever amount of insurance is generally available from private sources (whichever is less).

The licensee states that the risk of an incident at a permanently shutdown and defueled reactor is much less than the risk from an operating power reactor. In addition, since reactor operation is no longer authorized at Oyster Creek, there are no events that would require the stabilization of reactor conditions after an accident. Similarly, the risk of an accident that would result in significant onsite contamination at Oyster Creek is also much lower than the risk of such an event at operating reactors. Therefore, Exelon is requesting an exemption from 10 CFR 50.54(w)(1) to reduce its onsite property damage insurance from $1.06 billion to $50 million, commensurate with the reduced risk of an incident at the permanently shutdown and defueled Oyster Creek site.

III. Discussion.

Under 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) any of the special circumstances listed in 10 CFR 50.12(a)(2) are present.

The financial protection limits of 10 CFR 50.54(w)(1) were established after the Three Mile Island accident out of concern that licensees may be unable to financially cover onsite cleanup costs in the event of a major nuclear accident. The specified $1.06 billion coverage amount requirement was developed based on an analysis of an accident at a nuclear reactor operating at power, resulting in a large fission product release and requiring significant resource expenditures to stabilize the reactor and ultimately decontaminate and cleanup the site.

These cost estimates were developed based on the spectrum of postulated accidents for an operating nuclear reactor. Those costs were derived from the consequences of a release of radioactive material from the reactor. Although the risk of an accident at an operating reactor is very low, the consequences onsite and offsite can be significant. In an operating plant, the high temperature and pressure of the reactor coolant system (RCS), as well as the inventory of relatively short-lived radionuclides, contribute to both the risk and consequences of an accident. With the permanent cessation of reactor operations at Oyster Creek and the permanent removal of the fuel from the reactor vessel, such accidents are no longer possible. As a result, the reactor vessel, RCS, and supporting systems no longer operate and have no function related to the storage of the irradiated fuel. Therefore, postulated accidents involving failure or malfunction of the reactor, RCS, or supporting systems are no longer be applicable.

During reactor decommissioning, the largest radiological risks are associated with the storage of spent fuel onsite. By letter dated March 29, 2018, as supplemented by letter dated May 8, 2018, exemption request, Exelon discusses both design-basis and beyond design-basis events involving irradiated fuel stored in the spent fuel pool (SFP). The licensee determined that there are no possible design-basis events at Oyster Creek that could result in an offsite radiological release exceeding the limits established by the U.S. Environmental Protection Agency's (EPA) early-phase Protective Action Guidelines (PAGs) of 1 rem (roentgen equivalent man) at the exclusion area boundary, as a way to demonstrate that any possible radiological releases would be minimal and not require precautionary protective actions (e.g., sheltering in place or evacuation). The NRC staff evaluated the radiological consequences associated with various decommissioning activities, and design-basis accidents at Oyster Creek, in consideration of a permanently shutdown and defueled condition. The possible design-basis accident scenarios at Oyster Creek have greatly reduced radiological consequences. Based on its review, the NRC staff concluded that no reasonably conceivable design-basis accident exists that could cause an offsite release greater than the EPA PAGs.

The only incident that might lead to a significant radiological release at a decommissioning reactor is a zirconium fire. The zirconium fire scenario is a postulated, but highly unlikely, beyond design-basis accident scenario that involves loss of water inventory from the SFP, resulting in a significant heatup of the spent fuel, and culminating in substantial zirconium cladding oxidation and fuel damage. The probability of a zirconium fire scenario is related to the decay heat of the irradiated fuel stored in the SFP. Therefore, the risks from a zirconium fire scenario continue to decrease as a function of the time since Oyster Creek has been permanently shut down.

The Commission has previously authorized a lesser amount of onsite financial protection, based on this analysis of the zirconium fire risk. In SECY–96–256, ''Changes to Financial Protection Requirements for Permanently Shutdown Nuclear Power Reactors, 10 CFR 50.54(w)(1) and 10 CFR 140.11,'' dated December 17, 1996 (ADAMS Accession No. ML15062A483), the NRC staff recommended changes to the power reactor financial protection regulations that would allow licensees to lower onsite insurance levels to $50 million upon demonstration that the fuel stored in the SFP can be air-cooled. In its Staff Requirements Memorandum to SECY–96–256, dated January 28, 1997 (ADAMS Accession No. ML15062A454), the Commission supported the NRC staff's recommendation that, among other things, would allow permanently shutdown power reactor licensees to reduce commercial onsite property damage insurance coverage to $50 million when the licensee was able to demonstrate the technical criterion that the spent fuel could be air-cooled if the SFP was drained of water. The NRC staff has used this technical criterion to grant similar exemptions to other decommissioning reactors (*e.g.,* Maine Yankee Atomic Power Station, published in the **Federal Register** on January 19, 1999 (64 FR 2920); and Zion Nuclear Power Station, published in the **Federal Register** on December 28, 1999 (64 FR 72700)). These prior exemptions were based on these licensees demonstrating that the SFP could be air-cooled, consistent with the technical criterion discussed above.

In SECY–00–0145, ''Integrated Rulemaking Plan for Nuclear Power Plant Decommissioning,'' dated June 28, 2000, and SECY–01–0100, ''Policy Issues Related to Safeguards, Insurance, and Emergency Preparedness Regulations at Decommissioning Nuclear Power Plants Storing Fuel in the Spent Fuel Pool,'' dated June 4, 2001 (ADAMS Accession Nos. ML003721626 and ML011450420, respectively), the NRC staff discussed additional information concerning SFP zirconium fire risks at decommissioning reactors and associated implications for onsite property damage insurance. Providing an analysis of when the spent fuel stored in the SFP is capable of air-cooling is one measure that can be used to demonstrate that the probability of a zirconium fire is exceedingly low. However, the NRC staff has more recently used an additional analysis that bounds an incomplete drain down of the SFP water, or some other catastrophic event (such as a complete drainage of the SFP with rearrangement of spent fuel rack geometry and/or the addition of rubble to the SFP). The analysis postulates that decay heat transfer from the spent fuel via conduction, convection, or radiation would be impeded. This analysis is often referred to as an adiabatic heatup.

The licensee's analyses referenced in its exemption request demonstrates that under conditions where the SFP water inventory has drained completely and only air-cooling of the stored irradiated fuel is available, there is reasonable assurance that after 12 months (365 days) from the permanent shutdown of the facility on September 17, 2018, the Oyster Creek spent fuel will remain at temperatures far below those associated with a significant radiological release.

As discussed in the staff response to a question in SECY–00–0145, ''the staff believes that full insurance coverage must be maintained for 5 years or until a licensee can show by analysis that its SFP is no longer vulnerable to such [a zirconium] fire.''

The licensee's adiabatic heatup analyses demonstrates that there would be at least 10 hours after the loss of all means of cooling

(both air and/or water), before the spent fuel cladding would reach a temperature where the potential for a significant offsite radiological release could occur. The licensee states that for this loss of all cooling scenario, 10 hours is sufficient time for personnel to respond with additional resources, equipment, and capability to restore cooling to the SFPs, even after a non-credible, catastrophic event.

In the analysis provided in Attachment 2, ''Oyster Creek Nuclear Generating Station Zirconium Fire Analysis for Drained Spent Fuel Pool (Calculation C–1302–226–E310–457),'' to the letter dated August 22, 2017 (ADAMS Accession No. ML17234A082), as supplemented by letters dated March 8, 2018, and March 19, 2018 (ADAMS Accession Nos. ML18067A087 and ML18078A146, respectively), the licensee compared the conditions for the hottest fuel assembly stored in the SFP to a criterion proposed in SECY–99–168, ''Improving Decommissioning Regulations for Nuclear Power Plants'' (ADAMS Accession No. ML12265A598), applicable to offsite emergency response for the unit in the decommissioning process. This criterion considers the time for the hottest assembly to heat up from 30 degrees Celsius (°C) to 900 °C adiabatically. If the heatup time is greater than 10 hours, then offsite emergency preplanning involving the plant is not necessary. Based on the limiting fuel assembly for decay heat and adiabatic heatup analysis presented in Attachment 2 to the application, at 12 months (365 days) after permanent cessation of power operations (i.e., 12 months decay time), the time for the hottest fuel assembly to reach 900 °C is 10 hours after the assemblies have been uncovered. As stated in NUREG–1738, ''Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants'' (ADAMS Accession No. ML010430066), 900 °C is an acceptable temperature to use for assessing onset of fission product release under transient conditions (to establish the critical decay time for determining availability of 10 hours for deployment of mitigation equipment and, if necessary, for offsite agencies to take appropriate action to protect the health and safety of the public, if fuel and cladding oxidation occurs in air). The NRC staff reviewed the calculation to verify that important physical properties of materials were within acceptable ranges and the results were accurate. The NRC staff determined that physical properties were appropriate. Therefore, the NRC staff found that after 12 months (365 days) from the permanent shutdown of the facility on September 17, 2018, more than 10 hours would be available before a significant offsite release could begin. The NRC staff concluded that the adiabatic heatup calculation provided an acceptable method for determining the minimum time available for deployment of mitigation equipment and, if necessary, implementing measures under a comprehensive general emergency plan.

The NRC staff performed an evaluation of the design-basis accidents for Oyster Creek being permanently defueled as part of SECY–18–0062, ''Request By The Exelon Generation Company, LLC For Exemptions From Certain Emergency Planning Requirements For The Oyster Creek Nuclear Generating Station,'' dated May 31, 2018 (ADAMS Accession No. ML18030B340).

Based on the evaluation in SECY–18–0062 and SECY–96–256, ''Changes to Financial Protection Requirements for Permanently Shutdown Nuclear Power Reactors, 10 CFR 50.54(w)(1) and 10 CFR 140.11,'' dated December 17, 1996 (ADAMS Accession No. ML15062A483), the NRC staff determined $50 million to be an adequate level of onsite property damage insurance for a decommissioning reactor, once the spent fuel in the SFP is no longer susceptible to a zirconium fire. The NRC staff has postulated that there is still a potential for other radiological incidents at a decommissioning reactor that could result in significant onsite contamination besides a zirconium fire. In SECY–96–256, the NRC staff cited the rupture of a large contaminated liquid storage tank (~450,000 gallon), causing soil contamination and potential groundwater contamination, as the most costly postulated event to decontaminate and remediate (other than a SFP zirconium fire). The postulated large liquid radiological waste storage tank rupture event was determined to have a bounding onsite cleanup cost of approximately $50 million. Therefore, the NRC staff determined that the licensee's proposal to reduce onsite insurance to a level of $50 million would be consistent with the bounding cleanup and decontamination cost, as discussed in SECY–96–256, to account for the postulated rupture of a large liquid radiological waste tank at the Oyster Creek site, should such an event occur.

The NRC staff has determined that the licensee's proposed reduction in onsite property damage insurance coverage to a level of $50 million is consistent with SECY–96–256 and subsequent insurance considerations, resulting from additional zirconium fire risks, as discussed in SECY–00–0145 and SECY–01–0100. In addition, the NRC staff notes that similar exemptions have been granted to other permanently shutdown and defueled power reactors, upon demonstration that the criterion of the zirconium fire risks from the irradiated fuel stored in the SFP is of negligible concern. As previously stated, the NRC staff concluded that after 12 months (365 days) from permanent shutdown of the facility on September 17, 2018, sufficient irradiated fuel decay time has elapsed at Oyster Creek to decrease the probability of an onsite radiological release from a postulated zirconium fire accident to negligible levels. In addition, the licensee's proposal to reduce onsite insurance to a level of $50 million is consistent with the maximum estimated cleanup costs for the recovery from the rupture of a large liquid radwaste storage tank. Finally, the NRC staff notes that in accordance with the Oyster Creek Post Shutdown Decommissioning Activities Report (PSDAR) dated May 21, 2018 (ADAMS Accession No. ML18141A775), all spent fuel will be removed from the SFPs and moved into dry storage at an onsite independent spent fuel storage installation by the end of March 2024, and the probability of an initiating event that would threaten pool integrity occurring before that time is extremely low, which further supports the conclusion that the zirconium fire risk is negligible.

A. The Exemption is Authorized by Law

The requested exemption from 10 CFR 50.54(w)(1) would allow Exelon to reduce the minimum coverage limit for onsite property damage insurance. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR part 50 when the exemptions are authorized by law.

As explained above, the NRC staff has determined that the licensee's proposed reduction in onsite property damage insurance coverage to a level of $50 million is consistent with SECY–96– 256. Moreover, the NRC staff concluded that 12 months (365 days) after the permanent shutdown of the facility, sufficient irradiated fuel decay time will have elapsed at Oyster Creek to decrease the probability of an onsite and offsite radiological release from a postulated zirconium fire accident to negligible levels. In addition, the licensee's proposal to reduce onsite insurance to a level of $50 million is consistent with the maximum estimated cleanup costs for the recovery from the rupture of a large liquid radiological waste storage tank.

The NRC staff has determined that granting the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, based on its review of Exelon's exemption request as discussed above, and consistent with SECY–96–256, the NRC staff concludes that the exemption is authorized by law.

B. The Exemption Presents No Undue Risk to the Public Health and Safety

The onsite property damage insurance requirements of 10 CFR 50.54(w)(1) were established to provide financial assurance that following a significant nuclear incident, onsite conditions could be stabilized and the site decontaminated. The requirements of 10 CFR 50.54(w)(1) and the existing level of onsite insurance coverage for Oyster Creek are predicated on the assumption that the reactor is operating. However, Oyster Creek permanently shutdown on September 17, 2018, and defueled on September 24, 2018. The permanently defueled status of the facility results in a significant reduction in the number and severity of potential accidents, and correspondingly, a significant reduction in the potential for and severity of onsite property damage. The proposed reduction in the amount of onsite insurance coverage does not impact the probability or consequences of potential accidents. The proposed level of insurance coverage is commensurate with the reduced consequences of potential nuclear accidents at Oyster Creek. Therefore, the NRC staff concludes that granting the requested exemption will not present an undue risk to the health and safety of the public.

C. The Exemption Is Consistent With the Common Defense and Security

The proposed exemption would not eliminate any requirements associated with physical protection of the site and would not

adversely affect Exelon's ability to physically secure the site or protect special nuclear material. Physical security measures at Oyster Creek are not affected by the requested exemption. Therefore, the proposed exemption is consistent with the common defense and security.

D. Special Circumstances

Special circumstances, in accordance with 10 CFR 50.12(a)(2)(ii), are present whenever application of the regulation in the particular circumstances is not necessary to achieve the underlying purpose of the regulation.

The underlying purpose of 10 CFR 50.54(w)(1) is to provide reasonable assurance that adequate funds will be available to stabilize reactor conditions and cover onsite cleanup costs associated with site decontamination, following an accident that results in the release of a significant amount of radiological material. Oyster Creek permanently shut down on September 17, 2018, and permanently defueled on September 25, 2018, it is no longer possible for the radiological consequences of design-basis accidents or other credible events at Oyster Creek to exceed the limits of the EPA PAGs at the exclusion area boundary. The licensee has evaluated the consequences of highly unlikely, beyond-design-basis conditions involving a loss of coolant from the SFP. The analyses show that after 12 months (365 days) from cessation of power operations on September 17, 2018, the likelihood of such an event leading to a large radiological release is negligible. The NRC staff's evaluation of the licensee's analyses confirm this conclusion.

The NRC staff also finds that the licensee's proposed $50 million level of onsite insurance is consistent with the bounding cleanup and decontamination cost, as discussed in SECY–96–256, to account for the hypothetical rupture of a large liquid radiological waste tank at the Oyster Creek site, should such an event occur. Therefore, the NRC staff concludes that the application of the current requirements in 10 CFR 50.54(w)(1) to maintain $1.06 billion in onsite insurance coverage is not necessary to achieve the underlying purpose of the rule for the permanently shutdown and defueled Oyster Creek reactor.

Under 10 CFR 50.12(a)(2)(iii), special circumstances are present whenever compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated.

The NRC staff concludes that if the licensee was required to continue to maintain an onsite insurance level of $1.06 billion, the associated insurance premiums would be in excess of those necessary and commensurate with the radiological contamination risks posed by the site. In addition, such insurance levels would be significantly in excess of other decommissioning reactor facilities that have been granted similar exemptions by the NRC.

The NRC staff finds that compliance with the existing rule would result in an undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted and are significantly in excess of those incurred by others similarly situated.

Therefore, the special circumstances required by 10 CFR 50.12(a)(2)(ii) and 10 CFR 50.12(a)(2)(iii) exist.

E. Environmental Considerations

The NRC approval of the exemption to insurance or indemnity requirements belongs to a category of actions that the Commission, by rule or regulation, has declared to be a categorical exclusion, after first finding that the category of actions does not individually or cumulatively have a significant effect on the human environment. Specifically, the exemption is categorically excluded from further analysis under § 51.22(c)(25).

Under 10 CFR 51.22(c)(25), granting of an exemption from the requirements of any regulation of Chapter I to 10 CFR is a categorical exclusion provided that (i) there is no significant hazards consideration; (ii) there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; (iii) there is no significant increase in individual or cumulative public or occupational radiation exposure; (iv) there is no significant construction impact; (v) there is no significant increase in the potential for or consequences from radiological accidents; and (vi) the requirements from which an exemption is sought involve: surety, insurance, or indemnity requirements.

As the Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, I have determined that approval of the exemption request involves no significant hazards consideration because reducing the licensee's onsite property damage insurance for Oyster Creek does 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. The exempted financial protection regulation is unrelated to the operation of Oyster Creek. Accordingly, there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; and no significant increase in individual or cumulative public or occupational radiation exposure.

In addition, the exempted regulation is not associated with construction, so there is no significant construction impact. The exempted regulation does not concern the source term (i.e., potential amount of radiation in an accident), nor mitigation. Therefore, there is no significant increase in the potential for, or consequences of, a radiological accident. In addition, there would be no significant impacts to biota, water resources, historic properties, cultural resources, or socioeconomic conditions in the region. Moreover, the requirement for onsite property damage insurance involves surety, insurance, and indemnity matters. Accordingly, the exemption request meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(25). Therefore, pursuant to 10 CFR 51.22(b) and 51.22(c)(25), no environmental impact statement or environmental assessment need be prepared in connection with the approval of this exemption request.

IV. Conclusions.

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present as set forth in 10 CFR 50.12.

Therefore, the Commission hereby grants Exelon an exemption from the requirements of 10 CFR 50.54(w)(1) for Oyster Creek. The licensee permanently ceased power operation at Oyster Creek on September 17, 2018. The exemption will permit Oyster Creek to lower the minimum required onsite insurance to $50 million no earlier than 12 months (365 days) after the licensee's certification of permanent cessation of operation under § 50.82(a)(1).

The exemption is effective 12 months (365 days) from the certification of permanent cessation of operation under § 50.82(a)(1).

Dated at Rockville, Maryland, this 19th day of December 2018.

For the Nuclear Regulatory Commission.

/RA/

Kathryn M. Brock,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2018–28202 Filed 12–27–18; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–219; NRC–2018–0288]

Exelon Generation Company, LLC; Oyster Creek Nuclear Generating Station

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing exemptions in response to a letter dated March 29, 2018, as supplemented by a letter dated May 8, 2018, exemption request from Exelon Generation Company, LLC (Exelon or the licensee). The exemption permits Exelon to reduce the required level of primary offsite liability insurance from $450 million to $100 million and to eliminate the requirement to carry secondary financial protection for Oyster Creek Nuclear Generating Station.

DATES: The exemption was issued on December 19, 2018.

ADDRESSES: Please refer to Docket ID NRC–2018–0288 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 Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0288. 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 listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

• *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: John G. Lamb, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3100; email: *John.Lamb@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the exemption is attached.

Dated at Rockville, Maryland, this 21st day of December 2018.

For the Nuclear Regulatory Commission.

John G. Lamb,

Senior Project Manager, Special Projects and Process Branch, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

Attachment—Exemption

NUCLEAR REGULATORY COMMISSION

Docket No. 50–219

Exelon Generation Company, LLC

Oyster Creek Nuclear Generating Station

Exemption

I. Background.

Exelon Generation Company, LLC (Exelon, the licensee), is the holder of Renewed Facility Operating License No. DPR–16 for Oyster Creek Nuclear Generating Station (Oyster Creek). By letter dated February 14, 2018 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML18045A084), Exelon submitted to the U.S. Nuclear Regulatory Commission (NRC) a certification in accordance with Sections 50.82(a)(1)(i) of Title 10 of the *Code of Federal Regulations* (10 CFR), indicating that it plans to cease permanent operation no later than October 31, 2018. Exelon permanently ceased operations at Oyster Creek on September 17, 2018. The facility consists of a permanently shutdown and defueled boiling-water reactor located in the town of Forked River, Ocean County, New Jersey.

II. Request/Action.

By letter dated March 29, 2018 (ADAMS Accession No. ML18088A849), as supplemented by letter dated May 8, 2018 (ADAMS Accession No. ML18128A291), Exelon submitted a request for exemption from 10 CFR 140.11(a)(4), concerning offsite primary and secondary liability insurance. The exemption from 10 CFR 140.11(a)(4) would permit Exelon to reduce the required level of primary offsite liability insurance from $450 million to $100 million and to eliminate the requirement to carry secondary financial protection for Oyster Creek.

The regulation at 10 CFR 140.11(a)(4) requires each licensee to have and maintain primary financial protection in an amount of $450 million. In addition, the licensee is required to participate in an industry retrospective rating plan (secondary financial protection) that commits each licensee to pay into an insurance pool to be used for damages that may exceed primary insurance coverage. Participation in the industry retrospective rating plan will subject Exelon to deferred premium charges up to a maximum total deferred premium of $131,056,000 with respect to any nuclear incident at any operating nuclear power plant, and up to a maximum annual deferred premium of $20,496,000 per incident.

The licensee states that the risk of an offsite radiological release is significantly lower at a nuclear power reactor that has permanently shut down and defueled, when compared to an operating power reactor. Similarly, the associated risk of offsite liability damages that would require insurance or indemnification is commensurately lower for permanently shut down and defueled plants. Therefore, Exelon is requesting an exemption from 10 CFR 140.11(a)(4), to permit a reduction in primary offsite liability insurance and to withdraw from participation in the industry retrospective rating plan.

III. Discussion.

Pursuant to 10 CFR 140.8, ''Specific exemptions,'' the Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in 10 CFR part 140, when the exemptions are authorized by law and are otherwise in the public interest. The NRC staff has reviewed Exelon's request for an exemption from 10 CFR 140.11(a)(4) and has concluded that the requested exemption is authorized by law and is otherwise in the public interest.

The Price Anderson Act of 1957 (PAA) requires that nuclear power reactor licensees have insurance to compensate the public for damages arising from a nuclear incident. Specifically, the PAA requires licensees of facilities with a ''rated capacity of 100,000 electrical kilowatts or more'' to maintain the maximum amount of primary offsite liability insurance commercially available (currently $450 million) and a specified amount of secondary insurance coverage (currently up to $131,056,000 per reactor). In the event of an accident causing offsite damages in excess of $450 million, each licensee would be assessed a prorated share of the excess damages, up to $131,056,000 per reactor, for a total of approximately $13 billion per nuclear incident. The NRC's regulations at 10 CFR 140.11(a)(4) implement these PAA insurance requirements and set forth the amount of primary and secondary insurance each power reactor licensee must have.

As noted above, the PAA requirements with respect to primary and secondary insurance, and the implementing regulations at 10 CFR 140.11(a)(4), apply to licensees of facilities with a ''rated capacity of 100,000 electrical kilowatts or more.'' When the NRC issues a license amendment to a decommissioning licensee to reflect the defueled status of the facility, the license amendment includes removal of the rated capacity of the reactor from the license.

Accordingly, a reactor that is undergoing decommissioning has no ''rated capacity.'' Removal of the rated capacity from the facility of a decommissioning licensee, thus, allows the NRC to take the reactor licensee out of the category of reactor licensees that are required to maintain the maximum available insurance and to participate in the secondary retrospective insurance pool under the PAA, subject to a technical finding that lesser potential hazards exist at the facility after termination of operations.

The financial protection limits of 10 CFR 140.11(a)(4) were established to require a licensee to maintain sufficient insurance, as specified under the PAA, to satisfy liability claims by members of the public for personal injury, property damage, and the legal cost associated with lawsuits, as the result of a nuclear accident at an operating reactor with a rated capacity of 100,000 kilowatts electric (or greater). Thus, the insurance levels established by this regulation, as required by the PAA, were associated with the risks and potential consequences of an accident at an operating reactor with a rated capacity of 100,000 kilowatts electric (or greater).

The legal and associated technical basis for granting exemptions from 10 CFR part 140 is set forth in SECY–93–127, ''Financial Protection Required of Licensees of Large Nuclear Power Plants During Decommissioning,'' dated May 10, 1993 (ADAMS Accession No. ML12257A628). The legal analysis underlying SECY–93–127 concluded that, upon a technical finding that lesser potential hazards exist after termination of operations (and removal of the rated capacity), the Commission has the discretion under the PAA to reduce the amount of insurance required of a licensee undergoing decommissioning.

As a technical matter, the fact that a reactor has permanently ceased operations is not

itself determinative as to whether a licensee may cease providing the offsite liability coverage required by the PAA and 10 CFR 140.11(a)(4). In light of the presence of freshly discharged irradiated fuel in the spent fuel pool (SFP) at a recently shutdown reactor, the primary consideration is the risk of offsite radiological release from a zirconium fire. That risk generally remains for about 10–16 months of decay time for the fuel used in the last cycle of power operation. After that time, the offsite consequences of an offsite radiological release from a zirconium fire are negligible for shutdown reactors, but the SFP is still operational and an inventory of radioactive materials still exists onsite. Therefore, an evaluation of the potential for offsite damage is necessary to determine the appropriate level of offsite insurance post shutdown, in accordance with the Commission's discretionary authority under the PAA to establish an appropriate level of required financial protection for such shutdown facilities.

The NRC staff has conducted an evaluation and concluded that, aside from the handling, storage, and transportation of spent fuel and radioactive materials for a permanently shut down and defueled reactor, no reasonably conceivable potential accident exists that could cause significant offsite damage. During normal power reactor operations, the forced flow of water through the reactor coolant system removes heat generated by the reactor. The reactor coolant system transfers this heat away from the reactor core by converting reactor feedwater to steam, which then flows to the main turbine generator to produce electricity. Most of the accident scenarios postulated for operating power reactors involve failures or malfunctions of systems that could affect the fuel in the reactor core, which in the most severe postulated accidents, would involve the release of large quantities of fission products. With the permanent cessation of reactor operations at Oyster Creek and the permanent removal of the fuel from the reactor core, such accidents are no longer possible. The reactor, reactor coolant system, and supporting systems no longer operate and have no function related to the storage of the irradiated fuel. Therefore, postulated accidents involving failure or malfunction of the reactor, reactor coolant system, or supporting systems are no longer applicable.

During reactor decommissioning, the principal radiological risks are associated with the storage of spent fuel onsite. On a case-by-case basis, licensees undergoing decommissioning have been granted permission to reduce the required amount of primary offsite liability insurance coverage from $450 million to $100 million and to withdraw from the secondary insurance pool. One of the technical criteria for granting the exemption is that the possibility of a design-basis event that could cause significant offsite damage has been eliminated.

The NRC staff performed an evaluation of the design-basis accidents for Oyster Creek being permanently defueled as part of SECY–18–0062, ''Request by the Exelon Generation Company, LLC for Exemptions from Certain Emergency Planning Requirements for the Oyster Creek Nuclear Generating Station,'' dated May 31, 2018 (ADAMS Accession No. ML18030B340).

The licensee has stated, and the NRC staff agrees, that while spent fuel remains in the SFP, the only postulated design-basis accident that would remain applicable to Oyster Creek in the permanently defueled condition that could contribute a significant dose will be a fuel handling accident (FHA) in the Reactor Building, where the SFP is located. For completeness, the NRC staff also evaluated the applicability of other design-basis accidents documented in the Oyster Creek Updated Final Safety Analysis Report (UFSAR) (ADAMS Accession No. ML15307A558), to ensure that these accidents would not have consequences that could potentially exceed the 10 CFR 50.67 dose limits and Regulatory Guide 1.183, ''Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors,'' dose acceptance criteria or approach the U.S. Environmental Protection Agency (EPA) early phase protective action guides (PAGs).

In the Oyster Creek UFSAR, the licensee has determined that within 33 days after shutdown, the FHA doses would decrease to a level that would not warrant protective actions under the EPA early phase PAG framework, notwithstanding meeting the dose limit requirements under 10 CFR 50.67 and dose acceptance criteria under Regulatory Guide 1.183.

The NRC staff notes that the doses from an FHA are dominated by the isotope Iodine-131. The date of cessation of power operations of Oyster Creek occurred on September 17, 2018. With 12 months of decay, the thyroid dose from an FHA would be negligible. After 12 months of decay, the only isotope remaining in significant amounts, among those postulated to be released in a design-basis accident FHA, would be Krypton-85. Since Krypton-85 primarily decays by beta emission, the calculated skin dose from an FHA analysis would make an insignificant contribution to the total effective dose equivalent (TEDE), which is the parameter of interest in the determination of the EPA early phase PAGs for sheltering or evacuation. The NRC staff concludes that the dose consequence from an FHA for the permanently defueled Oyster Creek would not approach the EPA early phase PAGs. Therefore, any offsite consequence from a design-basis radiological release is unlikely, and a significant amount of offsite liability insurance coverage is not required.

The only beyond design-basis event that has the potential to lead to a significant radiological release at a permanently shut down and defueled (decommissioning) reactor is a zirconium fire. The zirconium fire scenario is a postulated, but highly unlikely, accident scenario that involves the loss of water inventory from the SFP, resulting in a significant heatup of the spent fuel and culminating in substantial zirconium cladding oxidation and fuel damage. The probability of a zirconium fire scenario is related to the decay heat of the irradiated fuel stored in the SFP. Therefore, the risks from a zirconium fire scenario continue to decrease as a function of the time that Oyster Creek has been permanently shut down.

In the analysis provided in Attachment 2, ''Oyster Creek Nuclear Generating Station Zirconium Fire Analysis for Drained Spent Fuel Pool (Calculation C–1302–226–E310–457),'' to the application, as supplemented by letters dated March 8, 2018, and March 19, 2018 (ADAMS Accession Nos. ML18067A087 and ML18078A146, respectively), the licensee compared the conditions for the hottest fuel assembly stored in the SFP to a criterion proposed in SECY-99-168, ''Improving Decommissioning Regulations for Nuclear Power Plants,'' dated June 30, 1999 (ADAMS Accession No. ML12265A598), applicable to offsite emergency response for the unit in the decommissioning process. This criterion considers the time for the hottest assembly to heat up from 30 degrees Celsius (°C) to 900 °C adiabatically. If the heatup time is greater than 10 hours, then offsite emergency preplanning involving the plant is not necessary. Based on the limiting fuel assembly for decay heat and adiabatic heatup analysis presented in Attachment 2, at 12 months (365 days) after permanent cessation of power operations (i.e., 12 months decay time), the time for the hottest fuel assembly to reach 900 °C is 10 hours after the assemblies have been uncovered. As stated in NUREG–1738, ''Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants,'' February 2001 (ADAMS Accession No. ML010430066), 900 °C is an acceptable temperature to use for assessing onset of fission product release under transient conditions (to establish the critical decay time for determining availability of 10 hours for deployment of mitigation equipment and, if necessary, for offsite agencies to take appropriate action to protect the health and safety of the public, if fuel and cladding oxidation occurs in air).

The NRC staff reviewed the calculation to verify that important physical properties of materials were within acceptable ranges and the results were accurate. The NRC staff determined that physical properties were appropriate. Therefore, the NRC staff found that after 12 months (365 days), more than 10 hours would be available before a significant offsite release could begin. The NRC staff concluded that the adiabatic heatup calculation provided an acceptable method for determining the minimum time available for deployment of mitigation equipment and, if necessary, implementing measures under a comprehensive general emergency plan.

In this regard, one technical criterion for relieving decommissioning reactor licensees from the insurance obligations applicable to an operating reactor is a finding that the heat generated by the SFP has decayed to the point where the possibility of a zirconium fire is highly unlikely.

This was addressed in SECY–93–127, where the NRC staff concluded that there was a low likelihood and reduced short-term public health consequences of a zirconium fire once a decommissioning plant's spent fuel has sufficiently decayed. In its Staff Requirements Memorandum, ''Financial Protection Required of Licensees of Large Nuclear Power Plants during Decommissioning,'' dated July 13, 1993 (ADAMS Accession No. ML003760936), the

Commission approved a policy that authorized, through the exemption process, withdrawal from participation in the secondary insurance layer and a reduction in commercial liability insurance coverage to $100 million, when a licensee is able to demonstrate that the spent fuel could be air-cooled if the SFP was drained of water.

The NRC staff has used this technical criterion to grant similar exemptions to other decommissioning reactors (e.g., Maine Yankee Atomic Power Station, published in the **Federal Register** on January 19, 1999 (64 FR 2920); Zion Nuclear Power Station, published in the **Federal Register** on December 28, 1999 (64 FR 72700); Kewaunee Power Station, published in the **Federal Register** on March 24, 2015 (80 FR 15638); and Crystal River Unit 3 Nuclear Generation Plant, published in the **Federal Register** on May 6, 2015 (80 FR 26100)).

Additional discussions of other decommissioning reactor licensees that have received exemptions to reduce their primary insurance level to $100 million are provided in SECY-96-256, ''Changes to the Financial Protection Requirements for Permanently Shutdown Nuclear Power Reactors, 10 CFR 50.54(w) and 10 CFR 140.11,'' dated December 17, 1996 (ADAMS Accession No. ML15062A483). These prior exemptions were based on the licensee demonstrating that the SFP could be air-cooled, consistent with the technical criterion discussed above.

The NRC staff has evaluated the issue of zirconium fires in SFPs and presented an independent evaluation of a SFP subject to a severe earthquake in NUREG–2161, ''Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor,'' September 2014 (ADAMS Accession No. ML14255A365). This evaluation concluded that, for a representative boiling-water reactor, fuel in a dispersed high-density configuration would be adequately cooled by natural circulation air flow within several months after discharge from a reactor if the pool was drained of water.

By letters dated August 22 and December 6, 2017 (ADAMS Accession Nos. ML17234A082 and ML17340A708, respectively), Exelon confirmed that the plant design and fuel storage configuration considered in NUREG–2161 were consistent with the Oyster Creek plant design and fuel storage configurations to be used in the decommissioning of Oyster Creek. The NRC staff independently confirmed that the Oyster Creek fuel assembly decay levels are also consistent with the spent fuel considered in NUREG–2161. Thus, the NRC staff has determined that after 12 months (365 days) decay, the fuel stored in the Oyster Creek SFP will be able to adequately be cooled by air in the unlikely event of pool drainage.

In SECY–00–0145, ''Integrated Rulemaking Plan for Nuclear Power Plant Decommissioning,'' dated June 28, 2000, and SECY–01–0100, ''Policy Issues Related to Safeguards, Insurance, and Emergency Preparedness Regulations at Decommissioning Nuclear Power Plants Storing Fuel in Spent Fuel Pools,'' dated June 4, 2001 (ADAMS Accession Nos. ML003721626 and ML011450420, respectively), the NRC staff discussed additional information concerning SFP zirconium fire risks at decommissioning reactors and associated implications for offsite insurance. Analyzing when the spent fuel stored in the SFP is capable of adequate air-cooling is one measure that demonstrates when the probability of a zirconium fire would be exceedingly low.

The licensee's analyses referenced in its exemption request demonstrate that under conditions where the SFP water inventory has drained and only air cooling of the stored irradiated fuel is available, there is reasonable assurance that 12 months (365 days) after the certification of permanent removal of fuel from the reactor vessel that the Oyster Creek spent fuel will remain at temperatures far below those associated with a significant radiological release.

In addition, the licensee performed adiabatic heatup analyses, in which a complete drainage of the SFP is combined with rearrangement of spent fuel rack geometry and/or the addition of rubble to the SFP; this type of analysis postulates that decay heat transfer from the spent fuel via conduction, convection, or radiation would be impeded. The licensee's adiabatic heatup analyses demonstrate that 12 months (365 days) after the certification of permanent removal of the fuel from the reactor vessel, there would be at least 10 hours after the loss of all means of cooling (both air and/or water), before the spent fuel cladding would reach a temperature where the potential for a significant offsite radiological release could occur.

In Exelon's letter dated March 19, 2018 (ADAMS Accession No. ML18088A849), the licensee furnished the following information: ''Because of the length of time it would take for the adiabatic heatup to occur, there is ample time to respond (≥10 hours) to any drain down event that might cause such an occurrence by restoring cooling or makeup, or providing spray. As a result, the likelihood that such a scenario would progress to a zirconium fire is not deemed credible.''

In the NRC staff's evaluation contained in SECY–18–0062, ''Request by the Exelon Generation Company, LLC for Exemptions from Certain Emergency Planning Requirements for the Oyster Creek Nuclear Generating Station,'' dated May 31, 2018 (ADAMS Accession No. ML18030B340), the NRC staff assessed the Exelon accident analyses associated with the radiological risks from a zirconium fire at a permanently shut down and defueled Oyster Creek site. For the very unlikely beyond design-basis accident scenario where the SFP coolant inventory is lost in such a manner that all methods of heat removal from the spent fuel are no longer available, the NRC staff found there will be a minimum of 10 hours from the initiation of the accident until the cladding reaches a temperature where offsite radiological release might occur. The NRC staff finds that 10 hours is sufficient time to support deployment of mitigation equipment, consistent with plant conditions, to prevent the zirconium cladding from reaching a point of rapid oxidation.

The NRC staff has determined that the licensee's proposed reduction in primary offsite liability coverage to a level of $100 million, and the licensee's proposed withdrawal from participation in the secondary insurance pool for offsite financial protection, are consistent with the policy established in SECY–93–127 and subsequent insurance considerations resulting from zirconium fire risks, as discussed in SECY–00–0145 and SECY–01–0100. The NRC has previously determined in SECY–00–0145 that the minimum offsite financial protection requirement may be reduced to $100 million and that secondary insurance is not required, once it is determined that the spent fuel in the SFP is no longer thermal-hydraulically capable of sustaining a zirconium fire based on a plant-specific analysis. In addition, the NRC staff notes that similar exemptions from these insurance requirements, have been granted to other permanently shutdown and defueled power reactors, upon satisfactory demonstration that zirconium fire risk from the irradiated fuel stored in the SFP is of negligible concern.

A. The Exemption is Authorized by Law

The PAA, and its implementing regulations in 10 CFR 140.11(a)(4), require licensees of nuclear reactors that have a rated capacity of 100,000 kilowatts electric or more to have and maintain $450 million in primary financial protection and to participate in a secondary retrospective insurance pool. In accordance with 10 CFR 140.8, the Commission may grant exemptions from the regulations in 10 CFR part 140, as the Commission determines are authorized by law. The legal and associated technical basis for granting exemptions from 10 CFR part 140 are set forth in SECY–93–127. The legal analysis underlying SECY–93–127 concluded that, upon a technical finding that lesser potential hazards exist after termination of operations, the Commission has the discretion under the Price-Anderson Act to reduce the amount of insurance required of a licensee undergoing decommissioning.

Based on its review of Exelon's exemption request, the NRC staff concludes that the technical criteria for relieving Exelon from its existing primary and secondary insurance obligations have been met. As explained above, the NRC staff has concluded that no reasonably conceivable design-basis accident exists that could cause an offsite release greater than the EPA PAGs, and therefore, that any offsite consequence from a design-basis radiological release is unlikely, and the need for a significant amount of offsite liability insurance coverage is unwarranted. Additionally, the NRC staff determined that, after 12 months (365 days) decay, the fuel stored in the Oyster Creek SFP will be able to adequately be cooled by air in the unlikely event of pool drainage. Moreover, in the very unlikely beyond design-basis accident scenario where the SFP coolant inventory is lost in such a manner that all methods of heat removal from the spent fuel are no longer available, the NRC staff has determined that 10 hours would be available and is sufficient time to support deployment of mitigation equipment, consistent with plant conditions, to prevent the zirconium cladding from reaching a point of rapid oxidation. Thus, the NRC staff concludes that the fuel stored in

the Oyster Creek SFP will have decayed sufficiently by the requested effective exemption date of 12 months (365 days) after the certification that the fuel has been permanently removed from the reactor vessel, to support a reduction in the required insurance consistent with SECY–00–0145.

The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, Section 170, or other laws, as amended, which require licensees to maintain adequate financial protection. Accordingly, consistent with the legal standard presented in SECY–93–127, under which decommissioning reactor licensees may be relieved of the requirements to carry the maximum amount of insurance available and to participate in the secondary retrospective premium pool where there is sufficient technical justification, the NRC staff concludes that the requested exemption is authorized by law.

B. The Exemption is Otherwise in the Public Interest

The financial protection limits of 10 CFR 140.11 were established to require licensees to maintain sufficient offsite liability insurance to ensure adequate funding for offsite liability claims, following an accident at an operating reactor. However, the regulation does not consider the reduced potential for and consequence of nuclear incidents at permanently shutdown and decommissioning reactors.

The basis provided in SECY–93–127, SECY–00–0145, and SECY–01–0100 allows licensees of decommissioning plants to reduce their primary offsite liability insurance and to withdraw from participation in the retrospective rating pool for deferred premium charges. As discussed in these documents, once the zirconium fire concern is determined to be negligible, possible accident scenario risks at permanently shutdown and defueled reactors are greatly reduced, when compared to the risks at operating reactors, and the associated potential for offsite financial liabilities from an accident are commensurately less. The licensee has analyzed and the NRC staff has confirmed that the risks of accidents that could result in an offsite radiological risk are minimal, thereby justifying the proposed reductions in offsite primary liability insurance and withdrawal from participation in the secondary retrospective rating pool for deferred premium charges.

Additionally, participation in the secondary retrospective rating pool could potentially have adverse consequences on the safe and timely completion of decommissioning. If a nuclear incident sufficient to trigger the secondary insurance layer occurred at another nuclear power plant, the licensee could incur financial liability of up to $131,056,000. However, because Oyster Creek is permanently shut down, it cannot produce revenue from electricity generation sales to cover such a liability. Therefore, such liability if subsequently incurred, could significantly affect the ability of the facility to conduct and complete timely radiological decontamination and decommissioning activities. In addition, as SECY–93–127 concluded, the shared financial risk exposure to Exelon is greatly disproportionate to the radiological risk posed by Oyster Creek, when compared to operating reactors. The reduced overall risk to the public at decommissioning power plants does not warrant that Exelon be required to carry full operating reactor insurance coverage, after the requisite spent fuel cooling period has elapsed following final reactor shutdown. The licensee's proposed financial protection limits will maintain a level of liability insurance coverage commensurate with the risk to the public. These changes are consistent with previous NRC policy as discussed in SECY–00–0145, and exemptions approved for other decommissioning reactors. Thus, the underlying purpose of the regulations will not be adversely affected by the reductions in insurance coverage. Accordingly, an exemption from participation in the secondary insurance pool and a reduction in the primary insurance to $100 million, a value more in line with the potential consequences of accidents, would be in the public interest in that this assures there will be adequate funds to address any of those consequences and helps to assure the safe and timely decommissioning of the reactor.

Therefore, the NRC staff has concluded that an exemption from 10 CFR 140.11(a)(4), which would permit Exelon to lower the Oyster Creek primary insurance levels and to withdraw from the secondary retrospective premium pool at the requested effective date of 12 months (365 days) after the certification of permanent fuel removal from the reactor vessel, is in the public interest.

C. Environmental Considerations

The NRC's approval of an exemption from insurance or indemnity requirements belongs to a category of actions that the Commission, by rule or regulation, has declared to be a categorical exclusion, after first finding that the category of actions does not individually or cumulatively have a significant effect on the human environment. Specifically, the exemption is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement, in accordance with 10 CFR 51.22(c)(25).

Under 10 CFR 51.22(c)(25), granting of an exemption from the requirements of any regulation of Chapter I to 10 CFR is a categorical exclusion provided that: (i) There is no significant hazards consideration; (ii) there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; (iii) there is no significant increase in individual or cumulative public or occupational radiation exposure; (iv) there is no significant construction impact; (v) there is no significant increase in the potential for or consequences from radiological accidents; and (vi) the requirements from which an exemption is sought involve surety, insurance, or indemnity requirements.

As the Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, I have determined that approval of the exemption request involves no significant hazards consideration, as defined in 10 CFR 50.92, because reducing a licensee's offsite liability requirements at Oyster Creek does not: (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; (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. The exempted financial protection regulation is unrelated to the operation of Oyster Creek or site activities. Accordingly, there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite, and no significant increase in individual or cumulative public or occupational radiation exposure. The exempted regulation is not associated with construction, so there is no significant construction impact. The exempted regulation does not concern the source term (*i.e.,* potential amount of radiation in an accident), nor any activities conducted at the site. Therefore, there is no significant increase in the potential for, or consequences of, a radiological accident. In addition, there would be no significant impacts to biota, water resources, historic properties, cultural resources, or socioeconomic conditions in the region resulting from issuance of the requested exemption. The requirement for offsite liability insurance involves surety, insurance, or indemnity matters only.

Therefore, pursuant to 10 CFR 51.22(b) and 51.22(c)(25), no environmental impact statement or environmental assessment need be prepared in connection with the approval of this exemption request.

IV. Conclusions.

Accordingly, the Commission has determined that, pursuant to 10 CFR 140.8, the exemption is authorized by law and is otherwise in the public interest. Therefore, the Commission hereby grants Exelon an exemption from the requirements of 10 CFR 140.11(a)(4) for Oyster Creek. The licensee permanently ceased operation at Oyster Creek on September 17, 2018. The exemption from 10 CFR 140.11(a)(4) permits Oyster Creek to reduce the required level of primary financial protection, from $450 million to $100 million and to withdraw from participation in the secondary layer of financial protection 12 months (365 days) after the certification of permanent fuel removal from the reactor vessel.

The exemption is effective 12 months (365 days) after the certification of permanent fuel removal from the reactor vessel under § 50.82(a)(1).

Dated at Rockville, Maryland, this 19th day of December 2018.

For the Nuclear Regulatory Commission.

Kathryn M. Brock,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2018–28203 Filed 12–27–18; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2018–152; MC2019–60 and CP2019–65; MC2019–61 and CP2019–66; MC2019–62 and CP2019–67; MC2019–63 and CP2019–68]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 31, 2018.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2018–152; *Filing Title:* USPS Notice of Amendment to Priority Mail Contract 415, Filed Under Seal; *Filing Acceptance Date:* December 20, 2018, 2018; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Lyudmila Y. Bzhilyanskaya; *Comments Due:* December 31, 2018.

2. *Docket No(s).:* MC2019–60 and CP2019–65; *Filing Title:* USPS Request to Add Priority Mail Contract 501 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 20, 2018; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Lyudmila Y. Bzhilyanskaya; *Comments Due:* December 31, 2018.

3. *Docket No(s).:* MC2019–61 and CP2019–66; *Filing Title:* USPS Request to Add Priority Mail Express Contract 69 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 20, 2018; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Lyudmila Y. Bzhilyanskaya; *Comments Due:* December 31, 2018.

4. *Docket No(s).:* MC2019–62 and CP2019–67; *Filing Title:* USPS Request to Add Parcel Return Service Contract 11 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 20, 2018; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Lawrence Fenster; *Comments Due:* December 31, 2018.

5. *Docket No(s).:* MC2019–63 and CP2019–68; *Filing Title:* USPS Request to Add Parcel Return Service Contract 12 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 20, 2018; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Lawrence Fenster; *Comments Due:* December 31, 2018.

This Notice will be published in the **Federal Register**.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2018–28289 Filed 12–27–18; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL SERVICE

Product Change—Parcel Return Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 20, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Parcel Return Service Contract 12 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–63, CP2019–68.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–28159 Filed 12–27–18; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to

the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 20, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express Contract 69 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–61, CP2019–66.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–28157 Filed 12–27–18; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Parcel Return Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 20, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Parcel Return Service Contract 11 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–62, CP2019–67.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–28158 Filed 12–27–18; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Parcel Select and Parcel Return Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 21, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Parcel Select and Parcel Return Service Contract 7 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–64, CP2019–69.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–28188 Filed 12–27–18; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 20, 2018, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 501 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2019–60, CP2019–65.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2018–28156 Filed 12–27–18; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84880; File No. SR–NASDAQ–2018–103]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's All-Inclusive Annual Listing Fees for American Depositary Receipts

December 20, 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, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's all-inclusive annual listing fees for American Depositary Receipts.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to modify the Exchange's all-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

inclusive annual listing fees for American Depositary Receipts.

Currently, ADRs listed on Nasdaq pay an all-inclusive annual fee based on the number of shares they have outstanding, which ranges from $37,000 to $45,000 on the Capital Market and from $45,000 to $75,000 on the Global and Global Select Markets.[3] Nasdaq proposes to amend the all-inclusive annual fee for ADRs in Listing Rules 5910(b)(2)(B) and 5290(b)(2)(B) to the following amounts, effective January 1, 2019:

Global/Global Select Markets:	
Up to 10 million ADRs and other listed equity securities	$45,000
10+ to 50 million ADRs and other listed equity securities	$50,000
50+ to 75 million ADRs and other listed equity securities	$60,000
Over 75 million ADRs and other listed equity securities	$80,000
Capital Market:	
Up to 10 million ADRs and other listed equity securities	$42,000
Over 10 million ADRs and other listed equity securities	$50,000

Under the revised fee schedule, companies that list ADRs will pay the same minimum fee as other companies listing equity securities on the same tier of Nasdaq. Nasdaq believes that it is appropriate to charge ADRs the same minimum fees as other companies because these minimum fees reflect the minimum value of a Nasdaq listing and Nasdaq does not believe that this minimum value differs for companies listing ADRs: They trade on the same trading platform, are subject to the substantially the same regulatory oversight, and receive the same listing services as other companies. To effect this change, Nasdaq will create a new fee tier on the Global and Global Select Markets for companies with more than 10 million but not more than 50 million ADRs and other listed equity securities outstanding. The all-inclusive annual fee for companies on the Global and Global Select Markets with 10 million or fewer ADRs and other listed equity securities will remain at $45,000, which is the same as the minimum all-inclusive annual fee for other companies listing up to 10 million equity securities on the Global and Global Select Markets.[4] On the Capital Market, the all-inclusive annual fee for companies with 10 million or fewer ADRs and other listed equity securities will be increased to $45,000 [sic],[5] which is the same as the minimum all-inclusive annual fee for other companies listing up to 10 million equity securities on the Capital Market.[6]

The all-inclusive annual fees for all other companies listing ADRs on Nasdaq will also increase to reflect the value of the listing, although such fees will remain lower than the fees paid by other domestic and foreign companies listing equity securities.[7] Nasdaq believes it is appropriate to charge companies that list ADRs lower fees than companies that list common stock or ordinary shares, once they have reached the minimum fee. For many companies that list ADRs Nasdaq is not the primary listing and therefore the lower fee serves as an incentive to list or maintain their listing. In addition, issuers of ADRs are not subject to all of the same regulatory requirements as other companies and therefore Nasdaq's regulatory costs to list these companies is lower.[8]

While these changes are effective upon filing, Nasdaq has designated the proposed amendments to be operative on January 1, 2019.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[9] in general and with Section 6(b)(4) and (5) of the Act,[10] in particular in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The proposed fee change is an equitable allocation of reasonable fees because it will better align the all-inclusive annual fees paid by companies listing ADRs with the fees paid by other Nasdaq-listed companies and with the value that such a listing provides to the company. Specifically, under the proposed rule change, the minimum all-inclusive annual fee for companies that list ADRs would be the same minimum fees as are paid by other companies, which Nasdaq believes is reasonable and an equitable allocation of fees because companies that list ADRs receive the same services and trade on the same trading platform as other companies. For the same reason, Nasdaq also believes that it is an equitable allocation of reasonable fees to raise the fees paid by companies that list more ADRs than are included in the minimum fee tier because that change will result in fees that are closer to the fees paid by other companies listing the same number of securities.

Under the proposed fee schedule, the all-inclusive annual fee for companies that list more ADRs than the minimum fee tier will be lower than the fee charged to other companies. Further, the difference between the fees charged a company that lists ADRs and a company that lists other equity securities increases when there are more shares outstanding. Because companies that list ADRs also typically have primary trading on another market, and because companies that list ADRs are not subject to all of Nasdaq's governance and notification requirements and therefore Nasdaq's regulatory costs for such companies can be lower,[11] Nasdaq believes that it is an equitable allocation of reasonable fees, and not unfairly discriminatory to charge lower fees beyond the minimum fee tier and to have a lower maximum fee for ADRs than for other companies listing equity securities.

Finally, NASDAQ notes that it operates in a highly competitive market in which market participants can readily switch exchanges if they deem the listing fees excessive.[12] In such an environment, NASDAQ must

[3] *See* Listing Rules 5910(b)(2)(B) and 5920(b)(2)(B). Specifically, on the Capital Market, the all-inclusive annual fee for companies listing ADRs with up to 10 million ADRs and other listed equity securities outstanding (collectively ''Securities Outstanding'') is $37,000 and for companies with over 10 million Securities Outstanding it is $45,000. On the Global Market and Global Select Market, the all-inclusive annual fee for companies listing ADRs with up to 50 million Securities Outstanding is $45,000, for companies with 50+ to 75 million Securities Outstanding it is $52,500, and for companies with over 75 million Securities Outstanding it is $75,000.

[4] *See* Listing Rule 5910(b)(2)(A).

[5] The Commission notes that this reference to $45,000 is an error in Nasdaq's description of its proposed rule change and, in accordance with the proposed rule text and as described correctly above, the all-inclusive annual fee for companies on the Capital Market with 10 million or fewer ADRs and other listed equity securities will be increased to $42,000.

[6] *See* Listing Rule 5920(b)(2)(A).

[7] The all-inclusive annual fee for common stock and ordinary shares ranges from $42,000 to $75,000 on the Capital Market and from $45,000 to $155,000 on the Global and Global Select Markets. *See* Listing Rules 5910(b)(2)(A) and 5920(b)(2)(A).

[8] Because ADRs can only be issued by foreign private issuers, their issuers may rely on exemptions to certain corporate governance rules. *See* Listing Rule 5615(a)(3) and IM–5615–3. In addition, ADRs are not subject to the requirement to notify Nasdaq prior to certain share issuances. *See* Listing Rule 5250(e)(2).

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] *See* footnote 8, *supra.*

[12] The Justice Department has noted the intense competitive environment for exchange listings. *See* ''NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit'' (May 16, 2011), available at *http://www.justice.gov/atr/public/press_releases/2011/271214.htm.*

continually review its fees to assure that they remain competitive.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq 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 market for listing services is extremely competitive and listed companies may freely choose alternative venues, both within the U.S. and internationally. For this reason, Nasdaq does not believe that the proposed rule change will result in any burden on competition for listings.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2018–103 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2018–103. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2018–103, and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28181 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84896; File No. SR–CHX–2018–07]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Qualification, Registration and Continuing Education Requirements Applicable to Participants

December 20, 2018.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 18, 2018, the Chicago Stock Exchange, Inc. (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 amendments to the Exchange's rules (''Rules'') regarding qualification, registration and continuing education requirements applicable to Participants,[4] so as to harmonize such provisions with similar provisions under the rules of NYSE National, Inc. (''NYSE National''), a national securities exchange affiliated with the Exchange,[5] and thus promote consistency within the securities industry. Like NYSE National,[6] the Exchange is only adopting rules that are relevant to the Exchange's Participants. Specifically, the Exchange is not adopting registration categories under FINRA rules that are not applicable to Participants because Participants do not engage in the type of business that would require such registration. As such, the Exchange is amending current Article 1, Rule 1 to adopt a definition for the term ''Registered Person'' similar to NYSE National Rule 2.2(e); amending current Article 6, Rule 2 regarding registration and approval of Participant personnel; amending current Article 6, Rule 3 regarding the training and examination of registrants; amending current Article 6, Rule 10 regarding

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] A Participant is a ''member'' of the Exchange for purposes of the Act. *See* Article 1, Rule 1(s).

[5] The Exchange has four registered national securities exchange affiliates: NYSE National, NYSE Arca, Inc. (''NYSE Arca''), New York Stock Exchange LLC (''NYSE''), NYSE America LLC (''NYSE American'' and together with the Exchange, NYSE National, NYSE Arca and NYSE, the ''NYSE Group Exchanges'').

[6] The Financial Industry Regulatory Authority (''FINRA'') recently amended certain registration rules. *See* Securities Exchange Act Release No. 81098 (July 7, 2017), 82 FR 32419 (July 13, 2017) (SR–FINRA–2017–007) (Approval Order) (the ''FINRA Filing''). Thereafter, other self-regulatory organizations, such as NYSE National, submitted proposed rule changes to harmonize their registration rules with the corresponding FINRA rules amended pursuant to the FINRA Filing. *See e.g.,* Securities Exchange Act Release No. 84350 (October 3, 2018), 83 FR 51030 (October 10, 2018) (SR–NYSENat–2018–21) (the ''NYSE National Filing'').

fingerprinting of securities industry personnel to be similar to Commentary .08 of NYSE National Rule 2.2; amending current Article 6, Rule 11 regarding continuing education requirements to be similar to NYSE National Rule 2.2(e); amending current Article 16, Rule 3(b)(2) to require that Market Maker Authorized Traders successfully complete, in addition to current examination requirements, the Securities Industry Essentials qualification examination; adopting new Article 6, Rule 13 regarding registration requirements and related Interpretations and Policies to new Rule 13; adopting new Article 6, Rule 14 regarding registration categories [7] and related Interpretations and Policies to new Rule 14; and adopting new Article 6, Rule 15 regarding associated persons exempt from registration and related Interpretations and Policies to new Rule 15. Each of these rule changes, which are described in more detail below, would become operative upon filing. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its qualification, registration and continuing education requirements applicable to Participants. The proposed amendments are intended to: (i) Provide transparency and clarity with respect to the Exchange's registration, qualification and examination requirements; (ii) amend its rules relating to categories of registration and respective qualification examinations required for Participants that engage in trading activities on the Exchange; (iii) harmonize the Exchange's qualification, registration and examination rules with those of NYSE National so as to promote uniform standards across the securities industry; [8] and (iv) add new definitions of terms and make other conforming changes to enhance the comprehensiveness and clarity of the Rules.[9] The proposed changes are discussed below.

A. Proposed New Article 6, Rules 13–15

As a general matter, FINRA administers qualification examinations that are designed to establish that persons associated with Participants have attained specified levels of competence and knowledge. Over time, the examination program has increased in complexity to address the introduction of new products and functions, and related regulatory concerns and requirements. As a result, today, there are a large number of examinations, considerable content overlap across the representative-level examinations and requirements for individuals in various segments of the industry to pass multiple examinations. To address these issues, FINRA has formulated a general knowledge examination called the Securities Industry Essential (''SIE'') that all potential representative-level registrants would take.[10] Rule changes related to the adoption of the SIE and other proposed new rules are discussed below.

1. Proposed Article 6, Rule 13—Registration Requirements [11]

Proposed Rule 13 provides that each person engaged in the investment banking or securities business of a Participant must register with the Exchange as a representative or principal in each category of registration appropriate to his or her functions and responsibilities as specified in proposed Article 6, Rule 14, unless exempt from registration pursuant to proposed Article 6, Rule 15. Proposed Article 6, Rule 13 also provides that such person is not qualified to function in any registered capacity other than that for which the person is registered, unless otherwise stated in the Rules.

2. Proposed Paragraph .01 of the Interpretations and Policies of Article 6, Rule 13—Permissive Registrations [12]

The Exchange currently does not have a specific rule that provides for permissive registrations. With this proposed rule change, and to conform its rules to the FINRA and NYSE National rules, the Exchange proposes to adopt a specific rule regarding permissive registrations. Proposed paragraph .01 allows any associated person to obtain and maintain any registration permitted by a Participant. For instance, an associated person of a Participant working solely in a clerical or ministerial capacity, such as in an administrative capacity, would be able to obtain and maintain a General Securities Representative registration with the Participant. As another example, an associated person of a Participant who is registered and functioning solely as a General Securities Representative would be able to obtain and maintain a General Securities Principal registration with the Participant. Further, proposed paragraph .01 allows an individual engaged in the securities business of a foreign securities affiliate or subsidiary of a Participant to obtain and maintain any registration permitted by the Participant.

The Exchange is proposing to permit the registration of such individuals for several reasons. First, a Participant may foresee a need to move a former

[7] The relevant principal registration categories the Exchange proposes to adopt are (1) Principal; (2) General Securities Principal; (3) Compliance Officer; (4) Financial and Operations Principal and Introducing Broker-Dealer Financial and Operations Principal; (5) Securities Trader Principal; and (6) General Securities Sales Supervisor. The relevant representative registration categories the Exchange proposes to adopt are (1) Representative; (2) General Securities Representative; and (3) Securities Trader. Upon filing of this proposed rule change, the Exchange's registration categories will be identical to those of NYSE National. *See* NYSE National Rule 2.1220.

[8] The Exchange notes that in order to maintain consistency with the NYSE National Filing, the Exchange proposes to incorporate certain terms from the relevant NYSE National rule into the Exchange's rule that may not be applicable to all Participants. For example, while Participants may not be engaged in ''investment banking'' activity, the Exchange proposes to adopt that term within these registration rules to conform them to the NYSE National rules.

[9] The conforming changes the Exchange proposes would substitute the term ''Participant'' for ''ETP Holder.''

[10] The SIE would assess basic product knowledge; the structure and function of the securities industry markets, regulatory agencies and their functions; and regulated and prohibited practices. In particular, the SIE will cover four major areas. The first, ''Knowledge of Capital Markets,'' focuses on topics such as types of markets and offerings, broker-dealers and depositories, and economic cycles. The second, ''Understanding Products and Their Risks,'' covers securities products at a high level as well as associated investment risks. The third, ''Understanding Trading, Customer Accounts and Prohibited Activities,'' focuses on accounts, orders, settlement and prohibited activities. The final area, ''Overview of the Regulatory Framework,'' encompasses topics such as SROs, registration requirements and specified conduct rules.

[11] The proposed rule is substantially similar to NYSE National Rule 2.1210.

[12] The proposed rule is substantially similar to NYSE National Rule 2.120, Commentary .01.

representative or principal who has not been registered for two or more years back into a position that would require such person to be registered. Currently, such persons are required to requalify (or obtain a waiver of the applicable qualification examinations) and reapply for registration. Second, the proposed rule change would allow Participants to develop a depth of associated persons with registrations in the event of unanticipated personnel changes. Finally, allowing registration in additional categories encourages greater regulatory understanding.

Individuals maintaining a permissive registration under the proposed rule change would be considered Registered Persons, as defined under proposed Article 1, Rule 1(yy), as discussed below, and subject to all CHX Rules, to the extent relevant to their activities. Additionally, consistent with the requirements of the Exchange's supervision rules, as proposed, Participants would be required to have adequate supervisory systems and procedures reasonably designed to ensure that individuals with permissive registrations do not act outside the scope of their assigned functions. With respect to an individual who solely maintains a permissive registration, such as an individual working exclusively in an administrative capacity, the individual's day-to-day supervisor may be a non-Registered Person. However, for purposes of compliance with the Exchange's supervision rules, a Participant would be required to assign a registered supervisor who would be responsible for periodically contacting such individual's day-to-day supervisor to verify that the individual is not acting outside the scope of his or her assigned functions. If such individual is permissively registered as a representative, the registered supervisor must be registered as a representative or principal. If the individual is permissively registered as a principal, the registered supervisor must be registered as a principal.[13]

In light of proposed paragraph .01 under Article 6, Rule 13, the Exchange proposes to replace Article 6, Rule 2(e) with proposed Article 6, Rule 2(d), as discussed below, which provides that Participants shall not register or maintain the registration of any person unless consistent with the requirements of proposed Article 6, Rule 13.

3. Proposed Paragraph .02 of the Interpretations and Policies of Article 6, Rule 13—Qualification Examinations and Waivers of Examinations [14]

Proposed paragraph .02, provides that before the registration of a person as a representative can become effective under proposed Article 6, Rule 13, such person must pass the SIE and an appropriate representative-level qualification examination as specified in proposed Article 6, Rule 14(b).[15] Proposed paragraph .02 also provides that before the registration of a person as a principal can become effective under proposed Article 6, Rule 13, such person must pass an appropriate principal-level qualification examination as specified in proposed Article 6, Rule 14(a).

Further, proposed paragraph .02 provides that if a Registered Person's job functions change and he or she needs to become registered in another representative-level category, he or she would not need to pass the SIE again. Rather, the Registered Person would need to pass only the appropriate representative-level qualification examination.

Moreover, proposed paragraph .02 provides that all associated persons, such as associated persons whose functions are solely and exclusively clerical or ministerial, are eligible to take the SIE. Proposed paragraph .02 also provides that individuals who are not associated persons of firms, such as members of the general public, are eligible to take the SIE. The Exchange believes that expanding the pool of individuals who are eligible to take the SIE would enable prospective securities industry professionals to demonstrate to prospective employers a basic level of knowledge prior to submitting a job application. Further, this approach would allow for more flexibility and career mobility within the securities industry. While all associated persons of firms as well as individuals who are not associated persons would be eligible to take the SIE pursuant to the proposed rule, passing the SIE alone would not qualify them for registration with the Exchange. Rather, to be eligible for registration with the Exchange, an individual must pass an applicable representative or principal qualification examination and complete the other requirements of the registration process.

Proposed paragraph .02 also provides that the Exchange may, in exceptional cases and where good cause is shown waive the applicable qualification examination(s) and accept other standards as evidence of an applicant's qualifications for registration. In light of these provisions, the Exchange proposes to delete current paragraph .02 under Article 6, Rule 3, as discussed below. The proposed rule further provides that the Exchange will only consider examination waiver requests submitted by a Participant for individuals associated with the Participant who are seeking registration in a representative- or principal-level registration category. Moreover, the proposed rule states that the Exchange will consider waivers of the SIE alone or the SIE and the representative- and principal-level examination(s) for such individuals. The Exchange would not consider a waiver of the SIE for non-associated persons or for associated persons who are not registering as representatives or principals.

4. Proposed Paragraph .03 of the Interpretations and Policies of Article 6, Rule 13—Requirements for Registered Persons Functioning as Principals for a Limited Period [16]

Proposed paragraph .03 provides that a Participant may designate any person currently registered, or who becomes registered, with the Participant as a representative to function as a principal for a limited period, provided that such person has at least 18 months of experience functioning as a registered representative with the five-year period immediately preceding the designation. The proposed rule is intended to ensure that representatives designated to function as principals for the limited period under the proposal have an appropriate level of registered representative experience. The proposed rule clarifies that the requirements of the rule apply to designations to any principal category, including those categories that are not subject to a prerequisite representative-level registration requirement, such as the Financial and Operations Principal registration category.[17]

The proposed rule also clarifies that the individual must fulfill all applicable prerequisite registration, fee and examination requirements before his or her designation as a principal. Further,

[13] In either case, the registered supervisor of an individual who solely maintains a permissive registration would not be required to be registered in the same representative or principal registration category as the permissively-registered individual.

[14] The proposed rule is substantially similar to NYSE National Rule 2.120, Commentary .02.

[15] Proposed Article 6, Rule 14 sets forth each registration category and applicable qualification examination for Participants on the Exchange.

[16] The proposed rule is substantially similar to NYSE National Rule 2.120, Commentary .03.

[17] The Exchange notes that qualifying as a registered representative is a prerequisite to qualifying as a principal except with respect to the following principal-level registrations: (1) Compliance Official; (2) Financial and Operations Principal; and (3) Introducing Broker-Dealer Financial and Operations Principal.

the proposed rule provides that in no event may such person function as a principal beyond the initial 120 calendar days without having successfully passed an appropriate principal qualification examination. The proposed rule also provides an exception to the experience requirement for principals who are designated by a Participant to function in other principal categories for a limited period. Specifically, the proposed rule states that a Participant may designate any person currently registered, or who becomes registered, with the Participant as a principal to function in another principal category for 120 calendar days before passing any applicable examinations.

5. Proposed Paragraph .04 of the Interpretations and Policies of Article 6, Rule 13—Rules of Conduct for Taking Examinations and Confidentiality of Examinations [18]

Proposed paragraph .04 states that associated persons taking the SIE would be subject to the SIE Rules of Conduct, and associated persons taking a representative or principal examination would be subject to the Rules of Conduct for representative and principal examinations. Pursuant to proposed paragraph .04, a violation of the SIE Rules of Conduct or the Rules of Conduct for representative and principal examinations by an associated person would be deemed to be a violation of Article 9, Rule 2. Moreover, if an associated person is deemed to have violated the SIE Rules of Conduct or the Rules of Conduct for representative and principal examinations, the associated person may forfeit the results of the examination and may be subject to disciplinary action by the Exchange.

Further, the proposed rule states that individuals taking the SIE who are not associated persons must agree to be subject to the SIE Rules of Conduct. Among other things, the SIE Rules of Conduct would require individuals to attest that they are not qualified to engage in the investment banking or securities business based on passing the SIE and would prohibit individuals from cheating on the examination or misrepresenting their qualifications to the public subsequent to passing the SIE. Moreover, non-associated persons may forfeit their SIE results and may be prohibited from retaking the SIE if the Exchange determines that they cheated on the SIE or that they misrepresented their qualifications to the public subsequent to passing the SIE.

The proposed rule further notes that the Exchange considers all qualification examinations content to be highly confidential and that the removal of examination content from an examination center, reproduction, disclosure, receipt from or passing to any person, or use for study purposes of any portion of such qualification examination or any other use that would compromise the effectiveness of the examinations and the use in any manner and at any time of the questions or answers to the examinations is prohibited and would be deemed a violation of Article 9, Rule 2 (Just and Equitable Trade Principles).

6. Proposed Paragraph .05 of the Interpretations and Policies of Article 6, Rule 13—Waiting Periods for Retaking a Failed Examination [19]

Proposed paragraph .05 provides that any person who fails a qualification examination may retake that examination after 30 calendar days from the date of the person's last attempt to pass that examination. The proposed rule further provides that if a person fails an examination three or more times in succession within a two-year period, he or she would be prohibited from retaking the examination either until a period of 180 calendar days from the date of the person's last attempt to pass it. These waiting periods would apply to the SIE and the representative- and principal-level examinations. Moreover, the proposed rule provides that non-associated persons taking the SIE must agree to be subject to the same waiting periods for retaking the SIE.

7. Proposed Paragraph .06 Under the Interpretations and Policies of Article 6, Rule 13—All Registered Persons Must Satisfy the Regulatory Element of Continuing Education [20]

Pursuant to Article 6, Rule 11, the continuing education requirements applicable to Registered Persons consist of a Regulatory Element [21] and a Firm Element.[22] The Regulatory Element applies to Registered Persons and must be completed within prescribed time frames.[23] The term ''Registered Person'' means any person registered with the Exchange under any registration categories specified under Articles 6 or 16, any person who is permissively registered or any person designated as eligible for a waiver pursuant to the Rules.[24] The Firm Element consists of annual, Participant-developed and administered training programs designed to keep covered Registered Persons current regarding securities products, services and strategies offered by the Participant. For purposes of the Firm Element, the term covered Registered Persons means any Person registered with a Participant who has direct contact with customers in the conduct of the Participant's securities sales, trading and investment banking activities and to the immediate supervisors of such Persons.

The Exchange believes that all Registered Persons, regardless of their activities, should be subject to the Regulatory Element of the CE requirements so that they can keep their knowledge of the securities industry current. Therefore, the Exchange proposes to adopt proposed paragraph .06 to clarify that all Registered Persons, including those who solely maintain a permissive registration, are required to satisfy the Regulatory Element, as specified under Article 6, Rule 11(a). The Exchange is making corresponding changes to Article 6, Rule 11(a), as well as additional changes to harmonize the Article 6, Rule 11(a) with NYSE National Rule 2.2(e)(1), as discussed below. The Exchange is also proposing to the substantively amend the Firm Element requirement under Article 6, Rule 11(b)(B)(ii) to require that the program used to implement a Participant's training plan include at a minimum, in addition to the items already stated, training in ethics and professional responsibility, as described below. Individuals who have passed the SIE but not a representative- or principal-level examination and do not hold a registered position would not be subject to any CE requirements.

[18] The proposed rule is substantially similar to NYSE National Rule 2.1210, Commentary .04.

[19] The proposed rule is substantially similar to NYSE National Rule 2.120, Commentary .05.

[20] The proposed rule is substantially similar to NYSE National Rule 2.120, Commentary .06.

[21] *See* Article 6, Rule 11(a).

[22] *See* Article 6, Rule 11(b).

[23] Pursuant to amended Article 6, Rule 11(a), as described in detail below, each specified Registered Person is required to complete the Regulatory Element initially within 120 days after the person's second registration anniversary date and, thereafter, within 120 days after every third registration anniversary date. A Registered Person who has not completed the Regulatory Element program within the prescribed time frames will have his or her registrations deemed inactive and designated as ''CE inactive'' on the CRD system until such time as the requirements of the program have been satisfied. A CE inactive person is prohibited from performing, or being compensated for, any activities requiring registration, including supervision. Moreover, if a Registered Person is CE inactive for a two-year period, the Exchange will administratively terminate the person's registration status. The two-year period would be calculated from the date the person becomes CE inactive. In either case, such person must requalify (or obtain a waiver of the applicable qualification examination(s)) to be re-eligible for registration.

[24] *See* proposed Article 1, Rule 1(yy).

Proposed paragraph .06, also provides that a Registered Person of a Participant who becomes CE inactive would not be permitted to be registered in another registration category with the Participant or be registered in any registration category with another Participant, until the person has satisfied the Regulatory Element.

8. Proposed Paragraph .07 of the Interpretations and Policies of Article 6, Rule 13—Lapse of Registration and Expiration of the SIE [25]

Proposed paragraph .07 provides that any person who was last registered as a representative two or more years immediately preceding the date of receipt by the Exchange of a new application for registration as a representative is required to pass a qualification examination for representatives appropriate to the category of registration as specified in proposed Article 6, Rule 14(b).[26] Proposed paragraph .07 also sets forth that a passing result on the SIE would be valid for up to four years. Therefore, under the proposed rule change, an individual who passes the SIE and is an associated person of a Participant at the time would have up to four years from the date he or she passes the SIE to pass a representative-level examination to register as a representative with that Participant, or a subsequent Participant, without having to retake the SIE. In addition, an individual who passes the SIE and is not an associated person at the time would have up to four years from the date he or she passes the SIE to become an associated person of a Participant and pass a representative-level examination and register as a representative without having to retake the SIE.

Moreover, an individual holding a representative-level registration who leaves the industry after the effective date of this proposed rule change would have up to four years to re-associate with a Participant and register as a representative without having to retake the SIE. However, the four-year expiration period in the proposed rule change extends only to the SIE, and not the representative- and principal-level registrations. The representative- and principal-level registrations would continue to be subject to a two-year expiration period as is the case today.

Finally, paragraph .07, clarifies that, for purposes of the proposed rule, an application would not be considered to have been received by the Exchange if that application does not result in a registration.

9. Proposed Paragraph .08 of the Interpretations and Policies of Article 6, Rule 13—Waiver of Examinations for Individuals Working for a Financial Services Industry Affiliate of a Participant [27]

Proposed paragraph .08, provides the process for individuals working for a financial services industry affiliate of a Participant [28] to terminate their registrations with the Participant and be granted a waiver of their requalification requirements upon re-registering with a Participant, provided the firm that is requesting the waiver and the individual satisfy the criteria for a Financial Services Affiliate (''FSA'') waiver.

Under the proposed waiver process, the first time a Registered Person is designated as eligible for a waiver based on the FSA criteria, the Participant with which the individual is registered would notify the Exchange of the FSA designation. The Participant would concurrently file a full Form U5 terminating the individual's registration with the firm, which would also terminate the individual's other SRO and state registrations. To be eligible for initial designation as an FSA-eligible person by a Participant, an individual must have been registered for a total of five years within the most recent 10-year period prior to the designation, including for the most recent year with that Participant. An individual would have to satisfy these preconditions only for purposes of his or her initial designation as an FSA-eligible person, and not for any subsequent FSA designation(s). Thereafter, the individual would be eligible for a waiver for up to seven years from the date of initial designation,[29] provided that the other conditions of the waiver, as described below, have been satisfied. Consequently, a Participant other than the Participant that initially designated an individual as an FSA-eligible person may request a waiver for the individual and more than one Participant may request a waiver for the individual during the seven-year period.[30]

An individual designated as an FSA-eligible person would be subject to the Regulatory Element of CE while working for a financial services industry affiliate of a Participant. The individual would be subject to a Regulatory Element program that correlates to his or her most recent registration category, and CE would be based on the same cycle had the individual remained registered. If the individual fails to complete the prescribed Regulatory Element during the 120-day window for taking the session, he or she would lose FSA eligibility (*i.e.,* the individual would have the standard two-year period after termination to re-register without having to retake an examination). The Exchange is making corresponding changes to Article 6, Rule 11, as described below.

Upon registering an FSA-eligible person, a firm would file a Form U4 and request the appropriate registration(s) for the individual. The firm would also submit an examination waiver request to the Exchange,[31] similar to the process used today for waiver requests, and it would represent that the individual is eligible for an FSA waiver based on the conditions set forth below. The Exchange would review the waiver request and make a determination of

[25] The proposed rule is substantially similar to NYSE National Rule 2.120, Commentary .07.

[26] In light of these provisions, the Exchange proposes to delete current Article 6, Rule 2(g), as discussed below.

[27] The proposed rule is substantially similar to NYSE National Rule 2.120, Commentary .08.

[28] Proposed paragraph .08 of the Interpretations and Policies of Article 6, Rule 13 defines a ''financial services industry affiliate of an Participant'' as a legal entity that controls, is controlled by or is under common control with an Participant and is regulated by the SEC, CFTC, state securities authorities, federal or state banking authorities, state insurance authorities, or substantially equivalent foreign regulatory authorities.

[29] Individuals would be eligible for a single, fixed seven-year period from the date of initial designation, and the period would not be tolled or renewed.

[30] The following examples illustrate this point:

Example 1. Firm A designates an individual as an FSA-eligible person by notifying the Exchange and files a Form U5. The individual joins Firm A's financial services affiliate. Firm A does not submit a waiver request for the individual. After working for Firm A's financial services affiliate for three years, the individual directly joins Firm B's financial services affiliate for three years. Firm B then submits a waiver request to register the individual.

Example 2. Same as Example 1, but the individual directly joins Firm B after working for Firm A's financial services affiliate, and Firm B submits a waiver request to register the individual at that point in time.

Example 3. Firm A designates an individual as an FSA-eligible person by notifying the Exchange and files a Form U5. The individual joins Firm A's financial services affiliate for three years. Firm A then submits a waiver request to re-register the individual. After working for Firm A in a registered capacity for six months, Firm A re-designates the individual as an FSA-eligible person by notifying the Exchange and files a Form U5. The individual rejoins Firm A's financial services affiliate for two years, after which the individual directly joins Firm B's financial services affiliate for one year. Firm B then submits a waiver request to register the individual.

Example 4. Same as Example 3, but the individual directly joins Firm B after the second period of working for Firm A's financial services affiliate, and Firm B submits a waiver request to register the individual at that point in time.

[31] The Exchange would consider a waiver of the representative-level qualification examination(s), the principal-level qualification examination(s) and the SIE, as applicable.

whether to grant the request within 30 calendar days of receiving the request. The Exchange would summarily grant the request if the following conditions are met:

(1) Prior to the individual's initial designation as an FSA-eligible person, the individual was registered for a total of five years within the most recent 10-year period, including for the most recent year with the Participant that initially designated the individual as an FSA-eligible person;

(2) The waiver request is made within seven years of the individual's initial designation as an FSA-eligible person by a Participant;

(3) The initial designation and any subsequent designation(s) were made concurrently with the filing of the individual's related Form U5;

(4) The individual continuously worked for the financial services affiliate(s) of a Participant since the last Form U5 filing;

(5) The individual has complied with the Regulatory Element of CE; and

(6) The individual does not have any pending or adverse regulatory matters, or terminations, that are reportable on the Form U4, and has not otherwise been subject to a statutory disqualification while the individual was designated as an FSA-eligible person with a Participant.

Following the Form U5 filing, an individual could move between the financial services affiliates of a Participant so long as the individual is continuously working for an affiliate. Further, a Participant could submit multiple waiver requests for the individual, provided that the waiver requests are made during the course of the seven-year period.[32] An individual who has been designated as an FSA-eligible person by a Participant would not be able to take additional examinations to gain additional registrations while working for a financial services affiliate of a Participant.

10. Proposed Paragraph .09 of the Interpretations and Policies of Article 6, Rule 13—Status of Persons Serving in the Armed Forces of the United States [33]

Proposed paragraph .09 provides specific relief to Registered Persons serving in the Armed Forces of the United States. Among other things, the proposed rule permits a Registered Person of a Participant who volunteers for or is called into active duty in the Armed Forces of the United States to be registered in an inactive status and remain eligible to receive ongoing transaction-related compensation. The proposed rule also includes specific provisions regarding the deferment of the lapse of registration requirements for formerly Registered Persons serving in the Armed Forces of the United States. The proposed rule further requires that the Participant with which such person is registered promptly notify the Exchange of such person's return to employment with the Participant. The proposed rule would require a Participant that is a sole proprietor to also similarly notify the Exchange of his or her return to participation in the investment banking or securities business. The proposed rule also provides that the Exchange would defer the lapse of the SIE for formerly Registered Persons serving in the Armed Forces of the United States.

B. Proposed New Article 6, Rule 14—Registration Categories [34]

1. Proposed Rule 14(a)(1)—Principal

Article 6, Rule 2(c)(1) currently defines the term ''Principal'' to mean any Person associated with a Participant who are actively engaged in the management of the Participants' securities business, including supervision, solicitation, conduct of business or the training of persons associated with a member for any of these functions are designated as Principals and such persons include: (A) Sole Proprietors; (B) Officers; (C) Partners; (D) Branch office managers; and (E) Directors.

The Exchange is proposing to move the definition of ''Principal'' to proposed Article 6, Rule 14(a)(1), which is similar to current Article 6, Rule 2(c)(1), except that proposed Rule 14(a)(1) codifies the phrase ''actively engaged in the management of the Participant's securities business'' to include the management of, and the implementation of corporate policies related to, such business. The term also includes managerial decision-making authority with respect to the Participant's securities business and management-level responsibilities for supervising any aspect of such business, such as serving as a voting member of the Participant's executive, management or operations committee. In addition, the term ''principal'' is lowercase to be stylistically consistent with the use of the term throughout NYSE National rules [35] and therefore the Exchange propose to replace a reference to ''Principal'' under current Article 6, Rule 2(c) with ''principal.'' Correspondingly, the Exchange propose to delete current Article 6, Rule 2(c)(1) as repetitive.

2. Proposed Rule 14(a)(2)—General Securities Principal [36]

Proposed Rule 14(a)(2)(A) states that each principal as defined in proposed Rule 14(a)(1) is required to register with the Exchange as a General Securities Principal, subject to the following exceptions. The proposed rule provides that if a principal's activities include the functions of a Compliance Officer, a Financial and Operations Principal (or an Introducing Broker-Dealer Financial and Operations Principal, as applicable), a Principal Financial Officer, a Principal Operations Officer, or a Securities Trader Principal, then the principal must appropriately register in one or more of these categories.

Proposed Rule 14(a)(2)(A) further provides that if a principal's activities are limited solely to the functions of a General Securities Sales Supervisor, then the principal may appropriately register in that category in lieu of registering as a General Securities Principal.

Proposed Rule 14(a)(2)(B) requires that an individual registering as a

[32] For example, if a Participant submits a waiver request for an FSA-eligible person who has been working for a financial services affiliate of the Participant for three years and re-registers the individual, the Participant could subsequently file a Form U5 and re-designate the individual as an FSA-eligible person. Moreover, if the individual works with a financial services affiliate of the Participant for another three years, the Participant could submit a second waiver request and re-register the individual upon returning to the Participant.

[33] The proposed rule is substantially similar to NYSE National Rule 2.1210, Commentary .09.

[34] Like NYSE National, the Exchange is not adopting the following categories from the FINRA Filing because Participants do not engage in the type of business that would require registration with the Exchange: Investment Banking Principal, Research Principal, Registered Options Principal, Government Securities Principal, Investment Company and Variable Contracts Products Principal, Direct Participation Programs Principal, Private Securities Offerings Principal, Supervisory Analyst, Operations Professional, Investment Banking Representative, Research Analyst, Investment Company and Variable Contracts Products Representative, Direct Participation Programs Representative, and Private Securities Offering Representative. Also, like NYSE National, the Exchange is also not adopting the following categories because the FINRA Filing eliminated them: Order Processing Assistant Representative, United Kingdom Securities Representative, Canadian Securities Representative, Options Representative, Corporate Securities Representative and Government Securities Representative.

[35] *See e.g.,* NYSE National Rule 2.1210, Commentary .09.

[36] The proposed rule is substantially similar to NYSE National Rule 2.1220(a)(2).

General Securities Principal satisfy the General Securities Representative prerequisite registration and pass the General Securities Principal qualification examination. Proposed Rule 14(a)(2)(B) also clarifies that an individual may register as a General Securities Sales Supervisor and pass the General Securities Sales Supervisor qualification examination in lieu of passing the General Securities Principal examination.

Proposed Rule 14(a)(2)(B) also provides that, subject to the lapse of registration provisions in proposed paragraph .07 under Article 6, Rule 13, each person registered with the Exchange as a General Securities Principal on October 1, 2018 and each person who was registered with the Exchange as a Corporate Securities Representative and a General Securities Principal within two years prior to October 1, 2018 would be qualified to register as a General Securities Principal without having to take any additional qualification examinations, provided that such person's supervisory responsibilities in the investment banking and securities business of a Participant are limited to corporate securities activities of the Participant. The proposed rule further provides that all other individuals registering as General Securities Principals after October 1, 2018 shall, prior to or concurrent with such registration, become registered as a General Securities Representative and either (1) pass the General Securities Principal qualification examination; or (2) register as a General Securities Sales Supervisor and pass the General Securities Sales Supervisor qualification examination.

In light of proposed Rule 14(a)(2), the Exchange proposes to delete the portion of current Article 6, Rule 2(c) requiring that a person pass the ''Series 24'' exam as prerequisite to registering as a General Securities Principal, as discussed below.

3. Proposed Rule 14(a)(3)—Compliance Officer [37]

Proposed Rule 14(a)(3) establishes a Compliance Officer registration category and requires all persons designated as CCOs on Schedule A of Form BD to register as Compliance Officers, subject to an exception for Participants engaged in limited investment banking or securities business. The proposed rule only addresses the registration requirements for CCOs. However, consistent with proposed paragraph .01 under Article 6, Rule 13 relating to permissive registrations, a firm may allow other associated persons to register as Compliance Officers.

In addition, the Exchange is proposing to provide CCOs of firms that engage in limited investment banking or securities business with greater flexibility to satisfy the qualification requirements for CCOs. Specifically, proposed Rule 14(a)(3) set forth the following qualification requirements for Compliance Officer registration:

- Subject to the lapse of registration provisions in proposed paragraph .07 under Article 6, Rule 13, each person registered with the Exchange as a General Securities Representative and a General Securities Principal on October 1, 2018 and each person who was registered with the Exchange as a General Securities Representative and a General Securities Principal within two years prior to October 1, 2018 would be qualified to register as Compliance Officers without having to take any additional examinations. In addition, subject to the lapse of registration provisions in proposed paragraph .07 under Article 6, Rule 13, individuals registered as Compliance Officials in the CRD system on October 1, 2018 and individuals who were registered as such within two years prior to October 1, 2018 would also be qualified to register as Compliance Officers without having to take any additional examinations.

- All other individuals registering as Compliance Officers after October 1, 2018 would have to: (1) Satisfy the General Securities Representative prerequisite registration and pass the General Securities Principal qualification examination; or (2) pass the Compliance Official qualification examination.

- An individual designated as a CCO on Schedule A of Form BD of a Participant that is engaged in limited investment banking or securities business may be registered in a principal category under proposed Article 6, Rule 14(a) that corresponds to the limited scope of the Participant's business.

In light of proposed Rule 14(a)(3), the Exchange proposes to delete the portion of current Article 6, Rule 2(c) permitting a person pass the ''Series 14'' Compliance Official qualification exam in lieu of the ''Series 24'' exam as prerequisite to registering as a General Securities Principal, as discussed below.

4. Proposed Rule 14(a)(4)—Financial and Operation Principal and Introducing Broker-Dealer Financial and Operations Principal [38]

Proposed Rule 14(a)(4) provides that each principal who is responsible for the financial and operational management of a Participant that has a minimum net capital requirement of $250,000 under SEA Rules 15c3–1(a)(1)(ii) and 15c3–1(a)(2)(i), or a Participant that has a minimum net capital requirement of $150,000 under SEA Rule 15c–3–1(a)(8) must be designated as a Financial and Operations Principal (''FINOP'').[39] In addition, proposed Rule 14(a)(4) provides that a principal who is responsible for the financial and operational management of a Participant that is subject to the net capital requirements of SEA Rule 15c3–1, other than a Participant that is subject to the net capital requirements of SEA Rules 15c3–1(a)(1)(ii), (a)(2)(i) or (a)(8), must be designated and registered as either a Financial and Operations Principal or an Introducing Broker-Dealer Financial and Operations Principal.[40] Financial and Operations Principals and Introducing Broker-Dealer Financial and Operation Principals are not subject to a prerequisite representative registration, but they must pass the Financial and Operations Principal or Introducing Broker-Dealer Financial and Operations Principal examination, as applicable.

Additionally, proposed Rule 14(a)(4)(B) requires a Participant to designate a Principal Financial Officer with primary responsibility for the day-to-day operations of the business, including overseeing the receipt and delivery of securities and funds, safeguarding customer and firm assets, calculation and collection of margin from customers and processing dividend receivable and payables and reorganization redemptions and those books and records related to such activities. Further, the proposed rule requires that a firm's Principal Financial Officer and Principal Operations Officer qualify and register as Financial and Operations Principals or Introducing Broker-Dealer Financial and Operations Principals, as applicable.

Because the financial and operational activities of Participants that neither self-clear nor provide clearing services

[37] The proposed rule is substantially similar to NYSE National Rule 2.1220(a)(3).

[38] The proposed rule is substantially similar to NYSE National Rule 2.1220(a)(4).

[39] In light of these provisions, the Exchange proposes to delete current Article 6, Rule 2(c)(3), as discussed below.

[40] The Exchange does not currently recognize the Introducing Broker-Dealer Financial and Operations Principal registration category.

are more limited, such Participants may designate the same person as the Principal Financial Officer, Principal Operations Officer and Financial and Operations Principal or Introducing Broker-Dealer Financial and Operations Principal (that is, such Participants are not required to designate different persons to function in these capacities).

Given the level of financial and operational responsibility at clearing and self-clearing members, the Exchange believes that it is necessary for such Participants to designate separate persons to function as Principal Financial Officer and Principal Operations Officer. Such persons may also carry out the other responsibilities of a Financial and Operations Principal, such as supervision of individuals engaged in financial and operational activities. In addition, the proposed rule provides that a clearing or self-clearing Participant that is limited in size and resources may request a waiver of the requirement to designate separate persons to function as Principal Financial Officer and Principal Operations Officer.

In light of proposed Rule 14(a)(4), the Exchange proposes to delete current Article 6, Rule 2(c)(3), which describes the Limited Principal—Financial and Operations registration category, as discussed below.

5. Proposed Rule 14(a)(5)—Securities Trader Principal [41]

Proposed Rule 14(a)(5) requires that a principal responsible for supervising the securities trading activities specified in proposed Rule 14(b)(3) register as a Securities Trader Principal. The proposed rule requires that individuals registering as Securities Trader Principals must be registered as Securities Traders and pass the General Securities Principal qualification examination.

In light of proposed Rule 14(a)(5), the Exchange proposes to delete current Article 6, Rule 2(c)(2), which describes the Securities Trader Principal registration category, as discussed below.

6. Proposed Rule 14(a)(6)—General Securities Sales Supervisor [42]

Proposed Rule 14(a)(6) provides that a principal may register with the Exchange as a General Securities Sales Supervisor if his or her supervisory responsibilities in the investment banking or securities business of a Participant are limited to the securities sales activities of the Participant, including the approval of customer accounts, training of sales and sales supervisory personnel and the maintenance of records of original entry or ledger accounts of the Participant required to be maintained in branch offices by Exchange Act record-keeping rules.[43]

A person registering as a General Securities Sales Supervisor must satisfy the General Securities Representative prerequisite registration and pass the General Securities Sales Supervisor examinations.[44] Moreover, a General Securities Sales Supervisor is precluded from performing any of the following activities: (1) Supervision of the origination and structuring of underwritings; (2) supervision of market-making commitments; (3) supervision of the custody of firm or customer funds or securities for purposes of SEA Rule 15c3–3; or (4) supervision of overall compliance with financial responsibility rules.

7. Proposed Rule 14(b)(1)—Representative [45]

Proposed Rule 14(b)(1) defines a representative as any person associated with a Participant, including assistant officers other than principals, who is engaged in the Participant's investment banking or securities business, such as supervision, solicitation, conduct of business in securities or the training of persons associated with a Participant for any of these functions.

In light of proposed Rule 14(b)(1), the Exchange proposes to delete definition of ''Representative'' under current Article 6, Rule 2(b), as discussed below.

8. Proposed Rule 14(b)(2)—General Securities Representative [46]

Proposed Rule 14(b)(2)(A) states that each representative as defined in proposed Rule 14(b)(1) is required to register with the Exchange as a General Securities Representative, subject to the following exceptions. The proposed rule provides that if a representative's activities include the function of a Securities Trader, then the representative must appropriately register in that category.

The proposed rule further provides that, subject to the lapse of registration provisions in proposed paragraph .07 under Article 6, Rule 13, each person registered with the Exchange as a General Securities Representative on October 1, 2018 and each person who was registered with the Exchange as a General Securities Representative within two years prior to October 1, 2018 would be qualified to register as a General Securities Representative without having to take any additional qualification examinations. Additionally, the proposed rule would require that individuals registering as General Securities Representatives after October 1, 2018 shall, prior to or concurrent with such registration, pass the SIE and the General Securities Representative examination.

9. Proposed Rule 14(b)(3)—Securities Trader [47]

Proposed Rule 14(b)(3) provides that each representative as defined in proposed Rule 14(b)(1) is required to register as a Securities Trader if, with respect to transactions in equity (including equity options), preferred or convertible debt securities, such person is engaged in proprietary trading, the execution of transactions on an agency basis, or the direct supervision of such activities. The proposed rule provides an exception from the registration requirement for any associated person of a Participant whose trading activities are conducted primarily on behalf of an investment company that is registered with the SEC pursuant to the Investment Company Act and that controls, is controlled by, or is under common control with a Participant. The Exchange proposes to adopt NYSE National's definition of Securities Trader in proposed Rule 14(b)(3) in order to align the text of the rule to that adopted by NYSE National and other exchanges.[48]

The proposed rule also requires that associated persons primarily responsible for the design, development or significant modification of algorithmic trading strategies (or responsible for the day-to-day supervision or direction of such activities) register as Securities Traders. Individuals registering as Securities Traders must pass the SIE and the Securities Trader Examination.

Finally, the proposed rule provides that, subject to the lapse of registration provisions in proposed paragraph .07 under Article 6, Rule 13, each person registered with the Exchange as a

[41] The proposed rule is substantially similar to NYSE National Rule 2.1220(a)(5).

[42] The proposed rule is substantially similar to NYSE National Rule 2.1220(a)(6).

[43] The Exchange does not currently recognize the General Securities Sales Supervisor registration category.

[44] An individual may also register as a General Securities Sales Supervisor by passing a combination of other principal-level examinations.

[45] The proposed rule is substantially similar to NYSE National Rule 2.1220(b)(1).

[46] The proposed rule is substantially similar to NYSE National Rule 2.1220(b)(2).

[47] The proposed rule is substantially similar to NYSE National Rule 2.1220(b)(3).

[48] *See e.g.,* NYSE National Rule 2.1220(b)(3); *see also e.g.,* MIAX International Stock Exchange, LLC Rule 203(d).

Securities Trader on October 1, 2018 and each person who was registered with the Exchange as a Securities Trader within two years prior to October 1, 2018 would be qualified to register as a Securities Trader without having to take any additional qualification examinations. Additionally, the proposed rule would require that individuals registering as Securities Traders after October 1, 2018 shall, prior to or concurrent with such registration, pass the SIE and the Securities Trader qualification examination.

10. Proposed Paragraph .01 of the Interpretations and Policies of Rule 14—Foreign Registrations [49]

Proposed paragraph .01 states that individuals who are in good standing as representatives with the Financial Conduct Authority in the United Kingdom or with a Canadian stock exchange or securities regulator would be exempt from the requirement to pass the SIE, and thus would be required only to pass a specialized knowledge examination to register with the Exchange as a representative. The proposed approach would provide individuals with a United Kingdom or Canadian qualification more flexibility to obtain a representative-level registration. Additionally, proposed paragraph .01 provides that, subject to the lapse of registration provisions in proposed paragraph .07 under Article 6, Rule 13, each person who is registered with the Exchange as a United Kingdom Securities Representative or a Canada Securities Representative on October 1, 2018 and each person who was registered with the Exchange in such categories within two years prior to October 1, 2018 would be eligible to maintain such registrations with the Exchange. However, if persons registered in such categories subsequently terminate such registration(s) with the Exchange and the registration remains terminated for two or more years, they would not be eligible to re-register in such categories.

11. Proposed Paragraph .02 of the Interpretations and Policies of Rule 14—Additional Qualification Requirements for Persons Engaged in Security Futures [50]

Proposed paragraph .02 states that each person who is registered with the Exchange as a General Securities Representative, United Kingdom Securities Representative, Canada Securities Representative, or General Securities Sales Supervisor shall be eligible to engage in security futures activities as a representative or principal, as applicable, provided that such individual completes a Firm Element program as set forth in Article 6, Rule 11(b) that addresses security futures products before such person engages in security futures activities.[51]

12. Proposed Paragraph .03 of the Interpretations and Policies of Rule 14—Scope of General Securities Sales Supervisor Registration Category [52]

Proposed paragraph .03 explains the purpose of the General Securities Sales Supervisor registration category. The General Securities Sales Supervisor category is an alternate category of registration designed to lessen the qualification burdens on principals of general securities firms who supervise sales. Without this category of limited registration, such principals would be required to separately qualify pursuant to the rules of FINRA, the MSRB, the NYSE and the options exchanges. While persons may continue to separately qualify with all relevant self-regulatory organizations, the General Securities Sales Supervisor examination permits qualification as a supervisor of sales of all securities through one registration category. Persons registered as General Securities Sales Supervisors may also qualify in any other category of principal registration. Persons who are already qualified in one or more categories of principal registration may supervise sales activities of all securities by also qualifying as General Securities Sales Supervisors.

The proposed rule further provides that any person required to be registered as a principal who supervises sales activities in corporate, municipal and option securities, investment company products, variable contracts, and security futures (subject to the requirements of paragraph .02 under Rule 14) may be registered solely as a General Securities Sales Supervisor. In addition to branch office managers, other persons such as regional and national sales managers may also be registered solely as General Securities Sales Supervisors as long as they supervise only sales activities.

C. Proposed Article 6, Rule 15—Associated Persons Exempt From Registration [53]

Proposed Rule 15 provides an exemption from registration with the Exchange for certain associated persons. Specifically, the proposed rule provides that persons associated with a Participant whose functions are solely and exclusively clerical or ministerial would be exempt from registration.[54]

1. Proposed Paragraph .01 of the Interpretations and Policies of Article 6, Rule 15—Registration Requirements for Associated Persons Who Accept Customer Orders [55]

Proposed paragraph .01, clarifies that the function of accepting customer orders is not considered clerical or ministerial and that associated persons who accept customer orders under any circumstances are required to be appropriately registered. However, the proposed rule provides that an associated person is not accepting a customer order where occasionally, when an appropriately Registered Person is unavailable, the associated person transcribes the order details and the Registered Person contacts the customer to confirm the order details before entering the order.

In light of proposed Rule 15, the Exchange proposes conforming amendments to current Article 6, Rule 2(d)—Persons Exempt from Registration (proposed Article 6, Rule 2(c)), as discussed below.

D. Amendments to Article 1, Rule 1 (Definitions)

Current paragraph .01 under Article 6, Rule 11 provides that ''[f]or the purposes of this Rule, the term 'registered person' means any Participant, registered representative or other person registered required to be registered under Exchange rules.'' The Exchange now proposes to amend the

[49] The proposed rule is substantially similar to NYSE National Rule 2.1220, Commentary .01.

[50] The proposed rule is substantially similar to NYSE National Rule 2.1220, Commentary .02.

[51] FINRA Rule 1220.02 also includes Options Representative and Registered Options Principal registration categories. Like NYSE National, the Exchange does not trade options and Participants of the Exchange therefore would not be required to register with the Exchange in those categories and therefore the Exchange is not adopting those categories within proposed paragraph .02.

[52] The proposed rule is substantially similar to NYSE National Rule 2.1220, Commentary .03.

[53] The proposed rule is substantially similar to NYSE National Rule 2.1230.

[54] FINRA Rule 1230 provides an exemption from registration with FINRA to persons associated with a FINRA member whose functions are solely and exclusively clerical or ministerial and persons associated with a FINRA member whose functions are related solely and exclusively to (i) effecting transactions on the floor of a national securities exchange and who are appropriately registered with such exchange; (ii) effecting transactions in municipal securities; (iii) effecting transactions in commodities; or (iv) effecting transactions in security futures, provided that any such person is registered with a registered futures association. Participants of the Exchange do not solely and exclusively engage in any of the foregoing transactions and therefore, like NYSE National, the Exchange is not adopting that portion of FINRA Rule 1230.

[55] The proposed rule is substantially similar to NYSE National Rule 2.1230, Commentary .01.

definition to include, in addition to those persons required to register with the Exchange, those persons that are permissively registered under proposed paragraph .01 under Article 6, Rule 13 or any person that received a waiver under the Rules, such as pursuant to paragraphs .02 or .08 under Article 6, Rule 13. Accordingly, the Exchange proposes to (1) amend current paragraph .01 under Article 6, Rule 11 to provide that the term ''Registered Person'' is defined under proposed Article 1, Rule 1(yy); (2) adopt a new definition of ''Registered Person'' similar to NYSE National Rule 2.2(e) under proposed Article 1, Rule 1(yy) (as the term is used throughout Article 6 and not only under Article 6, Rule 11), which provides that ''Registered Person'' shall mean any person registered with the Exchange under any registration categories specified under proposed Articles 6 and 16, any person who is permissively registered or any person designated as eligible for a waiver pursuant to the Rules; and (4) capitalize all references to ''registered person'' throughout amended Article 6.

E. Amendments to Article 6, Rule 2 (Registration and Approval of Participant Personnel)

1. Proposed Rule 2(a)—Registration of Representatives

Current Rule 2(a) provides, among other things, that all Representatives shall be registered as such with the Exchange in the category of registration appropriate to the function to be performed and requires individual associated persons to submit the appropriate application for registration, pass appropriate qualification examinations, submit required registration and examination fees and comply with continuing education requirements.

In light of the new definition of ''representative'' under proposed Article 6, Rule 14(b)(1), as described above, the Exchange proposes to amend the current rule to provide that the term ''representative'' is defined under proposed Article 6, Rule 14(b)(1) and that representatives shall be registered as such with the Exchange in the category of registration appropriate to the function to be performed, pursuant to amended Article 6, Rule 3, as described below, and proposed Article 6, Rule 13, as described above. Moreover, the Exchange proposes to delete the current definition of ''representative'' under current Article 6, Rule 2(b) [56] and replace all references to ''Representative'' or ''Representatives'' under Article 6 with ''representative'' or ''representatives,'' respectively. The Exchange notes that the term ''representative'' is not capitalized under the NYSE National rules.[57]

2. Proposed Rule 2(b)—Registration of Principals

Current Rule 2(c) provides that all persons engaged or to be engaged in the securities business of a Participant who are to function as a Principal shall be registered with the Exchange as a General Securities Principal, unless the Principal meets the requirements under current Rule 2(c) and each Principal shall pass the Series 24 or Series 14 exam, as applicable, pursuant to current Article 6, Rule 3(b).

In light of the new definition of ''principal'' under proposed Article 6, Rule 14(a)(1), as described above, and the provisions related to principal registration categories and requirements are now under proposed Article 6, Rule 14(a)(1), proposed Rule 2(b) provides that the term ''principal'' is defined under proposed Article 6, Rule 14(a)(1) and that all persons engaged or to be engaged in the securities business of a Participant who are to function as a principal shall be registered with the Exchange in the category of registration appropriate to the function to be performed, pursuant to amended Article 6, Rule 3 and proposed Article 6, Rule 13. Moreover, the Exchange proposes to omit provisions requiring each principal to pass the Series 24 or Series 14 exam, as applicable, under proposed Rule 2(b) as repetitive of new provisions under proposed Article 6, Rules 14(a)(2)—General Securities Principal and (a)(3)—Compliance Officer, as described above.

In addition, the Exchange proposes to delete the current definition of ''Principal'' under current Rule 2(c)(1) given the new definition of ''principals'' under proposed Article 6, Rule 14(a)(1) and to replace a reference to ''Principal'' with ''principal'' under current Rule 2(c) (proposed Rule 2(b)). The Exchange notes that the term ''principal'' is not capitalized under the NYSE National rules.[58]

Furthermore, the Exchange propose to delete current Rule 2(c)(2), which describes the Securities Trader Principal registration category, as repetitive of proposed Article 6, Rule 14(a)(5); and delete current Rule 2(c)(3), which describes the Limited Principal—Financial and Operations registration category, as repetitive of proposed Article 6, Rule 14(a)(4). In light of these deletions, current Rule 2(c)(4) will become proposed Rule 2(b)(1).

Finally, the Exchange proposes to consolidate current Rules 2(c)(5)—Requirement of Two Registered Principals for Participants and (c)(6)—Waiver of Two Principal Requirement into proposed Rule 2(b)(2). Specifically, current Rule 2(c)(5) provides that a Participant shall have at least two officers or partners who are registered as principals with respect to each aspect of the Participant's securities business pursuant to the applicable provisions of Rule 3 of this Article and this requirement applies to applicants seeking admission as Participants and existing Participants. Current Rule 2(c)(5) also provides that in addition to the two registered principals, Participants shall also have at least one person qualified for registration as a FINOP pursuant to current Article 6, Rule 3(c). In turn, current Rule 2(c)(6) provides that based upon the written application of the Participant or prospective Participant, the Exchange may waive the requirement to maintain two principals if the Participant demonstrates conclusively that only one individual acting in such capacity should be required to register. Current Rule 2(c)(6) also provides that a Participant that conducts a proprietary trading business only and has 25 or fewer representatives shall only be required to have one officer or partner who is registered as a Principal. Current Rule 2(c)(6) further provides that a Participant shall be considered to conduct only proprietary trading if the Participant has the following characteristics: (A) The Participant is not required by Section 15(b)(8) of the Exchange Act to become a FINRA member; (B) All funds used or proposed to be used by the Participant are the Participant's own capital, traded through the Participant's own accounts; (C) The Participant does not, and will not, have customers; and (D) All persons registered on behalf of the Participant acting or to be acting in the capacity of a trader must be owners of, employees of, or contractors to the Participant.

Proposed Rule 2(b)(2) is similar to NYSE National Rule 2.2(c)(2) and largely retains the substance of current Rules 2(c)(5) and (6). Specifically, proposed Rule 2(b)(1) provides as follows:

Each Participant, other than a sole proprietorship is required to register at least two Principals with the Exchange; provided, however, that a proprietary trading firm with 25 or fewer representatives shall only be required to register one principal with the

[56] Subsequent paragraphs under amended Article 6, Rule 2 will be revised accordingly.

[57] *See* NYSE National Rule 2.1220(b)(1).

[58] NYSE National Rule 2.1220(a)(1).

Exchange. A person registered solely as a Financial and Operations Principal or an Introducing Broker-Dealer Financial and Operations Principal (''FINOP''), as defined under Article 6, Rule 14(a)(4), does not count toward the two-principal requirement and shall not be qualified to function in a principal capacity with responsibility over any area of business activity not described under Article 6, Rule 14(a)(4). The Exchange may waive the provisions of this paragraph (b)(2) in situations that indicate conclusively that only one person associated with an applicant for membership should be required to register as a principal. For purposes of this paragraph (b)(2), a ''proprietary trading firm'' shall mean a Participant meeting the following characteristics: It trades its own capital, does not have customers, excluding broker-dealers, and is not a FINRA member. To qualify for this definition, the funds used by a proprietary trading firm must be exclusively firm funds, all trading must be in the firm's accounts, and traders must be owners of, employees of, or contractors to the firm.

3. Proposed Rule 2(c)—Persons Exempt From Registration [59]

Current Rule 2(d) (Persons Exempt from Registration) the following persons associated with a Participant are not required to be registered with the Exchange: (1) Persons associated with a Participant whose functions are solely and exclusively clerical or ministerial; (2) persons associated with a Participant who are not actively engaged in the securities business; (3) individual Participants and individual associated persons whose functions are related solely and exclusively to the Participant's need for nominal corporate officers or for capital participation; and (4) individual associated persons whose functions are related solely and exclusively to: (A) Transactions in commodities; or (B) transactions in security futures; or (C) effecting transactions at another national securities exchange and who are registered as members with such exchange.

In light of proposed Article 6, Rule 15 (Associated Persons Exempt from Registration), the Exchange does not propose to maintain the current exemption from registration provisions as it is inconsistent with NYSE National Rule 2.1230. Accordingly, proposed Rule 2(c) provides that only persons who qualify for exemption from registration pursuant to proposed Article 6, Rule 15 shall be exempt from registration with the Exchange.

[59] *See supra* note 56.

4. Proposed Rule 2(d)—Impermissible Registrations [60]

Current Rule 2(e) (Other Registration Requirements) provides several bases upon which a person may not be registered with a Participant. The rule provides that a Participant shall not make application for the registration of any person associated with the Participant where there is no intent to employ such person in the securities business of the Participant. The rule also states that a Participant shall not maintain a registration with the Exchange for any person who is no longer active in the Participant's securities business; who is no longer functioning in the registered capacity; or where the sole purpose is to avoid an examination requirement. However, proposed paragraph .01 of Article 6, Rule 13 provides that a Participant may make application for or maintain the registration as a representative or principal of any associated person of a Participant and any individual engaged in the securities business of a foreign securities affiliate or subsidiary of the Participant. Therefore, without amending current Rule 2(e), a person may be eligible for permissive registration pursuant to proposed paragraph .01 under Article 6, Rule 13, but may be prohibited from such registration pursuant to current Rule 2(e).

In light of proposed paragraph .01 under Article 6, Rule 13, the Exchange proposes to delete current Rule 2(e) in its entirety and to adopt proposed Rule 2(d), which provides that Participants shall not register or maintain the registration of any person unless consistent with the requirements of proposed Article 6, Rule 13.[61]

F. Amendments to Article 6, Rule 3—Training and Examination of Registrants

1. Proposed Rule 3(a)—Registration Requirements of Representatives

Current Rule 3(a)(1) provides the current registration requirements of representatives. The Exchange now proposes to amend Rule 2(a) to replace references to the ''Series 7 General Securities Representative examination'' and the ''Series 57 Securities Trader Examination'' with ''General Securities Representative qualification examination ('Series 7')'' and ''Securities Trader Examination ('Series 57'),'' respectively, so as to be consistent with references to the examinations under NYSE National Rule 2.2, Commentaries .01 and .03. The Exchange also proposes to amend the rule to require that representatives pass the SIE in addition to the Series 7 or Series 57, as applicable, which is consistent with proposed Article 6, Rules 14(b)(2)(B) and 14(b)(3)(B). Finally, the Exchange proposes replace language describing persons who must register with the Exchange as a Securities Trader with new language providing that each representative meeting the definition of a Securities Trader under proposed Article 6, Rule 14(b)(3) must pass the Series 57 and the SIE.

Current Rule 3(a)(2) provides that a representative that is engaged solely in ''securities trading activities'' shall not be required to registered as a General Securities Representative. In light of proposed Article 6, Rule 14(b)(3), which outlines the types of trading activities that would require a representative to register as a Securities Trader, the Exchange proposes to amend Rule 3(a)(2) to clarify that ''securities trading activities'' are described under proposed Article 6, Rule 14(b)(3).

2. Proposed Rule 3(b)—Supervisory Requirements and Registration

Current Rule 3(b) provides general registration and supervisory requirements of principals. The Exchange now proposes to replace references to the ''General Securities Principal examination, Series 24'' with ''General Securities Principal qualification examination ('Series 24'),'' so as to be stylistically consistent with the proposed references to the Series 7 and Series 57 exams under proposed Article 6, Rule 3(a)(1). In addition, the Exchange proposes to replace citations to the current definition of ''Principal'' under current Article 6, Rule 2(c)(1) with the amended definition of ''principal'' under proposed Article 6, Rule 14(a). Finally, the Exchange proposes replace the references to ''successfully complete and maintain'' with the word ''pass,'' so as to be stylistically consistent with references under proposed Article 6, Rule 14 to ''passing'' or having to ''pass'' a qualification examination.

Current Rule 3(b)(1) provides a ''Securities Trading Exception'' permitting the Chief Compliance Officer of a Participant Firm that engages solely in securities trading activities to complete and maintain the Compliance Officer Exam (Series 14) as an alternative qualification to the Series 24. The Exchange now proposes to eliminate this exception and to generally provide that the Exchange will accept the New York Stock Exchange

[60] *Id.*

[61] The proposed change is substantially similar to that contained in FINRA Rule 1210.10.

(''NYSE'') Compliance Official Examination (''NYSE Series 14'') as an alternative qualification to the Series 24 to register as a principal an individual identified as the Chief Compliance Officer on the Participant's Form BD.[62]

3. Proposed Rule 3(c)—Financial and Operations Principals

Current Rule 3(c) requires that each Participant designate one individual as a FINOP, who must pass the Financial Operations Principal examination, Series 27. The Exchange now proposes to replace reference to ''Limited Principal—Financial and Operations ('FINOP')'' with ''FINOP,'' as the abbreviation is already established under proposed Article 6, Rule 2(b)(2). In addition, the Exchange proposes to adopt additional language permitting a Participant to designate an ''Introducing Broker-Dealer FINOP,'' in lieu of a FINOP, if applicable, and requiring all Registered Persons designated as an Introducing Broker-Dealer FINOP to pass the Introducing Broker-Dealer Financial and Operations Principal qualification examination (''Series 28''). Finally, the Exchange propose to replace a reference to the ''Financial and Operations Principal examination, Series 27'' with ''Financial and Operations Principal qualification examination ('Series 27'),'' so as to be stylistically consistent with the proposed references to other examinations, such as the Series 7 and Series 57 exams under proposed Article 6, Rule 3(a)(1).

4. Proposed Rule 3(d)—Institutional Broker Representatives

Current Rule 3(d) provides registration requirements for Institutional Broker Representatives, which is a registration category unique to CHX.[63] In addition, current paragraph .01(a) under Article 6, Rule 3 provides that all applicants seeking to register as Institutional Broker Representatives must successfully complete the Institutional Broker Exam. The Exchange now proposes to amend current Rule 3(d) by adding an introductory sentence that consolidates and replaces current paragraph .01(a) under Article 6, Rule 3 and the first sentence of current Rule 3(d), which states that all applicants seeking to register as Institutional Broker Representatives, as defined under current Article 1, Rule 1(gg), must pass the Exchange's Institutional Broker Examination and comply with the provisions of Article 17. The Exchange also proposes to replace references to ''Series 7 General Securities Representative examination,'' ''Series 57 Securities Trader Exam'' and the General Securities Principal Series 24 exam'' with ''General Securities Representative qualification examination,'' ''Securities Trader qualification examination'' and the ''General Securities Principal qualification examination,'' which is stylistically consistent with references to the examinations under proposed Article 6, Rules 3(a) and 3(b). In addition, the Exchange proposes to amend the rule to require that Institutional Broker Representatives that are required to register with the exchange as a representative pass the SIE in addition to the Series 7 or Series 57, as applicable, which is consistent with proposed Article 6, Rules 14(b)(2)(B) and 14(b)(3)(B). Also, in light of the amendments to Rule 3(b)(1) described above, the Exchange proposes to replace reference to the Securities Trading Exception, which will be eliminated, with a reference to the NYSE Compliance Official Examination. Finally, the Exchange proposes to clarify that the term ''Firm'' refers to ''Participant Firm.''

5. Deleting Current Paragraph .02 Under Article 6, Rule 3—Waiver of the Examination Requirement

In light of proposed paragraph .02 under Article 6, Rule 13, which adopts new requirements related to, among other things, waiver of examination requirements, as described above, the Exchange propose to delete current paragraph .02 in its entirety.

G. Amendments to Article 6, Rule 10 (Fingerprinting)

Current Rule 10 provides that each Participant is responsible for ensuring compliance with Section 17(f)(2) of the Exchange Act and Rule 17f–2 under the Exchange Act, regarding the fingerprinting of securities industry personnel. The rule further provides that each Participant shall submit the fingerprints of its associated persons to the FINRA Web CRD prior to such persons performing the functions listed under Rule 17f–2 under the Exchange Act. The Exchange now propose to amend the fingerprinting requirement to be substantively similar to NYSE National Rule 2.2, Commentary .08 and FINRA Rule 1010(d). Specifically, the Exchange propose to replace the second sentence under current Rule 10 with the following:

Upon filing an electronic Form U4 on behalf of a person applying for registration, a Participant shall promptly submit fingerprint information for that person. The Exchange may make a registration effective pending receipt of the fingerprint information. If a Participant fails to submit the fingerprint information within 30 days after the Exchange receives the electronic Form U4, the person's registration shall be deemed inactive. In such case, the Exchange shall notify the Participant that the person must immediately cease all activities requiring registration and is prohibited from performing any duties and functioning in any capacity requiring registration. The Exchange shall administratively terminate a registration that is inactive for a period of two years. A person whose registration is administratively terminated may reactivate the registration only by reapplying for registration and meeting the qualification requirements under the Rules. Upon application and a showing of good cause, the Exchange may extend the 30-day period.

H. Amendments to Article 6, Rule 11—Continuing Education for Registered Persons

Current Article 6, Rule 11 provides the continuing education requirements of certain Registered Persons subsequent to their initial qualification and registration with the Exchange, and includes a Regulatory Element and a Firm Element. The Regulatory Element applies to Registered Persons and consists of periodic computer-based training on regulatory, compliance, ethical, supervisory subjects and sales practice standards. The Firm Element consists of at least an annual, member-developed and administered training programs designed to keep Registered Persons current regarding securities products, services and strategies offered by the member.

As noted above,[64] proposed Article 1, Rule 1(yy) includes within the definition of a Registered Person any person who is permissively registered pursuant to proposed paragraph .01 under Article 6, Rule 13 and any person designated as eligible for a waiver pursuant to proposed paragraph .08 under Article 6, Rule 13.[65] The purpose of this change is to ensure all Registered Persons, including those with permissive registrations, keep their knowledge of the securities industry current. The inclusion of persons

[62] The proposed rule is substantially similar to NYSE National Rule 2.2, Commentary .02.

[63] *See* CHX Article 1, Rule 1(gg) defining ''Institutional Broker Representative.''

[64] *See supra* Section 3(a)(D).

[65] The proposed change is substantially similar to that contained in NYSE National Rule 2.2(e).

designated as eligible for a waiver under the term ''Registered Person'' corresponds to the requirements of proposed paragraph .08 under Article 6, Rule 13.

1. Regulatory Element

The Exchange propose to amend Article 6, Rule 11(a) to provide that the content of the Regulatory Element of the program shall be determined by the Exchange and shall be appropriate to the status of the person subject to this Rule, which is consistent with NYSE National Rule 2.2(e)(1)(A).

Also, the Exchange proposes to amend Article 6, Rule 11(a) to provide, consistent with proposed paragraph .08 under Article 6, Rule 13, that a waiver-eligible person would be subject to a Regulatory Element program that correlates to his or her most recent registration category, and that the content of the Regulatory Element would be based on the same cycle had the individual remain registered.[66]

Furthermore, the Exchange proposes to amend Article 6, Rule 11(a)(1) to provide that any person whose registration has been deemed inactive under the rule may not accept or solicit business or receive any compensation for the purchase or sale of securities. The proposed amendment provides, however, that such person may receive trail or residual commissions resulting from transactions completed before the inactive status, unless the Participant with which the person is associated has a policy prohibiting such trail or residual commissions.[67] The proposed amendment also provides that a registration that is inactive for a period of two years will be administratively terminated and that a person whose registration is so terminated may reactivate the registration only by reapplying for registration and meeting the qualification requirements of the applicable provisions of these Rules. Accordingly, the Exchange proposes to delete current paragraph .05 under Article 6, Rule 11 as repetitive. Finally, the amended rule also states that the Exchange may, upon application and a showing of good cause, allow for additional time for a Registered Person satisfy the program requirements and if a person designated as eligible for a waiver pursuant to paragraph .08 under Article 6, Rule 13 fails to complete the Regulatory Element within the prescribed time frames, the person shall no longer be eligible for such a waiver.[68]

In addition, under current Article 6, Rule 11(a)(2), a Registered Person is required to retake the Regulatory Element in the event that such person (A) is subject to any statutory disqualification as defined in Section 3(a)(39) of the Exchange Act; (B) is subject to suspension or to the imposition of a fine of $5,000 or more for violation of any provision of any securities law or regulation, or any agreement with or rule or standard of conduct of any securities governmental agency, securities self-regulatory organization, or as imposed by any such regulatory or self-regulatory organization in connection with a disciplinary proceeding; or (C) is ordered as a sanction in a disciplinary action to retake the Regulatory Element by any securities governmental agency or self-regulatory organization. The Exchange proposes to amend Rule 11(a)(2) to provide an exception to a waiver-eligible person from retaking the Regulatory Element and satisfy all of its requirements.[69]

Current Rule 11(a)(2) also provides that re-taking of the Regulatory Element shall commence with participation within 120 days of the Registered Person becoming subject to the statutory disqualification, pursuant to Rule 11(a)(2)(A), or the disciplinary action becoming final, pursuant to either Rule 11(a)(2)(B) or (C). To better comport to Rule 11(a)(2), the Exchange proposes to amend current paragraph .03 under Article 6, Rule 11 to clarify that the new base date for a Registered Person subject to statutory disqualification is the date on which such person became subject to statutory disqualification. Specifically, amended paragraph .03 provides that a Registered Person who becomes subject to a disciplinary action as enumerated in subsections (a)(2)(A)–(C) of the Rule, will be required to satisfy the requirements of the Regulatory Element of the continuing education program with the date that the person becomes subject to statutory disqualification, in the case of subsection (a)(2)(A) of the Rule, or the person's disciplinary action becomes final, in the case of subsections (a)(2)(B) or (C) of the Rule, as the person's new base date.

Also, the Exchange proposes to update current Article 6, Rule 11(a)(3) to provide that the ''S201 Supervisor Program,'' which is the Regulatory Element program for Principals, is required for those persons registered with the Exchange as either an Introducing Broker-Dealer Financial and Operations Principals or General Securities Sales Supervisors, which are two registration categories that the Exchange is proposing to adopt under proposed Article 6, Rules 14(a)(4) and 14(a)(6), respectively.

Moreover, the Exchange proposes to adopt Article 6, Rule 11(a)(5) related to reassociation in a registered capacity, which is substantively similar to NYSE National Rule 2.2(e)(1)(D) and provides that any Registered Person who has terminated association with a Participant and who has, within two years of the date of termination, become reassociated in a registered capacity with a Participant shall participate in the Regulatory Element at such intervals that may apply (second anniversary and every three years thereafter) based on the initial registration anniversary date rather than based on the date of reassociation in a registered capacity. Accordingly, the Exchange proposes to delete the first paragraph under current paragraph .04 under Article 6, Rule 11 as repetitive.

Finally, the Exchange propose to adopt Article 6, Rule 11(a)(6), which is substantively similar to NYSE National Rule 2.2(e)(1)(E) and provides that each Participant shall designate and identify to the Exchange (by name and email address) an individual or individuals responsible for receiving email notifications provided via Web CRD regarding when a Registered Person is approaching the end of his or her Regulatory Element time frame and when a Registered Person is deemed inactive due to failure to complete the requirements of the Regulatory Element program. The rule also provides that each Participant shall identify, review, and, if necessary, update the information regarding the Regulatory Element contact person(s) with Web CRD.

2. Firm Element

The Exchange propose to capitalize the term ''Covered Registered Persons'' defined under current Article 6, Rule 11(b)(1), which is also capitalized under NYSE National Rule 2.2(e)(2), and to make conforming amendments throughout Rule 11(b).

Also, current Article 6, Rule 11(b)(2)(B) provides that programs used to implement a Participant's training program must be appropriate for the business of the Participant and, at a minimum must cover specific matters concerning securities products, services, and strategies offered by the Participant. The Exchange proposes to amend the

[66] The proposed change is substantially similar to that contained in NYSE National Rule 2.2(e)(1)(A).

[67] The proposed change is substantially similar to that contained in NYSE National Rule 2.2(e)(1)(B).

[68] The proposed change is substantially similar to that contained in NYSE National Rule 2.2(e)(1)(B).

[69] The proposed change is substantially similar to that contained in NYSE National Rule 2.2(e)(1)(C).

current rule to expand the minimum standard for such training programs by requiring that, at a minimum, a firm's training program must also cover training in ethics and professional responsibility.[70]

I. Amendments to Article 16, Rule 3—Obligations of Market Maker Authorized Traders (''MMATs'')

Current Article 16, Rule 3(b)(2) provides that to be eligible for registration as a MMAT, a person must successfully complete the Series 57 Securities Trader Examination and complete any other training and/or certification programs as may be required by the Exchange. In light of the adoption of the SIE, the Exchange now proposes to amend the rule to require that MMATs successfully complete both the Securities Trader Examination and the SIE. In addition, the Exchange proposes to delete a reference to the ''Series 57'' such that reference to the ''Securities Trader Examination'' is stylistically similar to a reference to the examination under proposed Article 6, Rule 3(a).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[71] in general, and furthers the objectives of Section 6(b)(5),[72] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change will streamline, and bring consistency and uniformity to, the registration rules, which will, in turn, assist Participants and their associated persons in complying with these rules and improve regulatory efficiency. The proposed rule change will also improve the efficiency of the examination program, without compromising the qualification standards. In addition, the proposed rule change will expand the scope of permissive registrations, which, among other things, will allow Participants to develop a depth of associated persons with registrations to respond to unanticipated personnel changes and will encourage greater regulatory understanding. Further, the proposed rule change will provide a more streamlined and effective waiver process for individuals working for a financial services industry affiliate of a Participant, and it will require such individuals to maintain specified levels of competence and knowledge while working in areas ancillary to the investment banking and securities business.

Finally, the Exchange believes that, with the introduction of the SIE and expansion of the pool of individuals who are eligible to take the SIE, the proposed rule change has the potential of enhancing the pool of prospective securities industry professionals by introducing them to securities laws, rules and regulations and appropriate conduct before they join the industry in a registered capacity.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments are intended to promote transparency in the Exchange's rules, and consistency with the rules of other SROs with respect to the examination, qualification, and continuing education requirements applicable to Participants and their registered personnel. The Exchange believes that in that regard that any burden on competition would be clearly outweighed by the important regulatory goal of ensuring clear and consistent requirements applicable across SROs, avoiding duplication, and mitigating any risk of SROs implementing different standards in these important areas.

Further, the Exchange does not believe that the proposed amendments will affect competition among securities markets since all SROs are expected to adopt similar rules with uniform standards for qualification, registration and continuing education requirements.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[73] and Rule 19b–4(f)(6) thereunder.[74] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[75] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[76] 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 proposal may become operative immediately upon filing. The Exchange has represented that, to the Exchange's knowledge, the waiver of the operative delay would not adversely or unfairly affect current or prospective Participants, and would make the Exchange's qualification requirements consistent with those of NYSE National and FINRA, which were implemented on October 1, 2018. Waiver of the 30-day operative delay will allow the Exchange to harmonize its registration, examination and continuing education requirements with the rules of FINRA and the exchanges, as of the date of filing so that registered persons will be subject to consistent requirements across the industry. Therefore, the Commission believes that the wavier is consistent with the protection of investors and hereby waives the 30-day operative delay and designates the proposal operative on December 18, 2018.[77]

[70] The proposed change is substantially similar to that contained in NYSE National Rule 2.2(e)(2)(ii).

[71] 15 U.S.C. 78f(b).

[72] 15 U.S.C. 78f(b)(5).

[73] 15 U.S.C. 78s(b)(3)(A)(iii).

[74] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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 satisfied this requirement.

[75] 17 CFR 240.19b–4(f)(6).

[76] 17 CFR 240.19b–4(f)(6)(iii).

[77] For purposes only of waiving the 30-day operative delay, the Commission has also

Continued

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[78] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CHX–2018–07 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–CHX–2018–07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2018–07 and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[79]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28193 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[78] 15 U.S.C. 78s(b)(2)(B).

[79] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84888; File No. SR–MIAX–2018–34]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change To Amend Exchange Rule 519, MIAX Order Monitor; Exchange Rule 519A, Risk Protection Monitor; and Rule 517, Quote Types Defined

December 20, 2018.

On November 9, 2018, Miami International Securities Exchange, LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Exchange Rules 519 (MIAX Order Monitor), 519A (Risk Protection Monitor), and 517 (Quote Types Defined). The proposed rule change was published for comment in the **Federal Register** on November 20, 2018.[3] The Commission has received no comments on the proposal.

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is January 4, 2019.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change.

Accordingly, pursuant to Section 19(b)(2) of the Act[5] and for the reasons stated above, the Commission designates February 18, 2019, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–MIAX–2018–34).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28185 Filed 12–27–18; 8:45 am]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 84594 (Nov. 14, 2018), 83 FR 58642.

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84882; File No. SR–NYSENAT–2018–27]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Change To Make Non-Substantive Changes to Its Certificate of Incorporation

December 20, 2018.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b-4 thereunder,[3] notice is hereby given that, on December 18, 2018, NYSE National, Inc. (the ''Exchange'' or ''NYSE National'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b-4.

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 make non-substantive changes to its certificate of incorporation. The proposed change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make two non-substantive changes to its Amended and Restated Certificate of Incorporation of the Exchange (''Exchange Certificate'').

The Exchange recently filed to amend the Exchange Certificate (as amended, the ''Amended Certificate'') to (1) harmonize certain provisions thereunder with similar provisions in the governing documents of the Exchange's national securities exchange affiliates and parent companies; and (2) make clarifying and updating changes.[4] Such changes will become operative upon the Amended Certificate becoming effective pursuant to its filing with the Secretary of State of the State of Delaware, which will not be prior to 30 days from the date on which the November Amendment was filed.[5]

The Exchange proposes to make two non-substantive changes to the Amended Certificate prior to its being filed with the Secretary of State of the State of Delaware. Specifically, in the first sentence of the introductory paragraph and the signature line, the Exchange's name is written in capital and lower case letters, as ''NYSE National, Inc.'' The Exchange proposes to amend the name so that it is in all capital letters, as ''NYSE NATIONAL, INC.'' [6]

Such changes would become operative upon the Amended Certificate becoming effective pursuant to its filing with the Secretary of State of the State of Delaware.

The Exchange is proposing to make the described changes because currently the exact name of the Exchange on the records of the Secretary of State of the State of Delaware is ''NYSE NATIONAL, INC.'' The previously filed changes to Article FIRST, which uses the name ''NYSE National, Inc.'', will update the name of the Exchange on such records of the Secretary of State of the State of Delaware from ''NYSE NATIONAL, INC.'' to ''NYSE National, Inc.'' [7]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,[8] in general, and furthers the objectives of Section 6(b)(1)[9] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,[10] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The proposed non-substantive changes would conform the Amended Certificate with the records of the Secretary of State of Delaware, which would further enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. Such amendments would also remove impediments to and perfect the mechanism of a free and open market by removing any confusion that may result from any inconsistency between the Amended Certificate and the records of the Secretary of State of Delaware. The Exchange further believes that the proposed amendments would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency and clarity, thereby reducing potential confusion. The proposed changes would have no effect on the operations of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change is not intended to address competitive issues but rather is non-substantive and concerned solely with the corporate governance and administration of the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(3) [12] thereunder in that the proposed rule change is concerned solely with the administration of the Exchange.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may 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,

[4] *See* Exchange Act Release No. 84644 (November 21, 2018), 83 FR 61177 (November 28, 2018) (SR–NYSENAT–2018–24) (''November Amendment'') (notice of filing and immediate effectiveness of proposed rule change to amend Exchange Certificate and bylaws).

[5] *Id.* at 61182.

[6] *Id.* at 61178. The Exchange inadvertently stated in the November Amendment that the legal name of the Exchange is not entirely in capital letters. *Id.* This previous statement, and current correction, have no effect on the operations of the Exchange.

[7] *See* Del. Code tit. 8, § 242.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(1).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b-4(f)(3).

or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [13] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSENAT–2018–27 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSENAT–2018–27. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSENAT–2018–27, and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28183 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(2)(B).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84879; File No. SR–OCC–2018–014]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change, as Modified by Partial Amendment No. 1, Related to The Options Clearing Corporation's Margin Methodology for Incorporating Variations in Implied Volatility

December 20, 2018.

I. Introduction

On October 22, 2018, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2018–014 (''Proposed Rule Change'') pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 [2] thereunder to propose changes to OCC's model for incorporating variations in implied volatility within OCC's margin methodology, the System for Theoretical Analysis and Numerical Simulations.[3]

On October 30, 2018, OCC filed a partial amendment (''Partial Amendment No. 1'') to the Proposed Rule Change.[4] The Proposed Rule Change, as modified by Partial Amendment No. 1, was published for public comment in the **Federal Register** on November 8, 2018,[5] and the Commission received no comments regarding the Proposed Rule Change. This order approves the Proposed Rule Change.

II. Background

The System for Theoretical Analysis and Numerical Simulations (''STANS'') is OCC's methodology for calculating margin. STANS includes econometric models that incorporate a number of risk factors. OCC defines a risk factor in STANS as a product or attribute whose historical data is used to estimate and simulate the risk for an associated product. The majority of risk factors utilized in STANS are the returns on individual equity securities; however, a number of other risk factors may be considered, including, among other things, returns on implied volatility risk factors.[6]

As a general matter, the implied volatility of an option is a measure of the expected future volatility of the option's underlying security at expiration, which is reflected in the price of the option.[7] Changes in implied volatility, therefore, result in changes to an option's value. In effect, the implied volatility is responsible for that portion of the premium that cannot be attributed to the then-current intrinsic value of the option (*i.e.,* the difference between the price of the underlying and the exercise price of the option), discounted to reflect its time value.

STANS includes a model that simulates variations in implied volatility for most of the option contracts that OCC clears (''Implied Volatility Model'').[8] The purpose of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Notice of Filing *infra* note 5, at 83 FR 55918.

[4] In Partial Amendment No. 1, OCC corrected an error in Exhibit 5 without changing the substance of the Proposed Rule Change. References to the Proposed Rule Change from this point forward refer to the Proposed Rule Change, as amended by Partial Amendment No. 1.

[5] Securities Exchange Act Release No. 84524 (Nov. 2, 2018), 83 FR 55918 (Nov. 8, 2018) (SR–OCC–2018–014) (''Notice of Filing''). OCC also filed a related advance notice (SR–OCC–2018–804) (''Advance Notice'') with the Commission pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 and Rule 19b–4(n)(1)(i) under the Act. 12 U.S.C. 5465(e)(1). 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively. The Advance Notice was published in the **Federal Register** on November 26, 2018. Securities Exchange Act Release No. 84626 (Nov. 19, 2018), 83 FR 60541 (Nov. 26, 2018) (SR–OCC–2018–804).

[6] In December 2015, the Commission approved a proposed rule change and issued a Notice of No Objection to an advance notice filing by OCC to its modify margin methodology by more broadly incorporating variations in implied volatility within STANS. *See* Securities Exchange Act Release No. 76781 (Dec. 28, 2015), 81 FR 135 (Jan. 4, 2016) (SR–OCC–2015–016) and Securities Exchange Act Release No. 76548 (Dec. 3, 2015), 80 FR 76602 (Dec. 9, 2015) (SR–OCC–2015–804).

[7] Using the Black-Scholes options pricing model, the implied volatility is the standard deviation of the underlying asset price necessary to arrive at the market price of an option of a given strike, time to maturity, underlying asset price and the current risk-free rate.

[8] OCC's Implied Volatility Model excludes: (i) Binary options, (ii) options on commodity futures, (iii) options on U.S. Treasury securities, and (iv) Asians and Cliquets. These products were relatively new products at the time that OCC completed its last implied volatility margin methodology changes, and OCC had *de minimus* open interest in those options. OCC uses its Implied Volatility Model specifically for options that have a residual tenor of less than three years (''Shorter Tenor Options'').

OCC's Implied Volatility Model is to ensure that the anticipated cost of liquidating options positions in an account recognizes the possibility that implied volatility could change during the two-business day liquidation time horizon and lead to corresponding changes in the market prices of the options. OCC, in turn, uses such anticipated costs to determine and collect the amount of margin necessary to collateralize the exposure that OCC could face in the event of a Clearing Member default.

One component of the Implied Volatility Model is a forecast of the volatility of implied volatility. In the process of performing backtesting and impact analyses as well as comparing the Implied Volatility Model to industry benchmarks, OCC determined that its process for forecasting the volatility of implied volatility is extremely sensitive to sudden spikes in volatility, which can at times result in over-reactive margin requirements that OCC believes are unreasonable and procyclical.[9] For example, on February 5, 2018, the Cboe Volatility Index (''VIX'') experienced a large amount of volatility.[10] Based on its review and understanding of OCC's analysis, the Commission understands that OCC's Implied Volatility Model forecasted an extreme increase in the volatility of implied volatility in response to the increase in the VIX on February 5, 2018.[11] Specifically, the Implied Volatility Model forecasted a volatility of implied volatility for an at-the-money, one-month tenor SPX position that was approximately 4 times larger than the comparable market index.[12] This forecast caused aggregate margin requirements at OCC to jump more than 80 percent overnight due to the Implied Volatility Model, and margin requirements for certain individual Clearing Members increased by a factor of 10.[13] Due in large part to the over-reaction of the Implied Volatility Model's to the rise in the VIX, a future shock to the VIX during a time of market stress could result in an increase in margin requirements that likely would impose additional stresses on Clearing Members.

The Proposed Rule Change would modify OCC's Implied Volatility Model by introducing an exponentially weighted moving average[14] for the daily forecasted volatility of implied volatility risk factors. Specifically, when forecasting the volatility for each implied volatility risk factor, OCC would use an exponentially weighted moving average of forecasted volatilities over a specified look-back period rather than using unweighted daily forecasted volatilities. The Proposed Rule Change would change the Implied Volatility Model's sensitivity to large, sudden shocks in market volatility when forecasting the volatility of implied volatility. Specifically, the Proposed Rule Change would result in a more measured initial response to such shocks while producing margin requirements that may remain elevated for a longer period of time following a market shock. Based on its analysis of data provided by OCC, the Commission understands that the margin requirements calculated with the current and proposed models would be very similar during less volatile periods, and that the likelihood that OCC would have sufficient margin to cover its exposures under normal market conditions would not decrease under the proposed model.[15] However, the proposed model would present a more commensurate response to the extreme volatility increases in the market.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Exchange Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization.[16] After carefully considering the Proposed Rule Change, the Commission finds the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to OCC. More specifically, the Commission finds that the proposal is consistent with Section 17A(b)(3)(F) of the Exchange Act[17] and Rule 17Ad–22(e)(6)(i) thereunder.[18]

A. Consistency With Section 17A(b)(3)(F) of the Exchange Act

Section 17A(b)(3)(F) of the Exchange Act requires that the rules of a clearing agency be designed to, among other things, assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, and, in general, to protect investors and the public interest.[19] Based on its review of the record, the Commission believes that the proposed changes are designed to assure the safeguarding of securities and funds which are in OCC's custody or control, and, in general, protect investors and the public interest for the reasons set forth below.

First, margin deposits at OCC provide collateral to mitigate the potential default of a Clearing Member. As noted above, OCC uses STANS, including the Implied Volatility Model, to determine and collect the amount of margin necessary to collateralize the exposure that OCC could face in the event of a Clearing Member default. The Proposed Rule Change would change the Implied Volatility Model's response to sudden, large changes in market volatility. As noted above, the margin requirements produced by the current model appear to be overly responsive to sudden, large shocks. Following implementation of the Proposed Rule Change, OCC's margin methodology would produce a more measured initial response to a sudden, large change in market volatility while maintaining elevated margin requirements following such a shock. As described above, however, the coverage provided by OCC's margin methodology following implementation of the Proposed Rule Change would likely be comparable to the coverage provided currently.[20] Further, the proposal would result in margin requirements that remain elevated for a longer period of time following a market shock, which could provide further support for OCC's ability to cover its potential future exposure to risk.

For these reasons, the Commission believes that the Proposed Rule Change would enhance the Implied Volatility Model by enabling OCC to determine its margin requirements more precisely and to better reflect the risks and particular attributes of the products cleared by OCC, thereby allowing OCC to more effectively cover its credit exposure to its Clearing Members. By more precisely determining OCC's credit exposure to its Clearing Members, the Proposed Rule Change is designed to help ensure that,

[9] *See* Notice of Filing, 83 FR at 55919.

[10] The VIX is a measure of the implied volatility of the of Standard & Poor's 500 index (''SPX'').

[11] *See* Notice of Filing, 83 FR at 55919.

[12] *See id.*

[13] *See id.* For example, the total margin requirements for one Clearing Member would have increased from $120 million on February 2, 2018 to $1.78 billion on February 5, 2018. *See* Notice of Filing, 83 FR at 55919, n. 22.

[14] An exponentially weighted moving average is a statistical method that averages data in a way that gives more weight to the most recent observations.

[15] OCC's backtesting, which the Commission has reviewed and analyzed, demonstrated that coverage levels using the proposed model were substantially similar to the results obtained from the current model. *See* Notice, 83 FR at 55920.

[16] 15 U.S.C. 78s(b)(2)(C).

[17] 15 U.S.C. 78q–1(b)(3)(F).

[18] 17 CFR 240.17Ad–22(e)(6)(i).

[19] 15 U.S.C. 78q–1(b)(3)(F).

[20] *See supra* note 15.

in the event of a Clearing Member default, OCC's operations would not be disrupted and non-defaulting Clearing Members would not be exposed to losses that they cannot anticipate or control. In this way, the Proposed Rule Change is designed to help assure the safeguarding of securities and funds which are in the custody or control of OCC, or for which it is responsible, consistent with Section 17A(b)(3)(F) of the Exchange Act.

Second, the Proposed Rule Change could reduce the likelihood that OCC's margin requirements impose sudden and excessive stress on Clearing Members during times of broader market stress. As described above, the current Implied Volatility Model could result in dramatic increases in Clearing Member margin requirements in response to a sudden, large shock in market volatility. Based on its review of OCC's data comparing margin requirements to market data on February 5, 2018, the Commission understands that the size of such an increase would not necessarily be commensurate with the risk of the Clearing Member's portfolio because, as described above, the volatility of implied volatility forecasted by the current model on that day was 4 times the size of a comparable market index, resulting in margin requirements for some Clearing Members that rose by a factor of 10. Imposing a large, unexpected increase in margin requirements could impose a large, unexpected stress on a Clearing Member during a period of high volatility. The Commission believes that reducing the likelihood of unnecessarily large and unexpected stresses on Clearing Members could help to lessen the risk of Clearing Member defaults. Reducing the risk of Clearing Member defaults could also reduce the likelihood of contagion during times of market stress because Clearing Members, particularly large Clearing Members, tend to be active participants in multiple asset markets. Therefore, the Commission believes that the Proposed Rule Change provides for rules designed, in general, to protect investors and the public interest.

Accordingly, and for the reasons stated above, the Commission believes that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Exchange Act.[21]

B. Consistency With Rule 17Ad–22(e)(6) Under the Exchange Act

Rule 17Ad–22(e)(6)(i) under the Exchange Act requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover, if the covered clearing agency provides central counterparty services, its credit exposures to its participants by establishing a risk-based margin system that, among other things, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[22]

The Proposed Rule Change is designed to better align the margin requirements produced by OCC's margin methodology with the level of risk posed by changes in market volatility. The component of the current Implied Volatility Model that forecasts the volatility of implied volatility is very sensitive to sudden, large changes in market volatility, as evidenced by the model's reaction to the large, sudden spike in market volatility observed on February 5, 2018 discussed above, which produced dramatic increases in Clearing Member margin requirements. The Proposed Rule Change to the Implied Volatility Model would reduce the sensitivity of the model to sudden, large changes in market volatility, and, as demonstrated by OCC's backtesting, would be unlikely to reduce the level of coverage.[23]

The Commission believes that revising the Implied Volatility Model could produce margin requirements that are more precise and better reflect the risks and particular attributes of the products cleared by OCC. The Commission further believes that such changes could produce margin levels that are commensurate with the risks of the products being cleared. Accordingly, based on the foregoing, the Commission believes that the Proposed Rule Change is consistent with Exchange Act Rule 17Ad–22(e)(6)(i).[24]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Exchange Act, and in particular, the requirements of Section 17A of the Exchange Act[25] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[26] that the Proposed Rule Change (SR–OCC–2018–014) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28180 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

[21] 15 U.S.C. 78q–1(b)(3)(F).

[22] 17 CFR 240.17Ad–22(e)(6)(i).

[23] *See supra* note 15.

[24] 17 CFR 240.17Ad–22(e)(6).

[25] In approving this Proposed Rule Change, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[26] 15 U.S.C. 78s(b)(2).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84900; File No. SR–MIAX–2018–35]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change To Amend Exchange Rule 100, Definitions; Rule 515, Execution of Orders and Quotes; and Rule 503, Openings on the Exchange

December 20, 2018.

On November 9, 2018, Miami International Securities Exchange, LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Exchange Rules 100 (Definitions), 515 (Execution of Orders and Quotes), and 503 (Openings on the Exchange). The proposed rule change was published for comment in the **Federal Register** on November 20, 2018.[3] The Commission has received no comments on the proposal.

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is January 4, 2019.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 84589 (Nov. 14, 2018), 83 FR 58633.

[4] 15 U.S.C. 78s(b)(2).

to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change.

Accordingly, pursuant to Section 19(b)(2) of the Act [5] and for the reasons stated above, the Commission designates February 18, 2019, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–MIAX–2018–35).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28197 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84899; File No. SR–NYSE–2018–65]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Price List Regarding Certain Bond Trading License Fee Waivers

December 20, 2018.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 19, 2018, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to (i) extend a fee waiver for new firm application fees for applicants seeking only to obtain a bond trading license (''BTL'') for 2019; and (ii) waive the BTL fee for 2019. The Exchange proposes to implement the fee changes effective January 2, 2019. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List to (i) extend a fee waiver for new firm application fees for applicants seeking only to obtain a BTL for 2019; [4] and (iii) waive the BTL fee for 2019. The Exchange proposes to implement the fee changes effective January 2, 2019.

The Exchange currently charges a New Firm Fee ranging from $2,500 to $20,000, depending on the type of firm, which is charged per application for any broker-dealer that applies to be approved as an Exchange member organization. The Exchange proposes to waive the New Firm Fee for 2019 for new member organization applicants that are seeking only to obtain a BTL and not trade equities at the Exchange. The proposed waiver of the New Firm Fee would be available only to applicants seeking approval as a new member organization, including carrying firms, introducing firms, or non-public organizations, which would be seeking to obtain a BTL at the Exchange and not trade equities. Further, if a new firm that is approved as a member organization and has had the New Firm Fee waived converts a BTL to a full trading license within one year of approval, the New Firm Fee would be charged in full retroactively. The Exchange believes that charging the New Firm Fee retroactively within a year of approval is appropriate because it would discourage applicants to claim that they are applying for a BTL solely to avoid New Firm Fees.

Additionally, the Exchange currently charges a BTL fee of $1,000 per year. The Exchange proposes to amend the Price List to waive the BTL fee for 2019 for all member organizations.

The Exchange believes that the proposed fee changes would provide increased incentives for bond trading firms that are not currently Exchange member organizations to apply for Exchange membership and a BTL. The Exchange believes that having more member organizations trading on the Exchange's bond platform would benefit investors through the additional display of liquidity and increased execution opportunities in Exchange-traded bonds at the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[6] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that it is reasonable to waive the New Firm Fee and the annual BTL fee for 2019 to provide an incentive for bond trading firms to apply for Exchange membership and a BTL. The Exchange believes that providing an incentive for bond trading firms that are not currently Exchange member organizations to apply for membership and a BTL would encourage market participants to become members of the Exchange and bring additional liquidity to a transparent bond market. To the extent the existing New Firm Fees or the BTL fee serves as a disincentive for bond trading firms to become Exchange member organizations, the Exchange believes that the proposed fee change could expand the number of firms eligible to trade bonds on the Exchange. The Exchange believes creating incentives for bond trading firms to trade bonds on the Exchange protects investors and the public interest by increasing the competition and liquidity

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange initially filed to adopt the fee waiver and waive the BTL fee in 2015. *See* Securities Exchange Act Release No. 74031 (January 12, 2015), 80 FR 2462 (January 16, 2015) (SR–NYSE–2014–78). The Exchange subsequently filed to extend the fee waiver and waive the BTL fee in 2017 and 2018. *See* Securities Exchange Act Release Nos. 79710 (December 29, 2016), 82 FR 1395 (January 5, 2017) (SR–NYSE–2016–89); and 82418 (December 28, 2017), 83 FR 568 (January 4, 2018) (SR–NYSE–2017–70).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4), (5).

on a transparent market for bond trading. The proposed waiver of the New Firm Fee and BTL fee is equitable and not unfairly discriminatory because it would be offered to all market participants that wish to trade at the Exchange the narrower class of debt securities only.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[7] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Debt securities typically trade in a decentralized over-the-counter (''OTC'') dealer market that is less liquid and transparent than the equities markets. The Exchange believes that the proposed change would increase competition with these OTC venues by reducing the cost of being approved as and operating as an Exchange member organization that solely trades bonds at the Exchange, which the Exchange believes will enhance market quality through the additional display of liquidity and increased execution opportunities in Exchange-traded bonds at the Exchange.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues that are not transparent. In such an environment, the Exchange must continually review, and consider adjusting its fees and rebates to remain competitive with other exchanges as well as with alternative trading systems and other venues that are not required to comply with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. As a result of all of these considerations, the Exchange does not believe that the proposed change will impair the ability of member organizations or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[8] of the Act and subparagraph (f)(2) of Rule 19b–4[9] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[10] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2018–65 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2018–65. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2018–65, and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28196 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78f(b)(8).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

[10] 15 U.S.C. 78s(b)(2)(B).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84943; File No. 265–30]

Fixed Income Market Structure Advisory Committee

AGENCY: Securities and Exchange Commission.

ACTION: Notice of meeting.

SUMMARY: Notice is being provided that the Securities and Exchange Commission Fixed Income Market Structure Advisory Committee will hold a public meeting on Monday, January 28, 2019 in Multi-Purpose Room LL–006 at the Commission's headquarters, 100 F Street NE, Washington, DC. The meeting will begin at 9:30 a.m. (ET) and will be open to the public. The meeting will be webcast on the Commission's website at *www.sec.gov.* Persons needing special accommodations to take part because of a disability should notify the contact persons listed below. The public is

invited to submit written statements to the Committee. The meeting will include updates and presentations from the subcommittees.

DATES: The public meeting will be held on January 28, 2019. Written statements should be received on or before January 23, 2019.

ADDRESSES: The meeting will be held at the Commission's headquarters, 100 F Street NE, Washington, DC. Written statements may be submitted by any of the following methods:

Electronic Statements

- Use the Commission's internet submission form (*http://www.sec.gov/rules/other.shtml*); or
- Send an email message to *rule-comments@sec.gov.* Please include File Number 265–30 on the subject line; or

Paper Statements

- Send paper statements in triplicate to Brent J. Fields, Federal Advisory Committee Management Officer, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. 265–30. This file number should be included on the subject line if email is used. To help us process and review your statement more efficiently, please use only one method. The Commission will post all statements on the Commission's internet website at *http://www.sec.gov/comments/265-30/265-30.shtml.*

Statements also will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Room 1580, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All statements received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: David Dimitrious, Senior Special Counsel, at (202) 551–5131, or Benjamin Bernstein, Special Counsel, at (202) 551–5354, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: In accordance with Section 10(a) of the Federal Advisory Committee Act, 5 U.S.C.—App. 1, and the regulations thereunder, Brett Redfearn, Designated Federal Officer of the Committee, has ordered publication of this notice.

Dated: December 21, 2018.

Brent J. Fields,

Committee Management Officer.

[FR Doc. 2018–28314 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84898; File No. SR–NYSEARCA–2018–93]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Options Fees and Charges and Equities Fees and Charges To Extend for One Year a Fee Discount for the Partial Cabinet Solution Bundles Offered in Connection With the Exchange's Co-Location Services

December 20, 2018.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 12, 2018, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Options Fees and Charges (the ''Options Fee Schedule'') and Equities Fees and Charges (the ''Equities Fee Schedule'', together with the Options Fee Schedule, the ''Fee Schedules'') to extend for one year a fee discount for the Partial Cabinet Solution bundles offered in connection with the Exchange's co-location services. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Exchange's Fee Schedules to extend a fee discount for the Partial Cabinet Solution bundles offered in connection with the Exchange's co-location services.[4] The Exchange offers the four Partial Cabinet Solution bundles to attract smaller Users, such as those with minimal power or cabinet space demands, or those for which the attendant costs of having a dedicated cabinet and related connectivity are too burdensome.[5]

The Exchange offers Users [6] that purchase a Partial Cabinet Solution bundle on or before December 31, 2018 a 50% reduction in the monthly recurring charges (''MRC'') for the first 24 months.[7] The Exchange proposes to extend the 50% fee reduction to those Users that purchase a Partial Cabinet Solution bundle on or before December 31, 2019.[8] The Exchange does not

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in 2010. *See* Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR–NYSEArca–2010–100) (the ''Original Co-location Filing''). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users.

[5] *See* Securities Exchange Act Release No. 77070 (February. 5, 2016), 81 FR 7401 (February. 11, 2016) (SR–NYSEArca–2015–102).

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76010 (September 29, 2015), 80 FR 60197 (October 5, 2015) (SR–NYSEArca–2015–82). As specified in the Fee Schedules, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates New York Stock Exchange LLC (''NYSE LLC'') and NYSE MKT LLC (''NYSE MKT'' and, together with NYSE LLC, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70173 (August 13, 2013), 78 FR 50459 (August 19, 2013) (SR–NYSEArca–2013–80).

[7] *See* Securities Exchange Act Release No. 79716 (December 30, 2016), 82 FR 1774 (January 6, 2017) (SR–NYSEArca–2016–168).

[8] The Exchange previously extended the MRC reduction for one year. *See* Securities Exchange Act

Continued

propose to amend the length of the discount period.

The amended portions of the Fee Schedules would read as follows:

Type of service	Description	Amount of charge
Partial Cabinet Solution bundles ..... **Note:** A User and its Affiliates are limited to one Partial Cabinet Solution bundle at a time. A User and its Affiliates must have an Aggregate Cabinet Footprint of 2 kW or less to qualify for a Partial Cabinet Solution bundle. See Note 2 under ''General Notes.''	Option A: 1 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $3,000 monthly for first 24 months of service, and $6,000 monthly thereafter. • For Users that order after December 31, 2019: $6,000 monthly.
	Option B: 2 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $3,500 monthly for first 24 months of service, and $7,000 monthly thereafter. • For Users that order after December 31, 2019: $7,000 monthly.
	Option C: 1 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $7,000 monthly for first 24 months of service, and $14,000 monthly thereafter. • For Users that order after December 31, 2019: $14,000 monthly.
	Option D: 2 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $7,500 monthly for first 24 months of service, and $15,000 monthly thereafter. • For Users that order after December 31, 2019: $15,000 monthly.

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (*e.g.,* a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis; [9] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.[10]

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Sections 6(b)(4) [12] and 6(b)(5) [13] of the Act, in particular. The proposal is consistent with Section 6(b)(4) of the Act because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. The Proposal is also consistent with Section 6(b)(5) of the Act because it is designed to promote just and equitable principles of trade, remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposal provides for the equitable allocation of reasonable dues, fees, and other charges because it would extend the existing eligibility for a 50% MRC reduction for another year, providing smaller Users with minimal power or cabinet space demands with additional time to purchase a Partial Cabinet Solution at a discounted rate. The Exchange believes that it is reasonable to continue to offer the fee reduction as an incentive to Users to utilize the service, including both new and past Users. As is currently the case, the purchase of any colocation service (including Partial Cabinet Solution bundles) is completely voluntary. All Users that order a bundle on or before December 31, 2019 would have their MRC reduced by 50% for the first 24 months.

The proposal would remove impediments to, and perfects the mechanisms of, a free and open market

Release No. 82226 (December 6, 2017), 82 FR 58462 (December 12, 2017) (SR–NYSEArca–2017–134). *See also* Securities Exchange Act Release Nos. 82223 (December 6, 2017), 82 FR 58459 (December 12, 2017) (SR–NYSE–2017–62), *and* 82224 (December 6, 2017), 82 FR 58465 (December 12, 2017) (SR–NYSEAmer–2017–35).

[9] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[10] *See* SR–NYSEArca–2013–80, *supra* note 6, at 50459. The Exchange's affiliates have also submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2018–63, SR–NYSEAmer–2018–55, and SR–NYSENAT–2018–26.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4).

[13] 15 U.S.C. 78f(b)(5).

and a national market system because extending the 50% MRC reduction would continue to make it more cost effective for Users to utilize co-location by offering a cost effective, convenient way to create a colocation environment, through the choice of four Partial Cabinet Solution bundles with different cabinet footprints and network connections options. As mentioned above, the Exchange expects that such Users would include those with minimal power or cabinet space demands and Users for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome.

The proposal would not unfairly discriminate between customers, issuers, brokers or dealers because it would apply to all Users equally. The Exchange would continue to offer the same four different Partial Cabinet Solution bundles with different cabinet footprints and network connections options. Users that require other sizes or combinations of cabinets, network connections and cross connects could still request them.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule changes will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of Section 6(b)(8) of the Act.[14] The proposal changes will enhance competition by continuing to offer cost effective options for Users to create a colocation environment through four Partial Cabinet Solution bundles. Partial Cabinet Solution bundles allow Users to select their desired cabinet footprint and network connections at a reduced MRC for the first 24 months. Such Users may choose, in turn, to pass on such cost savings to their customers. In addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.,* the same products and services are available to all Users, and the extension of the 50% reduction for the MRC for the Partial Cabinet Solution bundles, would apply to all Users).

The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange. In such an environment, the Exchange must continually review, and consider adjusting, its services and related fees and credits to remain competitive with other exchanges.

For the reasons described above, the Exchange believes that the proposed rule changes reflect this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[15] of the Act and subparagraph (f)(2) of Rule 19b–4[16] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[17] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEARCA–2018–93 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–NYSEARCA–2018–93. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments

[14] 15 U.S.C. 78f(b)(8).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(2).

[17] 15 U.S.C. 78s(b)(2)(B).

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–NYSEARCA–2018–93 and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28195 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84881; File No. SR–NYSEArca–2018–94]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating To Listing and Trading of Shares of iShares Gold Trust Micro Under NYSE Arca Rule 8.201–E

December 20, 2018.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 14, 2018, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 list and trade shares of iShares Gold Trust Micro under NYSE Arca Rule 8.201–E. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares (''Shares'') of the iShares Gold Trust Micro under NYSE Arca Rule 8.201–E.[4] Under NYSE Arca Rule 8.201–E, the Exchange may propose to list and/or trade pursuant to unlisted trading privileges (''UTP'') ''Commodity-Based Trust Shares.''[5]

The Trust will not be registered as an investment company under the Investment Company Act of 1940, as amended.[6] The Trust is not a commodity pool for purposes of the Commodity Exchange Act of 1936, as amended (the ''Commodity Exchange Act'').[7]

The sponsor of the Trust is iShares Delaware Trust Sponsor LLC (''Sponsor''). The trustee is The Bank of New York Mellon (''Trustee'') and the custodian is JPMorgan Chase Bank N.A., London branch (''Custodian'').

The Commission has previously approved listing on the Exchange under NYSE Arca Rules 5.2–E(j)(5) and 8.201–E of other precious metals and gold-based commodity trusts, including the GraniteShares Gold MiniBAR Trust;[8] GraniteShares Gold Trust;[9] Merk Gold Trust;[10] ETFS Gold Trust,[11] ETFS Platinum Trust[12] and ETFS Palladium Trust (collectively, the ''ETFS Trusts'');[13] APMEX Physical–1 oz. Gold Redeemable Trust;[14] Sprott Gold Trust;[15] SPDR Gold Trust (formerly, streetTRACKS Gold Trust); iShares Silver Trust;[16] iShares COMEX Gold Trust (now known as iShares Gold Trust);[17] Long Dollar Gold Trust;[18] Euro Gold Trust, Pound Gold Trust and Yen Gold Trust;[19] and The Gold Trust.[20] Prior to their listing on the Exchange, the Commission approved listing of the streetTRACKS Gold Trust on the New York Stock Exchange (''NYSE'')[21] and listing of iShares COMEX Gold Trust and iShares Silver Trust on the American Stock Exchange LLC.[22] In addition, the Commission has

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Trust has filed a registration statement on Form S–1 under the Securities Act of 1933 (15 U.S.C. 77a), dated November 19, 2018 (File No. 333–228469) (the ''Registration Statement''). The description of the operation of the Trust and the Shares herein is based, in part, on the Registration Statement.

[5] Commodity-Based Trust Shares are securities issued by a trust that represents investors' discrete identifiable and undivided beneficial ownership interest in the commodities deposited into the Trust.

[6] 15 U.S.C. 80a–1.

[7] 17 U.S.C. 1.

[8] Securities Exchange Act Release No. 84257 (September 21, 2018), 83 FR 48877 (September 27, 2018) (SR–NYSEArca–2018–55) (order approving listing and trading shares of the GraniteShares Gold MiniBAR Trust under NYSE Arca Equities Rule 8.201).

[9] Securities Exchange Act Release No. 81077 (July 5, 2017), 82 FR 24181 (July 11, 2017) (SR–NYSEArca–2017–55) (order approving listing and trading shares of the GraniteShares Gold Trust under NYSE Arca Equities Rule 8.201).

[10] Securities Exchange Act Release No. 71378 (January 23, 2014), 79 FR 4786 (January 29, 2014) (SR–NYSEArca–2013–137).

[11] Securities Exchange Act Release No. 59895 (May 8, 2009), 74 FR 22993 (May 15, 2009) (SR–NYSEArca–2009–40).

[12] Securities Exchange Act Release No. 61219 (December 22, 2009), 74 FR 68886 (December 29, 2009) (SR–NYSEArca–2009–95).

[13] Securities Exchange Act Release No. 61220 (December 22, 2009), 74 FR 68895 (December 29, 2009) (SR–NYSEArca–2009–94).

[14] Securities Exchange Act Release No. 66930 (May 7, 2012), 77 FR 27817 (May 11, 2012) (SR–NYSEArca–2012–18).

[15] Securities Exchange Act Release No. 61496 (February 4, 2010), 75 FR 6758 (February 10, 2010) (SR–NYSEArca–2009–113).

[16] *See* Securities Exchange Act Release No. 58956 (November 14, 2008), 73 FR 71074 (November 24, 2008) (SR–NYSEArca–2008–124) (order approving listing on the Exchange of the iShares Silver Trust).

[17] *See* Securities Exchange Act Release No. 56224 (August 8, 2007), 72 FR 45850 (August 15, 2007) (SR–NYSEArca–2007–76) (order approving listing on the Exchange of the street TRACKS Gold Trust); Securities Exchange Act Release No. 56041 (July 11, 2007), 72 FR 39114 (July 17, 2007) (SR–NYSEArca–2007–43) (order approving listing on the Exchange of iShares COMEX Gold Trust).

[18] *See* Securities Exchange Act Release No. 79518 (December 9, 2016), 81 FR 90876 (December 15, 2016) (SR–NYSEArca–2016–84) (order approving listing and trading of shares of the Long Dollar Gold Trust).

[19] *See* Securities Exchange Act Release No. 80840 (June 17, 2017) (SR–NYSEArca–2017–33) (order approving listing and trading of shares of the Euro Gold Trust, Pound Gold Trust, and the Yen Gold Trust under NYSE Arca Equities Rule 8.201).

[20] *See* Securities Exchange Act Release No. 81918 (October 23, 2017), 82 FR 49884 (October 27, 2017) (SR–NYSEArca–2017–98) (Order Approving a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to List and Trade Shares of The Gold Trust under NYSE Arca Rule 8.201–E).

[21] *See* Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) (SR–NYSE–2004–22) (order approving listing of street TRACKS Gold Trust on NYSE).

[22] *See* Securities Exchange Act Release Nos. 51058 (January 19, 2005), 70 FR 3749 (January 26,

approved trading of the streetTRACKS Gold Trust and iShares Silver Trust on the Exchange pursuant to UTP.[23]

The Exchange represents that the Shares satisfy the requirements of NYSE Arca Rule 8.201–E and thereby qualify for listing on the Exchange.[24]

Operation of the Trust [25]

According to the Registration Statement, the Trust will seek to reflect generally the performance of the price of gold before payment of the Trust's expenses and liabilities. The Trust will issue Shares which represent units of fractional undivided beneficial interest in the net assets of the Trust.

The Trust will not trade in gold futures, options or swap contracts on any futures exchange or over the counter (''OTC''). The Trust will not hold or trade in commodity futures contracts, ''commodity interests'', or any other instruments regulated by the Commodity Exchange Act. The Trust will take delivery of physical gold that complies with the London Bullion Market Association (''LBMA'') gold delivery rules.

The Shares are intended to constitute a simple and cost-effective means of making an investment similar to an investment in gold. Although the Shares are not the exact equivalent of an investment in gold, they are intended to provide investors with an alternative that allows a level of participation in the gold market through the securities market.

Operation of the Gold Market

The global trade in gold consists of OTC transactions in spot, forwards, and options and other derivatives, together with exchange-traded futures and options.

The OTC gold market includes spot, forward, and option and other derivative transactions conducted on a principal-to-principal basis. While this is a global, nearly 24-hour per day market, its main centers are London, New York, and Zurich.

According to the Registration Statement, most OTC market trades are cleared through London. The LBMA plays an important role in setting OTC gold trading industry standards. A London Good Delivery Bar (as described below), which is acceptable for settlement of any OTC transaction, will be acceptable for delivery to the Trust in connection with the issuance of Baskets.

The most significant gold futures exchange in the U.S. is COMEX, operated by Commodities Exchange, Inc., a subsidiary of New York Mercantile Exchange, Inc., and a subsidiary of the Chicago Mercantile Exchange Group (the ''CME Group''). Other commodity exchanges include the Tokyo Commodity Exchange (''TOCOM''), the Multi Commodity Exchange Of India (''MCX''), the Shanghai Futures Exchange, ICE Futures US (the ''ICE''), and the Dubai Gold & Commodities Exchange. The CME Group and ICE are members of the Intermarket Surveillance Group (''ISG'').

Although the Trust will not invest in gold futures, information about the gold futures market is relevant as such markets contribute to, and provide evidence of, the liquidity of the overall market for gold.

The London Gold Bullion Market

According to the Registration Statement, most trading in physical gold is conducted on the OTC market, predominantly in London. LBMA coordinates various OTC-market activities, including clearing and vaulting, acts as the principal intermediary between physical gold market participants and the relevant regulators, promotes good trading practices and develops standard market documentation. In addition, the LBMA promotes refining standards for the gold market by maintaining the ''London Good Delivery List,'' which identifies refiners of gold that have been approved by the LBMA.

In the OTC market, gold bars that meet the specifications for weight, dimensions, fineness (or purity), identifying marks (including the assay stamp of an LBMA-acceptable refiner) and appearance described in ''The Good Delivery Rules for Gold and Silver Bars'' published by the LBMA are referred to as ''London Good Delivery Bars.'' A London Good Delivery Bar (typically called a ''400 ounce bar'') must contain between 350 and 430 fine troy ounces of gold (1 troy ounce = 31.1034768 grams), with a minimum fineness (or purity) of 995 parts per 1,000 (99.5%), be of good appearance and be easy to handle and stack. The fine gold content of a gold bar is calculated by multiplying the gross weight of the bar (expressed in units of 0.025 troy ounces) by the fineness of the bar. A London Good Delivery Bar must also bear the stamp of one of the refiners identified on the London Good Delivery List.

Following the enactment of the Financial Markets Act 2012, the Prudential Regulation Authority of the Bank of England is responsible for regulating most of the financial firms that are active in the bullion market, and the Financial Conduct Authority is responsible for consumer and competition issues. Trading in spot, forwards and wholesale deposits in the bullion market is subject to the Non-Investment Products Code adopted by market participants.

Creation and Redemption of Shares

According to the Registration Statement, the Trust will create and redeem Shares on a continuous basis in ''Baskets'' of 50,000 Shares. Only ''Authorized Participants'', which are registered broker-dealers who have entered into written agreements with the Sponsor and the Trustee, can deposit gold and receive Baskets in exchange. Upon the deposit of the corresponding amount of gold with the Custodian, and the payment of the Trustee's applicable fee and of any expenses, taxes or charges, the Trustee will deliver the appropriate number of Baskets to the DTC account of the depositing Authorized Participant. The Sponsor and the Trustee will maintain a current list of Authorized Participants. Gold deposited with the Custodian must meet the specifications for weight, dimensions, fineness (or purity), identifying marks and appearance of gold bars as set forth in ''The Good Delivery Rules for Gold and Silver Bars'' published by the LBMA. Orders to create or redeem Shares must be placed by 3:59 p.m. Eastern Time (''E.T.'').

The ''Basket Gold Amount'' necessary for the creation of a Basket will change from day to day.[26] On each day that NYSE Arca is open for regular trading, the Trustee will adjust the quantity of gold constituting the Basket Gold Amount as appropriate to reflect sales of gold, any loss of gold that may occur, and accrued expenses. The computation is made by the Trustee as promptly as

2005) (SR–Amex–2004–38) (order approving listing of iShares COMEX Gold Trust on the American Stock Exchange LLC); 53521 (March 20, 2006), 71 FR 14967 (March 24, 2006) (SR–Amex–2005–72) (order approving listing on the American Stock Exchange LLC of the iShares Silver Trust).

[23] *See* Securities Exchange Act Release Nos. 53520 (March 20, 2006), 71 FR 14977 (March 24, 2006) (SR–PCX–2005–117) (order approving trading on the Exchange pursuant to UTP of the iShares Silver Trust); 51245 (February 23, 2005), 70 FR 10731 (March 4, 2005) (SR–PCX–2004–117) (order approving trading on the Exchange of the streetTRACKS Gold Trust pursuant to UTP).

[24] With respect to the application of Rule 10A–3 (17 CFR 240.10A–3) under the Act, the Trust relies on the exemption contained in Rule 10A–3(c)(7).

[25] The description of the operation of the Trust, the Shares and the gold market contained herein is based, in part, on the Registration Statement. *See* note 4, *supra*.

[26] The Basket Gold Amount is the amount of gold (measured in fine ounces), determined on each business day by the Trustee, which Authorized Participants must transfer to the Trust in exchange for a Basket, or will receive in exchange for each Basket surrendered for redemption.

practicable after 4:00 p.m., E.T. The Trustee will determine the Basket Gold Amount for a given day by multiplying the NAV by the number of Shares in each Basket (50,000) and dividing the resulting product by that day's LBMA Gold Price PM.

The Trustee intends to make available on each business day through the same channels used to disseminate the actual Basket Gold Amount determined by the Trustee as indicated above an indicative Basket Gold Amount for the next business day. Authorized Participants may use that indicative Basket Gold Amount as guidance regarding the amount of gold that they may expect to have to deposit with the Custodian in respect of purchase orders placed by them on such next business day and accepted by the Trustee. The agreement entered into with each Authorized Participant provides, however, that once a purchase order has been accepted by the Trustee, the Authorized Participant will be required to deposit with the Custodian the Basket Gold Amount determined by the Trustee on the effective date of the purchase order.

Redemption of Baskets; Withdrawal of Gold

According to the Registration Statement, Authorized Participants, acting on authority of the registered holder of Shares, may surrender Baskets in exchange for the corresponding Basket Gold Amount announced by the Trustee. Upon the surrender of such Shares and the payment of the Trustee's applicable fee and of any expenses, taxes or charges, the Trustee will deliver to the order of the redeeming Authorized Participant the amount of gold corresponding to the redeemed Baskets.

The amount of gold necessary for the creation of a Basket, or to be received upon redemption of a Basket, will decrease over the life of the Trust, due to the payment or accrual of fees and other expenses or liabilities payable by the Trust.

Unless otherwise agreed to by the Custodian, gold is delivered to the redeeming Authorized Participants in the form of physical bars only (except that any amount of less than 430 ounces may be transferred to an unallocated account of or as ordered by, the redeeming Authorized Participant).

Net Asset Value

According to the Registration Statement, the net asset value of the Trust will be obtained by subtracting all accrued fees, expenses and other liabilities of the Trust on any day from the total value of the gold and all other assets of the Trust on that day; the net asset value per Share (the ''NAV'') will be obtained by dividing the net asset value of the Trust by the number of Shares outstanding on the date the computation is made. On each day on which NYSE Arca is open for regular trading, the Trustee will determine the NAV as promptly as practicable after 4:00 p.m., E.T. The Trustee will value the Trust's gold on the basis of that day's LBMA Gold Price PM. If there is no LBMA Gold Price PM on any day, the Trustee is authorized to use the most recently announced LBMA Gold Price AM unless the Sponsor determines that such price is inappropriate as a basis for evaluation.

Availability of Information Regarding Gold

Currently, the ''Consolidated Tape Plan'' does not provide for dissemination of the spot price of a commodity such as gold over the consolidated tape. However, there will be disseminated over the consolidated tape the last sale price for the Shares. In addition, there is a considerable amount of information about gold and gold markets available on public websites and through professional and subscription services.

Investors may obtain gold pricing information on a 24-hour basis based on the spot price for an ounce of gold from various financial information service providers, such as Reuters and Bloomberg.

Reuters and Bloomberg, for example, provide at no charge on their websites delayed information regarding the spot price of gold and last sale prices of gold futures, as well as information about news and developments in the gold market. Reuters and Bloomberg also offer a professional service to subscribers for a fee that provides information on gold prices directly from market participants. Complete real-time data for gold futures and options prices traded on the COMEX are available by subscription from Reuters and Bloomberg. There are a variety of other public websites providing information on gold, ranging from those specializing in precious metals to sites maintained by major newspapers. In addition, the LBMA Gold Price is publicly available at no charge at *www.lbma.org.uk.*

Availability of Information

The intraday indicative value (''IIV'') per Share for the Shares will be disseminated by one or more major market data vendors. The IIV will be calculated based on the amount of gold held by the Trust and a price of gold derived from updated bids and offers indicative of the spot price of gold.[27]

The website for the Trust (*www.ishares.com*) will contain the following information, on a per Share basis, for the Trust: (a) The mid-point of the bid-ask price [28] at the close of trading (''Bid/Ask Price''), and a calculation of the premium or discount of such price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. The website for the Trust will also provide the Trust's prospectus. Finally, the Trust's website will provide the last sale price of the Shares as traded in the U.S. market. In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

Criteria for Initial and Continued Listing

The Trust will be subject to the criteria in NYSE Arca Rule 8.201–E(e) for initial and continued listing of the Shares.

A minimum of two Baskets or 100,000 Shares will be required to be outstanding at the start of trading, which is equivalent to 1,000 fine ounces of gold. The Exchange believes that the anticipated minimum number of Shares outstanding at the start of trading is sufficient to provide adequate market liquidity.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Trust subject to the Exchange's existing rules governing the trading of equity securities. Trading in the Shares on the Exchange will occur in accordance with NYSE Arca Rule 7.34–E(a). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6–E, the minimum price variation (''MPV'') for quoting and entry of orders in equity

[27] The IIV on a per Share basis disseminated during the ''Core Trading Session'', as defined in NYSE Arca Rule 7.34–E, should not be viewed as a real-time update of the NAV, which is calculated once a day.

[28] The bid-ask price of the Shares will be determined using the highest bid and lowest offer on the consolidated tape as of the time of calculation of the closing day NAV.

securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

Further, NYSE Arca Rule 8.201–E sets forth certain restrictions on ETP Holders acting as registered Market Makers in the Shares to facilitate surveillance. Under NYSE Arca Rule 8.201–E(g), an ETP Holder acting as a registered Market Maker in the Shares is required to provide the Exchange with information relating to its trading in the underlying gold, related futures or options on futures, or any other related derivatives. Commentary .04 of NYSE Arca Rule 11.3–E requires an ETP Holder acting as a registered Market Maker, and its affiliates, in the Shares to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments (including the Shares).

As a general matter, the Exchange has regulatory jurisdiction over its ETP Holders and their associated persons, which include any person or entity controlling an ETP Holder. A subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts would not be subject to Exchange jurisdiction, but the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading on the Exchange in the Shares may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which conditions in the underlying gold market have caused disruptions and/or lack of trading, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in Shares will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange's ''circuit breaker'' rule.[29] The Exchange will halt trading in the Shares if the NAV of the Trust is not calculated or disseminated daily. The Exchange may halt trading during the day in which an interruption occurs to the dissemination of the IIV, as described above. If the interruption to the dissemination of the IIV persists past the trading day in which it occurs, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority (''FINRA'') on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[30] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[31]

Also, pursuant to NYSE Arca Rule 8.201–E(g), the Exchange is able to obtain information regarding trading in the Shares and the underlying gold, gold futures contracts, options on gold futures, or any other gold derivative, through Equity Trading Permit (''ETP'') Holders acting as registered ''Market Makers'', in connection with such ETP Holders' proprietary or customer trades through ETP Holders which they effect on any relevant market.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares of the Trust on the Exchange.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Baskets (including noting that Shares are not individually redeemable); (2) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) how information regarding the IIV is disseminated; (4) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (5) the possibility that trading spreads and the resulting premium or discount on the Shares may widen as a result of reduced liquidity of gold trading during the Core Trading Session and ''Late Trading Session'' (as defined in NYSE Arca Rule 7.34–E) after the close of the major world gold markets; and (6) trading information. For example, the Information Bulletin will advise ETP Holders, prior to the commencement of trading, of the

[29] *See* NYSE Arca Rule 7.12–E.

[30] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[31] For a list of the current members of ISG, *see www.isgportal.org.*

prospectus delivery requirements applicable to the Trust. The Exchange notes that investors purchasing Shares directly from the Trust will receive a prospectus. ETP Holders purchasing Shares from the Trust for resale to investors will deliver a prospectus to such investors.

In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses as will be described in the Registration Statement. The Information Bulletin will also reference the fact that there is no regulated source of last sale information regarding physical gold, that the Commission has no jurisdiction over the trading of gold as a physical commodity, and that the Commodity Futures Trading Commission has regulatory jurisdiction over the trading of gold futures contracts and options on gold futures contracts.

The Information Bulletin will also discuss any relief, if granted, by the Commission or the staff from any rules under the Act.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) [32] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.201–E. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange may obtain information via the ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that there is a considerable amount of gold price and gold market information available on public websites and through professional and subscription services. Investors may obtain on a 24-hour basis gold pricing information based on the spot price for an ounce of gold from various financial information service providers. Investors may obtain gold pricing information based on the spot price for an ounce of gold from various financial information service providers. Current spot prices also are generally available with bid/ask spreads from gold bullion dealers. In addition, the Trust's website will provide pricing information for gold spot prices and the Shares. Market prices for the Shares will be available from a variety of sources including brokerage firms, information websites and other information service providers. The NAV of the Trust will be published by the Sponsor on each day that the NYSE Arca is open for regular trading and will be posted on the Trust's website. The IIV relating to the Shares will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session. In addition, the LBMA Gold Price is publicly available at no charge at *www.lbma.org.uk.* The Trust's website will also provide the Trust's prospectus, as well as the two most recent reports to stockholders. In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding gold pricing.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed rule change will enhance competition by accommodating Exchange trading of an additional exchange-traded product relating to physical gold.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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; or (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [33] and Rule 19b–4(f)(6) thereunder.[34]

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that the Fund would operate in a manner comparable to other issues of Commodity-Based Trust Shares whose listing and trading the Commission has previously approved.[35] The Exchange does not believe the proposed rule change raises any novel regulatory issues. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest and hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing.[36]

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

[32] 15 U.S.C. 78f(b)(5).

[33] 15 U.S.C. 78s(b)(3)(A).

[34] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its 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 satisfied this requirement.

[35] *See* notes 8–23, *supra.*

[36] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 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–NYSEArca–2018–94 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–NYSEArca–2018–94. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2018–94 and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[37]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28182 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

[37] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84895; File No. SR–NYSENAT–2018–26]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Schedule of Fees and Rebates To Extend for One Year a Fee Discount for the Partial Cabinet Solution Bundles Offered in Connection With the Exchange's Co-Location Services

December 20, 2018.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 12, 2018, NYSE National, Inc. (the ''Exchange'' or ''NYSE National'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Schedule of Fees and Rebates (the ''Price List'') to extend for one year a fee discount for the Partial Cabinet Solution bundles offered in connection with the Exchange's co-location services. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Exchange's Fee Schedules to extend a fee discount for the Partial Cabinet Solution bundles offered in connection with the Exchange's co-location services.[4] The Exchange offers the four Partial Cabinet Solution bundles to attract smaller Users, such as those with minimal power or cabinet space demands, or those for which the attendant costs of having a dedicated cabinet and related connectivity are too burdensome.[5]

The Exchange offers Users[6] that purchase a Partial Cabinet Solution bundle on or before December 31, 2018 a 50% reduction in the monthly

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange initially filed rule changes relating to its co-location services with the Commission on May 18, 2018. *See* Securities Exchange Act Release No. 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR–NYSENAT–2018–07). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users.

[5] *Id.*

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See supra* note 4 at note 9. As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE American LLC (''NYSE American''), New York Stock Exchange LLC (''NYSE''), and NYSE Arca, Inc. (''NYSE Arca'' and, together with NYSE American and NYSE, the ''Affiliate SROs''). *See supra* note 4 at note 11.

[7] *See supra* note 4.

recurring charges (''MRC'') for the first 24 months.[7] The Exchange proposes to extend the 50% fee reduction to those Users that purchase a Partial Cabinet Solution bundle on or before December 31, 2019. The Exchange does not propose to amend the length of the discount period.

The amended portions of the Fee Schedules would read as follows:

Type of service	Description	Amount of charge
Partial Cabinet Solution bundles ..... **Note:** A User and its Affiliates are limited to one Partial Cabinet Solution bundle at a time. A User and its Affiliates must have an Aggregate Cabinet Footprint of 2 kW or less to qualify for a Partial Cabinet Solution bundle. See Note 2 under ''General Notes.''	Option A: 1 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $3,000 monthly for first 24 months of service, and $6,000 monthly thereafter. • For Users that order after December 31, 2019: $6,000 monthly.
	Option B: 2 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $3,500 monthly for first 24 months of service, and $7,000 monthly thereafter. • For Users that order after December 31, 2019: $7,000 monthly.
	Option C: 1 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $7,000 monthly for first 24 months of service, and $14,000 monthly thereafter. • For Users that order after December 31, 2019: $14,000 monthly.
	Option D: 2 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $7,500 monthly for first 24 months of service, and $15,000 monthly thereafter. • For Users that order after December 31, 2019: $15,000 monthly.

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (*e.g.,* a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis; [8] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.[9]

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) [11] and 6(b)(5) [12] of the Act, in particular. The proposal is consistent with Section 6(b)(4) of the Act because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. The Proposal is also consistent with Section 6(b)(5) of the Act because it is designed to promote just and equitable principles of trade, remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposal provides for the equitable allocation of reasonable dues, fees, and other charges because it would extend the existing eligibility for a 50% MRC reduction for another year, providing smaller Users with minimal power or cabinet space demands with additional time to purchase a Partial Cabinet Solution at a discounted rate. The Exchange believes that it is reasonable to continue to offer the fee reduction as an incentive to Users to utilize the service, including both new and past

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See supra* note 4 at note 9. As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE American LLC (''NYSE American''), New York Stock Exchange LLC (''NYSE''), and NYSE Arca, Inc. (''NYSE Arca'' and, together with NYSE American and NYSE, the ''Affiliate SROs''). *See supra* note 4 at note 11.

[7] *See supra* note 4.

[8] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[9] *See* SR–NYSENAT–2018–07, *supra* note 4 at 26315. The Exchange's affiliates have also submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSEAmer–2018–55 and SR–NYSEArca–2018–93, and SR–NYSE–2018–63.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

Users. As is currently the case, the purchase of any colocation service (including Partial Cabinet Solution bundles) is completely voluntary. All Users that order a bundle on or before December 31, 2019 would have their MRC reduced by 50% for the first 24 months.

The proposal would remove impediments to, and perfects the mechanisms of, a free and open market and a national market system because extending the 50% MRC reduction would continue to make it more cost effective for Users to utilize co-location by offering a cost effective, convenient way to create a colocation environment, through the choice of four Partial Cabinet Solution bundles with different cabinet footprints and network connections options. As mentioned above, the Exchange expects that such Users would include those with minimal power or cabinet space demands and Users for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome.

The proposal would not unfairly discriminate between customers, issuers, brokers or dealers because it would apply to all Users equally. The Exchange would continue to offer the same four different Partial Cabinet Solution bundles with different cabinet footprints and network connections options. Users that require other sizes or combinations of cabinets, network connections and cross connects could still request them.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule changes will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of Section 6(b)(8) of the Act.[13] The proposal changes will enhance competition by continuing to offer cost effective options for Users to create a colocation environment through four Partial Cabinet Solution bundles. Partial Cabinet Solution bundles allow Users to select their desired cabinet footprint and network connections at a reduced MRC for the first 24 months. Such Users may choose, in turn, to pass on such cost savings to their customers. In addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.,* the same products and services are available to all Users, and the extension of the 50% reduction for the MRC for the Partial Cabinet Solution bundles, would apply to all Users).

The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange. In such an environment, the Exchange must continually review, and consider adjusting, its services and related fees and credits to remain competitive with other exchanges.

For the reasons described above, the Exchange believes that the proposed rule changes reflect this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [14] of the Act and subparagraph (f)(2) of Rule 19b–4 [15] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [16] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSENAT–2018–26 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSENAT–2018–26. 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

[12] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(2).

[16] 15 U.S.C. 78s(b)(2)(B).

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSENAT–2018–26 and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28192 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:

Rules 6a–1 and 6a–2, Form 1, SEC File No. 270–0017, OMB Control No. 3235–0017

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 6a–1 (17 CFR 240.6a–1), Rule 6a–2 (17 CFR 240.6a–2), and Form 1 (17 CFR 249.1) under the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

The Exchange Act sets forth a regulatory scheme for national securities exchanges. Rule 6a–1 under the Exchange Act generally requires an applicant for initial registration as a national securities exchange to file an application with the Commission on Form 1. An exchange that seeks an exemption from registration based on limited trading volume also must apply for such exemption on Form 1. Rule 6a–2 under the Exchange Act requires registered and exempt exchanges: (1) To amend the Form 1 if there are any material changes to the information provided in the initial Form 1; and (2) to submit periodic updates of certain information provided in the initial Form 1, whether such information has changed or not. The information required pursuant to Rules 6a–1 and 6a–2 is necessary to enable the Commission to maintain accurate files regarding the exchange and to exercise its statutory oversight functions. Without the information submitted pursuant to Rule 6a–1 on Form 1, the Commission would not be able to determine whether the respondent has met the criteria for registration (or an exemption from registration) set forth in Section 6 of the Exchange Act. The amendments and periodic updates of information submitted pursuant to Rule 6a–2 are necessary to assist the Commission in determining whether a national securities exchange or exempt exchange is continuing to operate in compliance with the Exchange Act.

Initial filings on Form 1 by prospective exchanges are made on a one-time basis. The Commission estimates that it will receive approximately one initial Form 1 filing per year and that each respondent would incur an average burden of 880 hours to file an initial Form 1 at an average internal compliance cost per response of approximately $335,984. Therefore, the Commission estimates that the annual burden for all respondents to file the initial Form 1 would be 880 hours (one response/respondent × one respondent × 880 hours/response) and an internal compliance cost of $335,984 (one response/respondent × one respondent x $335,984/response).

There currently are 21 entities registered as national securities exchanges. The Commission estimates that each registered or exempt exchange files nine amendments or periodic updates to Form 1 per year, incurring an average burden of 25 hours to comply with Rule 6a–2. The SEC estimates that the average internal compliance cost for a national securities exchange per response would be approximately $8,365. The Commission estimates that the annual burden for all respondents to file amendments and periodic updates to the Form 1 pursuant to Rule 6a–2 is 4,725 hours (21 respondents × 25 hours/response × 9 responses/respondent per year) and an internal compliance cost of $1,580,985 (21 respondents × $8,365/response × 9 responses/respondent per year).

Written comments are invited on: (a) 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; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Charles Riddle, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Candace Kenner, 100 F Street NE, Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: December 21, 2018.

Brent J. Fields,

Secretary.

[FR Doc. 2018–28316 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84901; File No. SR–FINRA–2018–042]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend FINRA Rules 7610A and 7620A To Modify Certain Fees and Credits Applicable to FINRA/Nasdaq TRF Retail Participants

December 20, 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

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

17, 2018, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as ''establishing or changing a due, fee or other charge'' under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon receipt of this filing by 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

FINRA is proposing to amend FINRA Rules 7610A and 7620A to modify certain fees and credits applicable to Retail Participants that use the FINRA/Nasdaq Trade Reporting Facility Carteret (the ''FINRA/Nasdaq TRF Carteret'') and/or the FINRA/Nasdaq Trade Reporting Facility Chicago (the ''FINRA/Nasdaq TRF Chicago''). Under FINRA rules and as used herein, the term ''FINRA/Nasdaq TRF'' means the FINRA/Nasdaq TRF Carteret, the FINRA/Nasdaq TRF Chicago, or both, as applicable, depending on the facility or facilities to which the participant elects to report.

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA 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, FINRA 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. FINRA 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 FINRA/Nasdaq TRF is a facility of FINRA that is operated by Nasdaq, Inc. (''Nasdaq''). In connection with the establishment of the FINRA/Nasdaq TRF, FINRA and Nasdaq entered into a limited liability company agreement (the ''LLC Agreement''). Under the LLC Agreement, FINRA, the ''SRO Member,'' has sole regulatory responsibility for the FINRA/Nasdaq TRF. Nasdaq, the ''Business Member,'' is primarily responsible for the management of the FINRA/Nasdaq TRF's business affairs, including establishing pricing for use of the FINRA/Nasdaq TRF, to the extent those affairs are not inconsistent with the regulatory and oversight functions of FINRA. Additionally, the Business Member is obligated to pay the cost of regulation and is entitled to the profits and losses, if any, derived from the operation of the FINRA/Nasdaq TRF.

Pursuant to the FINRA Rule 7600A Series, FINRA/Nasdaq TRF participants are charged fees, may qualify for fee caps (Rule 7620A), and also may qualify for revenue sharing payments for trade reporting to the FINRA/Nasdaq TRF (Rule 7610A). These rules are administered by Nasdaq, in its capacity as the Business Member and operator of the FINRA/Nasdaq TRF on behalf of FINRA,[5] and Nasdaq collects all fees on behalf of the FINRA/Nasdaq TRF.

Pursuant to Supplementary Material .01 to FINRA Rule 7620A, a ''Retail Participant'' [6] is a participant ''for which substantially all of its trade reporting activity on the FINRA/Nasdaq Trade Reporting Facility comprises Retail Orders.'' [7] Under FINRA Rule 7620A, Retail Participants presently are subject to four categories of transaction-based fees, each of which is applicable to transactions on the three Tapes: [8] (1) Media/Executing Party; (2) Non-Media/Executing Party; (3) Media/Contra Party; and (4) Non-Media/Contra Party.[9] Rule 7620A provides that for any of these categories of fees, a Retail Participant may qualify for a cap on the fees it would otherwise pay to report trades to a particular Tape during a given month, provided that during the month, the Retail Participant achieves a daily average number of Media/Executing Party trades of at least 2,500 in that same Tape.[10] The uncapped fee rates and cap amounts that apply to Retail Participants are different from those that apply to non-Retail Participants under the Rule.[11]

Under Rule 7610A, FINRA members that report over-the-counter (''OTC'') transactions in NMS stocks to a FINRA/Nasdaq TRF for public dissemination or ''media'' purposes may receive quarterly transaction credits that equal a percentage of FINRA/Nasdaq TRF revenues that are attributable to the members' transactions.[12] The percentage of attributable revenue that a FINRA member may receive in the form of a transaction credit varies depending upon the extent of the member's market share on the FINRA/Nasdaq TRF.[13] The

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] FINRA's oversight of this function performed by the Business Member is conducted through a recurring assessment and review of TRF operations by an outside independent audit firm.

[6] To qualify as a ''Retail Participant'' and for special pricing under the Retail Participant fee schedule, a participant must complete and submit to Nasdaq, as the Business Member, an application. The application form requires the participant to attest to its qualifications as a Retail Participant on the FINRA/Nasdaq TRF in which it is a participant and for which it seeks Retail Participant pricing. The participant must also attest to its reasonable expectation that it will maintain its qualifications for a one year period following the date of attestation. Once a participant has been designated as a Retail Participant, it must complete and submit a written attestation to Nasdaq on an annual basis to retain its status as such. A Retail Participant must inform Nasdaq promptly if at any time it ceases to qualify or it reasonably expects that it will cease to qualify as a Retail Participant.

[7] Pursuant to FINRA Rule 7260A.01, a ''Retail Order'' means ''an order that originates from a natural person, provided that, prior to submission, no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.''

[8] Market data is transmitted to three tapes based on the listing venue of the security: New York Stock Exchange securities (''Tape A''), NYSE American and regional exchange securities (''Tape B''), and Nasdaq Stock Market securities (''Tape C'').

[9] Media eligible trade reports are those that are submitted to the FINRA/Nasdaq TRF for public dissemination by the Securities Information Processors (''SIPs''). By contrast, non-media trade reports are not submitted to the FINRA/Nasdaq TRF for public dissemination, but are submitted for regulatory and/or clearance and settlement purposes.

Pursuant to the Rule's Supplementary Material, the ''Executing Party (EP)'' is defined as the member with the trade reporting obligation under FINRA rules, and the ''Contra (CP)'' is defined as the member on the contra side of a trade report.

[10] Additionally, the Rule provides for a monthly Participation Fee, from which Retail Participants are exempt. It also provides for two special fee cap programs—known as the ''ATS Market Maker Media/Contra Party Cap'' and the ''ATS Market Maker Combined Media Activity Cap''—for participants that make markets in an alternative trading system (''ATS'').

[11] Retail Participants generally do not achieve Executing Party activity sufficient to qualify for cap programs due to the nature and scale of their retail businesses. Retail orders that originate from natural persons or from nonprofessional investors are not produced in the same volumes or notional amounts as are orders that originate from professional executing broker firms. To date, only one Retail Participant has achieved enough Executing Party activity to qualify for a cap.

[12] Under the Rule, a transaction is attributable to a FINRA member if a trade report submitted to the FINRA/Nasdaq TRF that the FINRA/Nasdaq TRF then submits to either of the SIPs identifies the FINRA member as the Executing Party on the transaction.

[13] For purposes of this Rule, the term ''market share'' means a percentage calculated by dividing the total number of shares represented by trades reported by a FINRA member to the FINRA/Nasdaq

Continued

schedule of transaction credits is as follows. (Presently, it does not distinguish among categories of FINRA/Nasdaq TRF participants.)

Percentage market share	Percent of attributable revenue shared
Tape A:	
Greater than or equal to 2%	98
Less than 2% but greater than or equal to 1%	95
Less than 1% but greater than or equal to 0.50%	75
Less than 0.50% but greater than or equal to 0.10%	20
Less than 0.10%	0
Tape B:	
Greater than or equal to 2%	98
Less than 2% but greater than or equal to 1%	90
Less than 1% but greater than or equal to 0.35%	70
Less than 0.35% but greater than or equal to 0.10%	10
Less than 0.10%	0
Tape C:	
Greater than or equal to 2%	98
Less than 2% but greater than or equal to 1%	95
Less than 1% but greater than or equal to 0.50%	75
Less than 0.50% but greater than or equal to 0.10%	20
Less than 0.10%	0

The Rule 7600A Series expressly provides that the schedules of credits and fees apply to reporting activity that occurs on either or both of the FINRA/Nasdaq TRFs and a participant's eligibility for any volume-based credits or fee caps will be determined based upon its aggregate reporting volume between the two FINRA/Nasdaq TRFs. Nasdaq, as the Business Member, has determined to make several amendments to the current schedules of fees, caps, and credits. There is substantial competition in the market for OTC trade reporting between the FINRA/Nasdaq TRF and the FINRA/NYSE TRF, as evidenced by a recent shift in market share between these facilities.[14] The proposed rule change responds to these competitive forces by reducing the fees that most Retail Participants pay to the FINRA/Nasdaq TRF. It also establishes a new transaction credit program that will be more accessible to Retail Participants than is the existing credit program. The proposed rule change also clarifies the fee schedule and corrects a typographical error in the existing fee schedule. Each of these proposed changes is described in detail below.

General Clarification and Reorganization

First, the proposed rule change clarifies Rule 7620A by adding roman numerals to each of the headings in the fee schedule and also letters and numbers to its subheadings. These proposed changes will render the fee schedule easier to read and understand, particularly when there is a need to cross-reference the various fee programs contained therein.

The proposed rule change also moves the example of the operation of the fee schedule, which presently appears immediately under the heading ''Non-Comparison/Accept (Non-Match/Compare) Trade Report Fees and Caps on Trade Report Fees'' (to be numbered ''II''), to the subheading ''Cap Qualifying Activity (Requisite Daily Average Media/Executing Party Trade Reporting Activity for a Participant to Qualify for Fee Caps in Paragraphs 1–4 Above)'' (to be relocated to follow subparagraphs 1 through 4 and numbered ''II.A''). Movement of this example is necessary because of other proposed changes to the Rule, to be discussed below, which will render the example applicable only under the fee program set forth in revised subparagraph II.A. As discussed below, the proposed rule change adds new examples that are tailored for the new Retail Participant fee programs that will be set forth in proposed subparagraphs II.B and II.C.

Additionally, the proposed rule change adds a clarifying sentence beneath proposed paragraph II, which states that a participant's activity that qualifies for more than one special fee program under the Rule will automatically receive the benefit of the lowest applicable fee rate or cap. The purpose of this sentence is to clarify how the fee schedule operates where multiple discounts or caps apply to the same activity on the FINRA/Nasdaq TRF. An example of the application of this principle is included in the Rule text, under proposed subparagraph II.C, and below.

Lastly, the proposed rule change amends the definition of a ''Retail Order,'' in Supplementary Material .01 to Rule 7620A, to clarify that it includes orders ''on behalf of accounts that are held in a corporate legal form, such as an Individual Retirement Account, Corporation, or a Limited Liability Corporation that has been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual.'' Although the existing definition arguably implies that a Retail Order already includes such orders,

TRF for media purposes during a given calendar quarter by the total number of shares represented by all trades reported to the Consolidated Tape Association or the Nasdaq Securities Information Processor, as applicable, during that quarter. Market Share is calculated separately for each tape. *See* Rule 7620A. The Rule notes, moreover, that if a FINRA member reports trades to both FINRA/Nasdaq TRFs during a given calendar quarter, then ''market share'' shall be calculated by dividing the total number of shares represented by trades reported by the member to both of the FINRA/Nasdaq TRFs during that calendar quarter by the total number of shares represented by all trades reported to the Consolidated Tape Association or the Nasdaq SIP, as applicable, during that quarter.

[14] Nasdaq understands, based upon Retail Participant feedback, that recent market share changes are attributable to disparities in pricing between the FINRA/Nasdaq TRF and the FINRA/NYSE TRF. Due to pricing concerns, some Retail Participants have instructed their executing counterparties to shift their trade reporting activity from the FINRA/Nasdaq TRF to the FINRA/NYSE TRF. The proposed rule change seeks to lower Retail Participant pricing on the FINRA/Nasdaq TRF to render the FINRA/Nasdaq TRF a more attractive trade reporting venue for this market segment.

prospective Retail Participants have requested the proposed clarification to eliminate any uncertainty in this regard.

Special Pricing Programs for Retail Participants

The proposed rule change will replace the existing pricing programs for Retail Participants with two new programs that are intended to substantially decrease the fees that many Retail Participants pay to the FINRA/Nasdaq TRF. The first new program is the Retail Participant Contra Party Fee Discount and Cap Program and the second one is the Retail Participant Combined Cap Program. These new pricing programs are described below.[15]

Retail Participant Contra Party Fee Discount and Cap Program

The first proposed pricing program, which is set forth in a new subparagraph II.B, will focus on a Retail Participant's Contra Party activity on the FINRA/Nasdaq TRF. Most of the activity in which Retail Participants engage on the FINRA/Nasdaq TRF is Contra Party activity, and this new program is intended to reduce substantially the fees that Retail Participants, and their clients, pay for engaging in such activity.

Presently, a Retail Participant that engages in Contra Party activity on the FINRA/Nasdaq TRF pays the following fees. The monthly charge for a Retail Participant that engages in Media/Contra Party (Non-Media/Contra Party) activity is $0.013 multiplied by the number of Media/Contra Party (Non-Media/Contra Party) trades that the participant reports to the FINRA/Nasdaq TRF during the month. Retail Participants qualify for a cap (on a per Tape basis) on Media/Contra Party (Non-Media/Contra Party) fees during a given month if they report to the FINRA/Nasdaq TRFs, on average, at least 2,500 Media/Executing Party trades per day in Tapes A, B, or C. If capped, Media/Contra Party (Non-Media/Contra Party) fees for a Retail Participant equal $0.013 multiplied by 2,500 multiplied by the number of trading days during that month.

The proposed rule change will largely replace this pricing scheme with a new one that will make it easier for Retail Participants to qualify for discounts or caps on their Contra Party activity. Specifically, a Retail Participant will be entitled to receive special tiered pricing on its Contra Party activity even when it has no corresponding Media/Executing Party Activity. Under the proposed program, a Retail Participant will qualify for discounted or capped fees to the extent that it achieves, during a given month, a qualifying volume of average daily Contra Party activity (Media, Non-Media, or both) in a particular Tape. Within each Tape, a qualifying Retail Participant will receive a volume-based discount on its monthly uncapped Contra Party activity charges relative to the standard rate.[16] For both Media/Contra Party and Non-Media/Contra Party activity, the standard uncapped rate is the number of Media/Contra Party (Non-Media/Contra Party) reports during the month multiplied by $0.013, whereas the discounted rates under the new program will be the number of Media/Contra Party (Non-Media/Contra Party) reports multiplied by the following:

Tier	Daily average number of executions during the month needed to qualify for tier	Discounted rate (relative to standard rate) to be used to calculate monthly charge, if uncapped
Tape A:		
1	50,000–100,000	$0.0120
2	100,001–200,000	0.0072
3	200,001–300,000	0.0052
4	>300,000	0.0050
Tape B:		
1	15,000–30,000	0.0120
2	30,001–60,000	0.0072
3	60,001–100,000	0.0052
4	>100,000	0.0050
Tape C:		
1	50,000–100,000	0.0120
2	100,001–200,000	0.0072
3	200,001–300,000	0.0052
4	>300,000	0.0050

In addition, monthly fees for a Retail Participant's qualifying Contra Party activity for each Tape will be capped at a maximum monthly amount if the Retail Participant qualifies for Tier 4 pricing, as follows:

Tier	Daily average number of executions during the month needed to qualify for tier	Maximum monthly charge, if capped
Tape A:		
1	50,000–100,000	n/a
2	100,001–200,000	n/a

[15] The proposed rule change would specify that if a participant in the FINRA/Nasdaq TRF is approved as a Retail Participant on or before the twenty-second day of a month, such approval will be deemed effective, for purposes of Rule 7620A, as of the first day of that month, whereas an approval that occurs after the twenty-second day of the month will be deemed effective the first day of the next month. If a participant in the FINRA/Nasdaq TRF notifies Nasdaq, Inc. that it no longer qualifies as a Retail Participant during a given month, such notification shall be deemed effective, for purposes of Rule 7620A, as of the first day of the next month.

[16] The structure of the proposed tiers differs within each Tape. The tiers are structured to enable Retail Participants to qualify for special pricing on Contra Party activity beginning at lower volumes on Tape B, where the FINRA/Nasdaq TRF has less such activity, and at higher volumes on Tapes A and C, where the FINRA/Nasdaq TRF has more such activity.

Tier	Daily average number of executions during the month needed to qualify for tier	Maximum monthly charge, if capped
3	200,001–300,000	n/a
4	>300,000	$32,000
Tape B:		
1	15,000–30,000	n/a
2	30,001–60,000	n/a
3	60,001–100,000	n/a
4	>100,000	11,000
Tape C:		
1	50,000–100,000	n/a
2	100,001–200,000	n/a
3	200,001–300,000	n/a
4	>300,000	32,000

These caps will replace the existing cap formulas that apply to Retail Participants for their Media/Contra Party and Non-Media Contra Party reporting activity (proposed subparagraphs II.3 and II.4).

Example 1

An example of the application of the proposed program is as follows. If in a given month with 20 trading days, a Retail Participant achieves an average daily execution volume on the FINRA/Nasdaq TRF of 150,000 Media/Contra Party trades in Tape A, 20,000 Media/Contra Party Trades in Tape B, and 400,000 Media/Contra Party Trades in Tape C, then the Retail Participant would be entitled to receive the special Media/Contra Party pricing set forth in proposed subparagraph 3 with respect to its activity in Tape A (Tier 2), Tape B (Tier 1) and Tape C (Tier 4). As to Tape A, the Retail Participant would pay the uncapped discounted monthly charges applicable to Tier 2 (($.0072) × (the number of Media/Contra Party trades in Tape A during the month (150,000)) × (20 trading days) = $21,600. As to Tape B, the Retail Participant would pay the uncapped discounted monthly charges applicable to Tier 1, which would be $4,800 (($.012) × (the number of Media/Contra Party trades in Tape B during the month (20,000)) × (20 trading days)). As to Tape C, the Retail Participant would pay the lesser of the uncapped discounted monthly charges applicable to Tier 4 (($.005) × (the number of Media/Contra Party trades in Tape C during the month (400,000)) × (20 trading days) = $40,000) or the Tier 4 cap ($32,000), which would be $32,000. Assuming that these Media/Contra Party transactions comprised all of the Retail Participant's activity on the FINRA/Nasdaq TRF, then the Retail Participant's total fees would be $58,400.

By comparison, under the existing program, the Retail Participant would not receive the benefit of any cap on its Contra Party activity unless it also achieves at least 2,500 average daily Executing Party reports in each Tape during the month. If the Retail Participant does not achieve a cap on its Contra Party activity—as has been the case generally,[17] then under the existing program, the Retail Participant would pay the standard rate. At the standard rate, the same Contra Party activity would cost the Retail Participant $39,000 in Tape A ($0.013 × 150,000 average daily executions × 20 trading days), $5,200 in Tape B ($.013 × 20,000 average daily executions × 20 trading days), and $104,000 in Tape C ($.013 × 400,000 average daily executions × 20 trading days), or a total of $148,200. Thus, under the existing fee schedule, the Retail Participant in this example would pay roughly 2.45 times more for its Contra Party activity on the FINRA/Nasdaq TRF than it would under the proposed rule change.

Retail Participant Combined Cap Program

The second proposed pricing program, which is set forth in a new subparagraph II.C, is a Retail Participant Combined Cap Program, which will apply to Retail Participants that engage in Media/Executing Party activity in addition to Contra Party activity on the FINRA/Nasdaq TRF.

Presently, a Retail Participant may qualify for a cap on its Media (Non-Media)/Executing Party activity separate and apart from the cap on its Contra Party activity. For Media/Executing Party (Non-Media/Executing Party) fees, the monthly charge for a Retail Participant is $0.018 multiplied by the number of Media/Executing Party (Non-Media/Executing Party) trades that the Retail Participant reports to the FINRA/Nasdaq TRF during that month. Such fees are capped once the Retail Participant reports to the FINRA/Nasdaq TRF, on average, at least 2,500 Media/Executing Party trades per day in Tapes A, B, or C during that month. If capped for trades in a particular Tape, Media/Executing Party (Non-Media/Executing Party) fees for a Retail Participant equal $0.018 multiplied by 2,500 multiplied by the number of trading days during that month.

The proposed rule change would eliminate this cap program because it is ill-suited for Retail Participants. The existing Retail Participant Executing Party pricing programs were adapted from programs that were based on Executing Party activity among non-Retail Participants, *i.e.,* participants whose activity on the FINRA/Nasdaq TRF consists of Executing Party activity, primarily, and Contra Party activity, secondarily. However, Retail Participants' typical activity on the FINRA/Nasdaq TRF is the opposite of non-Retail Participants—it is almost exclusively limited to Contra Party activity. As such, the existing programs—which require a Retail Participant to engage in a threshold level of Media/Executing Party activity to qualify for a cap on either its Executing Party or its Contra Party activity—are ineffective. Indeed, only one Retail Participant to date has achieved enough Media/Executing Party activity to qualify for a cap.

The proposed rule change would replace the existing Executing Party programs with a new Combined Activity Cap that is tailored specifically to the behavior of Retail Participants. That is, for Retail Participants that engage primarily in Contra Party activity on the FINRA/Nasdaq TRF, the proposed program would not disqualify them from any special pricing—as does the existing program—if they fail to engage in Executing Party activity. For Retail Participants that do engage in Executing

[17] To date, only one Retail Participant has achieved the requisite Executing Party activity to also qualify it for a Contra Party cap.

Party activity, the proposed program would cap their combined Executing Party and Contra Party activity for the month.

Specifically, the proposed rule change would establish a new three-tiered combined fee cap. Tier 1 would cap at $50,000 a Retail Participant's fees for its total Executing Party and Contra Party activity during a month. To qualify for the Tier 1 cap, a Retail Participant would need to achieve between 1,000 and 2,000 average daily Media/Executing Party trades across all three Tapes during the immediately preceding three month period.[18] (This qualifying level of Media/Executing Party activity is notably less than the existing threshold requirement of 2,500 average daily Media/Executing Party trades.) Tier 2 would cap a Retail Participant's total monthly fees at $25,000. To qualify for the Tier 2 cap, a Retail Participant would need to achieve between 2,001 and 4,000 average daily Media/Executing Party trades across all three Tapes during the immediately preceding three month period. Finally, Tier 3 of the new program would cap a Retail participant's total monthly fees at $15,000. To qualify for the Tier 3 cap, a Retail Participant would need to achieve more than 4,000 average daily Media/Executing Party trades across all three Tapes during the immediately preceding three month period.

Example 2

The following is an example of the application of the Retail Participant Combined Activity Cap. Assume that a Retail Participant has the same level of Contra Party activity during a month as described in Example 1 above. Assume also that, in addition to this Contra Party activity, the Retail Participant also achieves, during the immediately preceding three month period, an average of 1,500 Media/Executing Party trade reports per day in Tape A, 500 Media/Executing Party trade reports per day in Tape B, and 100 Media/Executing Party trade reports per day in Tape C. In this scenario, the Retail Participant's aggregate 2,100 average daily Media/Executing Party trades across all three Tapes would qualify it for the Tier 2 Retail Participant Combined Activity Cap of $25,000. The capped fee would cover all of the Retail Participant's Executing Party and Contra Party activity for the month. Thus, the Retail Participant would pay the $25,000 combined cap in lieu of paying $58,400 for its Contra Party activity under the proposed Retail Participant Contra Party Fee Discount and Cap Program (as described in Example 1). This is because the Retail Participant would receive the benefit of the lowest applicable fee for its activity on the FINRA/Nasdaq TRF.

Retail Participant Securities Transaction Credit

The proposed rule change would amend Rule 7610A to establish a new category of transaction credits tailored to Retail Participants. Much like the existing fee program discussed above, the existing transaction credit program set forth in Rule 7610A was not designed with Retail Participants in mind because participants are entitled to credits only to the extent that they engage in substantial amounts of Media/Executing Party activity. For example, those participants with less than 0.10% market share on the FINRA/Nasdaq TRF presently receive no credits for any revenue that is attributable to their Media/Executing Party activity in any Tape.

The proposed rule change would make the transaction credit program available to Retail Participants that achieve even low levels of Media/Executing Party activity during a given quarter. Under the proposed rule change, Retail Participants that achieve less than 0.10 percent market share on the FINRA/Nasdaq TRFs on any of the three Tapes would be entitled to receive credits equal to 75 percent of the revenue that is attributable to their Media/Executing Party activity in Tape A and Tape C and credits equal to 70 percent of attributable revenue in Tape B. Retail Participants that achieve a market share of between 0.10 percent and less than 0.50 percent in Tape A or Tape C would receive credits equal to 75 percent of attributable revenue in that Tape (versus 20 percent of attributable revenue for other participants). Retail Participants that achieve a market share of between 0.10 percent and less than 0.35 percent in Tape B would receive credits equal to 70 percent of attributable revenue in that Tape (versus 10 percent of attributable revenue for other participants). For higher market shares, Retail Participants in all Tapes would receive the same percentage shares of attributable revenue as would other participants.[19]

The proposal to tailor the transaction credit program to Retail Participants would provide another mechanism—in addition to lower fees and fee caps—to lower the overall costs to Retail Participants of participating in the FINRA/Nasdaq TRF, particularly for Retail Participants with a greater scope and volume of activity.

Clarification to ATS Market Maker Media/Contra Party Cap

Lastly, the proposed rule change would amend the ATS Market Maker Media/Contra Party Cap, which currently is set forth in subparagraph 5 and would be renumbered as subparagraph D, to correct a typographical error and also clarify the provision. This cap program provides for participants making markets in alternative trading systems registered pursuant to Regulation ATS to qualify for a fee cap on all their trades in a month if they meet three criteria. Presently in the Rule, the second criterion is that the ''Participant must be contra to a minimum of 1,000,000 trades in Tape A, 500,000 trades in Tape C *or* 250,000 trades in Tape B.'' Prior to the reorganization of the fee schedule, effective September 1, 2018, this provision stated that to qualify for the program, ''Participant must be contra to a minimum of 1,000,000 trades in Tape A, 500,000 trades in Tape C *and* 250,000 trades in Tape B.'' (Emphasis added.)[20] Upon reorganizing the fee schedule, the ''and'' in this provision was inadvertently changed to ''or.'' The proposed rule change corrects that unintended error.

Additionally, the proposed rule change further amends this criterion due to concern that it could be misinterpreted (as corrected above) to mean that qualification for the cap requires a participant to meet minimum Contra Party trade reporting volumes in all three Tapes. In fact, the criterion is intended to mean that to qualify for the cap with respect to trade reports in a

[18] Unlike the existing program, which measures a Retail Participant's average daily executions during the prior month, the proposed program will measure activity over the course of the immediately preceding prior three months. Thus, to qualify for the proposed program, Retail Participants will be required to sustain their daily average activity level for a longer period of time than they do presently. This longer qualification period is intended to ensure that the program applies to Retail Participants that are maintaining or increasing Executing party activity, rather than those that have only episodic activity. This time period also aligns with the schedules for dividend reinvestment programs, which often are the basis for Executing Party activity.

[19] The proposed rule change would specify that if a participant in the FINRA/Nasdaq TRF is approved as a Retail Participant after the first day of a calendar quarter, such approval will be deemed effective, for purposes of Rule 7610A, as of the first day of the next calendar quarter. Likewise, if a participant in the FINRA/Nasdaq TRF notifies Nasdaq, Inc. that it no longer qualifies as a Retail Participant after the first day of a calendar quarter, such notification shall be deemed effective, for purposes of Rule 7610A, as of the first day of the next calendar quarter.

[20] *See* Securities Exchange Act Release No. 83866 (Aug. 16, 2018), 83 FR 42545 (Aug. 22, 2018) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2018–029).

particular Tape, a participant must meet the minimum trade volume threshold for that Tape. The proposed revised and corrected text is as follows:

Participant must be contra to a minimum number of trades during the month in a particular Tape to qualify for a cap on trades in that Tape. The minimum number of monthly trades for each Tape are as follows: 1,000,000 trades in Tape A, 500,000 trades in Tape C and 250,000 trades in Tape B.

FINRA has filed the proposed rule change for immediate effectiveness. The operative date will be January 1, 2019.

2. Statutory Basis

FINRA believes that the proposed rule changes [sic] are consistent with the provisions of Section 15A(b)(5) of the Act,[21] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

First, FINRA believes that the proposed elimination of the existing Retail Participant pricing programs under Rule 7620A and adoption of new programs that are better aligned with and tailored to the behavioral profile of Retail Participants is an equitable allocation of reasonable fees. The existing pricing programs for Retail Participants were established by carving Retail Participants out from the general pricing programs applicable to all participants. The existing pricing programs were not designed with Retail Participants in mind, but instead are geared toward participants that engage in Executing Party activity primarily, and Contra Party activity secondarily. The behavioral profile of Retail Participants is the opposite of non-Retail Participants, such as ATS market makers and wholesalers. Retail Participants engage primarily, if not exclusively, in Contra Party activity on the FINRA/Nasdaq TRF. However, the only aspect of the Retail Participant programs that distinguishes them from their non-Retail Participant counterparts is the fact that their pricing is frozen at pre-September 2018 levels. Because the Retail Participant programs were designed for non-Retail Participants, the existing Retail Participant programs have proven to be ineffective in accomplishing their objectives of lowering fees for Retail Participants and their retail customers. That is, the existing programs require Retail Participants to achieve at least 2,500 average daily Media/Executing Party trades to qualify for caps on either their Executing Party or their Contra Party activity fees, but Retail Participants generally do not generate enough Executing Party activity to trigger the caps. To date, only one Retail Participant has qualified for a cap. Moreover, the ineffectiveness of the existing Retail Participant programs in lowering fees has led certain Retail Participants to direct their executing counterparties to stop reporting their trades to the FINRA/Nasdaq TRF and to report them instead to the FINRA/NYSE TRF, which does not charge Contra Parties that are not also reporting parties.

The two proposed Retail Participant fee programs address the ineffectiveness of the existing programs by aligning fees, discounts, and caps with the activities in which Retail Participants engage on the FINRA/Nasdaq TRF. First and foremost in this regard, the proposed rule change introduces a tiered system of caps—as well as discounts, when caps are not economical to the Retail Participant—that become more favorable as the level of the Retail Participant's Contra Party activity increases. The proposed rule change also eliminates the requirement that a Retail Participant must engage in a threshold level of Media/Executing Party activity to qualify for discounts or caps on their Contra Party activity.

Moreover, the proposed rule change introduces a Retail Participant Combined Activity Cap that would provide Retail Participants with a cap on their combined monthly activity on the FINRA/Nasdaq TRF to the extent that they have Media/Executing Party activity. This Combined Activity Cap in many cases would be more favorable than the Contra Activity cap for Retail Participants that also have Executing Party activity.

For similar reasons, FINRA believes that the proposed rule change to establish a new securities transaction credit program under Rule 7610A that is tailored to Retail Participants is an equitable allocation of reasonable fees. The existing securities transaction program is generally inaccessible to Retail Participants, insofar as they generally engage in low levels of Media/Executing Party activity. The proposed rule change would enable Retail Participants with even low levels of Media/Executing Party activity to receive credits for engaging in such activity. It also would increase the percentage of revenue sharing that occurs at these low levels of activity relative to the percentage that other types of participants receive with the same market shares. As such, the proposed rule change would provide another mechanism to lower the overall costs to Retail Participants of participating in the FINRA/Nasdaq TRF.

The proposed new programs to benefit Retail Participants specifically are not unfairly discriminatory. Effective September 1, 2018, a distinct category of Retail Participant pricing for the FINRA/Nasdaq TRF was established in recognition of the fact that customers of Retail Participants generally include individual investors who trade less frequently than do other categories of customers. Accordingly, Retail Participants often report fewer trades to the FINRA/Nasdaq TRF than other participants. As such, the fees that Retail Participants (and their customers) pay should be better tailored to their activity on the FINRA/Nasdaq TRF.[22] However, the existing programs have not achieved their objective of reducing costs for Retail Participants.

Because the existing programs have not succeeded in reducing costs to Retail Participants relative to the FINRA/NYSE TRF (which also competes for Contra Party business and does not charge Contra Parties that are not also reporting parties), several Retail Participants have requested that their executing counterparties report their trades to the FINRA/NYSE TRF rather than the FINRA/Nasdaq TRF. The proposed rule change is designed to further reduce the costs to Retail Participants on the FINRA/Nasdaq TRF in an effort to stem, if not reverse, this loss of retail business to the FINRA/NYSE TRF.

The proposed changes also are not unfairly discriminatory in that they will be available to all FINRA members that use the FINRA/Nasdaq TRF and meet the threshold requirements to qualify for the terms of the programs. The programs themselves are designed to be accessible to most, if not all, existing Retail Participants, including those with both low and high levels of activity on the FINRA/Nasdaq TRF.

Additionally, the proposed rule change would reorganize and clarify Rule 7620A so that it is easier to comprehend and presented in a more logical order. The reorganization will also ensure that examples of the application of the Rule are placed in the paragraphs where they will be applicable going forward.

The proposed rule change also would amend the definition of a ''Retail Order'' in Supplementary Material .01 to Rule 7620A to clarify that this term includes

[21] 15 U.S.C. 78o–3(b)(5).

[22] *See* Securities Exchange Act Release No. 83866 (Aug. 16, 2018), 83 FR 42545 (Aug. 22, 2018) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2018–029).

orders that originate from accounts that exist in corporate form for the benefit of individuals, provided that individuals submit the orders. Although it is reasonable to interpret the existing definition of a Retail Order to include an order that originates from an individual retirement account or another corporate account that exists for the benefit of an individual, the proposed rule change will eliminate any uncertainty in this regard. Moreover, the proposed rule change will aid prospective Retail Participants in understanding their obligations as such. The proposed clarifying language derives from the definition of a ''Designated Retail Order'' in Nasdaq Rule 7018 [sic], which is reasonable because the concepts are similar. This proposed change is equitable and not unfairly discriminatory because it merely makes a non-substantive technical clarification to the meaning of ''Retail Order.''

Finally, the proposed rule change would correct an unintended typographical error that occurred when Rule 7620A was reorganized effective September 1, 2018. FINRA, Nasdaq, and all FINRA/Nasdaq TRF participants have an interest in FINRA maintaining rules for its trade reporting facilities that are accurate and free of errors. Likewise, FINRA believes that clarifying the ATS Market Maker Media/Contra Party Cap will avoid confusion as to the number of Contra Party trades in a particular Tape that are required to qualify for the cap for that Tape.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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.

Regulatory Need

Nasdaq, as the Business Member and operator of the FINRA/Nasdaq TRF, collects all fees on behalf of the FINRA/Nasdaq TRF. As discussed above, Nasdaq has observed an increase in competition in the market for OTC trade reporting, and in response to competitive forces, determined to reduce fees for most Retail Participants that report trades to the FINRA/Nasdaq TRFs and establish a new transaction credit program that will be more accessible to such participants.

Economic Baseline

As discussed above, pursuant to FINRA Rule 7620A, Retail Participants in the FINRA/Nasdaq TRF are currently subject to four categories of fees, each of which is applicable to transactions on the three Tapes: (1) Media/Executing Party; (2) Non-Media/Executing Party; (3) Media/Contra Party; (4) and Non-Media/Contra Party. The rule also provides fee caps for Retail Participants for a particular Tape during a given month, provided that during the month, the Retail Participant achieves a daily average number of Media/Executing Party trades of at least 2,500 in the same Tape.

There are currently fifteen participants who are either approved or being considered for the Retail Participant program, that cumulatively represent approximately 25% of total reporting activity in the FINRA/Nasdaq TRF over the past 12 months. However, due to the nature and scale of retail businesses, to date, only one Retail Participant had sufficient reporting activity to qualify for a cap.

Also, pursuant to Rule 7610A, FINRA members that report OTC transactions in NMS stocks to a FINRA/Nasdaq TRF for public dissemination or ''media'' purposes may receive quarterly transaction credits that equal a percentage of FINRA/Nasdaq TRF revenues that are attributable to the members' transactions. However, the current rule does not distinguish among categories of FINRA/Nasdaq TRF participants. Due to Retail Participants' relatively smaller reporting activity compared to that of non-Retail Participants, Retail Participants have not received transactions credits in the past.

Economic Impacts

The proposed rule change replaces the existing retail Participant Pricing Program with two new programs, ''Retail Participant Contra Party Fee Discount and Cap Program'' and ''Retail Participant Combined Cap Program,'' which are designed to reduce the fees that most Retail Participants pay to the FINRA/Nasdaq TRF.

As mentioned above, there are fifteen current and prospective Retail Participants that could potentially benefit from the reduced fees under the proposed Retail Participant programs. While Example 1 above illustrates the potential reduction in fees for a given volume in all Tapes, the potential reduction in fees in each Tape ranges from a few hundred dollars to approximately $50,000. The reduction in fees could be larger if the Participant qualifies for both the reduced fees and the combined cap. Currently, only one Retail Participant would have the sufficient activity to qualify for the Retail Participant Combined Cap Program based on its historical activity. Going forward, however, as a result of the proposal, additional Retail Participants may increase their Executing Party activity on the FINRA/Nasdaq TRF and potentially become eligible for transaction credits or the Retail Participant Combined Cap Program.

FINRA analyzed data provided by Nasdaq that contain monthly fees incurred by fifteen current and prospective Retail Participants that reported OTC trades to FINRA/Nasdaq TRF over a one year period from July 2017 through June 2018. The data included the estimated reduction in fees that would have occurred under the proposed fee and cap schedule assuming that the reporting behavior would be the same under the current and the proposed schedule. The analysis demonstrated that there would be no reduction in fees for ten of the fifteen current and prospective Retail Participants, since their level of reporting activity would not qualify them for the discounts (although such Retail Participants would, at a minimum, be exempt from the $350 per month Participant Fee). The remaining five participants would observe average monthly reduction in fees that range from $390 to $111,856.

The proposed rule change also opens up the transaction credit program to Retail Participants that achieve even low levels of Executing Party activity during a given quarter. In the four quarters between July 2017 and June 2018, four Retail Participants would have sufficient market share to qualify for transaction credits. The quarterly credits would range from $55 to $11,007 across all Tapes, with a median credit of $4,749.

The potential net impact of the proposed rule change depends on whether participants alter their reporting activity across TRFs to be eligible for the fee caps. To the extent that the proposed reduction in fees provide [sic] net benefits, they may choose to shift their reporting from FINRA/NYSE TRF to FINRA/Nasdaq TRF. The net impact would also depend on whether the proposed fee caps create an optimal reporting strategy to be eligible for a specific cap to maximize the overall savings for all trade types reported to the FINRA/Nasdaq TRFs.

Finally, FINRA notes that the proposed fee and fee cap changes occur within the context of a competitive environment in which the various trade reporting facilities vie for market share. The FINRA/NYSE TRF is free to adjust its fees and fee cap programs in response to the changes proposed herein to render them more attractive relative

to the FINRA/Nasdaq TRF. If any existing or prospective participant in FINRA/Nasdaq TRF determines that the new fees or fee cap thresholds are less attractive or are unfavorable relative to fees and fee cap programs applicable to the FINRA/NYSE TRF, such participants may choose to report to the FINRA/NYSE TRF in lieu of the FINRA/Nasdaq TRF, in which case the FINRA/Nasdaq TRFs would lose market share. However, the impact of differences in fees and fee cap programs across the TRFs on a participant's decision to prefer one TRF over the other may be limited by the set of functionalities each TRF provides.

Alternatives Considered

No other alternatives were considered for the proposed rule change.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [23] and paragraph (f)(2) of Rule 19b–4 thereunder.[24] 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 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–FINRA–2018–042 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–FINRA–2018–042. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2018–042, and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28198 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

[23] 15 U.S.C. 78s(b)(3)(A).

[24] 17 CFR 240.19b–4(f)(2).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Extension:

Form ID. SEC File No. 270–291, OMB Control No. 3235–0328

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Form ID (OMB Control No. 3235–0328; SEC File No. 270–291) is used by companies and other entities to apply for identification numbers and access codes used in conjunction with the EDGAR electronic filing system. The information provided on Form ID is an essential part of the security of the EDGAR system. Form ID must be filed every time a registrant or other person obtains or changes an identification number. Form ID is filed by all persons that are required to file information electronically on EDGAR, including but not limited to, individuals, companies, other for-profit organizations, or governmental entities. We estimate that approximately 46,842 filers file Form ID annually and that it takes approximately 0.15 hours per response to prepare for a total of 7,027 annual burden hours.

Written comments are invited on: (a) Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

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 control number.

Please direct your written comment to Charles Riddle, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Candace Kenner, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: December 21, 2018.

Brent J. Fields,

Secretary.

[FR Doc. 2018–28315 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33334; 812–14947]

TigerShares Trust, et al.; Notice of Application

December 20, 2018.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act, as well as from certain disclosure requirements in rule 20a–1 under the Act, Item 19(a)(3) of Form N–1A, Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A under the Securities Exchange Act of 1934, and sections 6–07(2)(a), (b), and (c) of Regulation S–X (''Disclosure Requirements''). The requested exemption would permit an investment adviser to hire and replace certain sub-advisers without shareholder approval and grant relief from the Disclosure Requirements as they relate to fees paid to the sub-advisers.

Applicants: TigerShares Trust (the ''Trust''), a Delaware statutory trust that is registered under the Act as an open-end management investment company, and Wealthn LLC (the ''Initial Adviser''), a Pennsylvania limited liability company that will be registered as an investment adviser under the Investment Advisers Act of 1940 (collectively with the Trust, the ''Applicants'').

Filing Dates: The application was filed on September 5, 2018.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 14, 2019, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090. Applicants, 3532 Muirwood Drive, Newtown Square, PA 19073.

FOR FURTHER INFORMATION CONTACT: Erin C. Loomis, Senior Counsel, at (202) 551–6721, or Parisa Haghshenas, Branch Chief, at (202) 551–6723 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application:

1. An Adviser will serve as the investment adviser to each Subadvised Series pursuant to an investment advisory agreement with the Trust (the ''Investment Management Agreement'').[1] An Adviser will provide each Subadvised Series with continuous investment management services, subject to the supervision of, and policies established by, the board of trustees of the Trust (the ''Board''). Each Investment Management Agreement permits the Adviser, subject to the approval of the Board, to delegate to one or more sub-advisers (each, a ''Sub-Adviser'' and collectively, the ''Sub-Advisers'') the responsibility to provide the day-to-day portfolio investment management of each Subadvised Series, subject to the supervision and direction of the Adviser.[2] The primary responsibility for managing each Subadvised Series will remain vested in the Adviser. The Adviser will hire, evaluate, allocate assets to and oversee the Sub-Advisers, including determining whether a Sub-Adviser should be terminated, at all times subject to the authority of the Board.

2. Applicants request an exemption to permit the Adviser, subject to Board approval, to hire certain Sub-Advisers pursuant to Sub-Advisory Agreements and materially amend existing Sub-Advisory Agreements without obtaining the shareholder approval required under section 15(a) of the Act and rule 18f–2 under the Act.[3] Applicants also seek an exemption from the Disclosure Requirements to permit a Subadvised Series to disclose (as both a dollar amount and a percentage of the Subadvised Series' net assets): (a) The aggregate fees paid to the Adviser and any Wholly-Owned Sub-Adviser; (b) the aggregate fees paid to Non-Affiliated Sub-Advisers; and (c) the fee paid to each Affiliated Sub-Adviser (collectively, ''Aggregate Fee Disclosure'').

3. Applicants agree that any order granting the requested relief will be subject to the terms and conditions stated in the application. Such terms and conditions provide for, among other safeguards, appropriate disclosure to Subadvised Series shareholders and notification about sub-advisory changes and enhanced Board oversight to protect the interests of the Subadvised Series' shareholders.

4. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provisions of the Act, or any rule thereunder, if such relief is necessary or appropriate in the public interest and consistent with the protection of investors and purposes fairly intended by the policy and provisions of the Act. Applicants believe that the requested relief meets this standard because, as further explained in the application, the Investment Management Agreements will remain subject to shareholder

[1] Applicants request relief with respect to the named Applicants, as well as to any future series of the Trust and any other registered open-end management investment company or series thereof that: (a) Is advised by the Initial Adviser, its successors, or any entity controlling, controlled by or under common control with the Initial Adviser or its successors (each, an ''Adviser''); (b) uses the multi-manager structure described in the application; and (c) complies with the terms and conditions set forth in the application (each, a ''Subadvised Series''). For purposes of the requested order, ''successor'' is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

[2] A ''Sub-Adviser'' for a Subadvised Series is (1) an indirect or direct ''wholly-owned subsidiary'' (as such term is defined in the Act) of the Adviser for that Subadvised Series, or (2) a sister company of the Adviser for that Subadvised Series that is an indirect or direct ''wholly-owned subsidiary'' of the same company that, indirectly or directly, wholly owns the Adviser (each of (1) and (2) a ''Wholly-Owned Sub-Adviser'' and collectively, the ''Wholly-Owned Sub-Advisers''), or (3) not an ''affiliated person'' (as such term is defined in section 2(a)(3) of the Act) of the Subadvised Series or the Adviser, except to the extent that an affiliation arises solely because the Sub-Adviser serves as a sub-adviser to a Subadvised Series (''Non-Affiliated Sub-Adviser'').

[3] The requested relief will not extend to any sub-adviser, other than a Wholly-Owned Sub-Adviser, who is an affiliated person, as defined in section 2(a)(3) of the Act, of the Subadvised Series, the Trust or of the Adviser, other than by reason of serving as a sub-adviser to one or more of the Subadvised Series (''Affiliated Sub-Adviser'').

approval while the role of the Sub-Advisers is substantially similar to that of individual portfolio managers, so that requiring shareholder approval of Sub-Advisory Agreements would impose unnecessary delays and expenses on the Subadvised Series.

Applicants believe that the requested relief from the Disclosure Requirements meets this standard because it will improve the Adviser's ability to negotiate fees paid to the Sub-Advisers that are more advantageous for the Subadvised Series.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2018–28200 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84894; File No. SR–DTC–2018–013]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Revise the Service Guide for the Canadian-Link Service

December 20, 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 19, 2018, The Depository Trust Company (''DTC'') 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 clearing agency. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(4) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change of DTC [5] consists of modifications to the text of the Procedures,[6] specifically the service guide (''Guide'') [7] for the DTC Canadian-Link Service (''Canadian-Link Service''), relating to the determination of a conversion rate applied by DTC for the conversion of Canadian dollar (''CAD'') amounts into the equivalent U.S. dollar (''USD'') amounts.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change consists of modifications to the Guide [8] relating to the determination of a conversion rate applied by DTC for the conversion of CAD amounts into the equivalent USD amounts, which DTC uses in connection with the calculation of the Collateral Value [9] of Securities delivered, and CAD funds transfers processed through, the Canadian-Link Service, as described below.

Background

In 2006, DTC established a ''northbound'' Canadian-Link Service that supports transactions settled in CAD.[10] Rule 30 [11] describes the operation of the Canadian-Link Service, which permits DTC Participants using the Canadian Link Service (''Canadian-Link Participants'') to (A) settle valued Securities transactions with participants (''CDS Participants'') of The Canadian Depository for Securities Limited (''CDS'') and other Canadian-Link Participants in CAD and (B) transfer CAD to or receive CAD from CDS Participants and other Canadian-Link Participants without any corresponding delivery or receipt of securities.[12]

The Canadian-Link Service provides Participants with a single depository interface for CAD transactions. The link facilitates Participants' ability to maintain U.S. and Canadian Security positions in their DTC accounts for securities listed in both Canada and the United States (*i.e.,* dually listed). This eliminates the need for Participants to maintain separate positions in an eligible [13] Security in CDS for CAD settlements and in DTC for USD settlements. It also eliminates the need for Participants to reposition Securities inventory between DTC and CDS in preparation for corporate action events and or transaction processing for dually listed issues.

Transactions between Canadian-Link Participants and CDS Participants are processed through an omnibus account

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b-4(f)(4).

[5] Capitalized terms not defined herein are defined in the Rules, By-Laws and Organization Certificate of DTC (''Rules''), *available at www.dtcc.com/~/media/Files/Downloads/legal/rules/dtc_rules.pdf* and the Guide.

[6] Pursuant to the Rules, the term ''Procedures'' means the Procedures, service guides, and regulations of DTC adopted pursuant to Rule 27, as amended from time to time. *See* Rule 1, Section 1, *supra* note 5. Pursuant to Rule 27, each Participant and DTC is bound by the Procedures and any amendment thereto in the same manner as it is bound by the Rules. *See* Rule 27 at 98, *supra* note 5.

[7] *Available at http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Canadian_Dollar_Settlement.pdf.*

[8] *Id.*

[9] The term ''Collateral Value'', as used with respect to the Collateral of a Participant, means, on any Business Day, (i) with respect to the Actual Participants Fund Deposit of a Participant, the amount of such Actual Participants Fund Deposit, (ii) with respect to the Actual Preferred Stock Investment of a Participant, the amount of such Actual Preferred Stock Investment, (iii) with respect to the Net Additions of a Participant, an amount determined by applying to the Market Value of such Net Additions a percentage determined by the Corporation, in its sole discretion, and (iv) with respect to any settlement progress payments wired by a Participant to the account of the Corporation at the Federal Reserve Bank of New York in the manner specified in the Procedures, the amount of such settlement progress payments. Rule 1, Section 1 at 3, *supra* note 5. Net Additions in the definition of Collateral Value refers to the term ''Net Addition Securities'' as defined in Rule 1. The term ''Net Addition Securities'' (sometimes referred to as ''Net Additions'') of a Participant on any Business Day means (i) Securities subject of Deliveries Versus Payment to the Participant, (ii) Securities credited to the Account of the Participant (such as Deposits of Eligible Securities and Free Deliveries of Securities) and designated as Net Addition Securities by the Participant in the manner specified in the Procedures. Net Addition Securities shall cease to be such if (x) they become Pledged or Segregated Securities, (y) they are Delivered or Withdrawn by the Participant or (z) they are designated as Minimum Amount Securities by the Participant in the manner specified in the Procedures. Rule 1, Section 1 at 10, *supra* note 5.

[10] *See* Securities Exchange Act Release No. 52784 (November 16, 2005), 70 FR 70902 (November 23, 2005) (SR–DTC–2005–08).

[11] *Supra* note 5.

[12] The Canadian-Link Service also provides for Cross-Border USD Securities Transactions between Participants and CDS Participants. *See* Rule 30, Section 1(a)(2), *supra* note 5. *See also* Securities Exchange Act Release No. 55239 (February 5, 2007), 72 FR 6798 (February 13, 2007).

[13] DTC may determine the Securities that are eligible for the Canadian-Link Service. Some Securities may be eligible for all purposes of the Canadian-Link Service and some Securities may be eligible only for limited purposes (*e.g.,* clearance and settlement through the facilities of CDS but only custody and asset servicing through the facilities of DTC). *See* Rule 30, Section 4, *supra* note 5.

maintained by DTC at CDS (''DTC Omnibus Account'') in accordance with the rules and procedures of CDS. Canadian-Link Participants are able (i) to deliver securities to or receive securities from CDS Participants against payment in CAD and (ii) to transfer funds to or receive funds from CDS Participants in CAD without any corresponding delivery or receipt of Securities. Transactions between Canadian-Link Participants and other Canadian-Link Participants are processed through accounts at DTC in accordance with the Rules.

For both transactions (i) between Canadian-Link Participants and CDS Participants processed through the DTC Omnibus Account and (ii) between Canadian-Link Participants and other Canadian-Link Participants processed through accounts at DTC, there is a single end-of-day CAD money settlement between DTC and its Canadian-Link Participants (''Canadian-Link Money Settlement''). For the transactions between Canadian-Link Participants and CDS Participants processed through the DTC Omnibus Account, there is a separate end-of-day CAD money settlement between CDS and DTC.

As with all valued transactions processed at DTC, DTC maintains risk controls with respect to transactions processed by Canadian-Link Participants, including the Net Debit Cap and Collateral Monitor.[14] With respect to Collateral Monitor, each Canadian-Link Participant has a single Collateral Monitor with respect to transactions processed for such Participant through the Canadian-Link Service and other transactions processed by DTC for such Participant.

In connection with CAD transactions, DTC faces the risk of USD/CAD exchange rate movements that may affect the Collateral Value relating to transactions and Securities processed through the Collateral Monitor. Specifically, CDS Participants' net settlement debits are expressed in CAD and DTC Collateral is expressed in USD, which presents the risk of adverse movement in the USD/CAD exchange rate which may impact the value of the Collateral Monitor.[15] To address this exchange rate risk, DTC currently uses a haircut approach applied to CAD net debits (''Haircut Approach'').

The Haircut Approach uses a 3 percent fixed-rate factor. DTC converts CAD amounts into the equivalent USD amounts using a conversion rate (''Collateral Monitor Conversion Rate'') that is a published rate for exchanging CAD to USD on the prior Business Day plus (in the case of CAD debits) or minus (in the case of CAD credits) the 3 percent fixed-rate factor.[16] The 3 percent fixed-rate factor is based on one-day, two-day and five-day exchange rate fluctuations over the ten years prior to implementation of the Collateral Monitor Conversion Rate.[17] At the time, DTC determined that the 3 percent fixed-rate factor adequately accounted for over 99 percent of exchange rate fluctuations during such period.[18]

The Guide provides that DTC may from time to time, if necessary, change the 3 percent fixed-rate factor (''Factor'') used to calculate the Collateral Monitor Conversion Rate to appropriately account for exchange rate fluctuations.[19] DTC has recently analyzed the Haircut Approach and has determined that it is necessary to amend the Guide with respect to text describing the Factor and the Collateral Monitor Conversion Rate.

Proposed Rule Change

While the Guide states that DTC may change the Factor, if necessary, to account for exchange rate fluctuations, it also refers to specific criteria, as described above, that were used to determine the 3 percent fixed-rate Factor at the time the Canadian-Link Service was implemented.[20] While DTC has not changed the Factor since its implementation, the criteria originally used to determine the Factor may not continue to appropriately account for the risk of exchange rate fluctuations and their impact on the Collateral Monitor when changes to market conditions and risk management practices over time are taken into account. Therefore, DTC proposes to amend the Guide to remove specific references to (i) the Factor being established at 3 percent and (ii) references to time intervals used to calculate the Factor at the time the Canadian-Link service was established.

In addition, DTC recently adopted its Clearing Agency Model Risk Management Framework (''Framework''), which is designed to assist DTC in identifying, measuring, monitoring, and managing the risks associated with the development, implementation, use and validation of quantitative models.[21] In this regard, all models used by DTC, including that used to derive any change to the Factor used in the calculation of the Collateral Monitor Conversion Rate, must be developed, implemented, used and validated in accordance with the Framework. Therefore, DTC also proposes to amend the Guide to state that the Factor would be calculated in accordance with a methodology established by DTC, from time to time, in accordance with the Clearing Agency Model Risk Management Framework of DTC, that appropriately accounts for exchange rate fluctuations.

DTC completed the Factor model validation process according to the Framework and would calibrate the Factor no less than semi-annually as follows: Four-day exchange rate returns would be calculated for a ten-year lookback period, plus a one-year stress period [22] which would be determined by calculating the evenly weighted volatility of the four-day exchange rate returns across rolling twelve-month periods. The twelve-month period with the highest resulting volatility would be selected as the one-year stress period. In addition, four-day exchange rate returns would be calculated for a ten-year lookback period. The factor would then be derived by estimating the 0.5th percentile from the combined sample of ten-year and one-year stress period returns. The factor would then be rounded up to a whole percentage.

[14] The term ''Collateral Monitor'' of a Participant, as used with respect to its obligations to the Corporation, means, on any Business Day, the record maintained by the Corporation for the Participant which records, in the manner specified in Procedures, the algebraic sum of (i) the Net Credit or Debit Balance of the Participant and (ii) the aggregate Collateral Value of the Collateral of the Participant. Rule 1, Section 1 at 3, *supra* note 5.

[15] For purposes of the Canadian-Link Service, the Collateral Monitor of a Canadian-Link Participant is adjusted as follows: (1) CAD net credits from transactions processed for such Participant through the Canadian-Link Service are converted into USD equivalents and added to USD net credits from other transactions processed by DTC for such Participant; (2) CAD net debits from transactions processed for such Participant through the Canadian-Link Service are converted into USD equivalents and added to USD net debits from other transactions processed by DTC for such Participant; (3) The Collateral Value of Securities delivered by such Participant to CDS Participants through the DTC Omnibus Account and the Collateral Value of Securities delivered by such Participant to other Canadian-Link Participants through accounts at DTC are converted into USD equivalents and deducted from the Collateral Value of the Collateral of such Participant; and (4) Collateral Value in USD is given for Securities received by such Participant from other Canadian-Link Participants but no Collateral Value is given for Securities received by such Participant from CDS Participants unless and until such Securities are credited to an account of such Participant at DTC. *See* Rule 30, Section 9, *supra* note 5.

[16] *See* Guide at 6, *supra* note 7.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *See* Securities Exchange Act Release No. 81485 (August 25, 2017), 82 FR 41433 (August 31, 2017).

[22] In a case of the one-year stress period overlapping the ten-year lookback period, the data used for calibration would be the ten-year period plus the non-overlapping days in the stress period.

In this regard, the Guide currently states with respect to the Factor:

''For purposes of adjustments in the collateral monitor, DTC will convert Canadian dollar amounts into the equivalent U.S. dollar amounts using a conversion rate (Collateral Monitor Conversion Rate) that is a published rate for exchanging Canadian dollars to U.S. dollars on the prior business day plus (in the case of Canadian dollar debits) or minus (in the case of Canadian dollar credits) a factor of 3%. The 3% factor is based on one day, two day and five day exchange rate fluctuations over the past ten years. Such 3% factor adequately accounts for over 99% of exchange rate fluctuations during such period. DTC may from time to time if necessary change the factor used to calculate the Collateral Monitor Conversion Rate to appropriately account for exchange rate fluctuations.'' [23]

Pursuant to the authority currently set forth in the Guide for DTC to, from time to time if necessary, change the factor used to calculate the Collateral Monitor Conversion Rate to appropriately account for exchange rate fluctuations,[24] DTC would amend the Guide text to read:

''For purposes of adjustments in the collateral monitor, on a given Business Day, DTC converts Canadian dollar amounts into the equivalent U.S. dollar amounts using a conversion rate (Collateral Monitor Conversion Rate) that is a published rate for exchanging Canadian dollars to U.S. dollars on the prior Business Day plus (in the case of Canadian dollar debits) or minus (in the case of Canadian dollar credits) a factor (''Factor'') of no less than 3%, calculated in accordance with a methodology established by DTC, from time to time, in accordance with the Clearing Agency Model Risk Management Framework of DTC, that appropriately accounts for exchange rate fluctuations. DTC will calibrate the Factor no less than semi-annually as follows: Four-day exchange rate returns will be calculated for a ten-year lookback period, plus a one-year stress period (Note: In a case where the one-year stress period overlaps with the ten-year lookback period, the data used for calibration would be the ten-year period plus the non-overlapping days in the stress period.) which will be determined by calculating the evenly weighted volatility of the four-day exchange rate returns across rolling twelve-month periods. The twelve-month period with the highest resulting volatility will be selected as the one-year stress period. In addition, four-day exchange rate returns will be calculated for a ten-year lookback period. The factor will then be derived by estimating the 0.5th percentile from the combined sample of ten-year and one-year stress period returns. The factor will then be rounded up to a whole percentage. Except for extreme market conditions, the methodology and any changes in the Factor will be distributed by Important Notice at least 5 Business Days before becoming effective.''

Effective Date

The proposed rule change would become effective upon filing with the Commission.

2. Statutory Basis

Section 17A(b)(3)(F) of the Act requires that the rules of the clearing agency be designed, *inter alia,* to promote the prompt and accurate clearance and settlement of securities transactions.[25] DTC believes that the proposed rule change is consistent with this provision of the Act because, by revising the Guide to update the description of how changes to the Factor would be made in light of DTC's adoption of the Framework, the proposed rule change would facilitate Participants' ability to understand the calculation of the Collateral Monitor Conversion Rate and its impact on risk controls relating to their transaction activity. Therefore, the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions consistent with Section 17A(b)(3)(F) of the Act.[26]

(B) Clearing Agency's Statement on Burden on Competition

DTC does not believe that the proposed rule change would have any impact on competition. The proposed rule change would merely update the Guide with respect to existing Procedures relating to DTC's discretion to change the Factor as necessary to account for exchange rate fluctuations.[27] The proposed change would reflect that any change in the Factor would be made pursuant to a methodology established in accordance with the Framework, which is a Procedure previously approved by the Commission.[28] Therefore, the proposed rule change would not affect the rights or obligations of Participants, and as such, would not impact competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

DTC has not received or solicited any written comments relating to this proposal. DTC will notify the Commission of any written comments received by DTC.

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 [29] and paragraph (f) of Rule 19b–4 thereunder.[30] 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 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–DTC–2018–013 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–DTC–2018–013. 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

[23] *See* Guide at 6, *supra* note 3.

[24] *Id.*

[25] 15 U.S.C. 78q–1(b)(3)(F).

[26] *Id.*

[27] *See* Guide at 6, *supra* note 7.

[28] *Supra* note 21.

[29] 15 U.S.C. 78s(b)(3)(A).

[30] 17 CFR 240.19b-4(f).

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–DTC–2018–013 and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28191 Filed 12–27–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84891; File No. 10–233)

In the Matter of the Application of MIAX EMERALD, LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission

December 20, 2018.

I. Introduction

On August 16, 2018, MIAX EMERALD, LLC (''MIAX EMERALD'' or ''Exchange'') submitted to the Securities and Exchange Commission (''Commission'') an application for Registration as a National Securities Exchange (''Form 1 Application'') under Section 6 of the Securities Exchange Act of 1934 (''Act''), seeking registration as a national securities exchange under Section 6 of the Act.[1] Notice of the Form 1 Application was published for comment in the **Federal Register** on October 3, 2018.[2] The Commission received no comments.

II. Statutory Standards

Under Sections 6(b) and 19(a) of the Act,[3] the Commission shall by order grant an application for registration as a national securities exchange if the Commission finds, among other things, that the proposed exchange is so organized and has the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

As discussed in greater detail below, the Commission finds that MIAX EMERALD's application for exchange registration meets the requirements of the Act and the rules and regulations thereunder. Further, the Commission finds that the proposed rules of MIAX EMERALD are consistent with Section 6 of the Act in that, among other things, they assure a fair representation of the Exchange's members in the selection of its directors and administration of its affairs and provide that one or more directors will be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer;[4] and that they are designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, or broker-dealers.[5] Finally, the Commission finds that MIAX EMERALD's proposed rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[6]

III. Discussion

A. Governance of MIAX EMERALD

1. MIAX EMERALD Board of Directors

The board of directors of MIAX EMERALD (''Exchange Board'' or ''MIAX EMERALD Board'') will be its governing body and will possess all of the powers necessary for the management of its business and affairs, including governance of MIAX EMERALD as a self-regulatory organization (''SRO'').[7]

Under the By-Laws of MIAX EMERALD (''MIAX EMERALD By-Laws''):[8]

- The Exchange Board will be composed of not less than ten directors;[9]
- One director will be the Chief Executive Officer of MIAX EMERALD;[10]
- The number of Non-Industry Directors,[11] including at least one Independent Director,[12] will equal or exceed the sum of the number of Industry Directors[13] and Member Representative Directors;[14] and

[31] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78f.

[2] *See* Securities Exchange Act Release No. 84313 (September 28, 2018), 83 FR 49965 (''Notice'').

[3] 15 U.S.C. 78f(b) and 15 U.S.C. 78s(a), respectively.

[4] *See* 15 U.S.C. 78f(b)(3).

[5] *See* 15 U.S.C. 78f(b)(5).

[6] *See* 15 U.S.C. 78f(b)(8).

[7] *See* MIAX EMERALD By-Laws, Section 2.1. *See also* Limited Liability Company Agreement of MIAX EMERALD, Section 8(b).

[8] The MIAX EMERALD By-Laws are included in the Amended and Restated Limited Liability Company Agreement of MIAX EMERALD (''MIAX EMERALD LLC Agreement'').

[9] *See* MIAX EMERALD By-Laws, Article II, Section 2.2(a).

[10] *See* MIAX EMERALD By-Laws, Article II, Section 2.2(b).

[11] ''Non-Industry Director'' means a Director who is an Independent Director or any other individual who would not be an Industry Director. *See* MIAX EMERALD By-Laws, Article I(aa).

[12] ''Independent Director'' means a ''Director who has no material relationship with [MIAX EMERALD] or any affiliate of [MIAX EMERALD], or any [MIAX EMERALD member] or any affiliate of any such [MIAX EMERALD member]; *provided,* however, that an individual who otherwise qualifies as an Independent Director shall not be disqualified from serving in such capacity solely because such Director is a Director of [MIAX EMERALD] or [Miami Holdings].'' *See* MIAX EMERALD By-Laws, Article I(p).

[13] An ''Industry Director'' is, among other things, a Director that is or has served within the prior three years as an officer, director, employee, or owner of a broker or dealer, as well as any Director who has, or has had, a consulting or employment relationship with MIAX EMERALD or any affiliate of MIAX EMERALD within the prior three years. *See* MIAX EMERALD By-Laws, Article I(r). This definition is consistent with what the Commission has approved for other exchanges. *See* Securities Exchange Act Release Nos. 79543 (December 13, 2016), 81 FR 92901 (December 20, 2016) (File No. 10–227) (order granting registration of MIAX PEARL, LLC) (''MIAX PEARL Order''); 68341 (December 3, 2012), 77 FR 73065 (December 7, 2012) (File No. 10–207) (order granting the registration of Miami International Securities Exchange, LLC (''MIAX Exchange'')) (''MIAX Order''); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10–182) (order granting the registration of BATS Exchange, Inc.) (''BATS Order''); and 66871 (April 27, 2012), 77 FR 26323 (May 3, 2012) (File No. 10–206) (order granting the registration of BOX Options Exchange LLC (''BOX'')) (''BOX Order'').

[14] *See* MIAX EMERALD By-Laws, Article II, Section 2.2 (b)(i). ''Member Representative Director'' means a Director who has been appointed by Miami International Holdings, Inc. as an initial Director pursuant to Section 2.5 of the MIAX EMERALD By-Laws to serve until the first annual meeting or who ''has been elected by the Miami International Holdings, Inc. after having been

Continued

• At least 20% of the directors on the Exchange Board will be Member Representative Directors.[15]

For the interim board (discussed below), and subsequently at the first annual meeting and each annual meeting thereafter, Miami International Holdings, Inc. (''Miami Holdings''), as the sole LLC Member of MIAX EMERALD, will elect the MIAX EMERALD Board pursuant to the MIAX EMERALD By-Laws.[16] In addition, Miami Holdings will appoint the initial Nominating Committee [17] and Member Nominating Committee,[18] consistent with each committee's compositional requirements,[19] to nominate candidates for election to the Exchange Board. Each of the Nominating Committee and Member Nominating Committee, after completion of its respective duties for nominating directors for election to the Board for that year, shall nominate candidates to serve on the succeeding year's Nominating Committee or Member Nominating Committee, as applicable. Additional candidates for the Member Nominating Committee may be nominated and elected by MIAX EMERALD members pursuant to a petition process.[20]

The Nominating Committee will nominate candidates for each director position, and Miami Holdings, as the sole LLC Member, will elect those directors. For Member Representative Director positions, the Nominating Committee will nominate those candidates submitted to it, and approved, by the Member Nominating Committee.[21] Additional candidates, however, may be nominated for the Member Representative Director positions by MIAX EMERALD members pursuant to a petition process.[22] If no candidates are nominated pursuant to a petition process, then the initial nominees submitted by the Member Nominating Committee will be nominated as Member Representative Directors by the Nominating Committee. If a petition process produces additional candidates, then the candidates nominated pursuant to the petition process, together with those nominated by the Member Nominating Committee, will be presented to MIAX EMERALD members for a run-off election to determine the final slate of candidates for the vacant Member Representative Director positions.[23] In the event of a contested run-off election, the candidates who receive the most votes will be nominated as the final slate of Member Representative Director candidates by the Nominating Committee.[24] Miami Holdings, as the sole LLC Member, is obligated to elect the final slate of the Member Representative Director candidates that are nominated by the Nominating Committee.[25]

The Commission believes that the requirement in the MIAX EMERALD By-Laws that 20% of the directors be Member Representative Directors and the means by which they will be chosen by MIAX EMERALD members provide for the fair representation of members in the selection of directors and the administration of MIAX EMERALD and therefore is consistent with Section 6(b)(3) of the Act.[26] The Commission notes that this requirement helps to ensure that members have a voice in the use of self-regulatory authority by MIAX EMERALD.[27]

In addition, with respect to the requirement that the number of Non-Industry Directors, including at least one Independent Director, will equal or exceed the sum of the number of Industry Directors and Member Representative Directors, the Commission believes that the proposed composition of the Exchange Board satisfies the requirements in Section 6(b)(3) of the Act,[28] which requires in part that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer. The Commission notes that the inclusion of public, non-industry representatives on exchange oversight bodies is an important mechanism to support an exchange's ability to protect the public interest.[29] Further, the presence of public, non-industry representatives can help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. The Commission believes that public, non-industry directors can provide unique, unbiased perspectives, which are designed to enhance the ability of the Exchange Board to address issues in a non-discriminatory fashion and foster the integrity of the Exchange.[30]

2. Interim Exchange Board

Prior to commencing operations, Miami Holdings will appoint an interim Exchange board of directors (''Interim Exchange Board''), which will include

nominated by the Member Nominating Committee or by an Exchange Member pursuant to [the] By-Laws and confirmed as the nominee of Exchange Members after majority vote of Exchange Members, if applicable. A Member Representative Director may, but is not required to be, an officer, director, employee, or agent of an Exchange Member.'' *See* MIAX EMERALD By-Laws, Article I(x). *See also* MIAX EMERALD By-Laws Article II, Section 2.5.

[15] *See* MIAX EMERALD By-Laws, Article II, Section 2.2(b)(ii).

[16] *See* MIAX EMERALD By-Laws, Article II, Section 2.4. *See also* MIAX EMERALD LLC Agreement, Section 9(a).

[17] The Nominating Committee will be comprised of at least three directors, and the number of Non-Industry members on the Nominating Committee must equal or exceed the number of Industry members. *See* MIAX EMERALD By-Laws, Article V, Section 5.2. *See also* MIAX EMERALD By-Laws, Article IV, Section 4.2(a).

[18] The Member Nominating Committee will be comprised of at least three directors, and each member of the Member Nominating Committee shall be a Member Representative member and shall not be required to be a Director of the Exchange. *See* MIAX EMERALD By-Laws, Article V, Section 5.3. *See also* MIAX EMERALD By-Laws, Article IV, Section 4.2(a). Pursuant to MIAX EMERALD By-Laws, Article I(y), a ''Member Representative member'' is a member of any committee or hearing panel appointed by the Exchange Board who has been elected or appointed after having been nominated by the Member Nominating Committee pursuant to the By-Laws and who is an officer, director, employee, or agent of an Exchange Member.

[19] *See* MIAX EMERALD By-Laws, Article V, Section 5.1.

[20] *See id.*

[21] The Member Nominating Committee will solicit comments from MIAX EMERALD members for the purpose of approving and submitting names of candidates for election to the position of Member Representative Director. *See* MIAX EMERALD By-Laws, Article II, Section 2.4(b).

[22] *See* MIAX EMERALD By-Laws, Article II, Section 2.4(c). The petition must be signed by executive representatives of 10% or more of the MIAX EMERALD members. No MIAX EMERALD member, together with its affiliates, may account for more than 50% of the signatures endorsing a particular candidate. *See id.*

[23] *See* MIAX EMERALD By-Laws, Article II, Sections 2.4(e) and (f). Each MIAX EMERALD Member shall have the right to cast one vote for each available Member Representative Director nomination, provided that any such vote must be cast for a person on the List of Candidates and that no MIAX EMERALD member, together with its affiliates, may account for more than 20% of the votes cast for a candidate. *See* MIAX EMERALD By-Laws, Article II, Section 2.4(f).

[24] *See* MIAX EMERALD By-Laws, Article II, Section 2.4(f).

[25] *See id.*

[26] 15 U.S.C. 78f(b)(3).

[27] *See, e.g.,* MIAX PEARL Order, *supra* note 13, at 92903; MIAX Order, *supra* note 13, at 73067; Securities Exchange Act Release Nos. 76998 (January 29, 2016), 81 FR 6066, 6068 (February 4, 2016) (File No. 10–221) (order granting exchange registration of ISE Mercury, LLC) (''ISE Mercury Order''); 70050 (July 26, 2013), 78 FR 46622, 46624 (August 1, 2013) (File No. 10–209) (order granting the exchange registration of ISE Gemini, LLC) (''ISE Gemini Order''); 53128 (January 13, 2006), 71 FR 3550, 3553 (January 23, 2006) (File No. 10–131) (granting the exchange registration of Nasdaq Stock Market, Inc.) (''Nasdaq Order''); and BATS Order, *supra* note 13, at 49501.

[28] 15 U.S.C. 78f(b)(3).

[29] *See, e.g.,* Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70882 (December 22, 1998) (''Regulation ATS Release'').

[30] *See* MIAX PEARL Order, *supra* note 13, at 92903; MIAX Order, *supra* note 13, at 73067; BATS Order, *supra* note 13, at 49501; and Nasdaq Order, *supra* note 27, at 3553.

interim Member Representative Directors.[31] With respect to the selection of the interim Member Representative Directors for the Interim Exchange Board, prior to the commencement of operations as an exchange, Miami Holdings will submit the names of its nominees for the interim Member Representative Directors positions to persons that have begun the process of becoming members in the new Exchange.[32] Such persons and firms will be allowed 14 days to submit the names of alternative candidates.[33] Voting will occur no sooner than 5 days after the interim election notice is delivered to confirm the final slate of candidates to become an interim Member Representative Director.[34] All other interim directors, except for the interim Member Representative Directors, will be appointed and elected by Miami Holdings, and must meet the MIAX EMERALD board composition requirements as set forth in the MIAX EMERALD By-Laws.[35] Once these interim Member Representative Directors are seated on the Interim Exchange Board, then the Interim Exchange Board will meet the board composition requirements set forth in the governing documents of MIAX EMERALD.

The Interim Exchange Board will serve until the first initial Exchange Board is elected pursuant to the full nomination, petition, and voting process set forth in the MIAX EMERALD By-Laws.[36] MIAX EMERALD will complete such process within 90 days after its application for registration as a national securities exchange is granted by the Commission.[37]

The Commission believes that the process for electing the Interim Exchange Board, as proposed, is consistent with the requirements of the Act, including that the rules of the exchange assure fair representation of the exchange's members in the selection of its directors and administration of its affairs.[38] As noted above, MIAX EMERALD represents that the initial members of MIAX EMERALD will consist substantially of the current group of persons and firms that have begun the membership application process with MIAX EMERALD.[39] MIAX EMERALD will engage these persons and firms in the interim board election process by, prior to the commencement of operations as an exchange, providing each of them with the opportunity to participate in the selection of interim Member Representative Directors consistent with the MIAX EMERALD By-Laws. Further, MIAX EMERALD represents that it will complete the full nomination, petition, and voting process as set forth in the MIAX EMERALD By-Laws, which will provide persons that are approved as members after the effective date of this Order with the opportunity to participate in the selection of the Member Representative Directors, within 90 days of when MIAX EMERALD's application for registration as a national securities exchange is granted.[40] Therefore, the Commission believes that MIAX EMERALD's initial interim board process is consistent with the Act, including Section 6(b)(3), in that it is designed to provide representation among the persons and firms likely to become members when MIAX EMERALD commences operations and is sufficient to allow MIAX EMERALD to commence operations for an interim period prior to going through the process to elect a new Exchange Board pursuant to the full nomination, petition, and voting process set forth in the MIAX EMERALD By-Laws.

3. Exchange Committees

In the MIAX EMERALD By-Laws, the Exchange proposed to establish several standing committees, which would be divided into two categories: Committees of the Board (composed of MIAX EMERALD directors) and Committees of the Exchange (composed of a mixture of MIAX EMERALD directors and persons that are not MIAX EMERALD directors).[41] The standing Committees of the Board would be the Audit, Compensation, Appeals, and Regulatory Oversight Committees.[42] In addition, the Exchange Chairman, with approval of the Exchange Board, may appoint an Executive Committee and a Finance Committee, which also would be Committees of the Board.[43]

The Audit Committee will consist of three or more directors, a majority of which will be Non-Industry Directors.[44] Each of the Compensation and Regulatory Oversight Committees will consist of three or more directors, all of which will be required to be Non-Industry Directors.[45] The Appeals Committee will consist of one Independent Director, one Industry Director, and one Member Representative Director.[46] If established, the Finance Committee will consist of at least three persons (who may, but are not required to, be directors) a majority of whom will be Non-Industry Directors.[47] The Executive Committee, if established, will consist of at least three directors. Because the Executive Committee will have the powers and authority of the Exchange Board in the management of the business and affairs of the Exchange between meetings of the Exchange Board, its composition must reflect that of the Exchange Board. Accordingly, the number of Non-Industry Directors on the Executive Committee must equal or exceed the number of Industry Directors and the percentages of Independent Directors and Member Representative Directors must be at least as great as the corresponding percentages on the Exchange Board as a whole.[48]

With respect to Committees of MIAX EMERALD, the Exchange has proposed to establish a Nominating Committee[49] and a Member Nominating Committee.[50] As discussed above, these

[31] *See* MIAX EMERALD By-Laws, Section 2.5.

[32] *See* MIAX EMERALD By-Laws, Section 2.5(b). Specifically, Miami Holdings will submit the names of its nominees for the interim Member Representative Director positions to persons who have submitted the initial documents for membership in the Exchange who would meet the qualifications for membership. *See* MIAX EMERALD By-Laws, Section 2.5(b). MIAX EMERALD additionally represents that the initial members of MIAX EMERALD will consist substantially of the current group of persons and firms that have begun the membership application process with MIAX EMERALD. *See* MIAX EMERALD Form 1 Application, Exhibit J.

[33] *See* MIAX EMERALD By-Laws, Section 2.5(b).

[34] *See* MIAX EMERALD By-Laws, Section 2.5(d).

[35] *See* MIAX EMERALD By-Laws Section 2.5(a).

[36] *See* MIAX EMERALD By-Laws, Sections 2.2(e) and 2.5(a).

[37] *See* MIAX EMERALD By-Laws, Sections 2.5(a). The 90-day period is consistent with what the Commission approved for MIAX PEARL. *See* MIAX PEARL Order, *supra* note 13, at 92903 (allowing MIAX PEARL to appoint an initial interim board to enable it to commence operations as a registered exchange). *See also* ISE Mercury Order, *supra* note 27, at 6068; MIAX Order, *supra* note 13, at 73067; and BOX Order, *supra* note 13, at 26325.

[38] *See* 15 U.S.C. 78f(b)(3).

[39] *See supra* note 32.

[40] MIAX EMERALD's proposed timeline for the interim board process follows a process identical to what the Commission approved for ISE Mercury, LLC. *See* ISE Mercury Order, *supra* note 27, at 6068.

[41] *See* MIAX EMERALD By-Laws, Section 4.1.

[42] *See* MIAX EMERALD By-Laws, Section 4.1(a).

[43] *See* MIAX EMERALD By-Laws, Section 4.5(e) and (f), respectively.

[44] *See* MIAX EMERALD By-Laws, Section 4.5(b). A Non-Industry Director shall serve as Chairman of the Committee. *See id. See also* MIAX EMERALD By-Laws, Section 4.2(a) (requiring that each committee be comprised of at least three people).

[45] *See* MIAX EMERALD By-Laws, Section 4.5(a) and 4.5(c).

[46] *See* MIAX EMERALD By-Laws, Section 4.5(d).

[47] *See* MIAX EMERALD By-Laws, Section 4.5(f). *See also* MIAX EMERALD By-Laws, Section 4.2(a) (providing that except as otherwise provided in the MIAX EMERALD By-Laws, committees may include persons who are not members of the Board).

[48] *See* MIAX EMERALD By-Laws, Section 4.5(e).

[49] *See* MIAX EMERALD By-Laws, Article V, Section 5.2, and *supra* note 17.

[50] *See* MIAX EMERALD By-Laws, Article V, Section 5.3, and *supra* note 18.

committees will have responsibility for, among other things, nominating candidates for election to the Exchange Board. On an annual basis, the members of these committees will nominate candidates for the succeeding year's respective committees to be elected by Miami Holdings, as the sole LLC Member.[51] In addition, MIAX EMERALD has proposed to establish a Quality of Markets Committee,[52] which will provide advice and guidance to the Exchange Board on issues related to the fairness, integrity, efficiency and competiveness of the information, order handling and execution mechanisms of the Exchange from the perspective of individual and institutional investors, retail and market making firms, and other market participants. The Quality of Markets Committee will include a broad representation of participants in the Exchange. Additionally, at least 20% of the members of the committee will be Member Representative members, and the number of Non-Industry members must equal or exceed the total number of Industry and Member Representative members. MIAX EMERALD also has proposed to establish a Business Conduct Committee, which shall be appointed by the Chairman of the Exchange Board.[53] Specifically, the Business Conduct Committee, which will not be a Board committee, will have a minimum of three members and will be composed of a number of individuals as determined by the Exchange Chairman, none of whom shall be Directors of MIAX EMERALD. In addition, at least one member of the Business Conduct Committee and any panel thereof must be an officer, director or employee of a MIAX EMERALD member.

The Commission believes that MIAX EMERALD's proposed committees, which are similar to the committees maintained by other exchanges,[54] are designed to help enable MIAX EMERALD to carry out its responsibilities under the Act and are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.[55]

B. Regulation of MIAX EMERALD

When MIAX EMERALD commences operations as a national securities exchange, the Exchange will have all the attendant regulatory obligations under the Act. In particular, MIAX EMERALD will be responsible for the operation and regulation of its trading system and the regulation of its members. Certain provisions in the MIAX EMERALD and Miami Holdings governance documents are designed to facilitate the ability of MIAX EMERALD and the Commission to fulfill their regulatory obligations. The discussion below summarizes some of these key provisions.

1. Ownership Structure: Ownership and Voting Limitations

MIAX EMERALD will be structured as a Delaware limited liability company, which will be wholly owned by the sole member of the LLC, Miami Holdings. The Miami Holdings' proposed Amended and Restated Certificate of Incorporation (''Miami Holdings Certificate'') includes restrictions on the ability to own and vote shares of capital stock of Miami Holdings.[56] These limitations are designed to prevent any Miami Holdings shareholder from exercising undue control over the operation of MIAX EMERALD and to assure that MIAX EMERALD and the Commission are able to carry out their regulatory obligations under the Act.

In particular, for so long as Miami Holdings (directly or indirectly) controls MIAX EMERALD, no person, either alone or together with its related persons,[57] may beneficially own more than 40% of any class of capital stock of Miami Holdings.[58] There would be a more conservative restriction for MIAX EMERALD members, wherein MIAX EMERALD *members,* either alone or together with their related persons, are prohibited from beneficially owning more than 20% of shares of any class of capital stock of Miami Holdings.[59] If any stockholder violates these ownership limits, Miami Holdings would redeem the shares in excess of the applicable ownership limit at their par value.[60] In addition, no person, alone or together with its related persons, may vote or cause the voting of more than 20% of the voting power of the then issued and outstanding capital stock of Miami Holdings.[61] If any stockholder purports to vote, or cause the voting of, shares that would violate this voting limit, Miami Holdings would not honor such vote in excess of the voting limit.[62]

Any person that proposes to own shares of capital stock in excess of the 40% ownership limitation, or vote or grant proxies or consents with respect to shares of capital stock in excess of the 20% voting limitation, must deliver written notice to the Miami Holdings board to notify the Board of its intention.[63] The notice must be delivered to the Board not less than 45 days before the proposed ownership of such shares or proposed exercise of such voting rights or the granting of such proxies or consents.[64] The Miami Holdings board may waive the 40% ownership limitation and the 20% voting limitation, pursuant to a resolution duly adopted by the Board of Directors, if it makes certain findings,[65]

[51] *See* MIAX EMERALD By-Laws, Article V, Section 5.1, and *supra* note 20. Additional candidates for the Member Nominating Committee may be nominated and elected by MIAX EMERALD members pursuant to a petition process. *See supra* note 22 and accompanying text.

[52] *See* MIAX EMERALD By-Laws, Article IV, Section 4.6.

[53] *See* MIAX EMERALD By-Laws, Article IV, Section 4.7.

[54] *See, e.g.,* MIAX PEARL Order, MIAX Order, and BATS Order, *supra* note 13, and ISE Mercury Order, ISE Gemini Order, and Nasdaq Order, *supra* note 27.

[55] 15 U.S.C. 78f(b)(1).

[56] These provisions are consistent with ownership and voting limits approved by the Commission for other SROs. *See, e.g.,* ISE Mercury Order and ISE Gemini Order, *supra* note 27; MIAX PEARL Order, MIAX Order, and BATS Order, *supra* note 13. *See also* Securities Exchange Act Release Nos. 78101 (June 17, 2016), 81 FR 41141 (June 23, 2016) (File No. 10–222) (order granting the registration of Investors' Exchange, LLC); 62158 (May 24, 2010), 75 FR 30082 (May 28, 2010) (CBOE–2008–88) (''CBOE Demutualization Approval Order''); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (SR–NSX–2006–03) (''NSX Demutualization Order''); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR–CHX–2004–26) (''CHX Demutualization Order''); and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003–73) (''Phlx Demutualization Order'').

[57] *See* Miami Holdings Certificate, Article NINTH (a)(ii) (defining ''related persons'').

[58] *See* Miami Holdings Certificate, Article NINTH (b)(i)(A).

[59] *See* Miami Holdings Certificate, Article NINTH (b)(i)(B).

[60] *See* Miami Holdings Certificate, Article NINTH (e). Any shares which have been called for redemption shall not be deemed outstanding shares for the purpose of voting or determining the total number of shares entitled to vote. Once redeemed by Miami Holdings, such shares shall become treasury shares and shall no longer be deemed to be outstanding. *See id.* Furthermore, if any redemption results in another stockholder owning shares in violation of the ownership limits described above, Miami Holdings shall redeem such shares. *See id.*

[61] *See* Miami Holdings Certificate, Article NINTH (b)(i)(C).

[62] *See* Miami Holdings Certificate, Article NINTH (d). The Miami Holdings Certificate also prohibits the payment of any stock dividends and conversions that would violate the ownership and voting limitations. *See* Miami Holdings Certificate, Article FOURTH A.(b) and (e), and D.7.

[63] *See* Miami Holdings Certificate, Article NINTH (b)(iv).

[64] *See id.*

[65] *See* Miami Holdings Certificate, Article NINTH (b)(ii)(B). The required findings include determinations that (A) such waiver will not impair the ability of MIAX EMERALD to carry out its functions and responsibilities under the Act and the rules and regulations promulgated thereunder, (B) such waiver is otherwise in the best interests of MIAX EMERALD and Miami Holdings, (C) such waiver will not impair the ability of the Commission to enforce the Act and (D) the transferee in such transfer and its related persons are not subject to any applicable ''statutory

except that the Miami Holdings board cannot waive the voting and ownership limits above 20% for MIAX EMERALD members and their related persons.[66] Any such waiver would not be effective unless and until approved by the Commission pursuant to Section 19 of the Act.[67]

The Miami Holdings Certificate also contains provisions that are designed to further safeguard the ownership and voting limitation described above, or are otherwise related to direct and indirect changes in control. Specifically, any person that, either alone or together with its related persons owns, directly or indirectly, of record or beneficially, 5% or more of the capital stock of Miami Holdings will be required to immediately notify Miami Holdings in writing upon acquiring knowledge of such ownership.[68] Thereafter, such persons will be required to update Miami Holdings of any increase or decrease of 1% or more in their previously reported ownership percentage.[69]

The MIAX EMERALD LLC Agreement does not include change of control provisions that are similar to those in the Miami Holdings Certificate; however the MIAX EMERALD LLC Agreement explicitly provides that Miami Holdings is the sole LLC Member of MIAX EMERALD.[70] Thus, if Miami Holdings ever proposes to no longer be the sole LLC Member of MIAX EMERALD (and therefore no longer its sole owner), MIAX EMERALD would be required to amend the MIAX EMERALD LLC Agreement and the MIAX EMERALD By-Laws. Any changes to the MIAX EMERALD LLC Agreement or the MIAX EMERALD By-Laws, including any change in the provisions that identify Miami Holdings as the sole owner of MIAX EMERALD, must be filed with, or filed with and approved by, the Commission pursuant to Section 19 of the Act, as the case may be.[71] Further, pursuant to the MIAX EMERALD By-Laws, Miami Holdings may not transfer or assign, in whole or in part, its ownership interest in MIAX EMERALD, unless such transfer is filed with and approved by the Commission pursuant to Section 19 of the Act.[72]

As described above, the provisions applicable to direct and indirect changes in control of Miami Holdings and MIAX EMERALD, as well as the voting limitation imposed on owners of Miami Holdings who also are MIAX EMERALD members, are designed to help prevent any owner of Miami Holdings from exercising undue influence or control over the operation of MIAX EMERALD. In addition, these limitations are designed to address the conflicts of interests that might result from a member of a national securities exchange owning interests in the exchange. A member's interest in an exchange, including an entity that controls an exchange, could become so large as to cast doubts on whether the exchange may fairly and objectively exercise its self-regulatory responsibilities with respect to such member.[73] A member that is a controlling shareholder of an exchange could seek to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and conduct surveillance of the member's conduct or diligently enforce the exchange's rules and the federal securities laws with respect to conduct by the member that violates such provisions. As such, the Commission believes that these voting and ownership limitations are designed to minimize the potential that a person or entity can improperly interfere with or restrict the ability of MIAX EMERALD to effectively carry out its regulatory oversight responsibilities under the Act.

The Commission believes that MIAX EMERALD's and Miami Holding's proposed governance provisions are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.[74] In particular, these requirements are designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or MIAX EMERALD to effectively carry out their regulatory oversight responsibilities under the Act.

2. Regulatory Independence and Oversight

Although Miami Holdings will not itself carry out regulatory functions, its activities with respect to the operation of MIAX EMERALD must be consistent with, and must not interfere with, MIAX EMERALD's self-regulatory obligations. In this regard, MIAX EMERALD and Miami Holdings propose to adopt certain provisions in their respective governing documents that are designed to help maintain the independence of the regulatory functions of MIAX EMERALD. These proposed provisions are substantially similar to those included in the governing documents of other exchanges that recently have been granted registration.[75] Specifically:

- The directors, officers, employees, and agents of Miami Holdings must give due regard to the preservation of the independence of the self-regulatory function of MIAX EMERALD and must

disqualification'' (within the meaning of Section 3(a)(39) of the Act). *See* Miami Holdings Certificate, Article NINTH (b)(ii)(B) and (b)(iii). The Commission has previously approved the rules of other exchanges that provide for the ability of the exchange to waive the ownership and voting limitations discussed above for non-members of the exchange. *See, e.g.,* ISE Mercury Order and ISE Gemini Order, *supra* note 27; MIAX PEARL Order and MIAX Order, *supra* note 13; and Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10–194 and 10–196) (order approving DirectEdge exchanges) (''DirectEdge Exchanges Order'').

[66] *See* Miami Holdings Certificate, Article NINTH (b)(ii)(B). These provisions are generally consistent with waiver of ownership and voting limits approved by the Commission for other SROs. *See, e.g.,* ISE Mercury Order, *supra* note 27; MIAX PEARL Order and MIAX Order, *supra* note 13; BATS Order, *supra* note 13; NSX Demutualization Order, *supra* note 56; CHX Demutualization Order, *supra* note 56; and Securities Exchange Act Release No. 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (SR–PCX–2004–08).

[67] *See* Miami Holdings Certificate, Article NINTH (b)(ii)(B).

[68] *See* Miami Holdings Certificate, Article NINTH(c)(i). The notice will require the person's full legal name; the person's title or status; the person's approximate ownership interest in Miami Holdings; and whether the person has power, directly or indirectly, to direct the management or policies of Miami Holdings. *See id.*

[69] *See* Miami Holdings Certificate, Article NINTH(c)(ii). Changes of less than 1% must also be reported to Miami Holdings if they result in such person crossing a 20% or 40% ownership threshold. *See id.* In addition, the MIAX EMERALD rules also impose limits on affiliation between MIAX EMERALD and a member of MIAX EMERALD. *See* MIAX EMERALD Rule 201(g) (''Without prior Commission approval, the Exchange or any entity with which it is affiliated shall not directly or indirectly through one or more intermediaries acquire or maintain an ownership interest in an Exchange Member. In addition, without prior Commission approval, no Member shall be or become affiliated with (1) the Exchange; or (2) any affiliate of the Exchange. Nothing herein shall prohibit a Member from acquiring or holding an equity interest in (i) Miami International Holdings, Inc. that is permitted by the Certificate of Incorporation of Miami International Holdings, Inc. or (ii) MIAX Emerald that is permitted by the Amended and Restated Limited Liability Company Agreement of MIAX Emerald.'').

[70] *See* MIAX EMERALD LLC Agreement and MIAX EMERALD By-Laws, Article I(v) (both of which define ''LLC Member'' to mean Miami Holdings, as the sole member of MIAX EMERALD).

[71] *See* 15 U.S.C. 78s. *See also* MIAX EMERALD LLC Agreement, Section 28(b).

[72] *See* MIAX EMERALD By-Laws, Article III, Section 3.4.

[73] *See, e.g.,* ISE Mercury Order, *supra* note 27; MIAX PEARL Order and MIAX Order, *supra* note 13; BATS Order, *supra* note 13; and DirectEdge Exchanges Order, *supra* note 65.

[74] 15 U.S.C. 78f(b)(1). *See also* ISE Mercury Order, *supra* note 27; MIAX PEARL Order and MIAX Order, *supra* note 13; and BOX Order, *supra* note 13.

[75] *See, e.g.,* DirectEdge Exchanges Order, *supra* note 65, and BATS Order, *supra* note 13. *See also* Securities Exchange Act Release No. 61152 (December 10, 2009), 74 FR 66699 (December 16, 2009) (File No. 10–191) (order approving C2 Options Exchange, Incorporated) (''C2 Order'').

not take actions that would interfere with the effectuation of decisions by the MIAX EMERALD Board relating to its regulatory functions or that would interfere with MIAX EMERALD's ability to carry out its responsibilities under the Act.[76]

• Miami Holdings must comply with federal securities laws and the rules and regulations promulgated thereunder, and agrees to cooperate with the Commission and MIAX EMERALD pursuant to, and to the extent of, their respective regulatory authority. In addition, Miami Holdings' officers, directors, employees, and agents must comply with federal securities laws and the rules and regulations promulgated thereunder and agree to cooperate with the Commission and MIAX EMERALD in respect of the Commission's oversight responsibilities regarding MIAX EMERALD and the self-regulatory functions and responsibilities of MIAX EMERALD.[77]

• Miami Holdings, and its officers, directors, employees, and agents are deemed to irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and MIAX EMERALD, for purposes of any action, suit, or proceeding pursuant to U.S. federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, MIAX EMERALD activities.[78]

• All books and records of MIAX EMERALD reflecting confidential information pertaining to the self-regulatory function of MIAX EMERALD (including but not limited to disciplinary matters, trading data, trading practices, and audit information) shall be retained in confidence by MIAX EMERALD and its personnel and will not be used by MIAX EMERALD for any non-regulatory purpose and shall not be made available to persons (including, without limitation, any MIAX EMERALD member) other than to personnel of the Commission, and those personnel of MIAX EMERALD, members of committees of MIAX EMERALD, members of the MIAX EMERALD Board, or hearing officers and other agents of MIAX EMERALD, to the extent necessary or appropriate to properly discharge the self-regulatory function of MIAX EMERALD.[79]

• The books and records of MIAX EMERALD and Miami Holdings must be maintained in the United States[80] and, to the extent they are related to the operation or administration of MIAX EMERALD, Miami Holdings books and records will be subject at all times to inspection and copying by the Commission.[81]

• Furthermore, to the extent they relate to the activities of MIAX EMERALD, the books, records, premises, officers, directors, employees, and agents of Miami Holdings will be deemed to be the books, records, premises, officers, directors, employees, and agents of MIAX EMERALD, for purposes of, and subject to oversight pursuant to, the Act.[82]

• Miami Holdings will take necessary steps to cause its officers, directors, employees, and agents, prior to accepting a position as an officer, director, employee or agent (as applicable) to consent in writing to the applicability of provisions regarding books and records, confidentiality, jurisdiction, and regulatory obligations, with respect to their activities related to MIAX EMERALD.[83]

• Miami Holdings Certificate and By-Laws require that, so long as Miami Holdings controls MIAX EMERALD, any changes to those documents be submitted to the MIAX EMERALD Board, and, if such change is required to be filed with the Commission pursuant to Section 19(b) of the Act and the rules and regulations thereunder, such change shall not be effective until filed with, or filed with and approved by, the Commission.[84]

The Commission believes that the provisions discussed in this section, which are designed to help maintain the independence of MIAX EMERALD's regulatory function and help facilitate the ability of MIAX EMERALD to carry out its regulatory responsibilities and operate in a manner consistent with the Act, are appropriate and consistent with the requirements of the Act, particularly with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.[85] Whether MIAX EMERALD operates in compliance with the Act, however, depends on how it and Miami Holdings in practice implement the governance and other provisions that are the subject of this Order.

Further, Section 19(h)(1) of the Act[86] provides the Commission with the authority ''to suspend for a period not exceeding twelve months or revoke the registration of [an SRO], or to censure or impose limitations upon the activities, functions, and operations of [an SRO], if [the Commission] finds, on the record after notice and opportunity for hearing, that [the SRO] has violated or is unable to comply with any provision of the Act, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance'' with any such provision by its members (including associated persons thereof).[87] If Commission staff were to find, or become aware of, through staff review and inspection or otherwise, facts indicating any violations of the Act, including without limitation Sections 6(b)(1) and 19(g)(1), these matters could provide the basis for a disciplinary proceeding under Section 19(h)(1) of the Act.

The Commission also notes that, even in the absence of the governance provisions described above, under Section 20(a) of the Act, any person with a controlling interest in MIAX EMERALD would be jointly and severally liable with and to the same extent that MIAX EMERALD is liable

[76] *See* Amended and Restated By-Laws of Miami Holdings (''Miami Holdings By-Laws''), Article VII, Section 1.

Similarly, Article II, Section 2.1(d) of the MIAX EMERALD By-Laws requires the MIAX EMERALD Board to, when managing the business and affairs of MIAX EMERALD and evaluating any proposal, consider the requirements of Section 6(b) of the Act. Section 2.1(e) also requires the MIAX EMERALD Board, when evaluating any proposal to take into account (among other things and to the extent relevant), the potential impact on the integrity, continuity and stability of the national securities exchange operated by MIAX EMERALD and the other operations of MIAX EMERALD, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and whether such would promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system.

[77] *See* Miami Holdings By-Laws, Article VII, Section 4.

[78] *See* Miami Holdings By-Laws, Article VII, Section 5.

[79] *See* MIAX EMERALD By-Laws Article X, Section 10.4. The Commission notes that the Miami Holdings By-Laws also provide that all books and records of MIAX EMERALD reflecting confidential information pertaining to the self-regulatory function of MIAX EMERALD will be subject to confidentiality restrictions. *See* Miami Holdings By-Laws Article VII, Section 2. The requirement to keep such information confidential shall not limit the Commission's ability to access and examine such information or limit the ability of officers, directors, employees, or agent of Miami Holdings to disclose such information to the Commission. *See id.*

[80] *See* MIAX EMERALD By-Laws, Article X, Section 10.4; and Miami Holdings By-Laws, Article VII, Section 3.

[81] *See* Miami Holdings By-Laws, Article VII, Section 3.

[82] *See* Miami Holdings By-Laws, Article VII, Section 3.

[83] *See* Miami Holdings By-Laws, Article VII, Section 6.

[84] *See* Miami Holdings Certificate, Article VIII; and Miami Holdings By-Laws, Article XII, Section 1.

[85] 15 U.S.C. 78f(b)(1).

[86] *See* 15 U.S.C. 78s(h)(1).

[87] *See id.*

under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.[88] In addition, Section 20(e) of the Act creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder.[89] Further, Section 21C of the Act authorizes the Commission to enter a cease-and-desist order against any person who has been ''a cause of'' a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.[90] These provisions are applicable to all entities' dealings with MIAX EMERALD, including Miami Holdings.

3. *Regulation of MIAX EMERALD*

As a prerequisite to the Commission's granting of an exchange's application for registration, an exchange must be so organized and have the capacity to carry out the purposes of the Act.[91] Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with the Act and the rules and regulations thereunder and the rules of the exchange.[92] The discussion below summarizes how MIAX EMERALD proposes to structure and conduct its regulatory operations.

a. Regulatory Oversight Committee

The regulatory operations of MIAX EMERALD will be monitored by the Regulatory Oversight Committee of the Exchange Board. The Regulatory Oversight Committee will consist of at least three directors, all of whom will be Non-Industry Directors. The Regulatory Oversight Committee will be responsible for overseeing the adequacy and effectiveness of MIAX EMERALD's regulatory and SRO responsibilities, assessing MIAX EMERALD's regulatory performance, and assisting the Exchange Board (and committees of the Exchange Board) in reviewing MIAX EMERALD's regulatory plan and the overall effectiveness of MIAX EMERALD's regulatory functions.[93]

Further, a Chief Regulatory Officer (''CRO'') of MIAX EMERALD will have general supervision over MIAX EMERALD's regulatory operations.[94] The Regulatory Oversight Committee also will be responsible for recommending compensation and personnel actions involving the CRO and senior regulatory personnel to the Compensation Committee of MIAX EMERALD for action.[95] The CRO will report to the Regulatory Oversight Committee.[96]

b. Regulatory Funding

To help assure the Commission that it has and will continue to have adequate funding to be able to meet its responsibilities under the Act, MIAX EMERALD represents in its Form 1 Application that, prior to beginning operations as a national securities exchange, Miami Holdings will provide sufficient funding to MIAX EMERALD for the exchange to carry out its responsibilities under the Act.[97] Specifically, MIAX EMERALD represents that Miami Holdings has allocated sufficient operational assets to enable its operation and that prior to launching operations, Miami Holdings will make a capital contribution of not less than $5,000,000 into MIAX EMERALD's capital account, in addition to any previously-provided in-kind contributions, such as legal, regulatory, and infrastructure-related services.[98] MIAX EMERALD represents that such cash and in-kind contributions by Miami Holdings will be adequate to begin operation of the Exchange, including the regulation of the Exchange.

MIAX EMERALD also represents in its Form 1 application that there is a written agreement (''Funding Agreement'') between MIAX EMERALD and Miami Holdings that requires Miami Holdings to provide adequate funding for MIAX EMERALD's ongoing operations, including the regulation of MIAX EMERALD. This Funding Agreement provides that MIAX EMERALD will receive all fees, including regulatory fees and trading fees, payable by MIAX EMERALD's members, as well as any funds received from any applicable market data fees and Options Price Reporting Authority tape revenue. The Funding Agreement further provides that Miami Holdings will reimburse MIAX EMERALD for its costs and expenses to the extent MIAX EMERALD's assets are insufficient to meets its costs and expenses.[99] Based on the various financial statements for 2016 through 2018 that MIAX EMERALD has filed as part of its Form 1 for itself, its affiliates, and Miami Holdings, the Commission believes that the Funding Agreement appropriately will facilitate the ability of MIAX EMERALD to commence and continue operations.

Further, any revenues received by MIAX EMERALD from fees derived from its regulatory function or regulatory penalties will not be used for non-regulatory purposes.[100] Any excess funds, as determined by MIAX EMERALD, may be remitted to Miami Holdings, however ''Regulatory Funds'' will not be remitted to Miami Holdings.[101]

c. Rule 17d–2 Agreements; Regulatory Contract With FINRA

Unless the SRO is relieved of this responsibility pursuant to Section 17(d) or Section 19(g)(2) of the Act,[102] Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange, absent reasonable justification or excuse, to enforce compliance by its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules.[103] Section 17(d) of the Act and Rule 17d–2 thereunder permit SROs to propose joint plans to allocate regulatory responsibilities among themselves for their common rules with respect to their common members.[104] These

[88] 15 U.S.C. 78t(a).

[89] 15 U.S.C. 78t(e).

[90] 15 U.S.C. 78u–3.

[91] *See* Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

[92] *See id. See also* Section 19(g) of the Act, 15 U.S.C. 78s(g).

[93] *See* MIAX EMERALD By-Laws, Article IV, Section 4.5(c). The Regulatory Oversight Committee is responsible for reviewing MIAX EMERALD's regulatory budget, and also will meet regularly with the Chief Regulatory Officer. *See id.*

[94] *See* MIAX EMERALD By-Laws, Article VI, Section 6.10.

[95] *See* MIAX EMERALD By-Laws, Article IV, Section 4.5(c).

[96] *See* MIAX EMERALD By-Laws, Article VI, Section 6.10.

[97] *See* MIAX EMERALD Form 1 Application, Exhibit I.

[98] *See id.*

[99] *See id.*

[100] *See* MIAX EMERALD By-Laws, Article IX, Section 9.4.

[101] *See* MIAX EMERALD Form 1 Application, Exhibit I. *See also* MIAX EMERALD LLC Agreement, Section 16; and MIAX EMERALD By-Laws, Article IX, Section 9.4. MIAX EMERALD By-Laws, Article 1(gg) defines ''Regulatory Funds'' as ''fees, fines, or penalties derived from the regulatory operations of [MIAX EMERALD]'', but such term does not include ''revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of [MIAX EMERALD], even if such revenues are used to pay costs associated with the regulatory operations of [MIAX EMERALD].'' This definition is consistent with the rules of other SROs. *See, e.g.,* By-Laws of MIAX Exchange, Article I(ll); By-Laws of MIAX PEARL, Article 1(gg); By-Laws of Nasdaq PHLX LLC, Article I(ii); and By-Laws of Nasdaq BX, Inc., Article I(ii).

[102] 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

[103] 15 U.S.C. 78s(g)(1).

[104] *See* Section 17(d)(1) of the Act and Rule 17d–2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d–2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO

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agreements, which must be filed with and declared effective by the Commission, generally cover areas where each SRO's rules substantively overlap, including such regulatory functions as personnel registration and sales practices. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO.[105] Such regulatory duplication would add unnecessary expense for common members and their SROs. A 17d–2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.[106] Many SROs have entered into Rule 17d–2 agreements.[107]

A 17d–2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.[108] MIAX EMERALD has represented to the Commission that it intends to become a party to the existing multiparty options Rule 17d–2 plans concerning sales practice regulation and market surveillance.[109] MIAX EMERALD has also represented that it will enter into a bi-lateral 17d–2 agreement to allocate regulatory responsibility to FINRA for common rules of dual members between MIAX EMERALD and FINRA. Under these agreements, the examining SROs will examine firms that are common members of MIAX EMERALD and the particular examining SRO for compliance with certain provisions of the Act, certain rules and regulations adopted thereunder, and certain MIAX EMERALD Rules.

In addition, MIAX EMERALD has represented that it will enter into a Regulatory Services Agreement (''RSA'') with FINRA, under which FINRA will perform certain regulatory functions on behalf of MIAX EMERALD.[110] Pursuant to the RSA, FINRA, in its capacity as service provider to MIAX EMERALD, will perform various services on MIAX EMERALD's behalf, including assisting MIAX EMERALD with member registration and related administrative support services; certain cross-market surveillance services; certain options trading examinations; at MIAX EMERALD's request, investigating potential violations of enumerated MIAX EMERALD market rules, as well as federal securities laws, and rules and regulations thereunder, related to MIAX EMERALD market activity; performing examinations of options, including routine and for cause examinations of MIAX EMERALD members under certain MIAX EMERALD rules and federal securities laws; bringing formal disciplinary actions, including hearing officer services; and providing arbitration, mediation, and other dispute resolution services to MIAX EMERALD member firms.[111] Notwithstanding the RSA, MIAX EMERALD, as an SRO, has the ultimate legal responsibility for the regulation of its members and market.

The Commission believes that it is consistent with the Act for MIAX EMERALD to contract with other SROs to perform certain examination, enforcement, and disciplinary functions.[112] This regulatory structure would be consistent with that of other SROs.[113] These functions are fundamental elements of a regulatory program, and constitute core self-regulatory functions. The Commission believes that FINRA, as an SRO that provides contractual services to other SROs, should have the capacity to perform these functions for MIAX EMERALD.[114] However, MIAX EMERALD, unless relieved by the Commission of its responsibility,[115] bears the ultimate responsibility for self-regulatory responsibilities and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on MIAX EMERALD's behalf. In performing these regulatory functions, however, the SRO retained to perform regulatory functions may nonetheless bear liability for causing or aiding and abetting the failure of MIAX EMERALD to perform its regulatory functions.[116] Accordingly, although FINRA will not act on its own behalf in carrying out these regulatory services for MIAX EMERALD, as the SRO retained to perform certain regulatory functions, FINRA may have secondary liability if, for example, the Commission finds that the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws by MIAX EMERALD.

C. Trading System

1. Access to MIAX EMERALD

Access to MIAX EMERALD will be granted to individuals or organizations who are approved to become Members.[117] Approved Members will be

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who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) Receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

[105] Section 17(d) was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication with respect to Common Members. *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[106] *See id.*

[107] *See, e.g.,* Securities Exchange Act Release Nos. 83696 (July 24, 2018), 83 FR 35682 (July 27, 2018) (Financial Industry Regulatory Authority, Inc. (''FINRA'')/MIAX PEARL); 77321 (March 8, 2016), 81 FR 13434 (March 14, 2016) (File No. 4–697) (FINRA/ISE Mercury, LLC), 73641 (November 19, 2014), 79 FR 70230 (November 25, 2014) (File No. 4–678) (FINRA/MIAX Exchange); 70053 (July 26, 2013), 78 FR 46656 (August 1, 2013) (File No. 4–663) (FINRA/ISE Gemini, LLC); 59218 (January 8, 2009), 74 FR 2143 (January 14, 2009) (File No. 4–575) (FINRA/Boston Stock Exchange, Inc.); 58818 (October 20, 2008), 73 FR 63752 (October 27, 2008) (File No. 4–569) (FINRA/BATS Exchange, Inc.); 55755 (May 14, 2007), 72 FR 28087 (May 18, 2007) (File No. 4–536) (National Association of Securities Dealers, Inc. (''NASD'') (n/k/a FINRA) and Chicago Board of Options Exchange, Inc. concerning the CBOE Stock Exchange, LLC); 55367 (February 27, 2007), 72 FR 9983 (March 6, 2007) (File No. 4–529) (NASD/International Securities Exchange, LLC); and 54136 (July 12, 2006), 71 FR 40759 (July 18, 2006) (File No. 4–517) (NASD/The Nasdaq Stock Market LLC).

[108] *See supra* notes 104–105.

[109] *See* MIAX EMERALD Form 1 Application, Exhibit L. *See also* Securities Exchange Act Release No. 68363 (December 5, 2012), 77 FR 73711 (December 11, 2012) (File No. S7–966) (notice of filing and order approving and declaring effective an amendment to the multiparty 17d–2 plan concerning options-related sales practice matters); and 68362 (December 5, 2012), 77 FR 73719 (December 11, 2012) (File No. 4–551) (notice of filing and order approving and declaring effective an amendment to the multiparty 17d–2 plan concerning options-related market surveillance).

[110] *See* MIAX EMERALD Form 1 Application, Exhibit L.

[111] *See id.*

[112] *See, e.g.,* Regulation ATS Release, *supra* note 29. *See also* Securities Exchange Act Release Nos. 50122 (July 29, 2004), 69 FR 47962 (August 6, 2004) (SR–Amex–2004–32) (order approving rule that allowed Amex to contract with another SRO for regulatory services) (''Amex Regulatory Services Approval Order''); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004) (''NOM Approval Order''); Nasdaq Order, *supra* note 27; and BATS Order, *supra* note 13.

[113] For example, MIAX Exchange, MIAX PEARL, Nasdaq MRX, LLC, Cboe EDGA Exchange, Inc., Cboe EDGX Exchange Inc., and Cboe BZX Exchange, Inc. have entered into 17d–2 Plans and RSAs with FINRA.

[114] *See, e.g.,* Amex Regulatory Services Approval Order, *supra* note 112; NOM Approval Order, *supra* note 112; and Nasdaq Order, *supra* note 27. The Commission notes that the RSA is not before the Commission and, therefore, the Commission is not acting on it.

[115] *See supra* note 104.

[116] For example, if failings by the SRO retained to perform regulatory functions have the effect of leaving an exchange in violation of any aspect of the exchange's self-regulatory obligations, the exchange will bear direct liability for the violation, while the SRO retained to perform regulatory functions may bear liability for causing or aiding and abetting the violation. *See, e.g.,* Nasdaq Order, *supra* note 27; BATS Order, *supra* note 13; and Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10–127) (approval of registration of International Securities Exchange Act, LLC as a national securities exchange).

[117] A ''Member'' is defined as an individual or organization approved to exercise the trading rights associated with a Trading Permit. MIAX EMERALD

issued Trading Permits that grant the Member the ability to transact on MIAX EMERALD through its electronic systems.[118] Trading Permits will not convey upon Members any ownership interest in MIAX EMERALD, and they will not be transferable except in cases where a Member experiences a change in control or corporate reorganization.[119] Membership will be open to any broker-dealer that: (1) Is registered under Section 15 of the Act; [120] and (2) has and maintains membership in another registered options exchange (other than MIAX Exchange or MIAX PEARL) or FINRA.[121] As explained below, a holder of a MIAX Exchange or MIAX PEARL trading permit will not be required to submit a full application for membership on MIAX EMERALD.[122] There will be no limit to the number of Trading Permits that MIAX EMERALD can issue, although MIAX could determine in the future a limit or decrease in the number of Trading Permits issued.[123] Members of MIAX EMERALD may be one of three classes of Market Maker,[124] or they may be Electronic Exchange Members.[125]

A holder of a MIAX Exchange or MIAX PEARL trading permit in good standing will be eligible to receive one MIAX EMERALD Trading Permit.[126] MIAX Exchange and MIAX PEARL member applicants will not be required to submit a full application for membership on MIAX EMERALD, but rather will only need to complete selected MIAX EMERALD forms concerning their election to trade on MIAX EMERALD, consent to MIAX EMERALD's jurisdiction, and other operational matters.[127] This waive-in application process is similar to arrangements in place at other exchanges.[128]

Applicants that do not hold a MIAX Exchange or MIAX PEARL trading permit and seek to become members of MIAX EMERALD will need to submit a full application in accordance with procedures established by the Exchange.[129] Individuals and entities that become members, and their associated persons, will be required to meet and maintain certain qualification and registration criteria similar to what is required by other options exchanges.[130] In addition, MIAX EMERALD proposes further requirements on members that seek to do business with the public.[131] Applicants who are denied membership may appeal MIAX EMERALD's decision pursuant to MIAX EMERALD's rules governing Hearings, Review, and Arbitration.[132] Every Member will be subject to MIAX EMERALD's regulatory jurisdiction, including MIAX EMERALD's disciplinary jurisdiction.[133]

The Commission finds that MIAX EMERALD's proposed membership rules are consistent with the Act, including Section 6(b)(2) of the Act, which requires the rules of an exchange to provide that any registered broker or dealer or natural person associated with a broker or dealer may become a member of such exchange or associated with a member thereof.[134] MIAX EMERALD's proposed rules with respect to exchange membership are substantively similar to the rules of other exchanges.

The Commission notes that pursuant to Section 6(c) of the Act,[135] an exchange must deny membership to any person, other than a natural person, that is not a registered broker or dealer, any natural person that is not, or is not associated with, a registered broker or dealer, and registered broker-dealers that do not satisfy certain standards, such as financial responsibility or operational capacity. As a registered exchange, MIAX EMERALD must independently determine if an applicant satisfies the standards set forth in the Act, regardless of whether an applicant is a member of another SRO.[136]

In addition, Members may enter into arrangements with other parties, including non-Members and other Members, to provide ''Sponsored Access'' to trading on MIAX EMERALD.[137] Members who provide such Sponsored Access will be responsible for all trading conducted pursuant to the access agreement, and to the same extent as if the Member were trading directly.[138] Accordingly, Members that provide Sponsored Access must maintain and implement policies and procedures to supervise and monitor sponsored trading activity.[139] Additionally, non-Members who seek to trade on MIAX EMERALD

Members are ''members'' as defined under the Act. *See* MIAX EMERALD Rule 100. A ''Trading Permit'' means a permit issued by the Exchange that confers the ability to transact on the Exchange. *Id.*

[118] *See* MIAX EMERALD Rule 200(a). MIAX EMERALD represents that it has designed its systems to allow its Members to individually determine the best method for accessing the Exchange, whether by using customized front-end software using protocols determined by the Exchange or through third-party vendors who route orders to MIAX EMERALD through a front-end or service bureau configuration. *See* MIAX EMERALD Form 1 Application, Exhibit E.

[119] *See* MIAX EMERALD Rule 200(e).

[120] *See* MIAX EMERALD Rule 200(b).

[121] *See* MIAX EMERALD Rule 200(d). If such other options exchange has not been designated by the Commission to examine Members for compliance with financial responsibility rules, then the broker-dealer must have and maintain a membership in FINRA. *Id.*

[122] *See* MIAX EMERALD Rule 200(c) and *infra* notes 127–128 and accompanying text.

[123] *See* MIAX EMERALD Rule 200(a). MIAX EMERALD would announce in advance any limitation or decrease it plans to impose pursuant to Rule 200(a). *See id.* In the event that MIAX EMERALD imposes a limitation or decrease, MIAX EMERALD, in doing so, may not eliminate the ability of an existing member to trade on the Exchange unless MIAX EMERALD is permitted to do so pursuant to a rule filing submitted to the Commission under Section 19(b) of the Act. *See id.* In addition, MIAX EMERALD's exercise of authority under proposed Rule 200 would be subject to the provisions of Section 6(c)(4) of the Act. *See id. See also* Cboe Exchange, Inc. (''Cboe'') Rule 3.1(a)(vi); MIAX Exchange Rule 200(a) (concerning limiting or reducing the number of trading permits); and MIAX PEARL Rule 200(a) (concerning limiting or reducing the number of trading permits). Further, MIAX EMERALD's exercise of authority under proposed Rule 200 would be subject to the provisions of Section 6(b)(2) of the Act, which requires the rules of an exchange to provide that any registered broker or dealer or any natural person associated with a registered broker or dealer may become a member of such exchange and any person may become associated with a member thereof. *See* 15 U.S.C. 78f(b)(2).

[124] *See* MIAX EMERALD Rule 600. Market Maker registration is discussed in greater detail below, *infra* Section III.C.3.

[125] An ''Electronic Exchange Member'' is the holder of a Trading Permit who is not a Market Maker. MIAX EMERALD Electronic Exchange Members are ''members'' as defined under the Act. *See* MIAX EMERALD Rule 100.

[126] *See* MIAX EMERALD Rule 200(c)(1).

[127] See *id.*

[128] *See, e.g.,* Nasdaq MRX, LLC Rule 302(a) (containing similar expedited waive-in membership process for members of the Nasdaq ISE, LLC and Nasdaq GEMX, LLC); MIAX PEARL Rule 200(c)(1) (containing similar expedited waive-in membership process for members of MIAX Exchange); and Cboe C2 Exchange, Inc. Rule 3.1(c)(1) (containing similar expedited waive-in membership process for members of Cboe).

[129] *See* MIAX EMERALD Rule 200(c)(2).

[130] *See* MIAX EMERALD Rules Chapter II. Such criteria include, but are not limited to, capital maintenance requirements. *See, e.g.,* MIAX Exchange Rule 200 Series; MIAX PEARL Rule 200 Series; and Cboe C2 Exchange, Inc. Rules 3.1 and 3.2 (containing similar criteria).

[131] *See* MIAX EMERALD Rules Chapter XIII (incorporating by reference Chapter XIII of the MIAX Exchange Rules). Chapter XIII of the MIAX Exchange Rules also is similar to the rules of other exchanges. *See, e.g.,* Nasdaq ISE, LLC Rules Chapter 6.

[132] *See* MIAX EMERALD Rules Chapter XI (incorporating by reference Chapter XI of the MIAX Exchange Rules).

[133] *See* MIAX EMERALD Rule 200(g). For MIAX EMERALD's rules concerning discipline, *see* Chapter X of the MIAX EMERALD Rules.

[134] 15 U.S.C. 78f(b)(2).

[135] 15 U.S.C. 78f(c).

[136] *See, e.g.,* MIAX PEARL Order, *supra* note 13, at 92910; ISE Mercury Order, *supra* note 27, at 6076; ISE Gemini Order, *supra* note 27, at 46633; MIAX Order, *supra* note 13, at 73074; BOX Order, *supra* note 13, at 26337; BATS Order, *supra* note 13, at 49502; and Nasdaq Order, *supra* note 27, at 3555.

[137] *See* MIAX EMERALD Rule 210.

[138] *See* MIAX EMERALD Rule 210(b).

[139] *See* MIAX EMERALD Rule 210(b)–(c).

through Sponsored Access agreements will need to agree to comply with all applicable federal securities laws and rules and Exchange rules.[140] MIAX EMERALD's rules governing Sponsored Access arrangements are similar to the rules of other exchanges.[141]

2. Linkage

MIAX EMERALD intends to become a participant in the Options Order Protection and Locked/Crossed Markets Plan or any successor plan (''Linkage Plan'').[142] If admitted as a participant to the Linkage Plan, other plan participants would be able to send orders to MIAX EMERALD in accordance with the terms of the plan as applied to the Exchange. The MIAX EMERALD Rules include relevant definitions, establish the conditions pursuant to which members may enter orders in accordance with the Linkage Plan, impose obligations on the Exchange regarding how it must process incoming orders, establish a general standard that members and MIAX EMERALD should avoid trade-throughs, establish potential regulatory liability for members that engage in a pattern or practice of trading through other exchanges, and establish obligations with respect to locked and crossed markets.

The Commission believes that MIAX EMERALD has proposed rules that are designed to comply with the requirements of the Linkage Plan.[143] Further, as provided below, before MIAX EMERALD can commence operations as a national securities exchange, it must become a participant in the Linkage Plan.

3. Market Makers

a. Registration and Appointment

Members of MIAX EMERALD may apply to become one of three types of market maker: Primary Lead Market Maker, Lead Market Maker, or Registered Market Maker (collectively, ''Market Makers''). Market Makers are entitled to receive certain benefits and privileges in exchange for fulfilling certain affirmative and negative market-making obligations.[144] Each class of Market Maker will receive a specific level of benefits and privileges in exchange for a specific level of obligation that such Market Maker assumes to the MIAX EMERALD market.

To begin the process of registering as a Registered Market Maker or Lead Market Maker, a member will be required to file a written application with MIAX EMERALD.[145] In reviewing a member's application for membership, MIAX EMERALD will consider, among other things, the applicant's market making ability.[146] Only approved Lead Market Makers may apply to be considered for appointment as a Primary Lead Market Maker in one or more option classes traded on MIAX EMERALD.[147] All members who are approved to become Market Makers will be designated as specialists on MIAX EMERALD for all purposes under the Act and rules thereunder.[148]

In addition, all MIAX Exchange and MIAX PEARL market makers in good standing will be eligible to receive a MIAX EMERALD Trading Permit in the same membership category in which they operate on MIAX Exchange and MIAX PEARL, respectively, to trade on MIAX EMERALD.[149] For example, a Lead Market Maker in good standing in MIAX Exchange will be eligible to become a Lead Market Maker on MIAX EMERALD, through the submission and approval of a MIAX EMERALD waive-in membership application.[150]

Once approved, a Market Maker would seek appointment to make markets in one or more options classes traded on MIAX EMERALD.[151] Either the Exchange Board or a committee thereof[152] will appoint classes of options contract traded on MIAX EMERALD to Market Makers taking into consideration: (1) The financial resources available to the Market Maker; (2) the Market Maker's experience and expertise in market making or options trading; (3) the preferences of the Market Maker to receive appointment(s) in specific option class(es); and (4) the maintenance and enhancement of competition among Market Makers in each option class.[153] MIAX EMERALD will allow one Primary Lead Market Maker appointment per class,[154] and will have a maximum class quoting limit of fifty Market Makers per class.[155] Once appointed, MIAX EMERALD will surveil a Market Maker's activity for continued compliance with all applicable rules and requirements,[156] which are discussed in more detail below.

The Commission finds that MIAX EMERALD's rules for the registration and appointment of Market Makers are consistent with the Act. In particular, MIAX EMERALD's rules provide an objective process by which a member could become a Market Maker on MIAX EMERALD and provide for oversight by MIAX EMERALD to monitor for continued compliance by Market Makers with the terms of their application for such status. The Commission notes that MIAX EMERALD's proposed Market Maker registration and appointment requirements are similar to those of other options exchanges.[157]

b. Market Maker Obligations

Pursuant to MIAX EMERALD rules, all Market Makers will be subject to a number of general obligations. In particular, the transactions of a Market Maker must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market.[158] Among other things, a Market Maker must: (1) Compete with other Market Makers to improve the market; (2) make markets

[140] *See* MIAX EMERALD Rule 210(b). *See also, e.g.,* 17 CFR 240.15c3–5.

[141] *See, e.g.,* MIAX PEARL Rule 210; MIAX Exchange Rule 210; and Nasdaq Stock Market LLC Rule 4611(d).

[142] *See* MIAX EMERALD Form 1 Application, Exhibit E. *See also* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4–546) (order approving the Options Order Protection and Locked/Crossed Markets Plan submitted by the Chicago Board Options Exchange, Incorporated, International Securities Exchange, LLC, The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX, Inc., NYSE Amex LLC, and NYSE Arca, Inc.).

[143] *See* Chapter XIV of the MIAX EMERALD Rules (incorporating by reference Chapter XIV of the MIAX Exchange Rules).

[144] Market Makers' benefits and obligations are discussed in greater detail in the following section.

[145] *See* MIAX EMERALD Rule 600(b).

[146] *See id. See also* MIAX Exchange Rule 600(b) and Nasdaq MRX, LLC Rule 800(b). The provision permitting MIAX EMERALD to consider ''such other factors as [it] deems appropriate'' must be applied in a manner that is consistent with the Act, including provisions that prohibit an exchange from acting in an unfairly discriminatory manner. *See* 15 U.S.C. 78f(b)(5); *see also* C2 Order, *supra* note 75, at 66704, n. 80.

[147] *See id.*

[148] *See* MIAX EMERALD Rule 600(a).

[149] *See* MIAX EMERALD Rule 200(c).

[150] *See id.*

[151] *See* MIAX EMERALD Rule 602.

[152] *See* MIAX EMERALD Rule 602(a). MIAX EMERALD Chapter XI provides the process for hearings, review, and arbitration of claims by persons economically aggrieved by MIAX EMERALD action, which would include denial of registration as a Market Maker. *See* MIAX EMERALD Chapter XI (incorporating by reference MIAX Exchange Chapter XI).

[153] *See id.*

[154] *See* MIAX EMERALD Rule 602(c)(1).

[155] *See* MIAX EMERALD Rule 602(c)(2).

[156] *See, e.g.,* MIAX EMERALD Rule 602(f) (stating that MIAX EMERALD shall periodically conduct an evaluation of Market Makers to determine whether they have fulfilled performance standards relating to, among other things, quality of markets, competition among Market Makers, observance of ethical standards, and administrative factors).

[157] *See, e.g.,* MIAX Exchange Rule 600; Nasdaq MRX, LLC Rule 800; Nasdaq ISE, LLC Rules 800 and 801; and Cboe C2 Exchange, Inc. Rule 8.1 (registration of market makers). *See, e.g.,* MIAX Exchange Rule 602; Nasdaq ISE, LLC Rule 802; Nasdaq MRX, LLC Rule 802; and Cboe C2 Exchange, Inc. Rule 8.11 (appointment of market makers).

[158] *See* MIAX EMERALD Rule 603(a).

that, absent changed market conditions, will be honored for the number of contracts entered; (3) update quotations in response to changed market conditions; (4) price option contracts fairly by, among other things, bidding and offering so as to create differences of no more than $5 between the bid and offer following the opening rotation.[159] In addition, Market Makers must maintain minimum net capital in accordance with MIAX EMERALD rules and the federal securities laws.[160]

MIAX EMERALD's rules governing Market Maker quoting obligations are tailored to the specific class of Market Maker.[161] Specifically, a Primary Lead Market Maker will be subject to the highest standard applicable on MIAX EMERALD, as they will be required to provide continuous two-sided Standard quotes [162] throughout the trading day 90% of the time in the lesser of 99% of the series, or 100% of the series minus one put-call pair, in each appointed class.[163] Lead Market Makers must provide continuous two-sided quotes (consisting of Standard quotes) throughout the trading day 90% of the time in 90% of the series in each of their appointed classes.[164] Lastly, Registered Market Makers must provide continuous two-sided quotes (consisting of Standard quotes) 90% of the time in 60% of the series in each of its appointed classes.[165] Further, Registered Market Makers may be called upon by a MIAX EMERALD official to submit a single quote or maintain continuous quotes in one or more series of its appointed classes whenever, in the judgment of such official, it is necessary to do so in the interest of fair and orderly markets.[166] For purposes of meeting the continuous quoting obligations discussed herein, a Market Maker's quote must meet the bid/ask differential requirements of MIAX EMERALD Rule 603(b)(4).[167]

In options classes other than to which they are appointed, a Market Maker is prohibited from engaging in transactions in an account in which it has an interest that are disproportionate to, or in derogation of, the performance of its market making obligations as set forth in the MIAX EMERALD rules.[168] Further, the total number of contracts executed during a quarter by a Registered Market Maker in options classes to which it is not appointed may not exceed 25% of the total number of contracts traded by such Registered Market Maker in classes to which it is appointed.[169] Similarly, the total number of contracts executed during a quarter by a Lead Market Maker (including a Primary Lead Market Maker) in options classes to which it is not appointed may not exceed 10% of the total number of contracts traded by such Lead Market Maker in classes to which it is appointed.[170]

If MIAX EMERALD finds any failure by a Market Maker to meet minimum performance standards or properly perform as a Market Maker, such Market Maker may be subject to suspension, termination, or restriction of registration in one or more of the securities in which the Market Maker is registered.[171]

Market Makers will receive certain benefits in return for satisfying their responsibilities.[172] For example, a broker-dealer or other lender may extend ''good faith'' credit to a member of a national securities exchange or registered broker-dealer to finance its activities as a market maker or specialist.[173] In addition, market makers are excepted from the prohibition in Section 11(a) of the Act.[174] The Commission believes that a market maker must be subject to sufficient and commensurate affirmative obligations, including the obligation to hold itself out as willing to buy and sell options for its own account on a regular or continuous basis, to justify favorable treatment.[175] The Commission further believes that the rules of all U.S. options markets need not provide the same standards for market maker participation, so long as they impose affirmative obligations that are consistent with the Act.[176]

The Commission believes that MIAX EMERALD's Market Maker participation requirements impose appropriate affirmative obligations on MIAX EMERALD's Market Makers that are commensurate with the benefits afforded to such participants and, accordingly, are consistent with the Act.

Specifically, with regard to MIAX EMERALD's proposed continuous quoting obligations, only those quotes that are liquidity providing—Standard quotes, including Post-Only Quotes—will be counted towards a Market Maker's quoting obligations, rather than all types of eQuotes that a Market Maker will be permitted to utilize.[177] The Commission believes that this treatment is appropriate under the Act and consistent with a Market Maker's obligation to contribute to the maintenance of a fair and orderly market. Further, the Commission believes that the specific levels of benefits conferred on the different classes of Market Makers are appropriately balanced by the obligations imposed by MIAX EMERALD's rules. For example, as discussed below, Primary Lead Market Makers and Lead Market Makers are entitled to certain participation entitlements,[178] and at the same time, are subject to heightened continuous quoting obligations to justify these special benefits.[179]

Finally, the Commission believes that the Act does not mandate a particular market model for exchanges, and while Market Makers may become an important source of liquidity on MIAX EMERALD, they will likely not be the only source, as MIAX EMERALD is designed to match buying and selling interest of all MIAX EMERALD participants.

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[159] *See* MIAX EMERALD Rule 603(b).

[160] *See* MIAX EMERALD Rule 609.

[161] *See* MIAX EMERALD Rule 604.

[162] *See infra* Section III.C.4 (discussing the various types of quotes that may be submitted by Market Makers on MIAX EMERALD).

[163] *See* MIAX EMERALD Rule 604(e)(1). These obligations will apply to all appointed classes collectively for each Primary Lead Market Maker, rather than on a class-by-class basis. *See* MIAX EMERALD Rule 604(e)(1)(ii).

[164] *See* MIAX EMERALD Rule 604(e)(2). These obligations will apply to all appointed classes collectively for each Lead Market Maker, rather than on a class-by-class basis. *See* MIAX EMERALD Rule 604(e)(2)(ii).

[165] *See* MIAX EMERALD Rule 604(e)(3)(i). These obligations will apply to all appointed classes collectively for each Registered Market Maker, rather than on a class-by-class basis. *Id.*

[166] *See* MIAX EMERALD Rule 604(e)(3)(iii).

[167] *See* MIAX EMERALD Rule 604(e)(1)–(3) (for Primary Lead Market Makers, Lead Market Makers, and Registered Market Makers, respectively).

[168] *See* MIAX EMERALD Rule 603(d). Among other things, a Market Maker should not effect purchases or sales except in an orderly manner. *See id. See also* MIAX Exchange Rule 603(d) and Nasdaq ISE, LLC Rule 803(d) (containing an identical provision).

[169] *See* MIAX EMERALD Rule 605(b)(2). *See also* MIAX Exchange Rule 605(b)(2) and Nasdaq ISE, LLC Rule 805(b)(2).

[170] *See* MIAX EMERALD Rule 605(b)(3). *See also* MIAX Exchange Rule 605(b)(3) and Nasdaq ISE, LLC Rule 805(b)(3).

[171] *See* MIAX EMERALD Rules 600 and 602(f).

[172] *See, e.g.,* MIAX Order, *supra* note 13, at 73076 and NOM Approval Order, *supra* note 112, at 14526 (discussing the benefits and obligations of market makers).

[173] *See* 12 CFR 221.5 and 12 CFR 220.7; *see also* 17 CFR 240.15c3–1(a)(6) (capital requirements for market makers).

[174] 15 U.S.C. 78k(a).

[175] *See* NOM Approval Order, *supra* note 112, at 73 FR 14526.

[176] *See id.*

[177] *See infra* Section III.C.4 (discussing the various quote types that Market Makers can utilize).

[178] *See infra* notes 201–212 and accompanying text (describing the Primary Lead Market Maker and Directed Lead Market Maker participation entitlements). *See also infra* Section III.C.4 (discussing the benefit Market Makers receive from the MIAX EMERALD priority quote rule).

[179] *See supra* Section III.C.4 (describing Primary Lead Market Maker and Lead Market Maker quoting obligations).

4. Order Display, Execution, and Priority

MIAX EMERALD will operate a fully automated electronic options marketplace. Liquidity will be derived from orders to buy and orders to sell, as well as Market Maker quotations,[180] submitted to MIAX EMERALD electronically by its members from remote locations. There will be no physical trading floor. Options traded on the Exchange will be subject to Minimum Price Variations (''MPV'') that will begin at $0.05 for option contracts trading at less than $3.00 per option, and $.10 for option contracts trading at $3.00 per option or higher.[181] In addition, MIAX EMERALD will participate in the penny pilot program pursuant to which it will permit certain options with premiums under $3 (as well as heavily traded options on certain indices) to be quoted and traded in increments as low as $.01.[182]

All orders and quotes submitted to MIAX EMERALD will be displayed unless the order or quote is immediately marketable, is a contingent order (such as an immediate-or-cancel (''IOC'') order), or is a certain type of eQuote (such as an Auction-or-Cancel (''AOC'') eQuote or IOC eQuote). Displayed orders and quotes will be displayed on an anonymous basis at a specified price (except for Attributable Orders,[183] which allow voluntary disclosure of firm identification information). Non-displayed orders and quotes will not be displayed to any participant. Additionally, orders and quotes may have a non-displayed price that is different than the displayed price, as further described below.[184]

Members may submit the following types of orders: Market; Marketable Limit; Fill-or-Kill; Auction-or-Cancel; Immediate-or-Cancel; Attributable Order; Intermarket Sweep; Do Not Route; Opening; Customer Cross; Qualified Contingent Cross; Day Limit; Good 'Til Cancelled; and Post-Only.[185] All of these order types are based on similar order types available on other options exchanges.[186] The Commission believes that these order types are substantially similar to order types approved by the Commission on other exchanges.

MIAX EMERALD Market Makers will be permitted to submit Standard quotes, including Post-Only Quotes.[187] MIAX EMERALD Market Makers will also be allowed to submit eQuotes, which are quotes with a specific time in force that do not automatically cancel and replace a previous Standard quote or eQuote.[188] The types of eQuotes permitted on MIAX EMERALD will be AOC, Opening Only, IOC, Fill-or-Kill and Intermarket Sweep.[189] Only Standard quotes (including Post-Only Quotes) will be permitted to count towards a Market maker's continuous quoting obligations.[190] MIAX EMERALD's proposed quote types are based on similar quote types on other options exchanges.[191] The Commission believes that the MIAX EMERALD quote types are substantially similar to those approved by the Commission on other exchanges.

After the opening, trades will execute on MIAX EMERALD when a buy order/quote and a sell order/quote match one another on the MIAX EMERALD order book (''MIAX EMERALD Book'' or ''Book'').[192] The highest bid and lowest offer shall have priority on the Exchange. The MIAX EMERALD system will continuously and automatically match orders/quotes pursuant to either price-time allocation or pro-rata allocation, as determined by MIAX EMERALD on a class-by-class basis.[193]

On MIAX EMERALD all Market Maker quotes will be designated as either ''priority quotes'' or ''non-priority quotes.''[194] In the event a Market Maker has a priority quote on MIAX EMERALD, all of that Market Maker's quotes (including all Standard quotes and eQuotes) would be entitled to have precedence over all other ''Professional Interest'' (*i.e.,* non-Priority Customer orders, Market Maker orders and non-priority quotes) at the same price.[195] The Commission notes that this is substantially similar to the MIAX Exchange which was previously approved by the Commission.[196]

MIAX EMERALD also will offer additional priority overlays at its discretion on a class-by-class basis, which include ''Priority Customer''[197] and ''Market Turner''[198] overlays. Priority overlays would only be applicable for pro-rata allocation.[199] These priority overlays are the same as the priority overlays that were approved by the Commission for use on the MIAX Exchange.[200]

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[180] The definition of ''quote'' or ''quotation'' means a bid or offer entered by a Market Maker that is firm and may update the Market Maker's previous quote, if any. The Rules of the Exchange provide for the use of different types of quotes, including Standard and eQuotes, as more fully described in MIAX EMERALD Rule 517. A Market Maker may, at times, choose to have multiple types of quotes active in an individual option. *See* MIAX EMERALD Rule 100.

[181] *See* MIAX EMERALD Rule 510.

[182] *See* MIAX EMERALD Rule 510, Interpretations and Policies .01. MIAX EMERALD has established a scheduled expiration date of December 31, 2018. However, MIAX EMERALD may not be operational before December 31, 2018, thus the Exchange may need to file a proposed rule change under Section 19(b) of the Act to update this proposed rule.

[183] *See* MIAX EMERALD Rule 516(e). An Attributable Order is a market or limit order which displays the user firm ID for purposes of trading on the Exchange. Use of Attributable Orders will be voluntary.

[184] *See* text accompanying notes 219–233 *infra*.

[185] *See* MIAX EMERALD Rule 516 for a description of each of the order types. MIAX EMERALD notes that some of these order types will be valid only during certain portions of the trading day (*e.g.,* Opening Orders) or during certain events (*e.g.,* Auction-or-Cancel Orders). If a Member submits an order type during a time period when the order type is not valid, the System will reject the order.

[186] *See, e.g.,* Cboe BZX Exchange, Inc. Rule 21.1(c)(1) (Attributable Order), (d)(8) (Post Only Order) and (f)(5) (Fill-or-Kill Order); BOX Rule 7110(c)(5) (Customer Cross Order) and (c)(6) (Qualified Contingent Cross Order); MIAX Exchange Rule 516(b)(4) (Auction or Cancel Order); Nasdaq Options Market Rules, Chapter VI, Section 1(e)(7) (On the Open Order), 1(e)(8) (Intermarket Sweep Order) and 1(e)(1) (Cancel-replacement Order); Nasdaq PHLX LLC Rule 1080(m)(iv)(A) (Do Not Route Order and Immediate or Cancel Order); NYSE American, LLC Rule 900.3NY(m) (Day Order) and (n) (Good-Til-Cancelled Order).

[187] *See* MIAX EMERALD Rule 517(a)(1) (providing that Standard quote is a quote submitted by a Market Maker that cancels and replaces the Market Maker's previous Standard quote, and a Post-Only Quote is a Standard quote that will not remove liquidity from the Book).

[188] *See* MIAX EMERALD Rule 517(a)(2).

[189] *See id.* These eQuote types are similar to the eQuote types available on the MIAX Exchange. *See* MIAX Exchange Rule 517(a)(2); *see also* MIAX Order, *supra* note 13, at 73080–81.

[190] *See* MIAX EMERALD Rule 604(e); *see also supra* Section III.C.3.b (discussing Market Maker obligations).

[191] *See, e.g.,* MIAX PEARL Rules 100 and 516(j) (defining Quotations and Post-Only Orders, respectively); Cboe C2 Exchange, Inc. Rule 1.1 (similarly); MIAX Exchange Rule 517(a)(2) (describing eQuotes).

[192] MIAX EMERALD will open for trading with an opening rotation similar to that of the MIAX Exchange. *See* MIAX EMERALD Rule 503 and MIAX Exchange Rule 503.

[193] *See* MIAX EMERALD Rule 514(c).

[194] *See* MIAX EMERALD Rule 517(b).

[195] *See* MIAX EMERALD Rules 517(b) and 514(e).

[196] *See* MIAX Exchange Rules 517(b) and 514(e). *See also* MIAX Order, *supra* note 13, at 73080–82.

[197] Under the ''Priority Customer Overlay,'' the highest bid and lowest offer will have priority except that Priority Customer Orders will have priority over Professional Interest and all Market Maker interest at the same price. If there were two or more Priority Customer orders for the same options series at the same price, priority would be afforded based on the sequence in which such orders were received. *See* MIAX EMERALD Rule 514(d)(1); *see also* MIAX EMERALD Rule 100 (providing definitions of ''Priority Customer'' and ''Professional Interest'').

[198] Under the ''Market Turner'' priority overlay, the ''Market Turner'' refers to the participant that was the first to enter an order or quote at a better price than the previous best disseminated MIAX EMERALD price, where such order or quote is continuously in the market until the order or quote trades. When this priority overlay is in effect, the Market Turner would have priority at the highest bid or lowest offer that he or she established. The Market Turner overlay will never be in effect in conjunction with other priority overlays. *See* MIAX EMERALD Rule 514(d)(2).

[199] *See* MIAX EMERALD Rule 514(d).

[200] *See* MIAX Exchange Rule 514(d).

In addition, proposed MIAX EMERALD rules provide that it may grant Primary Lead Market Makers and Lead Market Makers certain participation entitlements. For example, Primary Lead Market Makers [201] may be entitled to a participation entitlement with respect to each incoming order if they have a priority quote [202] at the National Best Bid and Offer (''NBBO'').[203] The Primary Lead Market Maker participation entitlements will only be in effect if the Priority Customer Overlay also is in effect and will apply only to any remaining balance after any Priority Customer orders have first been satisfied.[204] Another proposed Primary Lead Market Maker entitlement provides that small size orders (*i.e.,* five or fewer contracts) will be allocated in full to the Primary Lead Market Maker if it has a priority quote at the NBBO.[205]

MIAX EMERALD also permits Electronic Exchange Members [206] to utilize Directed Orders.[207] A ''Directed Order'' refers to an order that an Electronic Exchange Member enters into the Exchange system and directs to a particular Lead Market Maker, including a Primary Lead Market Maker [208] (''Directed Lead Market Maker''). The Lead Market Maker must have an appointment in the relevant options class to receive a Directed Order in that class. A Directed Lead Market Maker may be granted a participation entitlement if he or she has a priority quote at the NBBO.[209] The Directed Lead Market Maker participation entitlement will only be in effect if the Priority Customer Overlay also is in effect and will apply only to any remaining balance after Priority Customer orders have first been satisfied.

These participation entitlements for Primary Lead Market Makers and Directed Lead Market Makers are identical to those that the Commission has approved for the MIAX Exchange.[210] Further, the Commission believes that these entitlements are appropriately balanced by the obligations imposed on these classes of market makers, as discussed in detail above.[211] In particular, the Commission notes that Primary Lead Market Makers and Lead Market Makers are subject to higher quoting obligations than other Registered Market Makers who are not eligible to receive the aforementioned participation entitlements.[212] Therefore, the Commission believes that the proposed rules regarding participation entitlements are consistent with the Act.

MIAX EMERALD proposes to make available order processing and matching features, which are based on those features available on MIAX Exchange and MIAX PEARL.[213] MIAX EMERALD's system will automatically execute incoming orders/quotes that are executable against orders/quotes in its system, provided that such incoming orders/quotes will not be executed at prices inferior to the NBBO.[214] MIAX EMERALD Rule 515 sets forth how the MIAX EMERALD system will handle incoming orders that cannot be executed in part or in full. In particular, MIAX EMERALD Rule 515 specifies a ''price protection process,'' a Managed Interest Process for non-Market Maker orders, a parallel process for handling Market Maker orders and quotes, and a Post Only Process, each discussed more fully below.

The MIAX EMERALD system offers a ''price protection'' process for non-Market Maker orders.[215] Price protection prevents an order from being executed beyond the price designated in the order's price protection instructions (''the price protection limit''). The price protection limit is expressed in units of MPV away from the national best bid and offer (''NBBO'') at the time of the order's receipt, or the MIAX EMERALD Best Bid and Offer (''EBBO'') if the best bid or offer on away markets (''ABBO'') is crossing the EBBO.[216] When triggered, price protection will cancel an order or the remaining contracts of an order. The MIAX EMERALD system will not execute such orders at prices inferior to the current NBBO.[217]

The MIAX EMERALD price protection process is substantially similar to that adopted by MIAX Exchange.[218] The Commission believes that this price protection functionality can benefit all market participants.

The Exchange's rules also provide for processes for managing non-routable orders [219] for non-Market Makers (''Managed Interest Process''), and for Market Maker orders or quotes (''Rule 515(d) Process''), that would either lock or cross the current opposite side ABBO where the EBBO is inferior to the ABBO (such non-Market Maker orders handled under the Managed Interest Process and Market Maker orders or quotes handled under the Rule 515(d) Process will, for purposes of this Order, be referred to collectively as ''managed orders or quotes'').[220] The MIAX EMERALD

[201] *See supra* Section III.C.3 (discussing the various categories of Market Makers, including Primary Lead Market Makers).

[202] *See supra* notes 194–196 and accompanying text (discussing priority quotes).

[203] *See* MIAX EMERALD Rule 514(g). Specifically, the Primary Lead Market Maker's participation entitlement will be equal to the greater of: (i) The proportion of the total size at the best price represented by the size of its quote, or (ii) 60% of the contracts to be allocated if there is only one other Market Maker quotation at the NBBO or 40% if there are two or more other Market Maker quotes at the NBBO. *See* MIAX EMERALD Rule 514(g)(1).

[204] *See* MIAX EMERALD Rule 514(g). Further, neither a Primary Lead Market Maker nor a Lead Market Maker could be allocated a total quantity greater than the quantity they are quoting at the execution price, and they will not receive any further allocation of an order if they receive a participation entitlement. *See id.*

[205] *See* MIAX EMERALD Rule 514(g)(2). The rule also provides that MIAX EMERALD will review the functioning of this provision quarterly to make sure that small size orders do not account for more than 40% of the volume executed on MIAX EMERALD.

[206] An Electronic Exchange Member is the holder of a trading permit who is not a Market Maker. *See* MIAX EMERALD Rule 100.

[207] *See* MIAX EMERALD Rule 514(h).

[208] *See supra* Section III.C.3 (discussing the various categories of market makers, including Lead Market Makers).

[209] *See* MIAX EMERALD Rule 514(h). Specifically, the Directed Lead Market Maker's participation entitlement will be equal to the greater of: (i) The proportion of the total size at the best price represented by the size of its quote; (ii) 60% of the contracts to be allocated if there is only one other Market Maker quotation at the NBBO or 40% if there are two or more other Market Maker quotes at the NBBO; or (iii) one contract.

[210] *See* MIAX Exchange Rules 514(g) (Primary Lead Market Maker Participation Entitlements) and 514(h) (Directed Lead Market Maker Participation Entitlements).

[211] *See supra* Section III.C.3.b (discussing market maker obligations).

[212] As discussed above, *supra* Section III.C.3.b, Primary Lead Market Makers must provide continuous two-sided quotes 90% of the time in the lesser of 99% of the series, or 100% of the series minus one put-call pair, in each class in which the Primary Lead Market Maker is assigned. *See* MIAX EMERALD Rule 604(e)(1). Lead Market Makers must provide continuous two-sided quotes 90% of the time in 90% of the series in each of its appointed classes. *See* MIAX EMERALD Rule 604(e)(2).

[213] *See infra* discussion of MIAX EMERALD's proposed price protection process, managed interest process, process for handling Market Maker orders and quotes, and process for handling Post-Only Orders and Quotes, which are based on substantially similar order processing and matching features on MIAX Exchange and MIAX PEARL.

[214] *See* MIAX EMERALD Rule 515(a) and (b).

[215] *See* MIAX EMERALD Rule 515(c)(1).

[216] *See* MIAX EMERALD Rule 515(c)(1). The Exchange will publish a Regulatory Circular setting a minimum and maximum number of MPVs away from the NBBO (or EBBO if the ABBO is crossing the EBBO) that a market participant may designate for its price protection limit, provided that the minimum shall be no less than zero MPVs and the maximum shall be no more than 20 MPVs. The Exchange will also set, and announce by Regulatory Circular, a default price protection limit within 1 to 5 MPVs away from the NBBO (or EBBO if the ABBO is crossing the EBBO).

[217] *See* MIAX EMERALD Rule 515(c)(1).

[218] *See* MIAX Exchange Rule 515(c)(1).

[219] Non-routable orders would include, for example, orders marked ''Do Not Route'' or Post-Only orders being handled under the Managed Interest Process.

[220] *See* MIAX EMERALD Rules 515(c)(1)(ii) (Managed Interest Process for Non-Routable Orders) and 515(d) (Handling of Market Maker Orders and Quotes).

system will not execute such managed orders or quotes at prices inferior to the current NBBO.[221] The managed order or quote would be displayed at one MPV away from the current opposite side ABBO and placed on the MIAX EMERALD Book at a price equal to the opposite side ABBO.[222] Should the ABBO price change to an inferior price level, the managed order or quote's displayed price will continue to re-price so that it is displayed one MPV away from the new ABBO, and the managed order or quote's Book price will continuously re-price to lock the new ABBO.[223] Such re-pricing will continue until the managed order or quote is fully executed, reaches its limit price, reaches its price protection limit, or is cancelled.[224] During these processes, if the Exchange receives a new order or quote on the opposite side of the market from the managed order or quote that could be executed, the MIAX EMERALD system will immediately execute the remaining contracts to the extent possible at the managed order or quote's current booked bid or offer price, provided that it does not trade through the current NBBO.[225]

The Commission believes that MIAX EMERALD's processes for handling managed orders or quotes are consistent with the processes that the Commission approved for handling such orders and quotes on MIAX Exchange and MIAX PEARL.[226]

MIAX EMERALD will also have a process for the handling of certain Post-Only Orders and Quotes (together, ''Post-Only OQs'') (''POP Process'').[227] The POP Process will apply to Post-Only OQs where the limit price of the Post-Only OQ locks or crosses the current opposite side EBBO where the EBBO is the NBBO (*i.e.,* locks or crosses an order or quote on the MIAX EMERALD Book).[228] The MIAX EMERALD system will display and book such Post-Only OQ one MPV away from the current opposite side EBBO.[229] Should the EBBO price change to an inferior price level, the Post-Only OQ's Book price and displayed price would continuously re-price to one MPV away from new PBBO until the Post-Only OQ is fully executed, reaches its limit price, reaches its price protection limit, or is cancelled.[230]

Under the POP Process, if the Exchange receives a new order or quote on the opposite side of the market from the Post-Only OQ that could be executed, the MIAX EMERALD system would immediately execute the remaining contracts to the extent possible at the Post-Only OQ's current booked bid or offer price, provided that it does not trade through the current NBBO.[231] If the Exchange receives a new Post-Only OQ on the opposite side of the market from a Post-Only OQ being managed under the POP Process, and the new Post-Only OQ locks or crosses the Book price of the resting Post-Only OQ, the Exchange will book and display the new Post-Only OQ one MPV away from the current opposite side EBBO.[232]

The POP Process under MIAX EMERALD's rules is consistent with the POP Process that the Commission approved for MIAX PEARL.[233]

MIAX EMERALD also proposes to establish certain additional crossing and price improvement functionalities based on features available on MIAX Exchange. Mechanisms proposed by MIAX EMERALD that are substantially the same as those available on MIAX Exchange are: A Price Improvement Mechanism (''PRIME'') (which affords the opportunity for price improvement above the NBBO after an auction for eligible orders); [234] a PRIME Solicitation Mechanism (which allows members representing agency orders the opportunity to cross large size solicited orders after an auction); [235] and a PRIME for Complex Orders (which makes the MIAX EMERALD PRIME functionality available for complex orders).[236] These mechanisms are consistent with substantially similar mechanisms currently existing on other options exchanges,[237] as well as those offered by MIAX Exchange.[238]

MIAX EMERALD will permit the trading of complex orders and quotes on the Exchange.[239] The proposed rule defines the types of complex orders and quotes,[240] and also describes the priority, execution, and allocation of complex orders and quotes,[241] including a managed interest process for complex orders.[242] MIAX EMERALD also proposes price and order protection features.[243] In addition, MIAX EMERALD will establish a Complex Auction Process.[244] MIAX EMERALD's rules governing the trading of complex orders and quotes are consistent with the complex order rules that the Commission approved for MIAX Exchange.[245]

The Commission believes that MIAX EMERALD's proposed display, execution, and priority rules discussed above in this section are consistent with the Act. In particular, the Commission finds that the proposed rules are consistent with Section 6(b)(5) of the Act,[246] which, among other things, requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and to not permit unfair discrimination between customers, issuers, or dealers. The Commission also finds that the proposed rules are consistent with Section 6(b)(8) of the Act,[247] which requires that the rules of an exchange not impose any burden on

[221] *See id.*

[222] *See* MIAX EMERALD Rules 515(c)(1)(ii)(B) and 515(d)(ii). *See also* MIAX Exchange Rule 515(c)(1)(ii) and MIAX PEARL Rule 515(d)(2) (providing for the same Managed Interest Process) and MIAX Exchange Rule 515(d) (providing for the same handling of Market Maker orders and quotes).

[223] *See id.*

[224] *See id.*

[225] *See* MIAX EMERALD Rules 515(c)(1)(ii)(C) and 515(d)(iii). *See also* MIAX Exchange Rules 515(c)(1)(ii) and 515(d) and MIAX PEARL Rule 515(d)(2)(iii)(A).

[226] *See* MIAX Exchange Rules 515(c)(1)(ii) and 515(d) and MIAX PEARL Rule 515(d)(2). With regard to the treatment of Post-Only Orders and Post-Only Quotes under MIAX EMERALD's processes, the Commission believes that the rules are consistent with the treatment of Post-Only Orders under MIAX PEARL's managed interest rule and rules that have been adopted by other exchanges. See MIAX EMERALD Rules 515(c)(1)(ii)(C)(2)–(3) and 515(d)(iii)(2)–(3) and MIAX PEARL Rule 515(d)(2)(iii)(B)–(C). *See also, e.g.,* Bats BZX Rule 21.1(h) and Securities Exchange Act Release No. 77818 (May 12, 2016), 81 FR 31283 (May 18, 2016) (SR–BatsBZX–2016–16).

[227] *See* MIAX EMERALD Rule 515(i).

[228] Non-Market Maker Post-Only Orders that lock or cross the current opposite side ABBO and the EBBO is inferior to the ABBO would be handled through the Managed Interest Process under Rule 515(c)(1)(ii) as described above. Market Maker Post-Only OQs that lock or cross the current opposite side ABBO and the EBBO is inferior to the ABBO would be handled through the process under Rule 515(d) as described above.

[229] *See* MIAX EMERALD Rule 515(i)(3)(ii).

[230] *Id.*

[231] *See* MIAX EMERALD Rule 515(i)(3)(iii)(A).

[232] *See* MIAX EMERALD Rule 515(i)(3)(iii)(B).

[233] *See* MIAX PEARL Rule 515(g).

[234] *See* MIAX EMERALD Rule 515A(a).

[235] *See* MIAX EMERALD Rule 515A(b).

[236] *See* MIAX EMERALD Rule 515A, Interpretations and Policies .12.

[237] *See, e.g.,* Cboe Rule 6.74A (Automated Improvement Mechanism) and Nasdaq PHLX, LLC Rule 1087 (Price Improvement XL).

[238] *See* MIAX Exchange Rule 519A.

[239] *See* MIAX EMERALD Rule 518.

[240] *See* MIAX EMERALD Rule 518(a)–(b).

[241] *See* MIAX EMERALD Rule 518(c).

[242] *See* MIAX EMERALD Rule 518(c)(4).

[243] *See* MIAX EMERALD Rule 518, Interpretations and Policies .05.

[244] *See* MIAX EMERALD Rule 518(d).

[245] *See* Securities Exchange Act Release No. 79072 (October 7, 2016), 81 FR 71131 (October 14, 2016) (SR–MIAX–2016–26) (approving MIAX Exchange's proposed new rules governing the trading of complex orders).

[246] 15 U.S.C. 78f(b)(5).

[247] 15 U.S.C. 78f(b)(8).

competition that is not necessary or appropriate in furtherance of the purposes of the Act. The trading rules of MIAX EMERALD are substantially similar to the current trading rules of MIAX Exchange, MIAX PEARL, and other exchanges, as noted above, which were filed with and approved by the Commission (or otherwise became effective) pursuant to Section 19(b) of the Act.[248] Therefore, the Commission believes that these rules are consistent with the Act.

5. Section 11(a) of the Act

Section 11(a)(1) of the Act [249] prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively, ''covered accounts''), unless an exception applies. The Exchange has represented that it has analyzed its rules proposed hereunder, and believes that they are consistent with Section 11(a) of the Act and rules thereunder.[250]

Rule 11a2–2(T) under the Act,[251] known as the ''effect versus execute'' rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute the transactions on the exchange. To comply with Rule 11a2–2(T)'s conditions, a member: (1) Must transmit the order from off the exchange floor; (2) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution; [252] (3) may not be affiliated with the executing member; and (4) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule.

In a letter to the Commission,[253] MIAX EMERALD requested that the Commission concur with its conclusion that MIAX EMERALD members that enter orders into the MIAX EMERALD trading system satisfy the requirements of Rule 11a2–2(T). For the reasons set forth below, the Commission believes that MIAX EMERALD members entering orders into the MIAX EMERALD trading system will satisfy the conditions of Rule 11a2–2(T).

First, Rule 11a2–2(T) requires that orders for covered accounts be transmitted from off the exchange floor. MIAX EMERALD will not have a physical trading floor, and the MIAX EMERALD trading system will receive orders from members electronically through remote terminals or computer-to-computer interfaces. In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.[254] Since the MIAX EMERALD trading system receives all orders electronically through remote terminals or computer-to- computer interfaces, the Commission believes that the trading system satisfies the off-floor transmission requirement.

Second, Rule 11a2–2(T) requires that the member not participate in the execution of its order once it has been transmitted to the member performing the execution. MIAX EMERALD has represented that the MIAX EMERALD trading system will at no time following the submission of an order allow a member or an associated person of such member to acquire control or influence over the result or timing of an order's execution.[255] According to MIAX EMERALD, the execution of a member's order is determined solely by what orders, bids, or offers are present in the MIAX EMERALD trading system at the time the member submits the order and the order priority based on MIAX EMERALD rules.[256] Accordingly, the Commission believes that a MIAX EMERALD member will not participate in the execution of its order submitted into the trading system.

Rule 11a2–2(T)'s third condition is that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that the requirement is satisfied when automated exchange facilities, such as the MIAX EMERALD trading system, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages over non-members in handling their orders after transmitting them to MIAX EMERALD.[257] MIAX EMERALD has represented that the design of its trading system ensures that no member has any special or unique trading advantage over non-members in the handling of its orders after transmitting its orders to MIAX EMERALD.[258] Based on MIAX EMERALD's representation, the Commission believes that the MIAX EMERALD trading system satisfies this requirement.''

Fourth, in the case of a transaction effected for an account with respect to

[248] Many of MIAX PEARL's and MIAX Exchange's rules were approved at the time that MIAX PEARL's and MIAX Exchange's registration as a national securities exchanges, respectively, were granted. *See* MIAX PEARL Order and MIAX Order, *supra* note 13.

[249] 15 U.S.C. 78k(a)(1).

[250] *See* Letter from Barbara J. Comly, EVP, General Counsel and Corporate Secretary, Miami Holdings, to Brent J. Fields, Secretary, Commission, and John C. Roeser, Associate Director, Office of Market Supervision, Division of Trading and Markets, Commission, dated November 30, 2018 (''MIAX EMERALD 11(a) Request Letter'').

[251] 17 CFR 240.11a2–2(T).

[252] The member may, however, participate in clearing and settling the transaction. *See* Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978) (regarding the NYSE's Designated Order Turnaround System (''1978 Release'')).

[253] MIAX EMERALD 11(a) Request Letter, *supra* note 250.

[254] *See, e.g.,* Securities Exchange Act Release Nos. 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR–BSE–2008–48) (order approving proposed rules of BX); 49068, (January 13, 2004), 69 FR 2775 (January 20, 2004) (establishing, among other things, BOX as an options trading facility of Boston Stock Exchange, Inc.); 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (approving the Pacific Exchange, Inc.'s (''PCX'') use of the Archipelago Exchange as its equity trading facility); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility). *See* 1978 Release, *supra* note 252. *See also* Securities Exchange Act Release No. 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (regarding the American Stock Exchange (''Amex'') Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX Communications and Execution System, and the Philadelphia Stock Exchange Automated Communications and Execution System) (''1979 Release'').

[255] *See* MIAX EMERALD 11(a) Request Letter, *supra* note 253. Members may change or cancel an order or quote at any time before the order is executed on the Exchange. *See* MIAX EMERALD Form 1 Application, Exhibit E. The Commission has stated that the non-participation requirement is satisfied under such circumstances, so long as such modifications or cancellations are also transmitted from off the floor. *See* 1978 Release, *supra* note 252 (stating that the ''non-participation requirement does not prevent initiating members from canceling of modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor'').

[256] *See* MIAX EMERALD 11(a) Request Letter, *supra* note 253.

[257] In considering the operation of automated execution systems operated by an exchange, the Commission noted that while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into each system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2–2(T). *See* 1979 Release, *supra* note 254.

[258] *See* MIAX EMERALD 11(a) Request Letter, *supra* note 253.

which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2–2(T).[259] MIAX EMERALD members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption.[260]

D. Discipline and Oversight of Members

As noted above, one prerequisite for the Commission's grant of an exchange's application for registration is that a proposed exchange must be so organized and have the capacity to be able to carry out the purposes of the Act.[261] Specifically, an exchange must be able to enforce compliance by its members and persons associated with its members with the Act and the rules and regulations thereunder and the rules of the exchange.[262]

MIAX EMERALD's rules codify MIAX EMERALD's disciplinary jurisdiction over its members, thereby facilitating its ability to enforce its members' compliance with its rules and the federal securities laws.[263] MIAX EMERALD's rules permit it to sanction members for violations of its rules and violations of any provision of the Act or the rules and regulations promulgated thereunder, by, among other things, expelling or suspending members; limiting members' activities, functions, or operations; fining or censuring members; suspending or barring a person from being associated with a member; or any other fitting sanction in accordance with MIAX EMERALD rules.[264]

MIAX EMERALD's disciplinary and oversight functions will be administered in accordance with Chapter X of the MIAX EMERALD rules which governs disciplinary actions and which incorporates by reference Chapter X of the MIAX Exchange rules. Unless delegated to another SRO pursuant to the terms of any effective 17d–2 plan,[265] MIAX EMERALD regulatory staff (including regulatory staff of another SRO that may be acting on MIAX EMERALD's behalf pursuant to a regulatory services agreement) will, among other things, investigate potential securities laws violations and initiate charges pursuant to MIAX EMERALD rules.[266]

Upon a finding of probable cause of a violation within the disciplinary jurisdiction of MIAX EMERALD and where further proceedings are warranted,[267] MIAX EMERALD will conduct a hearing on disciplinary matters before a professional hearing officer [268] and two members of the Business Conduct Committee [269] (the ''Panel'').[270] The MIAX EMERALD member (or their associated person) or the MIAX EMERALD regulatory staff may petition for review of the decision of the Panel by the MIAX EMERALD Board.[271] Any review would be conducted by the MIAX EMERALD Board or a committee thereof composed of at least three Directors of the MIAX EMERALD Board [272] (whose decision must be ratified by the MIAX EMERALD Board) and such decision will be final.[273] In addition, the MIAX EMERALD Board on its own motion may order review of a disciplinary decision.[274]

Appeals from any determination that impacts access to MIAX EMERALD, such as termination or suspension of membership, will be instituted under, and governed by, the provisions in the Chapter XI of the MIAX EMERALD Rules which incorporates by reference Chapter XI of the MIAX Exchange Rules. MIAX EMERALD's Chapter XI applies to persons economically aggrieved by any of the following actions of MIAX EMERALD including, but not limited to: (a) Denial of an application to become a Member; (b) barring a person from becoming associated with a Member; (c) limiting or prohibiting services provided by MIAX EMERALD or services of any exchange member.[275]

Any person aggrieved by an action of MIAX EMERALD within the scope of Chapter XI may file a written application to be heard within thirty days [276] after such action has been taken.[277] Applications for hearing and

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[259] 17 CFR 240.11a2–2(T)(a)(2)(iv). In addition, Rule 11a2–2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated person thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement. *See* 17 CFR 240.11a2–2(T)(d). *See also* 1978 Release, *supra* note 252 (stating ''[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests'').

[260] *See* MIAX EMERALD 11(a) Request Letter, *supra* note 253.

[261] *See* 15 U.S.C. 78f(b)(1).

[262] *See id.*

[263] *See* MIAX EMERALD Rule 1000 (which incorporates by reference MIAX Exchange Rule 1000).

[264] *See id. See also* MIAX Exchange Rule 1000, Cboe Rule 17.1(a), and Nasdaq ISE, LLC Rule 1600(a) (containing similar provisions).

[265] *See supra* Section II.B.3.c (concerning the 17d–2 plans to which MIAX EMERALD has committed to join).

[266] *See* MIAX EMERALD Rules 1002 and 1004 (which incorporate by reference MIAX Exchange Rules 1002 and 1004, respectively). As noted above, MIAX EMERALD has entered into an RSA with FINRA under which FINRA will perform certain regulatory functions on behalf of MIAX EMERALD. *See* MIAX EMERALD Rule 1015 (which incorporates by reference MIAX Exchange Rule 1015).

[267] *See* MIAX EMERALD Rule 1004 (which incorporates by reference MIAX Exchange Rule 1004).

[268] *See* MIAX EMERALD Rule 1015, Interpretation and Policy .01 (which incorporates by reference MIAX Exchange Rule 1015, Interpretation and Policy .01).

[269] *See* MIAX EMERALD By-Laws, Article IV, Section 4.7.

[270] *See* MIAX EMERALD Rule 1006 (which incorporates by reference MIAX Exchange Rule 1006).

[271] *See* MIAX EMERALD Rule 1010 (which incorporates by reference MIAX Exchange Rule 1010).

[272] Specifically, the Chairman of the MIAX EMERALD Board, with the approval of the Board, shall appoint an Appeals Committee to preside over all appeals related to disciplinary and adverse action determinations. *See* note 46 and accompanying text (detailing the composition of the Appeals Committee). If the Independent Director serving on the Appeals Committee recuses himself or herself from an appeal, due to conflict of interest or otherwise, the Independent Director may be replaced by a Non-Industry Director for purposes of the applicable appeal if there is no other Independent Director able to serve as the replacement. *See* MIAX EMERALD By-Laws, Article IV, Section 4.5(d). *See also* MIAX Exchange Amended and Restated By-Laws, Article IV, Section 4.5(d).

[273] *See* MIAX EMERALD Rule 1010 (which incorporates by reference MIAX Exchange Rule 1010).

[274] *See id.*

[275] *See* MIAX EMERALD Rule 1100 (which incorporates by reference MIAX Exchange Rule 1100). As noted above, MIAX EMERALD has entered into a RSA with FINRA under which FINRA will perform certain regulatory functions on behalf of MIAX EMERALD. MIAX EMERALD may perform some or all of the functions specified in the Chapter XI of the MIAX EMERLAD Rules, which incorporates by reference Chapter XI of the MIAX Exchange Rules. *See supra* note 110. *See also* MIAX EMERALD Rule 1106 (which incorporates by reference MIAX Exchange Rule 1106).

[276] An applicant may file for an extension of time as allowed by the Chairman of the Business Conduct Committee within thirty days of MIAX EMERALD's action. An application for an extension will be ruled upon by the Chairman of the Business Conduct Committee, and his ruling will be given in writing. Rulings on applications for extensions of time are not subject to appeal. *See* MIAX EMERALD Rule 1101 (which incorporates by reference MIAX Exchange Rule 1101).

[277] The application must include: (1) The action for which review is sought; (2) the specific reasons for the applicant's exception to such action; (3) the relief sought; and (4) whether the applicant intends to submit any documents, statements, arguments or other material in support of the application, with

review will be referred to the Business Conduct Committee, which will appoint a hearing panel of no less than three members of such Committee.[278] The decision of the hearing panel made pursuant to Chapter XI of the MIAX EMERALD rules is subject to review by the MIAX EMERALD Board, either on its own motion within 30 days after issuance of the decision, or upon written request submitted by the applicant or the President of MIAX EMERALD within 15 days after issuance of the decision.[279] The review would be conducted by the MIAX EMERALD Board or a committee of the MIAX EMERALD Board composed of at least three directors.[280]

The Commission finds that MIAX EMERALD's proposed disciplinary and oversight rules and structure, as well as its proposed process for persons economically aggrieved by certain MIAX EMERALD actions, are consistent with the requirements of Sections 6(b)(6) and 6(b)(7) of the Act[281] in that they provide fair procedures for the disciplining of members and persons associated with members. The Commission further finds that the proposed MIAX EMERALD rules are designed to provide MIAX EMERALD with the ability to comply, and with the authority to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of MIAX EMERALD.[282] The Commission notes that MIAX EMERALD's proposed disciplinary and oversight rules and structures are similar to the rules of other exchanges.[283]

E. Listing Requirements

MIAX EMERALD does not intend to initially list or trade common stock or non-option securities of operating companies but rather initially intends only to trade option contracts that meet the options listing standards of the Exchange.[284] MIAX EMERALDS's listing rules, including the criteria for the underlying securities of the options to be traded, incorporate by reference all of the listing rules of the MIAX Exchange, and are substantially similar to the listing standards adopted by other options exchanges.[285]

The Commission finds that MIAX EMERALD's proposed initial and continued listing rules are consistent with the Act, including Section 6(b)(5),[286] in that they are designed to protect investors and the public interest, prevent fraudulent and manipulative acts and practices, and promote just and equitable principles of trade. Before beginning operation, MIAX EMERALD will need to become a participant in the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934 (''OLPP'').[287] In addition, before beginning operation, MIAX EMERALD will need to become a participant in the Options Clearing Corporation.

IV. Exemption From Section 19(b) of the Act With Regard to MIAX Exchange, Cboe, New York Stock Exchange (''NYSE''), and FINRA Rules Incorporated by Reference

MIAX EMERALD proposes to incorporate by reference certain MIAX Exchange, Cboe, NYSE, and FINRA rules.[288] Thus, for certain MIAX EMERALD rules, MIAX EMERALD members will comply with a MIAX EMERALD rule by complying with the referenced MIAX Exchange, Cboe, NYSE, and FINRA rules.

In connection with the proposal to incorporate MIAX Exchange, Cboe, NYSE, and FINRA rules by reference, MIAX EMERALD requests, pursuant to Rule 240.0–12 under the Act,[289] an exemption under Section 36 of the Act from the rule filing requirements of Section 19(b) of the Act for changes to the MIAX EMERALD rules that are effected solely by virtue of a change to a cross-referenced MIAX Exchange, Cboe, NYSE or FINRA rule.[290] MIAX EMERALD proposes to incorporate by reference categories of rules, rather than individual rules within a category, that are not trading rules. In addition, MIAX EMERALD agrees to provide written notice to its members whenever MIAX Exchange, Cboe, NYSE or FINRA proposes a change to a cross-referenced rule[291] and whenever any such proposed changes are approved by the Commission or otherwise become effective.[292]

Using the authority under Section 36 of the Act, the Commission previously exempted certain SROs from the requirement to file proposed rule changes under Section 19(b) of the Act.[293] The Commission is hereby granting MIAX EMERALD's request for exemption, pursuant to Section 36 of

a description of any such materials. *See* MIAX EMERALD Rule 1101(a) (which incorporates by reference MIAX Exchange Rule 1101(a)).

[278] *See* MIAX EMERALD Rule 1102 (which incorporates by reference MIAX Exchange Rule 1102). The decision of the hearing panel will be made in writing and sent to the parties to the proceedings. *See* MIAX EMERALD Rule 1103(d) (which incorporates by reference MIAX Exchange Rule 1103(d)).

[279] *See* MIAX EMERALD Rule 1104(a) (which incorporates by reference MIAX Exchange Rule 1104(a)). The MIAX EMERALD Board, or a committee of the MIAX EMERALD Board, will have sole discretion to grant or deny either request. *See id.*

[280] *See* MIAX EMERALD Rule 1104(b) (which incorporates by reference MIAX Exchange Rule 1104(b)). The MIAX EMERALD Board or its designated committee may affirm, reverse, or modify in whole or in part, the decision of the hearing panel. The decision of the MIAX EMERALD Board or its designated committee would be final, and must be in writing and would be sent to the parties to the proceeding. *See* MIAX EMERALD Rule 1104(c) (which incorporates by reference MIAX Exchange Rule 1104(c)).

[281] 15 U.S.C. 78f(b)(6) and (b)(7), respectively.

[282] *See* Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

[283] *See, e.g.,* ISE Mercury Order, *supra* note 27, ISE Gemini Order, *supra* note 27, MIAX PEARL Order, *supra* note 13, and MIAX Order, *supra* note 13.

[284] *See* MIAX EMERALD Rules Chapter IV (Option Contracts Traded on the Exchange) (which incorporates by reference MIAX Exchange Chapter IV) and Chapter XVIII (Index Options) (which incorporates by reference MIAX Exchange Chapter XVIII).

[285] *See* MIAX Exchange Rules Chapter IV and Chapter XVIII, and MIAX PEARL Rules Chapter IV and Chapter XVIII. *See also* Nasdaq GEMX, LLC Rule 500 Series and Rule 2000 Series.

[286] 15 U.S.C. 78f(b)(5).

[287] 15 U.S.C. 78k–1(a)(3)(B).

[288] Specifically, MIAX EMERALD proposes to incorporate by reference the following MIAX Exchange Rules: Chapter III (Business Conduct), Chapter IV (Option Contracts Traded on the Exchange), Chapter VII (Exercises and Deliveries), Chapter VIII (Records, Reports and Audits), Chapter IX (Summary Suspension), Chapter X (Discipline), Chapter XI (Hearings, Review and Arbitration), Chapter XIII (Doing Business With the Public), Chapter XIV (Order Protection, Locked and Crossed Markets), Chapter XV (Margins), Chapter XVI (Net Capital Requirements), Chapter XVII (Consolidated Audit Trail Compliance Rule), and Chapter XVIII (Index Options). The following rules are cross-referenced in the MIAX Exchange rules: MIAX Exchange Rule 1107 (Arbitration) incorporates by reference the Rule 12000 Series and Rule 13000 Series of the FINRA Manual and FINRA Rule 2268; MIAX Exchange Rule 1321 (Transfer of Accounts) cross-references FINRA Rule 11870; MIAX Exchange Rule 1502 (Margin Requirements) cross-references the Cboe and NYSE rules concerning initial and maintenance margin requirements that may be in effect from time to time.

[289] 17 CFR 240.0–12.

[290] *See* Letter from Barbara J. Comly, EVP, General Counsel and Corporate Secretary, Miami Holdings, to Brent J. Fields, Secretary, Commission, dated November 30, 2018.

[291] *See id.*

[292] MIAX EMERALD will provide such notice through a posting on the same website location where MIAX EMERALD posts its own rule filings pursuant to Rule 19b–4(l) under the Act, within the required time frame. The website posting will include a link to the location on the MIAX Exchange, Cboe, NYSE or FINRA website where MIAX Exchange, Cboe, NYSE or FINRA's proposed rule change is posted. *See id.*

[293] *See, e.g.,* MIAX PEARL Order and MIAX Order, *supra* note 13, ISE Mercury Order, *supra* note 27, BATS Order, *supra* note 13, C2 Order, *supra* note 75, Nasdaq Order, *supra* note 27, and NOM Approval Order, *supra* note 112.

the Act, from the rule filing requirements of Section 19(b) of the Act with respect to the rules that MIAX EMERALD proposes to incorporate by reference. The exemption is conditioned upon MIAX EMERALD providing written notice to MIAX EMERALD members whenever MIAX Exchange, Cboe, NYSE or FINRA proposes to change an incorporated by reference rule and when the Commission approves any such changes. The Commission believes that the exemption is appropriate in the public interest and consistent with the protection of investors because it will promote more efficient use of Commission's and SROs' resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought to be implemented by more than one SRO.

V. Conclusion

It is ordered that the application of MIAX EMERALD for registration as a national securities exchange be, and it hereby is, granted.

It is further ordered that operation of MIAX EMERALD is conditioned on the satisfaction of the requirements below:

A. *Participation in National Market System Plans Relating to Options Trading.* MIAX EMERALD must join: (1) The Plan for the Reporting of Consolidated Options Last Sale Reports and Quotation Information (Options Price Reporting Authority); (2) the OLPP; (3) the Linkage Plan; (4) the Plan of the Options Regulatory Surveillance Authority; and (5) the Plan Governing the Consolidated Audit Trail;

B. *Participation in Multiparty Rule 17d–2 Plans.* MIAX EMERALD must become a party to the multiparty Rule 17d–2 agreements concerning options sales practice regulation and market surveillance, and covered Regulation NMS rules;

C. *Participation in the Options Clearing Corporation.* MIAX EMERALD must become an Options Clearing Corporation participant exchange; and

D. *Participation in the Intermarket Surveillance Group.* MIAX EMERALD must join the Intermarket Surveillance Group.

It is further ordered, pursuant to Section 36 of the Act,[294] that MIAX EMERALD shall be exempted from the rule filing requirements of Section 19(b) of the Act with respect to the MIAX Exchange, Cboe, NYSE and FINRA rules that MIAX EMERALD proposes to incorporate by reference, subject to the conditions specified in this order that MIAX EMERALD provide written notice to MIAX EMERALD members whenever MIAX Exchange,

Cboe, NYSE or FINRA proposes to change an incorporated by reference rule and when the Commission approves any such changes.

By the Commission.

Brent J. Fields,

Secretary.

[FR Doc. 2018–28179 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

[294] 15 U.S.C. 78mm.

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33343; 812–14812]

AQR Trust and AQR Capital Management, LLC; Notice of Application

December 21, 2018.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested order would permit (a) index-based series of certain open-end management investment companies (''Funds'') to issue shares redeemable in large aggregations (''Creation Units''); (b) secondary market transactions in Fund shares to occur at negotiated market prices rather than at net asset value (''NAV''); (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of shares for redemption; (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of Creation Units; (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the Funds (''Funds of Funds'') to acquire shares of the Funds; (f) certain Funds (''Feeder Funds'') to create and redeem Creation Units in-kind in a master-feeder structure; and (g) certain Funds to issue Shares in less than Creation Unit size to investors participating in a distribution reinvestment program.

APPLICANTS: AQR Trust (the ''Trust''), a Delaware statutory trust that will register under the Act as an open-end management investment company with multiple series and AQR Capital Management, LLC (the ''Initial Adviser''), a Delaware corporation registered as an investment adviser under the Investment Advisers Act of 1940.

FILING DATES: The application was filed on August 17, 2017 and amended on April 9, 2018, August 8, 2018, and December 12, 2018.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 15, 2019, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090; Applicants: William J. Fenrich, Esq., AQR Capital Management, LLC, Two Greenwich Plaza, 4th Floor, Greenwich, Connecticut 06830.

FOR FURTHER INFORMATION CONTACT: Steven I. Amchan, Senior Counsel, at (202) 551–6826, Hae-Sung Lee, Senior Counsel, at (202) 551–7345, or Andrea Ottomanelli Magovern, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application

1. Applicants request an order that would allow Funds to operate as index exchange traded funds (''ETFs'').[1] Fund

[1] Applicants request that the order apply to the initial fund and any additional series of the Trust, and any other existing or future open-end

shares will be purchased and redeemed at their NAV in Creation Units (other than pursuant to a distribution reinvestment program), as described in the application. All orders to purchase Creation Units and all redemption requests will be placed by or through an ''Authorized Participant'', which will have signed a participant agreement with the Distributor. Shares will be listed and traded individually on a national securities exchange, where share prices will be based on the current bid/offer market. Certain Funds may operate as Feeder Funds in a master-feeder structure. Any order granting the requested relief would be subject to the terms and conditions stated in the application.

2. Each Fund will hold investment positions selected to correspond closely to the performance of an Underlying Index. In the case of Self-Indexing Funds, an affiliated person, as defined in section 2(a)(3) of the Act (''Affiliated Person''), or an affiliated person of an Affiliated Person (''Second-Tier Affiliate''), of the Trust or a Fund, of the Adviser, of any sub-adviser to or promoter of a Fund, or of the Distributor will compile, create, sponsor or maintain the Underlying Index.[2]

3. Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis, or issued in less than Creation Unit size to investors participating in a distribution reinvestment program. Except where the purchase or redemption will include cash under the limited circumstances specified in the application, purchasers will be required to purchase Creation Units by depositing specified instruments (''Deposit Instruments''), and shareholders redeeming their shares will receive specified instruments (''Redemption Instruments''). The Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Fund's portfolio (including cash positions) except as specified in the application.

4. Because shares will not be individually redeemable, applicants request an exemption from Section 5(a)(1) and Section 2(a)(32) of the Act that would permit the Funds to register as open-end management investment companies and issue shares that are redeemable in Creation Units (other than pursuant to a dividend reinvestment program).

5. Applicants also request an exemption from section 22(d) of the Act and rule 22c–1 under the Act as secondary market trading in shares will take place at negotiated prices, not at a current offering price described in a Fund's prospectus, and not at a price based on NAV. Applicants state that (a) secondary market trading in shares does not involve a Fund as a party and will not result in dilution of an investment in shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants represent that share market prices will be disciplined by arbitrage opportunities, which should prevent shares from trading at a material discount or premium from NAV.

6. With respect to Funds that effect creations and redemptions of Creation Units in kind and that are based on certain Underlying Indexes that include foreign securities, applicants request relief from the requirement imposed by section 22(e) in order to allow such Funds to pay redemption proceeds within fifteen calendar days following the tender of Creation Units for redemption. Applicants assert that the requested relief would not be inconsistent with the spirit and intent of section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds.

7. Applicants request an exemption to permit Funds of Funds to acquire Fund shares beyond the limits of section 12(d)(1)(A) of the Act; and the Funds, and any principal underwriter for the Funds, and/or any broker or dealer registered under the Exchange Act, to sell shares to Funds of Funds beyond the limits of section 12(d)(1)(B) of the Act. The application's terms and conditions are designed to, among other things, help prevent any potential (i) undue influence over a Fund through control or voting power, or in connection with certain services, transactions, and underwritings, (ii) excessive layering of fees, and (iii) overly complex fund structures, which are the concerns underlying the limits in sections 12(d)(1)(A) and (B) of the Act.

8. Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act to permit persons that are Affiliated Persons, or Second Tier Affiliates, of the Funds, solely by virtue of certain ownership interests, to effectuate purchases and redemptions in-kind. The deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions of Creation Units will be the same for all purchases and redemptions and Deposit Instrument and Redemption Instruments will be valued in the same manner as those investment positions currently held by the Funds. Applicants also seek relief from the prohibitions on affiliated transactions in section 17(a) to permit a Fund to sell its shares to and redeem its shares from a Fund of Funds, and to engage in the accompanying in-kind transactions with the Fund of Funds.[3] The purchase of Creation Units by a Fund of Funds directly from a Fund will be accomplished in accordance with the policies of the Fund of Funds and will be based on the NAVs of the Funds.

9. Applicants also request relief to permit a Feeder Fund to acquire shares of another registered investment company managed by the Adviser having substantially the same investment objectives as the Feeder Fund (''Master Fund'') beyond the limitations in section 12(d)(1)(A) and permit the Master Fund, and any principal underwriter for the Master Fund, to sell shares of the Master Fund to the Feeder Fund beyond the limitations in section 12(d)(1)(B).

10. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 12(d)(1)(J) of the Act

management investment company or existing or future series thereof (each, included in the term ''Fund''), each of which will operate as an ETF, and their respective existing or future Master Funds and will track a specified index comprised of domestic and/or foreign equity securities and/or domestic and/or foreign fixed income securities (each, an ''Underlying Index''). Any Fund will (a) be advised by the Initial Adviser or an entity controlling, controlled by, or under common control with the Initial Adviser (each such entity and any successor thereto, an ''Adviser'') and (b) comply with the terms and conditions of the application. For purposes of the requested order, a ''successor'' is limited to an entity or entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

[2] Each Self-Indexing Fund will post on its website the identities and quantities of the investment positions that will form the basis for the Fund's calculation of its NAV at the end of the day. Applicants believe that requiring Self-Indexing Funds to maintain full portfolio transparency will help address, together with other protections, conflicts of interest with respect to such Funds.

[3] The requested relief would apply to direct sales of shares in Creation Units by a Fund to a Fund of Funds and redemptions of those shares. Applicants, moreover, are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an Affiliated Person, or a Second-Tier Affiliate, of a Fund of Funds because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Fund of Funds.

provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2018–28291 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84897; File No. SR–ISE–2018–100]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Supplementary Material .02 to Rule 715

December 20, 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 20, 2018, Nasdaq ISE, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Supplementary Material .02 to Rule 715, which relates to Cancel and Replace Orders, to correct an inadvertent error in the rule text.

The text of the proposed rule change is available on the Exchange's website at *http://ise.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 Exchange recently filed a proposal to amend Supplementary Material .02 to Rule 715 regarding Cancel and Replace Orders to correct an inconsistency between the Exchange's rule text and the operation of the System[3] by removing the reference to Rule 710, which relates to minimum price variations applicable to single leg options series traded on the Exchange.[4] The Exchange, however, inadvertently omitted the deletion of Rule 722(c)(1) from this rule. Rule 722(c)(1) corresponds to Rule 710 in that it relates to minimum price variations of complex strategies. Accordingly, the Exchange is proposing herein to delete the reference to Rule 722(c)(1) from Supplementary Material .02 to Rule 715.

By way of background, a member currently has the option of either sending in a cancel order and then separately sending in a new order which serves as a replacement of the original order (two separate messages), or sending a single cancel and replace order in one message (*i.e.,* a Cancel and Replace Order). Specifically, Supplementary Material .02 to Rule 715 defines a Cancel and Replace Order as a single message for the immediate cancellation of a previously received order and the replacement of that order with a new order.[5] The replacement portion of the Cancel and Replace Order is treated as a new order and as a result, goes through price or other reasonability checks conducted by the System to validate such order against current market conditions prior to proceeding with request to modify the order.[6] If the replacement portion of a Cancel and Replace Order does not satisfy the System's price or other reasonability checks, the existing order will be cancelled and not replaced. Accordingly, the reference to Rule 710, which relates to minimum price variations applicable to single leg options series traded on the Exchange, was deleted from Supplementary Material .02 to Rule 715 as part of SR–ISE–2018–97, because Rule 710 does not involve the System considering the current market at the time of the Cancel and Replace Order.[7] The Exchange further explained in SR–ISE–2018–97 that an incoming Cancel and Replace Order that fails the minimum price variation checks in Rule 710 would not result in the existing order being cancelled and not replaced.[8] Accordingly, the Exchange removed the reference to Rule 710 from the list of price or other reasonability checks to conform its rule text to the System.

As noted above, Rule 722(c)(1) relates to minimum price variations of complex strategies, and is therefore analogous to the single leg rule in ISE Rule 710. The Exchange therefore proposes to delete Rule 722(c)(1) from Supplementary Material .02 to Rule 715 for the same reasons provided above for Rule 710. Similar to Rule 710, Rule 722(c)(1) does not involve the System considering the current market at the time of the Cancel and Replace Order, and an incoming Cancel and Replace Order that fails the minimum price variation checks for complex strategies in Rule 722(c)(1) would likewise not result in the existing

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''System'' means the electronic system operated by the Exchange that receives and disseminates quotes, executes orders and reports transactions. *See* Rule 100(a)(63).

[4] *See* Securities Exchange Act Release No. 84741 (December 6, 2018), 83 FR 63922 (December 12, 2018) (SR–ISE–2018–97).

[5] If the previously placed order is already filled partially or in its entirety, the replacement order is automatically cancelled or reduced by the number of contracts that were executed. *See* Supplementary Material .02 to Rule 715. Supplementary Material .02 to Rule 715 further provides how the replacement portion may retain the priority of the original order, provided certain specified conditions are met. The manner in which the Exchange treats priority with respect to Cancel and Replace Orders is not changing under this proposal.

[6] *See* Securities Exchange Act Release No. 80432 (April 11, 2017), 82 FR 18191 (April 17, 2017) (SR–ISE–2017–03) (memorializing Cancel and Replace Orders in Supplementary Material .02 to Rule 715 as part of the Exchange's system migration to INET technology).

[7] *See* note 4 above.

[8] *Id.* In this instance, the System would simply reject the cancel and replace message as an invalid instruction. The Exchange notes that the previous T7 system likewise treated Cancel and Replace Orders in this manner.

order being cancelled and not replaced.[9] As such, the Exchange proposes to remove the reference to Rule 722(c)(1) from the list of price or other reasonability checks to conform its rule text to the System.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] 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's proposal corrects an inadvertent error in Supplementary Material .02 to Rule 715, which currently includes Rule 722(c)(1) within the list of price or other reasonability checks. As discussed above, including Rule 722(c)(1) is inconsistent with the operation of the Exchange's System because an incoming Cancel and Replace Order which fails the minimum price variation checks in Rule 722(c)(1) does not result in the existing order getting cancelled and not replaced. This rule change would amend the rule text to reflect ISE's current practice, and should avoid potential confusion about how the System processes Cancel and Replace Orders today.[12]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change will bring greater transparency to the Exchange's Rulebook, and therefore does not unduly burden competition.

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.

[9] Similar to Rule 710, the System would also simply reject the cancel and replace message as an invalid instruction in this instance. Furthermore, the previous T7 system likewise treated Cancel and Replace Orders in this manner.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] *See* note 9 above.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing 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, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [13] and subparagraph (f)(6) 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2018–100 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–ISE–2018–100. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2018–100 and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28194 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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 satisfied this requirement.

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33342; File No. 812–14811]

AQR Trust and AQR Capital Management, LLC; Notice of Application

December 21, 2018.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested order would permit (a) actively-managed series of certain open-end management

investment companies (''Funds'') to issue shares redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Fund shares to occur at negotiated market prices rather than at net asset value (''NAV''); (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of shares for redemption; (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of Creation Units; (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the Funds (''Funds of Funds'') to acquire shares of the Funds; (f) certain Funds (''Feeder Funds'') to create and redeem Creations Units in-kind in a master-feeder structure; and (g) the Funds to issue Shares in less than Creation Unit size to investors participating in a distribution reinvestment program.

APPLICANTS: AQR Trust (the ''Trust''), a Delaware statutory trust that will register under the Act as an open-end management investment company with multiple series and AQR Capital Management, LLC (the ''Initial Adviser''), a Delaware corporation registered as an investment adviser under the Investment Advisers Act of 1940.

FILING DATES: The application was filed on August 17, 2017 and amended on April 9, 2018, August 8, 2018, and December 12, 2018.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 15, 2019, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090; Applicants: William J. Fenrich, Esq., AQR Capital Management, LLC, Two Greenwich Plaza, 4th Floor, Greenwich, Connecticut 06830.

FOR FURTHER INFORMATION CONTACT: Steven I. Amchan, Senior Counsel, at (202) 551–6826, Hae-Sung Lee, Senior Counsel, at (202) 551–7345, or Andrea Ottomanelli Magovern, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application

1. Applicants request an order that would allow Funds to operate as actively-managed exchange traded funds (''ETFs'').[1] Fund shares will be purchased and redeemed at their NAV in Creation Units only (other than pursuant to a distribution reinvestment program described in the application). All orders to purchase Creation Units and all redemption requests will be placed by or through an ''Authorized Participant'', which will have signed a participant agreement with the Distributor. Shares will be listed and traded individually on a national securities exchange, where share prices will be based on the current bid/offer market. Certain Funds may operate as Feeder Funds in a master-feeder structure. Any order granting the requested relief would be subject to the terms and conditions stated in the application.

2. Each Fund will consist of a portfolio of securities and other assets and investment positions (''Portfolio Instruments''). Each Fund will disclose on its website the identities and quantities of the Portfolio Instruments that will form the basis for the Fund's calculation of NAV at the end of the day.

3. Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis, or issued in less than Creation Unit size to investors participating in a distribution reinvestment program. Except where the purchase or redemption will include cash under the limited circumstances specified in the application, purchasers will be required to purchase Creation Units by depositing specified instruments (''Deposit Instruments''), and shareholders redeeming their shares will receive specified instruments (''Redemption Instruments''). The Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Fund's portfolio (including cash positions) except as specified in the application.

4. Because shares will not be individually redeemable, applicants request an exemption from section 5(a)(1) and section 2(a)(32) of the Act that would permit the Funds to register as open-end management investment companies and issue shares that are redeemable in Creation Units only (other than pursuant to a dividend reinvestment program).

5. Applicants also request an exemption from section 22(d) of the Act and rule 22c–1 under the Act as secondary market trading in shares will take place at negotiated prices, not at a current offering price described in a Fund's prospectus, and not at a price based on NAV. Applicants state that (a) secondary market trading in shares does not involve a Fund as a party and will not result in dilution of an investment in shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants represent that share market prices will be disciplined by arbitrage opportunities, which should prevent shares from trading at a material discount or premium from NAV.

6. With respect to Funds that hold non-U.S. Portfolio Instruments and that effect creations and redemptions of Creation Units in kind, applicants request relief from the requirement imposed by section 22(e) in order to allow such Funds to pay redemption proceeds within fifteen calendar days following the tender of Creation Units for redemption. Applicants assert that the requested relief would not be inconsistent with the spirit and intent of section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds.

[1] Applicants request that the order apply to the initial Fund, as well as to future series of the Trust and any existing or future open-end management investment companies or series thereof (each, included in the term ''Fund''), each of which will operate as an actively-managed ETF, and their respective existing or future Master Funds. Any Fund will (a) be advised by the Initial Adviser or an entity controlling, controlled by, or under common control with the Initial Adviser (each such entity and any successor thereto, an ''Adviser'') and (b) comply with the terms and conditions of the application. For purposes of the requested order, a ''successor'' is limited to an entity or entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

7. Applicants request an exemption to permit Funds of Funds to acquire Fund shares beyond the limits of section 12(d)(1)(A) of the Act; and the Funds, and any principal underwriter for the Funds, and/or any broker or dealer registered under the Exchange Act, to sell shares to Funds of Funds beyond the limits of section 12(d)(1)(B) of the Act. The application's terms and conditions are designed to, among other things, help prevent any potential (i) undue influence over a Fund through control or voting power, or in connection with certain services, transactions, and underwritings, (ii) excessive layering of fees, and (iii) overly complex fund structures, which are the concerns underlying the limits in sections 12(d)(1)(A) and (B) of the Act.

8. Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act to permit persons that are Affiliated Persons, or Second-Tier Affiliates, of the Funds, solely by virtue of certain ownership interests, to effectuate purchases and redemptions in-kind. The deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions of Creation Units will be the same for all purchases and redemptions and Deposit Instruments and Redemption Instruments will be valued in the same manner as those Portfolio Instruments currently held by the Funds. Applicants also seek relief from the prohibitions on affiliated transactions in section 17(a) to permit a Fund to sell its shares to and redeem its shares from a Fund of Funds, and to engage in the accompanying in-kind transactions with the Fund of Funds.[2] The purchase of Creation Units by a Fund of Funds directly from a Fund will be accomplished in accordance with the policies of the Fund of Funds and will be based on the NAVs of the Funds.

9. Applicants also request relief to permit a Feeder Fund to acquire shares of another registered investment company managed by the Adviser having substantially the same investment objectives as the Feeder Fund (''Master Fund'') beyond the limitations in section 12(d)(1)(A) and permit the Master Fund, and any principal underwriter for the Master Fund, to sell shares of the Master Fund to the Feeder Fund beyond the limitations in section 12(d)(1)(B).

10. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2018–28300 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

[2] The requested relief would apply to direct sales of shares in Creation Units by a Fund to a Fund of Funds and redemptions of those shares. Applicants, moreover, are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an Affiliated Person, or a Second-Tier Affiliate, of a Fund of Funds because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Fund of Funds.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84902; File No. SR–BOX–2018–39]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 7050

December 20, 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 19, 2018, BOX Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7050. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxoptions.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to delete Rule 7050 (Minimum Trading Increments) in its entirety and replace it with an identical rule in place at another option exchange in the industry. Currently, Rule 7050(a) details the minimum trading increments in place on the Exchange. In this rule, such minimum increments established by the Board will be designated as a stated policy, practice, or interpretation with respect to the administration of this Rule 7050 within the meaning of subparagraph (3)(A) of Section 19(b) of the Exchange Act and will be filed with the SEC as a rule change for effectiveness upon filing. Further, the rule goes on to state that until such time as the Board makes a change in the increments, the following principles shall apply: (1) If the options contract is trading at less than $3.00 per option, five (5) cents; (2) if the options contract is trading at $3.00 per option of higher, ten (10) cents. The Exchange now proposes to delete 7050(a) in its entirety and add proposed Rule 7050(a)(1) and (2) which states that unless specified in another Exchange rule, the following minimum quoting increments shall apply to options traded on the Exchange: (1) Five cents ($0.05) for all

option contracts trading at less than $3 other than those defined in (3) below; (2) ten cents ($0.10) for all option contracts trading at $3 and above other than those defined in (3) below.[3]

The Exchange also notes that current Rule 7050(a)(3) states that if the options contract is traded pursuant to the procedures of the Improvement Period in Rule 7150 then one (1) cent. The Exchange proposes to include this in the deletion of current Rule 7050(a) as the minimum trading increments for option contracts traded in the Improvement Period are already addressed in the BOX Rulebook.[4]

Further, current Rule 7050(b) through (e) details exceptions to the minimum trading increments discussed in current Rule 7050(a). Specifically, current Rule 7050(b) states that notwithstanding paragraph (a) of this Rule 7050, the Exchange will operate a pilot program to permit options classes to be quoted and traded in increments as low as one (1) cent. The Exchange now proposes to delete current Rule 7050(b) and replace it with proposed Rule 7050(a)(3)which states that for options contract traded pursuant to the penny pilot as described in Rule 7260: (A) One cent ($0.01) for all options contracts in QQQ (PowerShares QQQQ Trust), SPY (SPDR S&P 500 ETF Trust) and IWM (iShares Russell 2000 Index Fund); (B) one cent ($0.01) for all other options contracts included in a penny pilot that are trading at less than $3; (C) five cents ($0.05) for all other option contracts included in a penny pilot that are trading at or above $3.[5]

Further, current Rules 7050(c) through (e) detail other exceptions to the minimum trading increments in current Rule 7050(a). Specifically, 7050(c) states that notwithstanding any other provision in this Rule 7050, the minimum trading increment for Mini Options shall be determined in accordance with IM–5050–10(d) to BOX Rule 5050. The Exchange proposes to delete this provision in its entirety as the minimum trading increments for Mini Options already exist in another provision in the BOX Rulebook. Similarly, the Exchange proposes to delete Rules 7050(d) and (e) for the same reason. The minimum trading increments for Jumbo SPY options (Rule 7050(d)) and Complex Orders (Rule 7050(e)) already exist in other provisions in the BOX Rulebook.[6]

The Exchange also proposes Rule 7050(b) which states that the minimum trading increment for option contracts traded on the Exchange will be one cent ($0.01) for all series. The Exchange notes that the proposed rule discussed herein is identical to rules at other options exchanges in the industry.[7]

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[8] in general, and Section 6(b)(5) of the Act,[9] in particular, in that the proposed change is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest, by conforming the Exchange's minimum trading increment rule with rules at other options exchanges in the industry.[10] The Exchange believes that the proposed change will provide clarity with respect to the minimum trading increment rule which removes impediments to and better provides for a free and open market. Additionally, the Exchange believes that deleting 7050(c) through (e) will reduce investor confusion with respect to certain minimum trading increments on the Exchange as the trading increments for the orders discussed in 7050(c) through (e) are already included in other rules in the BOX Rulebook. As such, BOX believes the proposed rule change is in the public interest, and therefore, consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposal merely conforms the Exchange's minimum trading increment rule to similar rules at other options exchanges in the industry. The proposed rule change would provide clarity and reduce any potential confusion with respect to minimum trading increments on the Exchange. As such, 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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (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, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[11] and subparagraph (f)(6) of Rule 19b–4 thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6)[13] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[14] permits the Commission to 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 proposal may become operative immediately upon filing. The Exchange notes that the proposed rule change simply seeks to conform the Exchange's minimum trading increments rule to similar rules at other options exchanges and raises no new or novel issues. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change as operative upon filing.[15]

[3] The Exchange notes that the current trading increment principles remain unchanged. The Exchange also notes that the proposed language is identical to rules at other options exchanges in the industry.

[4] *See* BOX Rule 7150(f)(2).

[5] The Exchange notes that the current minimum increments for the pilot program remain unchanged.

[6] The minimum trading increments for Jumbo SPY Options are located in Rule 5050(e)(4). The minimum trading increments for Complex Orders are addressed in Rule 7240(b)(1).

[7] *See* NYSE American, LLC (''NYSE American'') Rule 960NY, NYSE Arca, LLC (''NYSE Arca'') Rule 6.72–O.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *See supra* note 7.

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and the 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 satisfied this requirement.

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BOX–2018–39 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–BOX–2018–39. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BOX–2018–39 and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28199 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84889; File No. SR–ICC–2018–011]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to ICC's New Initiatives Approval Policy and Procedural Framework

December 20, 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 18, 2018, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by ICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the proposed rule change is to revise the ICC New Initiatives Approval Policy and Procedural Framework (''NIA Policy''). These revisions do not require any changes to the ICC Clearing Rules (''Rules'').

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC 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. ICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

ICC proposes to formalize its NIA Policy. ICC believes that such a change will facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible. The proposed rule change is described in detail as follows.

The NIA Policy sets forth ICC's policies and procedures for the review and approval of certain new initiatives to be offered or implemented by ICC. The NIA Policy clarifies and harmonizes the policies, procedures, and documentation for the review and approval of new initiatives that involve potentially significant changes. The intention of the NIA Policy is to notify all relevant departments of the introduction of the new initiative, provide for information sharing between departments and ensure a thorough understanding of the new initiative, and establish requirements for the pre-launch verification and testing of the new initiative.

The NIA Policy includes a list of definitions that serves to clarify and recognize the projects, key participants, and documents that are subject to the NIA Policy. New projects that are approved by the Steering Committee, a management committee responsible for prioritizing the implementation of initiatives and monitoring and guiding delivery, and meet the following criteria are defined as New Initiatives that are subject to the NIA Policy: (1) Involve new and material modifications to the risk or pricing methodology; (2) involve potential significant changes to the processing system, ICC Clearing Rules, or clearing operating procedures; (3) involve new and material modifications to existing and significant capabilities provided by ICC; or (4) involve Model Changes[3] classified as Materiality A under ICC's Model Validation Framework. The New Initiative Approval Committee (the ''NIAC'') identifies, reviews, and approves New Initiatives and is composed of ICC management, including department heads, and representatives from

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Model Changes include new and enhanced risk modeling components of ICC's risk management system. Depending on how substantially the Model Change affects the system's assessment of risk for the related risk driver(s), it is classified as Materiality A (*i.e.,* substantial impact) or Materiality B (*i.e.,* no substantial impact).

Enterprise Risk, Quality Systems, and Systems Operations. The NIAC also determines any conditions, limitations, restrictions or pre-conditions (''Stipulations'') with respect to a New Initiative. The NIAC utilizes several templates in carrying out its responsibilities, such as a matrix evidencing that all necessary approvals have been obtained (''Approvals Matrix''); an assessment describing key risks, mitigation plans, and residual impact ratings and comments (''Risk Assessment''); a verification form evidencing that Stipulations have been met and testing has been completed (''New Initiative Pre-Launch Verification Form''); and a log tracking the NIAC's identification and review of New Initiatives (''New Initiative Log'').

The NIA Policy describes the roles of key participants involved in the identification, review, and approval of New Initiatives. Key participants include various departments and their department heads, who are responsible for completing certain templates, reviewing proposals for and providing sign-off of New Initiatives, and/or evaluating New Initiatives for compliance with applicable regulations. The NIA Policy provides the NIAC with the responsibility and the authority to identify projects approved by the Steering Committee as New Initiatives; review New Initiatives with consideration of the risks, financial impact, legal and regulatory concerns, and strategic direction of ICC; approve, with Stipulations if appropriate, New Initiatives; and review New Initiatives post-implementation to determine compliance with Stipulations. The Chair of the NIAC ensures compliance with the NIA Policy and is responsible for, among other things, ensuring appropriate communication and coordination between the NIAC and the Steering Committee.

The NIAC's identification, review, and approval of New Initiatives is divided into five steps: Submission, identification, review, pre-launch verification, and log. The NIA Policy sets out the procedures for each step and notes the template and standard for review to be used by the NIAC. The five steps include: (1) Submission of a project proposal approved by the Steering Committee to the NIAC; (2) identification of a project as a New Initiative by the NIAC; (3) review of the New Initiative by the NIAC, (4) pre-launch verification with evidence of completed testing and implemented Stipulations, along with a statement of any outstanding post-launch Stipulations; and (5) documentation of the New Initiative in the New Initiative Log.

The NIA Policy is owned and maintained by the Chair of the NIAC. Material changes to the NIA Policy, as determined by the Chair of the NIAC, must be reviewed and approved by the ICC Board. Relevant templates utilized in the identification, review, and approval of New Initiatives are attached to the end of the NIA Policy, such as the Approvals Matrix, Risk Assessment, New Initiative Identification Form evidencing the identification of a project as a New Initiative by the NIAC, Charter of the NIAC, New Initiative Log, and New Initiative Pre-Launch Verification Form.

(b) Statutory Basis

Section 17A(b)(3)(F) of the Act[4] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, and to the extent applicable, derivative agreements, contracts and transactions; to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible; in general, to protect investors and the public interest; and to comply with the provisions of the Act and the rules and regulations thereunder. ICC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to ICC, in particular, to Section 17(A)(b)(3)(F),[5] because ICC believes that the proposed rule change establishes sound policies, practices, and procedures with respect to the offering or implementation of New Initiatives. Such sound policies, practices, and procedures are an important component of ICC's ability to comply with these requirements because disruptions to operations resulting from a new offering or implementation can impair the prompt and accurate clearance and settlement of securities transactions, derivatives agreements, contracts, and transactions; safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible; and protection of investors and the public interest. Moreover, the NIA Policy improves ICC's ability to assess and manage risk, including by notifying all relevant departments of the introduction of the New Initiative, providing for information sharing between departments and ensuring a thorough understanding of the New Initiative, and establishing procedures related to pre-launch verification and testing, thereby enhancing ICC's ability to promote the prompt and accurate clearance and settlement of securities transactions, derivatives agreements, contracts, and transactions; safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible; and protection of investors and the public interest. As such, the proposed rule change is designed to promote the prompt and accurate clearance and settlement of securities transactions, derivatives agreements, contracts, and transactions; to contribute to the safeguarding of securities and funds associated with security-based swap transactions in ICC's custody or control, or for which ICC is responsible; and, in general, to protect investors and the public interest within the meaning of Section 17A(b)(3)(F) of the Act.[6]

In addition, the proposed rule change is consistent with the relevant requirements of Rule 17Ad–22.[7] Rule 17Ad–22(d)(4)[8] requires ICC to establish, implement, maintain and enforce written policies and procedures reasonably designed to, in relevant part, identify sources of operational risk and minimize them through the development of appropriate systems, controls, and procedures. The proposed rule change to formalize the NIA Policy sets forth ICC's procedures for the identification, review, and approval of New Initiatives to be offered or implemented by ICC. By establishing procedures that provide for notification to all relevant departments, information sharing between departments to ensure a thorough understanding, establishment of Stipulations, and establishment of requirements for pre-launch verification and testing with respect to a New Initiative, ICC believes that it will reduce the likelihood of a disruption in operations from a New Initiative. Moreover, the establishment of Stipulations and the review of a New Initiative by the NIAC, including review of the Risk Assessment and Approvals Matrix and with consideration of, among other things, the risks, financial impact, legal and regulatory concerns, and the strategic direction of ICC, will reduce the risk that a new offering or implementation disrupting system operations is launched, thereby improving ICC's ability to identify sources of operational risk and minimize them through the

[4] 15 U.S.C. 78q–1(b)(3)(F).

[5] *Id.*

[6] *Id.*

[7] 17 CFR 240.17Ad–22.

[8] 17 CFR 240.17Ad–22(d)(4).

development of appropriate systems, controls, and procedures, consistent with the requirements of Rule 17Ad-22(d)(4).[9]

Rule 17Ad–22(d)(8) [10] requires ICC to establish, implement, maintain and enforce written policies and procedures reasonably designed to have governance arrangements that are clear and transparent to fulfill the public interest requirements in Section 17A of the Act.[11] The NIA Policy clearly assigns and documents responsibility and accountability for the identification, review, and approval of New Initiatives by the NIAC, the maintenance of the NIA Policy by the Chair of the NIAC, and the approval of material changes to the NIA Policy by the Board. These governance arrangements are clear and transparent, such that information relating to the assignment of responsibilities and the requisite involvement of department heads, the NIAC, and the Board is clearly documented, consistent with the requirements of Rule 17Ad–22(d)(8).[12]

(B) Clearing Agency's Statement on Burden on Competition

ICC does not believe the proposed rule change would have any impact, or impose any burden, on competition. The proposed change to formalize ICC's NIA Policy will apply uniformly across all market participants. Therefore, ICC does not believe the proposed rule change imposes any burden on competition that is inappropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICC–2018–011 on the subject line.

Paper Comments

Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–ICC–2018–011. 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 filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's website at *https://www.theice.com/clear-credit/regulation.* 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–ICC–2018–011 and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28186 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

[9] *Id.*

[10] 17 CFR 240.17Ad–22(d)(8).

[11] 15 U.S.C. 78q–1.

[12] 17 CFR 240.17Ad–22(d)(8).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33341; File No. 812–14910]

Hercules Capital, Inc.

December 21, 2018.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 23(a), 23(b) and 63 of the Act; under sections 57(a)(4) and 57(i) of the Act and rule 17d–1 under the Act permitting certain joint transactions otherwise prohibited by section 57(a)(4) of the Act; and under section 23(c)(3) of the Act for an exemption from section 23(c) of the Act.

SUMMARY OF THE APPLICATION: Hercules Capital, Inc. (''Company'' or ''Applicant'') requests an order that would permit Applicant to (i) issue restricted shares of its common stock (''Restricted Stock'') as part of the compensation package for its non-employee directors (the ''Non-Employee Directors'') [1] through its 2018 Non-Employee Director Plan (the ''Non-Employee Director Plan'') for Non-Employee Director Participants, (ii) issue Restricted Stock and Restricted Stock Units [2] (*i.e.,* the right to receive, on the date of settlement, one share of common stock or an amount equal to the fair market value of one share of common stock) as part of the compensation package for certain of its employees, officers and directors, excluding the Non-Employee Directors, through its Amended and Restated 2018 Equity Incentive Plan (the ''Equity Incentive Plan''), (iii) withhold shares of the Applicant's common stock or purchase shares of Applicant's common stock from Participants to satisfy tax

[1] Employees, officers and employee directors, together the ''Employee Participants'' and each an ''Employee Participant.'' The Employee Participants and the Non-Employee Directors, together the ''Participants'' and each, a ''Participant.''

[2] Restricted Stock and Restricted Stock Units are collectively referred to herein as Restricted Stock.

withholding obligations relating to the vesting of Restricted Stock or Restricted Stock Units or the exercise of options to purchase shares of Applicant's common stock (''Options'') that will be granted pursuant to the Equity Incentive Plan [3] and (iv) permit Participants to pay the exercise price of Options that will be granted to them pursuant to the Equity Incentive Plan with shares of Applicant's common stock.

APPLICANT: Hercules Capital, Inc.

FILING DATES: The application was filed on May 29, 2018, and amended on September 27, 2018.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 15, 2019 and should be accompanied by proof of service on applicant, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090. Applicant: Manuel A. Henriquez, Chief Executive Officer, Hercules Capital, Inc., 400 Hamilton Avenue, Suite 310, Palo Alto, California 94301.

FOR FURTHER INFORMATION CONTACT: Elizabeth G. Miller, Senior Counsel, at (202) 551–8707, or Aaron Gilbride, Branch Chief, at (202) 551–6825, (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for the applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicant's Representations

1. The Company is an internally managed, non-diversified, closed-end investment company that has elected to be regulated as a business development company (''BDC'') under the Act. Applicant represents that it is a specialty finance company focused on providing senior secured loans to high-growth, innovative venture capital-backed companies in a variety of technology, life sciences, and sustainable and renewable technology industries. Applicant was incorporated under General Corporation Law of the State of Maryland in December 2003. As of March 31, 2018, Applicant had 64 employees.

2. Hercules Technology II, L.P. (''HT II''), Hercules Technology III, L.P. (''HT III''), and Hercules Technology IV, L.P. (''HT IV'') are Delaware limited partnerships that were formed in January 2005, September 2009 and December 2010, respectively. HT II and HT III were licensed to operate as small business investment companies (''SBICs'') under the authority of the Small Business Administration on September 27, 2006 and May 26, 2010, respectively. HT IV was formed in anticipation of receiving an additional SBIC license; however, the Company has not received such license and HT IV currently has no material assets or liabilities. The Company also formed Hercules Technology SBIC Management, LLC (''HTM''), a limited liability company in November 2003. HTM is a wholly owned subsidiary of Applicant and serves as the limited partner and general partner of HT II and HT III. HT II and HT III hold approximately $113.1 million and $285.8 million in assets, respectively, and they accounted for approximately 5.7% and 14.4% of Applicant's total assets, respectively, prior to consolidation at March 31, 2018.

3. Applicant also established wholly own subsidiaries, all of which are structured as Delaware corporations and limited liability companies, to hold portfolio companies organized as limited liability companies (or other forms of pass-through entities).

4. Applicant currently has an eight-member board of directors (the ''Board'') of whom seven are Non-Employee Directors or non-interested persons of Applicant within the meaning of section 2(a)(19), and one is considered an ''interested person'' of Applicant.

5. Applicant believes that, because the market for superior investment professionals is highly competitive, Applicant's successful performance depends on its ability to offer fair compensation packages to its professionals that are competitive with those offered by other investment management businesses. Applicant states that the ability to offer equity-based compensation to its employees and Non-Employee Directors, which both aligns employee and Board behavior with stockholder interests and provides a retention tool, is vital to Applicant's future growth and success.

6. The Applicant's 2006 Non-Employee Director Plan, as amended in 2007 (the ''2006 Plan'') terminated in accordance with its terms in 2017, and no new awards are permitted to be granted under the 2006 Plan after its termination. The 2006 Plan provided for the grant of Options and shares of Restricted Stock subject to certain forfeiture restrictions to Non-Employee Directors. As a result of the termination of the 2006 Plan, the Non-Employee Director Plan was adopted on May 13, 2018 by the Board, including the required majority as defined in Section 57(o) (the ''Required Majority''),[4] and will be administered by a committee designated by the Board, the composition of which consists of ''non-employee directors'' within the meaning of rule 16b–3 (the ''Compensation Committee'').

7. The Non-Employee Plan provides for the grant of Restricted Stock, but unlike the 2006 Plan, does not provide for the grant of Options. Issuance of the Restricted Stock will allow the Non-Employee Directors to become owners of the Applicant's stock with a vested interest in value maintenance, income stream and stock appreciation, which interests align with those of the Applicant's stockholders.

8. Shares of Restricted Stock granted automatically under the Non-Employee Director Plan (i) upon initial election to the Board, are no longer subject to forfeiture restrictions, as to one-third immediately after the expiration of 33% of the initial three-year term, as to an additional one-third immediately after the expiration of 66% of the initial three-year term and the remaining one-third on the third anniversary of the commencement date of the applicable three-year staggered class term, and (ii) upon reelection to the Board, are no longer subject to forfeiture restrictions as to one-third of such shares on the anniversary of such grant over three years.

9. The maximum aggregate number of shares of common stock that may be authorized for issuance under awards of Restricted Stock under the Non-

[3] Options will not be granted to Non-Employee Directors and, therefore, no relief is sought in the application for the grant of Options.

[4] Section 57(o) of the Act provides that the term ''required majority,'' when used with respect to the approval of a proposed transaction, plan, or arrangement, means both a majority of a BDC's directors or general partners who have no financial interest in such transaction, plan, or arrangement and a majority of such directors or general partners who are not interested persons of such company.

Employee Director Plan is 300,000 shares. The maximum number of shares of common stock for which any Non-Employee Director may be granted awards under the Non-Employee Director Plan in any calendar year is 20,000 shares.

10. Shares of Restricted Stock will not be transferable except for disposition by will or the laws of descent and distribution or by gift to a permitted transferee. If any award of Restricted Stock for any reason is forfeited or otherwise terminates, in whole or in part, the shares not acquired under such award of Restricted Stock will revert to and again become available for issuance under the Non-Employee Director Plan on a one-for-one basis.

11. Unless sooner terminated by the Board, the Non-Employee Director Plan will terminate on the day before the tenth anniversary of the date the Non-Employee Director Plan is initially adopted by the Board or approved by stockholders, whichever is earlier.

12. The Applicant's Amended and Restated 2004 Equity Incentive Plan (the ''2004 EIP'') provides for grants of Options, Restricted Stock, restricted stock units (*i.e.,* the right to receive, on the date of settlement, one share of common stock or an amount equal to the fair market value of one share of common stock) (''Restricted Stock Units''), Performance Restricted Stock Units and other performance-based awards (collectively, ''Awards'') and warrants to Employee Participants. Applicant proposes to amend and restate the 2004 EIP, in its entirety, as the ''Equity Incentive Plan.'' The Equity Incentive Plan was adopted on May 13, 2018 by the Board, including the Required Majority, and will be administered by the Compensation Committee.

13. The Equity Incentive Plan provides for grants of Awards, but, unlike the 2004 EIP, does not provide for grants of warrants. The Equity Incentive Plan permits Employee Participants, subject to approval of the Board and if permitted by law, to pay the exercise price of Options with shares of the Applicant's common stock. The maximum aggregate number of shares of common stock that may be authorized for issuance under Awards granted under the Equity Incentive Plan is 9,261,229 shares, less one share for every one share issued under the plan after March 31, 2018 and prior to the date the plan is approved by stockholders. Notwithstanding anything to the contrary, the following shares will not revert to and again be available for issuance: (i) Shares tendered by an Employee Participant or withheld by the Applicant in payment of the purchase price of an Option; (ii) shares tendered by an Employee Participant or withheld by the Applicant to satisfy any tax withholding obligation with respect to Options; and (iii) shares reacquired by the Applicant on the open market or otherwise using cash proceeds from the exercise of Options.

14. The Board, including the Required Majority, found that the issuance of Awards will allow the Applicant to align its business plan, stockholder interests and employee interests based on the nature of the Applicant's business. Issuance of certain Awards will allow the Employee Participants to become owners of the Applicant's stock with a vested interest in value maintenance, income stream and stock appreciation, which interests align with those of the Applicant's stockholders.

15. Unless sooner terminated by the Board, the Equity Incentive Plan will terminate on the day before the tenth anniversary of the date the Equity Incentive Plan is initially adopted by the Board or approved by stockholders, whichever is earlier.

Applicant's Legal Analysis

Sections 23(a) and (b), Section 63

1. Under section 63 of the Act, the provisions of section 23(a) of the Act generally prohibiting a registered closed-end investment company from issuing securities for services or for property other than cash or securities are made applicable to BDCs. This provision would prohibit the issuance of Restricted Stock as a part of the Plans.

2. Section 23(b) of the Act generally prohibits a registered closed-end investment company from selling any common stock of which it is the issuer at a price below its current net asset value. Section 63(2) of the Act makes section 23(b) applicable to BDCs unless certain conditions are met. Because Restricted Stock that would be granted under the Plans would not meet the terms of section 63(2), sections 23(b) and 63 would prevent the issuance of Restricted Stock.

3. Section 6(c) provides, in part, that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes thereof, from any provision of the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicant requests an order pursuant to section 6(c) of the Act granting an exemption from the provisions of sections 23(a), 23(b) and 63 of the Act. Applicant states that the Plans would not violate the concerns underlying these sections, which include: (a) Preferential treatment of investment company insiders and the use of options and other rights by insiders to obtain control of the investment company; (b) complication of the investment company's structure that made it difficult to determine the value of the company's shares; and (c) dilution of shareholders' equity in the investment company. Applicant asserts that the Restricted Stock element of the Plans does not raise concerns about preferential treatment of Applicant's insiders because this element is a bona fide compensation plan of the type that is common among corporations generally. In addition, section 61(a)(3)(B) of the Act permits a BDC to issue to its directors, officers, employees, and general partners warrants, options, and rights to purchase the BDC's voting securities pursuant to an executive compensation plan, subject to certain conditions. Applicant states that, for reasons that are unclear, section 61 and its legislative history do not address the issuance by a BDC of restricted stock as incentive compensation. Applicant believes, however, that the issuance of Restricted Stock is substantially similar, for purposes of investor protection under the Act, to the issuance of warrants, options, and rights as contemplated by section 61. Applicant also asserts that the issuance of Restricted Stock would not become a means for insiders to obtain control of Applicant because the maximum amount of Restricted Stock that may be issued under the Plans and the 2006 Plan at any one time will be ten percent of the outstanding shares of common stock of Applicant.

5. Applicant further states that the Restricted Stock feature will not unduly complicate Applicant's capital structure because equity-based incentive compensation arrangements are widely used among corporations and commonly known to investors. Applicant notes that the Plans will be submitted for approval to the Applicant's stockholders. Applicant represents that the proxy materials submitted to Applicant's stockholders will contain a concise ''plain English'' description of the Plans and their potential dilutive effect. Applicant also states that it will comply with the proxy disclosure requirements in Item 10 of Schedule 14A under the Securities Exchange Act of 1934. Applicant further notes that the Plans will be disclosed to

investors in accordance with the requirements of the Form N–2 registration statement for closed-end investment companies and pursuant to the standards and guidelines adopted by the Financial Accounting Standards Board for operating companies. Applicant also will comply with the disclosure requirements for executive compensation plans applicable to BDCs.[5] Applicant thus concludes that the Plans will be adequately disclosed to investors and appropriately reflected in the market value of Applicant's shares.

6. Applicant acknowledges that awards granted under the Plans may have a dilutive effect on the stockholders' equity per share in Applicant, but believes that effect would be outweighed by the anticipated benefits of the Plans to Applicant and its stockholders. Moreover, based on the manner in which the issuance of Restricted Stock pursuant to the Plans will be administered, the Restricted Stock will be no more dilutive than if Applicant were to issue only Options to Participants who are employees, as is permitted by section 61(a)(3) of the Act. Applicant asserts that it needs the flexibility to provide the requested equity-based compensation in order to be able to compete effectively with commercial banks, investment banks, and other publicly traded companies that also are not investment companies registered under the Act for talented professionals. These professionals, Applicant suggests, in turn are likely to increase Applicant's performance and stockholder value. Applicant also asserts that equity-based compensation would more closely align the interests of Applicant's employees and Non-Employee Directors with those of its stockholders. In addition, Applicant states that its stockholders will be further protected by the conditions to the requested order that assure continuing oversight of the operation of the Plans by the Board.

Section 57(a)(4), Rule 17d–1

7. Section 57(a) proscribes certain transactions between a BDC and persons related to the BDC in the manner described in section 57(b) (''57(b) persons''), absent a Commission order. Section 57(a)(4) generally prohibits a 57(b) person from effecting a transaction in which the BDC is a joint participant absent such an order. Rule l7d-1, made applicable to BDCs by section 57(i), proscribes participation in a ''joint enterprise or other joint arrangement or profit-sharing plan,'' which includes a stock option or purchase plan. Employees and directors of a BDC are 57(b) persons. Thus, the issuance of shares of Restricted Stock could be deemed to involve a joint transaction involving a BDC and a 57(b) person in contravention of section 57(a)(4). Rule 17d–1(b) provides that, in considering relief pursuant to the rule, the Commission will consider (a) whether the participation of the BDC in a joint enterprise is consistent with the policies and purposes of the Act and (b) the extent to which such participation is on a basis different from or less advantageous than that of other participants.

8. Applicant requests an order pursuant to sections 57(a)(4) and 57(i) of the Act and rule 17d–1 under the Act to permit Applicant to issue Restricted Stock under the Plans. Applicant acknowledges that its role is necessarily different from the other participants because the other participants are its directors and employees. It notes, however, that the Plans are in the interest of the Applicant's stockholders, because the Plans will help align the interests of Applicant's employees with those of its stockholders, which will encourage conduct on the part of those employees designed to produce a better return for Applicant's stockholders. Additionally, section 57(j)(1) of the Act expressly permits any director, officer or employee of a BDC to acquire warrants, options and rights to purchase voting securities of such BDC, and the securities issued upon the exercise or conversion thereof, pursuant to an executive compensation plan which meets the requirements of section 61(a)(3)(B) of the Act. Applicant submits that the issuance of Restricted Stock pursuant to the Plans poses no greater risk to stockholders than the issuances permitted by section 57(j)(1) of the Act.

Section 23(c)

9. Section 23(c) of the Act, which is made applicable to BDCs by section 63 of the Act, generally prohibits a BDC from purchasing any securities of which it is the issuer except in the open market pursuant to tenders, or under other circumstances as the Commission may permit to ensure that the purchases are made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicant states that the withholding or purchase of shares of Restricted Stock and common stock in payment of applicable withholding tax obligations or of common stock in payment for the exercise price of a stock option might be deemed to be purchases by the Company of its own securities within the meaning of section 23(c) and therefore prohibited by the Act.

10. Section 23(c)(3) of the Act permits a BDC to purchase securities of which it is the issuer in circumstances in which the repurchase is made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicant believes that the requested relief meets the standards of section 23(c)(3).

11. Applicant submits that these purchases will be made in a manner that does not unfairly discriminate against Applicant's stockholders because all purchases of Applicant's stock will be at the closing price of the common stock on the Nasdaq Global Market (or any primary exchange on which its shares of common stock may be traded in the future) on the relevant date (*i.e.,* the public market price on the date of grant of Restricted Stock and the date of grant of Options). Applicant submits that because all transactions with respect to the Plans will take place at the public market price for the Applicant's common stock, these transactions will not be significantly different than could be achieved by any stockholder selling in a market transaction. Applicant represents that no transactions will be conducted pursuant to the requested order on days where there are no reported market transactions involving Applicant's shares.

12. Applicant represents that the withholding provisions in the Plans do not raise concerns about preferential treatment of Applicant's insiders because each Plan is a bona fide compensation plan of the type that is common among corporations generally. Furthermore, the vesting schedule is determined at the time of the initial grant of the Restricted Stock and the option exercise price is determined at the time of the initial grant of the Options. Applicant represents that all purchases may be made only as permitted by the Plans, which will be approved by the Applicant's stockholders prior to any application of the relief. Applicant believes that granting the requested relief would be consistent with the policies underlying the provisions of the Act permitting the use of equity compensation as well as prior exemptive relief granted by the

[5] See Executive Compensation and Related Party Disclosure, Securities Act Release No. 8655 (Jan. 27, 2006) (proposed rule); Executive Compensation and Related Party Disclosure, Securities Act Release No. 8732A (Aug. 29, 2006) (final rule and proposed rule), as amended by Executive Compensation Disclosure, Securities Act Release No. 8756 (Dec. 22, 2006) (adopted as interim final rules with request for comments).

Commission under section 23(c) of the Act.

Applicant's Conditions

Applicant agrees that the order granting the requested relief will be subject to the following conditions:

1. The Plans will be authorized by Applicant's stockholders.

2. Each issuance of Restricted Stock to an officer, employee, or Non-Employee Director will be approved by the Required Majority of Applicant's directors on the basis that such grant is in the best interest of Applicant and its stockholders.

3. The amount of voting securities that would result from the exercise of all of Applicant's outstanding warrants, options and rights, together with any Restricted Stock issued under the Plans and the 2006 Plan, at the time of issuance shall not exceed 25% of the outstanding voting securities of the Company, except that if the amount of voting securities that would result from the exercise of all of the Company's outstanding warrants, options and rights issued to the Company's directors, officers and employees, together with any Restricted Stock issued pursuant to the Plans and the 2006 Plan, would exceed 15% of the outstanding voting securities of the Company, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options and rights, together with any Restricted Stock issued pursuant to the Plans and the 2006 Plan, at the time of issuance shall not exceed 20% of the outstanding voting securities of the Company.

4. The amount of Restricted Stock issued and outstanding will not at the time of issuance of any shares of Restricted Stock exceed ten percent of Applicant's outstanding voting securities.

5. The Board will review the Plans at least annually. In addition, the Board will review periodically the potential impact that the issuance of Restricted Stock under the Plans could have on Applicant's earnings and net asset value per share, such review to take place prior to any decisions to grant Restricted Stock under the Plans, but in no event less frequently than annually. Adequate procedures and records will be maintained to permit such review. The Board will be authorized to take appropriate steps to ensure that the issuance of Restricted Stock under the Plans will be in the best interest of Applicant's stockholders. This authority will include the authority to prevent or limit the granting of additional Restricted Stock under the Plans. All records maintained pursuant to this condition will be subject to examination by the Commission and its staff.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2018–28318 Filed 12–27–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84892; File No. SR–ICEEU–2018–025]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Revised Clearing Fees

December 20, 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 18, 2018, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes described in Items I, II, and III below, which Items have been primarily prepared by ICE Clear Europe. ICE Clear Europe filed the proposed rule changes pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(4)(ii) thereunder,[4] so that the proposal was immediately effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the proposed rule change is to revise clearing fees applicable to certain ICE Futures Europe Limited (''IFEU'') financials and softs and UK natural gas products (''IFEU Products''). The revisions do not involve any changes to the ICE Clear Europe Clearing Rules or Procedures.[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

The purpose of the proposed rule change is for ICE Clear Europe to modify certain clearing fees relating to certain IFEU Products[6] as set out below:

- IFEU Softs: Clearing fee would increase from £0.37 to £0.55 per lot;
- IFEU Equities: Clearing fee would increase from £0.20 to £0.21 per lot for the following contracts:
  - FTSE 100 Futures (Z);
  - FTSE 100 Dividend Index Futures (YZ);
  - FTSE 100 Dividend Index—RDSA withholding future (XZ); and
- ICE's UK Natural Gas: clearing fee would increase from £0.26 to £0.34 for screen transactions and decrease from £0.58 to £0.46 per lot for block/exchange of futures for physicals (EFP)/exchange of futures for swap (EFS) transactions.

Attached as Exhibit 5 are the circulars listing the new fees relating to the IFEU Products. The relevant fee schedules relating to the IFEU Products will be updated and are available at: *https://www.theice.com/fees?=custom*. The new fees are expected to come into effect on January 2, 2019.

(b) Statutory Basis

ICE Clear Europe has determined that the proposed fee changes set forth above are reasonable and appropriate. In particular, ICE Clear Europe believes that the fees have been set at an appropriate level given the costs and expenses to ICE Clear Europe in offering clearing of such IFEU Products, taking into account the investments ICE Clear Europe has made in clearing the markets for these products. The fees will apply to all F&O Clearing Members. ICE Clear Europe believes that imposing such charges thus provides for the equitable allocation of reasonable dues, fees, and other charges among its Clearing Members, within the meaning of Section 17A(b)(3)(D) of the Act.[7] ICE Clear

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4)(ii).

[5] Capitalized terms used but not defined herein have the meanings specified in the ICE Clear Europe Clearing Rules.

[6] ICE Futures Europe is also changing certain exchange fees with respect to the IFEU Products at the same time.

[7] 15 U.S.C. 78q–1(b)(3)(D). Under this provision, ''[a] clearing agency shall not be registered unless

Continued

Europe therefore believes that the proposed rule change is consistent with the requirements of Section 17A of the Act [8] and regulations thereunder applicable to it.

(B) Self-Regulatory Organization's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed rule changes would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purpose of the Act. Although the changes may result in certain additional costs to Clearing Members, ICE Clear Europe believes that the revised fees have been set at an appropriate level given the costs and expenses to ICE Clear Europe in offering clearing of the IFEU Products. ICE Clear Europe does not believe that the amendments would adversely affect the ability of such Clearing Members or other market participants generally to engage in cleared transactions or to access clearing. Since the revised fees will apply to all F&O Clearing Members, ICE Clear Europe further believes that the fees will not otherwise adversely affect competition among Clearing Members, adversely affect the market for clearing services or limit market participants' choices for obtaining clearing services.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed changes to the rules have not been solicited or received. ICE Clear Europe will notify the Commission of any written comments received by ICE Clear Europe.

III. Date of Effectiveness of the Proposed Rule Change

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A) [9] of the Act and Rule 19b–4(f)(2) [10] thereunder because it establishes a fee or other charge imposed by ICE Clear Europe on its Clearing Members. Specifically, the proposed rule changes will establish fees to be paid by Clearing Members to ICE Clear Europe in connection with the clearing of certain IFEU Products. 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 proposed rule change, security-based swap submission or advance notice 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–ICEEU–2018–025 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–ICEEU–2018–025. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Section, 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 filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at *https://www.theice.com/clear-europe/regulation#rule-filing*. 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–ICEEU–2018–025 and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28189 Filed 12–27–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84887; File No. SR–PEARL–2018–25]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Exchange Rule 519, MIAX PEARL Order Monitor

December 20, 2018.

Pursuant to the provisions of 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 12, 2018, MIAX PEARL, LLC (''MIAX PEARL'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 519, MIAX PEARL Order Monitor (''MOM'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX PEARL's principal office, 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

the Commission determines that—(D) The rules of the clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.''

[8] 15 U.S.C. 78q–1.

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 519, MIAX PEARL Order Monitor (''MOM''). Specifically, the Exchange proposes to amend subsection (a)(3) to adopt new subsection (a)(3) and new subsection (a)(4) to reorganize the rule text for simplicity and to make clarifying changes to add additional detail to align the rule to the System's [3] behavior.

Current subsection (a)(3), Limit Orders to Buy Or Sell, provides that the System will reject an incoming limit order from a Market Maker [4] or an EEM [5] that crosses the contra-side NBBO [6] by at least (i) 50% of the opposite side NBBO where the minimum crossing price is $0.25, or (ii) $2.50, whichever is less. The rule provides the following examples to illustrate those situations where lower priced limit orders are rejected because they cross the NBBO by at least 50%: (A) (1) If the NBBO on the offer side is $4.00, an order to buy options for $6.00 or more will be rejected; and (2) if the NBBO on the bid side is $4.00, an order to sell options for $2.00 or less will be rejected. (B) The following are examples of those situations where higher priced limit orders are rejected because they cross the NBBO by $2.50 or more: (1) If the NBBO on the offer side is $12.00, an order to buy options for $14.50 or more will be rejected and (2) if the NBBO on the bid side is $12.00, an order to sell options for $9.50 or less will be rejected. (C) The following examples illustrate the effect of the qualifier that the minimum crossing price of a limit order that crosses the NBBO by at least 50% must be at least $0.25: (1) If the NBBO on the offer side is $0.10, an order to buy options for $0.15 will not be rejected because the minimum crossing price is not $0.25 even though the order crosses the contra-side NBBO by 50%; and (2) if the NBBO on the offer side is $0.50, an order to buy options for $0.75 or more will be rejected because it crosses by 50% of the opposite side NBBO and it meets the minimum price of $0.25.

The Exchange now proposes to amend current subsection (3) to create a separate subsection for limit orders to buy (proposed subsection (3)), and for limit orders to sell (proposed subsection (4)). The Exchange believes that creating separate subsections dedicated to buys and sells will provide clarity and additional detail to the Exchange's rule.

Proposed subsection (3), Limit Orders to Buy, will provide that for options with a National Best Offer (''NBO'') greater than $0.50 the System will reject an incoming limit order from a Market Maker or an EEM that has a limit price equal to or greater than the NBO by the lesser of (i) $2.50, or (ii) 50% of the NBO price. This provision is identical in operation as the current rule provision. The proposed rule will also provide that for options with an NBO less than or equal to $0.50 the System will reject an incoming limit order from a Market Maker or an EEM that has a limit price that is equal to or greater than the NBO price by $0.25. This provision clarifies the current provision and more accurately defines the concept of crossing price which is used in the current rule.

Similar to the current rule, examples are included in the proposed rule to demonstrate the operation of the rule in different circumstances. The proposed examples provide that (A) if the NBO is $12.00 an incoming limit order to buy options for $14.50 or more will be rejected; and (B) if the NBO is $0.10 an incoming limit order to buy options for $0.15 will not be rejected; whereas if the NBO is $0.10 an incoming limit order to buy options for $0.35 will be rejected as the limit price of the order is $0.25 greater than the NBO. Proposed example A provides an example of an order being rejected when the order's limit price ($14.50) is greater than the NBO ($12.00) by the lesser of $2.50 or 50% of the NBO price ($6.00). Proposed example B demonstrates how the MOM protection works when the NBO of the option is $0.50 or less. If the NBO is $0.10 an incoming limit order to buy options for $0.15 will not be rejected as the order's limit price is not $0.25 greater ($.35) than the NBO price. Example B also demonstrates the scenario where an order with a limit price $0.25 greater than the NBO will be rejected.

Proposed subsection (4) Limit Orders to Sell, will provide that for options with a National Best Bid (''NBB'') equal to or greater than $0.25 the System will reject an incoming limit order from a Market Maker or an EEM that has a limit price equal to or less than the NBB by the lesser of (i) $2.50, or (ii) 50% of the NBB price. The current rule similarly provides that the System will reject an incoming limit order from a Market Maker or an EEM that crosses the contra-side NBBO by at least 50% of the opposite side NBBO, but that also has a minimum crossing price of $0.25. When the NBB is $0.25 or less it is not feasible for an incoming limit order to be priced 50% through the NBB and also have a crossing price of $0.25. Therefore, the Exchange is proposing to add rule text to clarify that for options with an NBB of $0.25 or less the System will accept any incoming limit order to sell from a Market Maker or an EEM. When the NBB is greater than $0.50 any incoming limit order to sell priced 50% through the NBB will be for an amount greater than $0.25 and will be rejected. The Exchange now proposes to align the rule text to the current System behavior in certain instances where the NBB is greater than $0.25 but less than $0.50. Within this NBB range, the Exchange may receive an order that is priced greater than 50% through the NBB but that does not reach the $0.25 threshold. For example, an incoming limit order to sell with a limit price of $0.10, when the NBB is $.30, is priced more than 50% through the NBB, but is only $0.20 away from the NBB. The Exchange's System currently rejects this order and the Exchange is proposing to amend its rule to remove the $0.25 crossing price condition as the Exchange believes that orders that cross the NBB by at least 50% when the NBB is greater than $0.25 should be rejected. This provision provides clarity and additional detail regarding the handling of incoming limit orders to sell that are received when the NBB is greater than or less than $0.25.

Additionally, the proposed rule will include examples to demonstrate the operation of the rule in different circumstances. The proposed examples provide that (A) if the NBB is $12.00 an incoming limit order to sell options for $9.50 or less will be rejected; and (B) if the NBB is $0.30 an incoming limit order to sell options for $0.15 will be rejected; whereas if the NBB is $0.30 an

[3] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[4] The term ''Market Maker'' or ''MM'' means a Member registered with the Exchange for the purpose of making markets in options contracts traded on the Exchange and that is vested with the rights and responsibilities specified in Chapter VI of the MIAX PEARL Rules. *See* Exchange Rule 100.

[5] The term ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is a Member representing as agent Public Customer Orders or Non-Customer Orders on the Exchange and those non-Market Maker Members conducting proprietary trading. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[6] The term ''NBBO'' means the national best bid or offer as calculated by the Exchange based on market information received by the Exchange from OPRA. *See* Exchange Rule 100.

incoming limit order to sell options for $0.20 will not be rejected as the limit price of the order is not less than 50% of the NBB price. Proposed example A provides an example of an order being rejected when the order's limit price ($9.50) is less than the NBB ($12.00) by the lesser of $2.50 or 50% of the NBB price ($6.00). Proposed example B demonstrates how the MOM protection works when the NBB of the option is greater than $0.25.

The Exchange believes its proposed changes provide additional detail and clarity to the Exchange's rules concerning order protections for incoming limit orders to buy and sell.

2. Statutory Basis

MIAX PEARL believes that its proposed rule change is consistent with Section 6(b) of the Act [7] in general, and furthers the objectives of Section 6(b)(5) of the Act [8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed changes to its rulebook add additional detail and provide further clarification to Members,[9] investors, and the public, regarding the Exchange's order monitoring functionality. The Exchange believes it is in the interest of investors and the public to accurately describe the behavior of the Exchange's System in its rules as this information may be used by investors to make decisions concerning the submission of their orders. Transparency and clarity are consistent with the Act because it removes impediments to and helps perfect the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest by accurately describing the behavior of the Exchange's System.

Currently the Exchange's rule discusses the operation of the MIAX PEARL Order Monitor on incoming limit orders to buy or incoming limit orders to sell in a single paragraph.[10] The Exchange now proposes to provide separate rule text specifically discussing the MIAX PEARL Order Monitor process for incoming limit orders to buy (proposed paragraph (a)(3)) and for incoming limit orders to sell (proposed paragraph (a)(4)). The Exchange believes that the proposed changes promote just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system and, in general, protects investors and the public interest by providing additional detail and clarity in the Exchange's rules. Further, the Exchange believes that providing a clear line of delineation for the treatment of orders received when the NBB is less than or greater than $0.25 benefits investors and the public by establishing clear and unambiguous thresholds regarding the acceptance or rejection of orders. Further, the Exchange's proposal provides transparency and clarity in the rules and is consistent with the Act because it removes impediments to and helps perfect the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest by accurately describing the behavior of the Exchange's System. In particular, the Exchange believes that the proposed rule changes will provide greater clarity to Members and the public regarding the Exchange's Rules, and it is in the public interest for rules to be accurate and concise so as to eliminate the potential for confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

MIAX PEARL does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change does not alter any functionality of the Exchange's System and is designed to add additional clarity and detail to the Exchange's rules.

The Exchange does not believe that the proposed rule change will impose any burden on inter-market competition as the Rules apply equally to all Exchange Members. The proposed rule change is not a competitive filing and is intended to enhance the protection of investors by ensuring that the rule clearly and accurately describes the scenarios when a limit order to buy or a limit order to sell will be rejected by the Exchange's System. Additionally, the proposed rule change provides examples of hypothetical scenarios to provide additional detail and clarity to the Exchange's rulebook.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing 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 after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6) [12] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–PEARL–2018–25 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] The term ''Member'' means an individual or organization that is registered with the Exchange pursuant to Chapter II of MIAX PEARL Rules for purposes of trading on the Exchange as an ''Electronic Exchange Member'' or ''Market Maker.'' Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[10] *See* Exchange Rule 518(a)(3).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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 satisfied this requirement.

Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2018–25. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2018–25 and should be submitted on or before January 18, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28184 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84893; File No. SR–NYSE–2018–63]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Price List To Extend for One Year a Fee Discount for the Partial Cabinet Solution Bundles Offered in Connection With the Exchange's Co-Location Services

December 20, 2018.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 12, 2018, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to extend for one year a fee discount for the Partial Cabinet Solution bundles offered in connection with the Exchange's co-location services. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Exchange's Fee Schedules to extend a fee discount for the Partial Cabinet Solution bundles offered in connection with the Exchange's co-location services.[4] The Exchange offers the four Partial Cabinet Solution bundles to attract smaller Users, such as those with minimal power or cabinet space demands, or those for which the attendant costs of having a dedicated cabinet and related connectivity are too burdensome.[5]

The Exchange offers Users [6] that purchase a Partial Cabinet Solution bundle on or before December 31, 2018 a 50% reduction in the monthly recurring charges (''MRC'') for the first 24 months.[7] The Exchange proposes to extend the 50% fee reduction to those Users that purchase a Partial Cabinet Solution bundle on or before December 31, 2019.[8] The Exchange does not propose to amend the length of the discount period.

The amended portions of the Fee Schedules would read as follows:

[4] The Exchange initially filed rule changes relating to its co-location services with the Commission in 2010. *See* Securities Exchange Act Release No. 62960 (September 21, 2010), 75 FR 59310 (September 27, 2010) (SR–NYSE–2010–56). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users.

[5] *See* Securities Exchange Act Release No. 77072 (February 5, 2016), 81 FR 7394 (February. 11, 2016) (SR–NYSE–2015–53).

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR–NYSE–2015–40). As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE American LLC (''NYSE American''), NYSE National, Inc. (''National''), and NYSE Arca, Inc. (''NYSE Arca'' and, together with NYSE American and NYSE National, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70206 (August 15, 2013), 78 FR 51765 (August 21, 2013) (SR–NYSE–2013–59).

[7] *See* Securities Exchange Act Release No. 79715 (December 30, 2016), 82 FR 1777 (January. 6, 2017) (SR–NYSE–2016–91).

[8] The Exchange previously extended the MRC reduction for one year. *See* Securities Exchange Act Release No. 82223 (December 6, 2017), 82 FR 58459 (December 12, 2017) (SR–NYSE–2017–62). *See also* Securities Exchange Act Release Nos. 82224 (December 6, 2017), 82 FR 58465 (December 12, 2017) (SR–NYSEAmer–2017–35), *and* 82226 (December 6, 2017), 82 FR 58462 (December 12, 2017) (SR–NYSEArca–2017–134).

Type of service	Description	Amount of charge
Partial Cabinet Solution bundles ..... **Note:** A User and its Affiliates are limited to one Partial Cabinet Solution bundle at a time. A User and its Affiliates must have an Aggregate Cabinet Footprint of 2 kW or less to qualify for a Partial Cabinet Solution bundle. See Note 2 under ''General Notes.''	Option A:1 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $3,000 monthly for first 24 months of service, and $6,000 monthly thereafter. • For Users that order after December 31, 2019: $6,000 monthly.
	Option B: 2 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $3,500 monthly for first 24 months of service, and $7,000 monthly thereafter. • For Users that order after December 31, 2019: $7,000 monthly.
	Option C: 1 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $7,000 monthly for first 24 months of service, and $14,000 monthly thereafter. • For Users that order after December 31, 2019: $14,000 monthly.
	Option D: 2 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2019: $7,500 monthly for first 24 months of service, and $15,000 monthly thereafter. • For Users that order after December 31, 2019: $15,000 monthly.

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (*e.g.,* a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis; [9] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.[10]

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Sections 6(b)(4) [12] and 6(b)(5) [13] of the Act, in particular. The proposal is consistent with Section 6(b)(4) of the Act because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. The Proposal is also consistent with Section 6(b)(5) of the Act because it is designed to promote just and equitable principles of trade, remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposal provides for the equitable allocation of reasonable dues, fees, and other charges because it would extend the existing eligibility for a 50% MRC reduction for another year, providing smaller Users with minimal power or cabinet space demands with additional time to purchase a Partial Cabinet Solution at a discounted rate. The Exchange believes that it is reasonable to continue to offer the fee reduction as an incentive to Users to utilize the service, including both new and past Users. As is currently the case, the purchase of any colocation service (including Partial Cabinet Solution bundles) is completely voluntary. All Users that order a bundle on or before December 31, 2019 would have their MRC reduced by 50% for the first 24 months.

The proposal would remove impediments to, and perfects the mechanisms of, a free and open market and a national market system because extending the 50% MRC reduction would continue to make it more cost effective for Users to utilize co-location by offering a cost effective, convenient way to create a colocation environment, through the choice of four Partial Cabinet Solution bundles with different cabinet footprints and network connections options. As mentioned above, the Exchange expects that such Users would include those with minimal power or cabinet space demands and Users for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome.

[9] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[10] *See* SR–NYSE–2013–59, *supra* note 6 at 51766. The Exchange's affiliates have also submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSEAmer–2018–55 and SR–NYSEArca–2018–93, and SR–NYSENAT–2018–26.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4).

[13] 15 U.S.C. 78f(b)(5).

The proposal would not unfairly discriminate between customers, issuers, brokers or dealers because it would apply to all Users equally. The Exchange would continue to offer the same four different Partial Cabinet Solution bundles with different cabinet footprints and network connections options. Users that require other sizes or combinations of cabinets, network connections and cross connects could still request them.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule changes will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of Section 6(b)(8) of the Act.[14] The proposal changes will enhance competition by continuing to offer cost effective options for Users to create a colocation environment through four Partial Cabinet Solution bundles. Partial Cabinet Solution bundles allow Users to select their desired cabinet footprint and network connections at a reduced MRC for the first 24 months. Such Users may choose, in turn, to pass on such cost savings to their customers. In addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.* the same products and services are available to all Users, and the extension of the 50% reduction for the MRC for the Partial Cabinet Solution bundles, would apply to all Users).

The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange. In such an environment, the Exchange must continually review, and consider adjusting, its services and related fees and credits to remain competitive with other exchanges.

For the reasons described above, the Exchange believes that the proposed rule changes reflect this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[15] of the Act and subparagraph (f)(2) of Rule 19b–4[16] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[17] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2018–63 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–NYSE–2018–63. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2018–63 and should be submitted on or before January 18, 2019.

[14] 15 U.S.C. 78f(b)(8).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b-4(f)(2).

[17] 15 U.S.C. 78s(b)(2)(B).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Brent J. Fields,

Secretary.

[FR Doc. 2018–28190 Filed 12–27–18; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15843 and #15844; Oklahoma Disaster Number OK–00128]

Administrative Declaration of a Disaster for the State of Oklahoma

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Oklahoma dated 12/20/2018.

Incident: Tornadoes, Severe Storms and Straight-Line Winds.

Incident Period: 11/30/2018 through 12/01/2018.

DATES: Issued on 12/20/2018.

Physical Loan Application Deadline Date: 02/19/2019.

Economic Injury (EIDL) Loan Application Deadline Date: 09/20/2019.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Cherokee.

Contiguous Counties: Oklahoma; Adair, Delaware, Mayes, Muskogee, Sequoyah, Wagoner.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	4.000
Homeowners without Credit Available Elsewhere	2.000
Businesses with Credit Available Elsewhere	7.480
Businesses without Credit Available Elsewhere	3.740
Non-Profit Organizations with Credit Available Elsewhere	2.750
Non-Profit Organizations without Credit Available Elsewhere	2.750
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	3.740
Non-Profit Organizations without Credit Available Elsewhere	2.750

The number assigned to this disaster for physical damage is 15843 C and for economic injury is 15844 0.

The State which received an EIDL Declaration # is Oklahoma.

(Catalog of Federal Domestic Assistance Number 59008)

Dated: December 20, 2018.

Linda E. McMahon,

Administrator.

[FR Doc. 2018–28323 Filed 12–27–18; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[License No. 02/02–0685]

Graycliff Mezzanine III (SBIC), L.P.; Notice Seeking Exemption Under the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Graycliff Mezzanine III (SBIC), L.P., 500 Fifth Avenue, 47th Floor, New York, NY 10110, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, *Financings which Constitute Conflicts of Interest* of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107.730). Graycliff Mezzanine III (SBIC), L.P. is seeking SBA's prior written exemption to purchase a loan and equity holding in Strategic Delivery Solutions LLC, 1815 Broadhollow Rd., Farmingdale, NY 11735 from an Associate. The financing is brought within the purview of § 107.730(a) and (d) of the Regulations because Graycliff Mezzanine III, LP, an Associate of Graycliff Mezzanine III (SBIC), L.P., owns more than five percent of Strategic Delivery Solutions LLC and this transaction is considered *Providing Financing to a Small Business to discharge an obligation to your Associate.* Graycliff Mezzanine III (SBIC), L.P. has not invested in Strategic Delivery Solutions LLC to date but is seeking SBA's prior written exemption to provide financing to Strategic Delivery Solutions LLC.

Notice is hereby given that any interested person may submit written comments on this transaction within fifteen days of the date of this publication to the Associate Administrator, Office of Investment and Innovation, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416.

November 28, 2018.

A. Joseph Shepard,

Associate Administrator for Office of Investment and Innovation.

[FR Doc. 2018–28312 Filed 12–27–18; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[License No. 04/04–0330]

Ballast Point Ventures III, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Ballast Point Ventures III, L.P., 401 East Jackson Street, Suite 2300, Tampa, FL 33602, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing in a small concern, has sought an exemption under Section 312 of the Act, Section 107.730, Financings which constitute Conflicts of Interest of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107.730). Ballast Point Ventures III, L.P. proposes to invest $5 million in YPrime Inc., 263 Great Valley Parkway, Malvern, PA 19355.

The financing is brought within the purview of § 107.730(a)(1) and § 107.730(a)(4) of the Regulations because Ballast Point Ventures II, LP and Ballast Point Ventures EF II, LP (together ''BPV II'') and YPrime expect to receive $30 million and $5 million, respectively, from the proposed $52.5 million transaction, including $47.5 million from the lead investor and $5 million from the Licensee. BPV II and YPrime Inc. are Associates to the Licensee. Thus, this transaction constitutes a Conflict of Interest requiring SBA's prior written exemption.

Notice is hereby given that any interested person may submit written comments on this transaction within

[18] 17 CFR 200.30–3(a)(12).

fifteen days of the date of this publication to the Associate Administrator, Office of Investment and Innovation, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416.

A. Joseph Shepard,

Associate Administrator for Office of Investment and Innovation.

[FR Doc. 2018–28313 Filed 12–27–18; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[License No. 04/04–0337]

Plexus Fund IV–C, L.P.; Notice Seeking Exemption Under the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Plexus Fund IV–C, L.P., 4242 Six Forks Road, Suite 950, Raleigh, NC 27609, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107.730). Plexus Fund IV–C, L.P. is seeking a prior written exemption from SBA to make a debt financing to Bonita Marie International, 1960 Rutgers University Blvd. Lakewood, NJ 08701.

The financing is brought within the purview of § 107.730(a)(4) of the Regulations because Plexus IV–C, L.P., Plexus III, L.P., and Plexus QP III, L.P. are Associates by Common Control, therefore, since the proposed transaction is providing Financing which will discharge Plexus III, L.P.'s and Plexus QP III, L.P.'s obligation, prior SBA written exemption is required.

Notice is hereby given that any interested person may submit written comments on this transaction within fifteen days of the date of this publication to the Associate Administrator, Office of Investment and Innovation, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416.

A. Joseph Shepard,

Associate Administrator for Office of Investment and Innovation.

[FR Doc. 2018–28309 Filed 12–27–18; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Notice of Interest Rates

The Small Business Administration publishes an interest rate called the optional ''peg'' rate (13 CFR 120.214) on a quarterly basis. This rate is a weighted average cost of money to the government for maturities similar to the average SBA direct loan. This rate may be used as a base rate for guaranteed fluctuating interest rate SBA loans. This rate will be 3.125 percent for the January–March quarter of FY 2019.

Pursuant to 13 CFR 120.921(b), the maximum legal interest rate for any third party lender's commercial loan which funds any portion of the cost of a 504 project (see 13 CFR 120.801) shall be 6% over the New York Prime rate or, if that exceeds the maximum interest rate permitted by the constitution or laws of a given State, the maximum interest rate will be the rate permitted by the constitution or laws of the given State.

Dianna L. Seaborn,

Director, Office of Financial Assistance.

[FR Doc. 2018–28307 Filed 12–27–18; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 10617]

60-Day Notice of Proposed Information Collection: Affidavit of Identifying Witness

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. 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 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to *February 26, 2019.*

ADDRESSES: You may submit comments by any of the following methods:

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov*. You can search for the document by entering ''Docket Number: DOS–2018–0055'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: PPTFormsOfficer@state.gov.*
- *Regular Mail:* Send written comments to: PPT Forms Officer, U.S. Department of State, CA/PPT/S/PMO, 44132 Mercure Cir, P.O. Box 1199, Sterling, VA 20166–1199.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Affidavit of Identifying Witness.
- *OMB Control Number:* 1405–0088.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, Passport Services, Office of Program Management and Operational Support (CA/PPT/S/PMO).
- *Form Number:* DS–0071.
- *Respondents:* Individuals.
- *Estimated Number of Respondents:* 50,600.
- *Estimated Number of Responses:* 50,600.
- *Average Time per Response:* 5 minutes.
- *Total Estimated Burden Time:* 4,217 annual hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Affidavit of Identifying Witness is submitted in conjunction with an application for a U.S. passport. It is used by Passport Services to collect information for the purpose of establishing the identity of the applicant. This affidavit is completed by the identifying witness when the applicant is unable to establish his or

her identity to the satisfaction of a person authorized to accept passport applications.

Methodology

The Affidavit of Identifying Witness is submitted in conjunction with an application for a U.S. passport. Due to legislative mandates, Form DS–0071 is only available at acceptance facilities, passport agencies, and U.S. embassies and consulates. This form must be completed and signed in the presence of an authorized Passport Agent, Acceptance Agent, or Consular Officer.

Rachel M. Arndt,

Deputy Assistant Secretary for Passport Services, Bureau of Consular Affairs, Department of State.

[FR Doc. 2018–28201 Filed 12–27–18; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 10644]

Notice of Determinations; Culturally Significant Object Imported for Exhibition—Determinations: ''Visiting Masterpiece: Juan de Mesa's Saint Louis of France'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that a certain object to be included in the exhibition ''Visiting Masterpiece: Juan de Mesa's Saint Louis of France,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit object at The Art Institute of Chicago, Chicago, Illinois, from on or about January 17, 2019, until on or about December 17, 2020, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 236–21 of December 14, 2018.

Jennifer Z. Galt,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 2018–28228 Filed 12–27–18; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 10636]

Global Magnitsky Human Rights Accountability Act Annual Report

ACTION: Notice.

SUMMARY: This notice contains the text of the report required by the Global Magnitsky Human Rights Accountability Act, as submitted by the Secretary of State pursuant to Executive Order 13818.

FOR FURTHER INFORMATION CONTACT: Benjamin A. Kraut, Email: *Krautb@state gov*, Phone: (202) 647–9452.

SUPPLEMENTARY INFORMATION: On December 10, 2018, the Secretary of State approved the following report pursuant to Executive Order 13818 (E.O. 13818). E.O. 13818, which builds on and implements the Global Magnitsky Human Rights Accountability Act (Pub. L. 114–328, Title XII, Subtitle F), was issued by the President on December 20, 2017, with an effective date of December 21, 2017. The text of the report follows:

As required by Section 1264 of the Global Magnitsky Human Rights Accountability Act of 2016 (Pub. L. 114–328, Title XII, Subtitle F) (the ''Act''), and in accordance with E.O. 13818, issued to implement the Act, the Secretary of State, in consultation with the Secretary of the Treasury, submits this report to detail the Administration's implementation of the Act in 2018.

In 2018, the United States took significant action under the Global Magnitsky sanctions program (Global Magnitsky). As of December 10, 2018, the United States has designated 101 foreign persons (individuals and entities) under E.O. 13818. This sanctions program, which targets human rights abusers, corrupt actors, and their enablers, represents the best of the United States' values by taking impactful steps to protect and promote human rights and combat corruption around the world. Through the Act and E.O. 13818, the United States has sought to disrupt and deter serious human rights abuse and corruption abroad; promote accountability for those who act with impunity; and protect, promote, and enforce longstanding international norms alongside our partners and allies.

As the President outlined in his National Security Strategy (NSS), liberty, free enterprise, equal justice under the law, and the dignity of every human life are values that represent who we are as a people. Further, the NSS states that we support with our words and actions those who live under oppressive regimes and seek freedom, individual dignity, and the rule of law. Through Global Magnitsky, the Administration is taking action to execute the President's vision as described in the NSS.

Actions taken in 2018 demonstrated the reach, flexibility, and broad scope of Global Magnitsky. The United States responded to an evolving crisis in Nicaragua, promoted accountability for serious human rights abuse constituting ethnic cleansing in Burma, addressed serious human rights abuse and corruption in the Democratic Republic of Congo, the Dominican Republic, Turkey, Cambodia, and Saudi Arabia, and clearly demonstrated the resolve of the Administration to leverage this important tool, when appropriate, to target individuals and entities engaging in specified conduct.

When considering financial sanctions under Global Magnitsky, the United States prioritizes actions that are expected to produce a tangible and significant impact on the sanctioned persons and their affiliates, so as to prompt changes in behavior or disrupt the activities of malign actors. Persons sanctioned pursuant to this authority appear on the Office of Foreign Assets Control's (OFAC) List of Specially Designated Nationals and Blocked Persons (SDN List). As a result of these actions, any property or interests in property of the sanctioned persons within or transiting U.S. jurisdiction is blocked. Additionally, U.S. persons are generally prohibited from engaging in transactions with blocked persons, including entities 50 percent or more owned by designated persons. The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, imposed financial sanctions on the following persons pursuant to Global Magnitsky:

Financial Sanctions Imposed

1. Felix Ramon Bautista Rosario: Bautista was designated on June 12, 2018, for engaging in corrupt acts, including in relation to reconstruction efforts in Haiti. Bautista is a Senator

from the Dominican Republic who has engaged in significant acts of corruption in both the Dominican Republic and Haiti, and who has been publicly accused of money laundering and embezzlement. Bautista has reportedly engaged in bribery in relation to his position as a Senator, and is alleged to have engaged in corruption in Haiti, where he used his connections to win public works contracts to help rebuild Haiti following several natural disasters, including one case where his company was paid over $10 million for work it had not completed. In a related action, OFAC designated five entities in the Dominican Republic that are owned or controlled by Bautista: Constructora Hadom SA, Soluciones Electricas Y Mecanicas Hadom S.R.L., Seymeh Ingenieria SRL, Inmobiliaria Rofi SA, and Constructora Rofi SA.

2. Hing Bun Hieng: Bun Hieng was designated on June 12, 2018, for being the leader of an entity involved in serious human rights abuse. Bun Hieng is the commander of Cambodia's Prime Minister Bodyguard Unit (PMBU), a unit in the Royal Cambodian Armed Forces that has engaged in serious acts of human rights abuse against the people of Cambodia. The PMBU has been implicated in multiple attacks on unarmed Cambodians over the span of many years, including in 2013 at Wat Phnom and in 2015 in front of the National Assembly. In the 2015 incident, only three members of the PMBU were sent to jail after they confessed to participating in an attack on opposition lawmakers, and were promoted upon their release. Bun Hieng and the PMBU have been connected to incidents where military force was used to harass gatherings of protesters and the political opposition going back at least to 1997, including an incident where a U.S. citizen received shrapnel wounds.

3. Dan Gertler Affiliated Entities: Dan Gertler was named in the Annex to E.O. 13818 in December 2017, for his role as an international businessman and billionaire who amassed his fortune through hundreds of millions of dollars' worth of opaque and corrupt mining and oil deals in the Democratic Republic of the Congo (DRC). The entities designated on June 15, 2018, for being affiliated with Dan Gertler are as follows: Moku Mines D'or SA, Moku Goldmines AG, Fleurette Energy I B.V., Fleurette Africa Resources I B.V., African Trans International Holdings B.V., Fleurette African Transport B.V., Oriental Iron Company SPRL, Iron Mountain Enterprises Limited, Sanzetta Investments Limited, Almerina Properties Limited, Interlog DRC, Kitoko Food Farm, Karibu Africa Services SA, and Ventora Development Sasu.

4. Francisco Javier Diaz Madriz: Diaz was designated on July 5, 2018, for being responsible for, or the leader of entities involved in, serious human rights abuse in Nicaragua. Diaz is a Commissioner of Nicaragua's National Police (NNP) and has been referred to as the de facto head of, and has directed the day-to-day business of, the NNP. Under Diaz's command, the NNP has engaged in serious human rights abuse against the people of Nicaragua, including extrajudicial killings. In June, masked gunmen accompanied by individuals identified by witnesses as Nicaraguan police reportedly set fire to a family home in Managua, killing six, including two young children. When neighbors attempted to help, the police allegedly shot at them, preventing the would-be rescuers from reaching the family. The Nicaraguan police have approached gang leaders in Nicaragua for support in attacking anti-government protesters and have been accused of indiscriminately firing on and killing peaceful protestors.

5. Fidel Antonio Moreno Briones: Moreno was designated on July 5, 2018, for being responsible for, or the leader of entities involved in, serious human rights abuse in Nicaragua. Moreno serves as the main link between municipal governments and the Sandinista National Liberation Front (FSLN), and has also acted as a leader of the Sandinista Youth, the FSLN's youth organization. The Sandinista Youth has been implicated in numerous serious human rights abuses related to the ongoing protests against the Nicaraguan government, including in the beating of protesters in April 2018 and allegedly participating in the June attack that killed a family of six in Managua. Moreno was personally implicated in ordering attacks on protesters as far back as 2013, when elderly and young people who were peacefully protesting reduced retirement pensions, were violently dislodged from their encampment by members of the Sandinista Youth. In 2013, Moreno also orchestrated the use of motorcyclists to violently attack individuals protesting the flawed rollout of a Nicaraguan government program, and in early 2017 recruited others to join a group of motorcyclists to take part in measures to counter anti-government marches. Moreno has been accused of stealing large sums of money from Managua municipal projects, as well as using municipal funds to pay for FSLN party activities.

6. Jose Francisco Lopez Centeno: Lopez was designated on July 5, 2018, for engaging in corrupt activities. Lopez is the Vice President of ALBANISA, the Nicaraguan company that imports and sells Venezuelan petroleum products, and is President of the Nicaraguan state-owned oil company Petronic. Lopez has had access significant funds collected by the government in the form of taxes and fines that he could exploit, including for the personal use of Nicaraguan leaders. When involved in infrastructure projects, Lopez would syphon funds by negotiating personal fees, has positioned numerous individuals throughout the government who have helped him steal millions of dollars on an annual basis, and has used his position to his and his family's benefit by using companies they own to win government contracts. ALBANISA is 49% owned by Petronic, and 51% owned by Venezuela's national oil company, Petroleos de Venezuela (PDVSA). Senior officials within the Nicaraguan government and the FSLN have used ALBANISA funds to purchase television and radio stations, hotels, cattle ranches, electricity generation plants, and pharmaceutical laboratories.

7. Abdulhamit Gul: Gul, the Turkish Minister of Justice, was designated on August 1, 2018, for being the leader of an entity that has engaged in, or whose members have engaged in, serious human rights abuse.

8. Suleyman Soylu: Soylu, the Turkish Minister of Interior, was designated on August 1, 2018, for being the leader of an entity that has engaged in, or whose members have engaged in, serious human rights abuse.

9. Aung Kyaw Saw: Aug Kyaw Saw was designated on August 17, 2018, for having been the leader of the Bureau of Special Operations (BSO) 3, an entity whose members have engaged in serious human rights abuse during his tenure. As commander of BSO 3, Aung Kyaw Zaw controlled military and border guard police operations in Western, Southern, and Southwestern Commands from 2015 to early 2018. Operations in regions controlled by Western Command, were led by his subordinate Maung Maung Soe. The President sanctioned Soe for widespread human rights abuse on December 20, 2017, including military operations in Rakhine State in and after August 2017. Subordinates under his command played leading roles in a crisis in Rakhine State, which included widespread human rights abuses that killed thousands and drove hundreds of thousands of Rohingya to Bangladesh, a situation the Secretary of State concluded constitutes ethnic cleansing.

10. Khin Maung Soe: Khin Maung Soe was designated on August 17, 2018, for having been a leader of Military Operations Command (MOC) 15, an entity whose members engaged in serious human rights abuse during his tenure. Members of MOC 15 participated in the Maung Nu massacre on August 27, 2017, and other abuses in Rakhine State. In Maung Nu, soldiers reportedly beat, sexually assaulted, and summarily executed or otherwise killed dozens of Rohingya villagers.

11. Thura San Lwin: Thura San Lwin was designated on August 17, 2018, for having been the leader of the Border Guard Police (BGP), an entity whose members have engaged in serious human rights abuse during his tenure. Thura San Lwin commanded the BGP from October 2016 to October 2017, during which time his subordinates engaged in widespread extrajudicial killings, sexual violence, assault, and other abuses of human rights.

12. Khin Hlaing: Khin Hlaing was designated on August 17, 2018, for leading the 99th Light Infantry Division (LID), a military entity whose members engaged in serious human rights abuse during his tenure. The 99th LID participated in abuses, including in November 2016, when 99th LID soldiers in Mong Ko, Shan State, detained ethnic Kachin and Chinese minority villagers. For 13 days, the villagers were forced to serve as human shields by lying down between rows of fences encircling the 99th LID element's outpost. The villagers were forced to stay lying down, exposed to the elements, gunfire, and grenade attacks while 99th LID soldiers sheltered behind them while fighting with militia forces. The 99th LID also engaged in beatings, killings, forced disappearances, and other serious abuses in Shan State.

13. *The Burmese 99th LID: The 99th LID was designated on August 17, 2018, for engaging in serious human rights abuses. The 99th LID participated in abuses in Mong Ko and elsewhere in Shan State detailed above. In 2017, the 99th LID was deployed to Rakhine State and participated in serious human rights abuses alongside the 33rd LID and other security forces. In one operation in Min Gyi Village, hundreds of men, women, and children were reportedly forced to the nearby river bank where the 99th LID opened fire, executing many of the men, and forced women and girls to nearby houses where they were sexually assaulted. A number of these women and children were later stabbed and beaten, with the houses set on fire while they were inside.*

14. The Burmese 33rd LID: The 33rd LID was designated on August 17, 2018, for engaging in serious human rights abuse. The 33rd LID participated in abuses in Rakhine State, including the August 27, 2017, operation in Chut Pyin village. This operation included extrajudicial executions, forced disappearances, and sexual violence, as well as firing on fleeing villagers. Hundreds were reportedly killed in this one operation alone. Members of the 33rd LID, along with other security forces, also participated in operations in Inn Din in August and September of 2017. Nearly all of the thousands of Rohingya residing in Inn Din were driven out of the village. Ten Rohingya men and boys were captured, bound, and executed by security forces and militia. Two journalists remain detained for investigating the incident.

15. Saud Al-Qahtani: Saud Al-Qahtani was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He is a senior official of the Government of Saudi Arabia who was part of the planning and execution of the operation that led to the killing of Jamal Khashoggi in the Saudi Consulate in Istanbul, Turkey on October 2, 2018.

16. Maher Mutreb: Maher Mutreb was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He coordinated and executed the operations resulting in the killing of Jamal Khashoggi in the Saudi Consulate General in Istanbul, Turkey on October 2, 2018.

17. Salah Tubaigy: Salah Tubaigy was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

18. Meshal Albostani: Meshal Albostani was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

19. Naif Alarifi: Naif Alarifi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

20. Mohammed Alzahrani: Mohammed Alzahrani was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

21. Mansour Abahussain: Mansour Abahussain was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

22. Khalid Alotaibi: Khalid Alotaibi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

23. Abdulaziz Alhawsawi: Abdulaziz Alhawsawi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

24. Waleed Alsehri: Waleed Alsehri was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

25. Thaar Alharbi: Thaar Alharbi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

26. Fahad Albalawi: Fahad Albalawi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

27. Badr Alotaibi: Badr Alotaibi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

28. Mustafa Almadani: Mustafa Almadani was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

29. Saif Alqahtani: Saif Alqahtani was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

30. Turki Alsehri: Turki Alsehri was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

31. Mohammed Alotaibi: Mohammed Alotaibi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. Alotaibi played a role in the killing of Jamal Khashoggi and, in his capacity as Consul General, oversaw the Consulate General of Saudi Arabia in Istanbul where the killing occurred.

Visa Restrictions Imposed

Although no visa restrictions were imposed under the Act during 2018, persons designated pursuant to E.O. 13818 shall be subject to the visa restrictions articulated in section 2, unless an exception applies. Section 2 provides that the entry of persons designated under section 1 of the order is suspended pursuant to Presidential Proclamation 8693. In addition, the Department of State continues to take action, as appropriate, to impose visa restrictions on those responsible for certain human rights violations and corruption pursuant to other authorities, including Presidential Proclamations 7750 and 8697, and Section 7031(c) of the FY2018 Consolidated Appropriations Act. In addition, section 212(a)(3)(E) of the Immigration and Nationality Act renders aliens ineligible for visas if a consular officer has reason to believe that they participated in acts of genocide, torture or extrajudicial killings. The Department of State also continues to share information on an ongoing basis about the operation of Presidential Proclamation 7750 and section 7031(c) with interested governments.

Termination of Sanctions

The Secretary of the Treasury, in consultation with the Secretary of State, terminated financial sanctions on the following persons previously designated for serious human rights abuse:

1. *Abdulhamit Gul: On November 2, 2018, the Department of the Treasury terminated sanctions with respect to Abdulhamit Gul.*
2. *Suleyman Soylu: On November 2, 2018, the Department of the Treasury terminated sanctions with respect to Suleyman Soylu.*

Efforts To Encourage Governments of Other Countries To Impose Sanctions Similar to Those Authorized by the Act

In 2018, the Administration undertook an expansive outreach campaign in Europe, Canada, and the United Kingdom to lay the groundwork for a multilateral, trans-Atlantic human rights sanctions regime. After consulting closely with Canada, the United Kingdom, France, Germany, Spain, The Netherlands, Belgium, Estonia, Lithuania, and the European Union, the Administration has identified champions, partners, and potential spoilers of the objectives established by Congress within the Act. Subsequent to our outreach, the Foreign Ministers of Canada and the Netherlands, and the Prime Minister of the United Kingdom each publicly endorsed the establishment of a human rights sanctions program at the European Union. The United States joins our Canadian, Dutch, and British partners in calling for such a program, and continues to provide both public and private support for this initiative. The Departments of State and Treasury have, over the last year, shared information, coordinated messaging, and provided technical assistance to this end.

Dated: December 19, 2018.

David Hale,

Under Secretary for Political Affairs, Department of State.

[FR Doc. 2018–28311 Filed 12–27–18; 8:45 am]

BILLING CODE 4710–AE–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of product exclusions.

SUMMARY: Effective July 6, 2018, the U.S. Trade Representative (Trade Representative) imposed additional duties on goods of China with an annual trade value of approximately $34 billion (the $34 billion action) as part of the action in the Section 301 investigation of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation. The Trade Representative's determination included a decision to establish a product exclusion process. The Trade Representative initiated the exclusion process in July 2018, and stakeholders have proceeded to submit requests for the exclusion of specific products. This notice announces the Trade Representative's determination to grant certain exclusion requests, as specified in the Annex to this notice. The Trade Representative will continue to issue decisions on pending requests on a periodic basis.

DATES: The product exclusions announced in this notice will apply as of the July 6, 2018 effective date of the $34 billion action, and will extend for one year after the publication of this notice. U.S. Customs and Border Protection will issue instructions on entry guidance and implementation.

FOR FURTHER INFORMATION CONTACT: For general questions about this notice, contact Assistant General Counsels Arthur Tsao or Megan Grimball, or Director of Industrial Goods Justin Hoffmann at (202) 395–5725. For specific questions on customs classification or implementation of the product exclusions identified in the Annex to this notice, contact *traderemedy@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

For background on the proceedings in this investigation, please see the prior notices issued in the investigation, including 82 FR 40213 (August 23, 2017), 83 FR 14906 (April 6, 2018), 83 FR 28710 (June 20, 2018), 83 FR 33608 (July 17, 2018), 83 FR 38760 (August 7, 2018), and 83 FR 40823 (August 16, 2018), 83 FR 47974 (September 21, 2018), and 83 FR 65198 (December 19, 2018).

Effective July 6, 2018, the Trade Representative imposed additional 25 percent duties on goods of China classified in 818 8-digit subheadings of the Harmonized Tariff Schedule of the United States (HTSUS), with an approximate annual trade value of $34 billion. *See* 83 FR 28710. The Trade Representative's determination included a decision to establish a process by which U.S. stakeholders may request exclusion of particular products classified within an 8-digit HTSUS subheading covered by the $34 billion action from the additional duties. The Trade Representative issued a notice setting out the process for the product exclusions, and opening a public docket. *See* 83 FR 32181 (the July 11 notice).

Under the July 11 notice, requests for exclusion had to identify the product subject to the request in terms of the physical characteristics that distinguish the product from other products within the relevant 8-digit subheading covered by the $34 billion action. Requestors

also had to provide the 10-digit subheading of the HTSUS most applicable to the particular product requested for exclusion, and could submit information on the ability of U.S. Customs and Border Protection to administer the requested exclusion. Requestors had to provide the quantity and value of the Chinese-origin product that the requestor purchased in the last three years. With regard to the rationale for the requested exclusion, requests had to address the following factors:

- Whether the particular product only is available from China and specifically whether the particular product and/or a comparable product is available from sources in the United States and/or third countries.
- Whether the imposition of additional duties on the particular product would cause severe economic harm to the requestor or other U.S. interests.
- Whether the particular product is strategically important or related to ''Made in China 2025'' or other Chinese industrial programs.

The July 11 notice stated that the Trade Representative would take into account whether an exclusion would undermine the objective of the Section 301 investigation.

The July 11 notice required submission of requests for exclusion from the $34 billion action no later than October 9, 2018, and noted that the Trade Representative would periodically announce decisions. The Trade Representative regularly updates the status of each pending request and posts the status at *https://ustr.gov/issue-areas/enforcement/section-301-investigations/request-exclusion.*

B. Determination To Grant Certain Exclusions

Based on the evaluation of the factors set out in the July 11 notice, which are summarized above, pursuant to sections 301(b), 301(c), and 307(a) of the Trade Act of 1974, as amended, and in accordance with the advice of the interagency Section 301 Committee, the Trade Representative has determined to grant the product exclusions set out in the Annex to this notice. The Trade Representative's determination also takes into account advice from advisory committees and any public comments on the pertinent exclusion requests.

As set out in the Annex to this notice, the exclusions are established in two different formats: (1) As an exclusion of an existing 10-digit subheading from within an 8-digit subheading covered by the $34 billion action, or (2) as an exclusion reflected in specially prepared product descriptions. In particular, the exclusions take the form of seven 10-digit HTSUS subheadings, and 24 specially prepared product descriptions.

In accordance with the July 11 notice, the exclusions are available for any product that meets the description in the Annex, regardless of whether the importer filed an exclusion request. Further, the scope of each exclusion is governed by the scope of the 10-digit headings and product descriptions in the Annex to this notice, and not by the product descriptions set out in any particular request for exclusion.

The exclusions in the Annex cover approximately 1,000 separate exclusion requests: the excluded 10-digit subheadings cover 918 separate requests, and the 24 specially drafted product descriptions cover approximately 66 separate requests.

As stated in July 11 Notice, the exclusions will apply as of the July 6, 2018 effective date of the $34 billion action, and extend for one year after the publication of this notice. U.S. Customs and Border Protection will issue instructions on entry guidance and implementation.

The Trade Representative will continue to issue determinations on pending requests on a periodic basis.

Stephen Vaughn,

General Counsel, Office of the U.S. Trade Representative.

BILLING CODE3290–F9–C

ANNEX

Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on July 6, 2018, subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS) is modified:

1. by inserting the following new heading 9903.88.05 in numerical sequence, with the material in the new heading inserted in the columns of the HTSUS labeled "Heading/Subheading", "Article Description", "Rates of Duty 1-General", respectively:

Heading/ Subheading	Article Description	Rates of Duty		
		1		2
		General	Special	
"9903.88.05	Articles the product of China, as provided for in U.S. note 20(h) to this subchapter, each covered by an exclusion granted by the U.S. Trade Representative	The duty provided in the applicable subheading"		

2. by inserting the following new U.S. note 20(h) to subchapter III of chapter 99 in numerical sequence:

"(h) The U.S. Trade Representative determined to establish a process by which particular products classified in heading 9903.88.01 and provided for in U.S. notes 20(a) and 20(b) could be excluded from the additional duties imposed by heading 9903.88.01. See 83 Fed. Reg. 28710 (June 20, 2018) and 83 Fed. Reg. 32181 (July 11, 2018). Pursuant to the product exclusion process, the U.S. Trade Representative has determined that the additional duties provided for in heading 9903.88.01 shall not apply to the following particular products, which are provided for in the enumerated statistical reporting numbers:

(i) 8412.21.0075
(ii) 8418.69.0120
(iii) 8480.71.8045
(iv) 8482.10.5044
(v) 8482.10.5048
(vi) 8482.10.5052
(vii) 8525.60.1010
(viii) Spark-ignition engines for marine propulsion, outboard, each rated at not less than 29.83 kW but not more than 44.74 kW (described in statistical reporting number 8407.21.0080)

(ix) Welded hydraulic linear acting (cylinders) engines and motors, each with piston bore of 12.7 mm or more but not over 34.6 mm, with stroke not over 11.43 m, overall length not over 15.24 m and rod diameter not over 1.219 m (described in statistical reporting number 8412.21.0030)

(x) Stretchers of stainless steel, designed to move rollers to adjust tension of paper fabric to be dried, each with a pivoting arm with an actuator, linear rail movement with an actuator, and front and back units with mounting holes for tube roll bearing housings (described in statistical reporting number 8419.90.2000)

(xi) Roller machines with dies for embossing paper, manually powered (described in statistical reporting number 8420.10.9080)

(xii) Salad spinners of plastics, with capacity of at least 2.4 liters but not more than 3.8 liters (described in statistical reporting number 8421.19.0000)

(xiii) Nonelectric water filtration apparatus consisting of three cylinder-shaped filter cartridges, each measuring 6.35 cm by 26.67 cm, having water storage tank and plastic tubing measuring 0.63 cm or more but not over 0.95 cm, presented with installation kit (described in statistical reporting number 8421.21.0000)

(xiv) Winches, each having a winch frame with a corrosion resistant coating and stainless steel mandrel with nylon bushings, operated manually by a worm gear mechanism (described in statistical reporting number 8425.39.0100)

(xv) Elevators, comprising L-shaped steel buckets bolted to a steel chain, with guide rollers and a drive system (described in statistical reporting number 8428.32.0000)

(xvi) Belt conveyors, each comprising a frame with leveling feet, electric motor and food grade plastic conveyor belt (described in statistical reporting number 8428.33.0000)

(xvii) Belt conveyors, each comprising a welded frame with leveling feet and casters, electric motor and food grade plastic modular conveyor belt (described in statistical reporting number 8428.33.0000)

(xviii) Guards of stainless steel, designed to shield operators of papermaking machines from moving or rotating equipment, each with dimensions ranging from 30 cm by 30 cm by 50 cm to 50 cm by 50 cm by 4 m, weighing 30 kg or more but not over 100 kg (described in statistical reporting number 8439.99.1000)

(xix) Scrapers (“doctors”) of stainless steel, designed to scrape impurities from the rotating roll surface of the forming and press sections of papermaking machines, each comprising a beam with a blade of non-symmetrical cross section, long aspect ratio, and mounting journals and turning devices on either end, with dimensions ranging from 50 cm by 50 cm by 8 m to 60 cm by 6 m by 11 m, weighing 1 metric ton or more but not over 3 metric tons (described in statistical reporting number 8439.99.1000)

(xx) Frameworks of the forming and press section of papermaking machines, of stainless steel or cladded mild steel with stainless or acid proof steel, each with dimensions ranging from 1 m by 1 m by 1 m to 2.3 m by 2.3 m by 12 m, weighing 500 kg or more but not over 40 metric tons (described in statistical reporting number 8439.99.1000)

(xxi) Guides of stainless steel, designed for locating conveyer belts on papermaking machines, each with a moving arm with an actuator and front and back units with mounting holes for tube roll bearing houses, each with dimensions ranging from 40

cm by 50 cm by 30 cm to 1 m by 1 m by 50 cm, weighing 300 kg or more but not over 500 kg (described in statistical reporting number 8439.99.1000)

(xxii) Rollers of steel and cast iron ("nip rollers") with bearing journals on either end, designed for use in paper manufacturing to mechanically compress paper web to remove water or impart desired mechanical properties in paper web, each with a polymer cover, the foregoing with length of 7 m or more but not over 12 m, with diameter of 1 m or more but not over 1.5 m, weighing 15 metric tons or more but not over 30 metric tons (described in statistical reporting number 8439.99.1000)

(xxiii) Open containers ("savealls") of stainless steel, designed to catch water run off generated in the papermaking process, constructed of large square shaped plates and flat constructions with mounting holes on ends, each with dimensions ranging from 50 cm by 50 cm by 50 cm to 1.5 m by 1 m by 10 m, weighing 50 kg or more but not over 2 metric tons (described in statistical reporting number 8439.99.1000)

(xxiv) Stretchers of stainless steel, designed to move rollers of papermaking machines to adjust tension of fabric, each with a pivoting arm with an actuator, linear rail movement with an actuator and front and back units with mounting holes for tube roll bearing housings (described in statistical reporting number 8439.99.1000)

(xxv) Suction boxes of stainless steel, which remove water from paper web or papermaking fabrics during papermaking, each with dimensions ranging from 50 cm by 50 cm by 8 m to 1 m by 1 m by 10 m, weighing 1.5 metric tons or more but not over 2 metric tons (described in statistical reporting number 8439.99.1000)

(xxvi) Rollers of stainless steel or cast iron, designed for use in paper manufacturing to support and convey papermaking cloth (i.e. fabric) or the paper web, each weighing 7 metric tons or more but not over 20 metric tons, measuring 7 m or more but not over 12 m in length, with diameter of 40 cm or more but not over 1.5 m, presented with bearing journals on either end and a polymer cover (described in statistical reporting number 8439.99.1000)

(xxvii) Workstands designed to use with miter saws, each with metal tube frame, 4 metal legs and 2 metal extension arms (described in statistical reporting number 8466.92.5010)

(xxviii) Workstands designed for use with miter saws, each with wheels to make workstand mobile and with sides that fold up to extend the work area (described in statistical reporting number 8466.92.5010)

(xxix) Angle cock handle assemblies, of iron and steel, each measuring 11.43 cm by 21.59 cm by 5.08 cm and weighing 0.748 kg (described in statistical reporting number 8481.90.9040)

(xxx) Radiation therapy systems, each encased by steel-based structural shell with gantry cover comprising three pairs of plastics-based panels (described in statistical reporting number 9022.14.0000)

(xxxi) Thermostats designed for air conditioning or heating systems, not designed to connect to the internet, the foregoing designed for wall mounting (described in statistical reporting number 9032.10.0030)

3. by amending the last sentence of the first paragraph of U.S. note 20(a) to subchapter III to chapter 99 by inserting after the phrase "imposed by heading 9903.88.01" the following phrase:

", except products of China granted an exclusion by the U.S. Trade Representative and provided for in heading 9903.88.05 and U.S. note 20(h) to subchapter III of chapter 99";

4. by amending the first sentence of U.S. note 20(b) to subchapter III to chapter 99 by inserting after the phrase "the following 8-digit subheadings" the following phrase: ", except products of China granted an exclusion by the U.S. Trade Representative and provided for in heading 9903.88.05 and U.S. note 20(h) to subchapter III of chapter 99"; and

5. by amending the Article Description of heading 9903.88.01:

   a. by deleting: "Articles the product of China," and

   b. inserting in lieu thereof: "Except as provided in heading 9903.88.05, articles the product of China,".

[FR Doc. 2018–28277 Filed 12–27–18; 8:45 am]
BILLING CODE 3290–F9–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. USTR–2018–0037]

Request for Comments and Notice of a Public Hearing Regarding the 2019 Special 301 Review

AGENCY: Office of the United States Trade Representative.

ACTION: Request for comments and notice of public hearing.

SUMMARY: Each year, the Office of the United States Trade Representative (USTR) conducts a Special 301 review to identify countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. Based on this review, the United States Trade Representative (Trade Representative) determines which, if any, of these countries to identify as Priority Foreign Countries. USTR requests written comments that identify acts, policies, or practices that may form the basis of a country's identification as a Priority Foreign Country or placement on the Priority Watch List or Watch List. USTR also requests notices of intent to appear at the public hearing.

DATES:

February 7, 2019 at 11:59 p.m. EST: Deadline for submission of written comments, hearing statements, and notices of intent to appear at the hearing from the public.

February 21, 2019 at 11:59 p.m. EST: Deadline for submission of written comments, hearing statements, and notices of intent to appear at the hearing from foreign governments.

February 27, 2019: The Special 301 Subcommittee will hold a public hearing at the Office of the United State Trade Representative, 1724 F Street NW, Rooms 1&2, Washington, DC. If necessary, the hearing may continue on the next business day. Please consult the USTR website at *https://ustr.gov/issue-areas/intellectual-property/Special-301,* for confirmation of the date and location and the schedule of witnesses. March 5, 2019 at 11:59 p.m. EST: Deadline for submission of post-hearing written comments from persons who testified at the public hearing.

On or about April 26, 2019: USTR will publish the 2019 Special 301 Report within 30 days of the publication of the National Trade Estimate (NTE) Report.

ADDRESSES: USTR strongly encourages electronic submissions made through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the submission instructions in section IV below. The docket number is USTR–2018–0037. For alternatives to on-line submissions, please contact USTR at *Special301@ustr.eop.gov* before transmitting a comment and in advance of the relevant deadline.

FOR FURTHER INFORMATION CONTACT: Sung Chang, Director for Innovation and Intellectual Property, at *special301@ustr.eop.gov.* You can find information about the Special 301 Review at *www.ustr.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 182 of the Trade Act of 1974 (Trade Act) (19 U.S.C. 2242), commonly known as the ''Special 301'' provisions, requires the Trade Representative to identify countries that deny adequate and effective IPR protections or fair and equitable market access to U.S. persons who rely on intellectual property protection. The Trade Act requires the Trade Representative to determine which, if any, of these countries to identify as Priority Foreign Countries. Acts, policies or practices that are the basis of a country's identification as a Priority Foreign Country can be subject to the procedures set out in sections 301–305 of the Trade Act (19 U.S.C. 2411–2415).

In addition, USTR has created a ''Priority Watch List'' and ''Watch List'' to assist the Administration in pursuing the goals of the Special 301 provisions. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons that rely on

intellectual property protection. Trading partners placed on the Priority Watch List are the focus of increased bilateral attention concerning the problem areas.

USTR chairs the Special 301 Subcommittee (Subcommittee) of the Trade Policy Staff Committee. The Subcommittee reviews information from many sources, and consults with and makes recommendations to the Trade Representative on issues arising under Special 301. Written submissions from the public are a key source of information for the Special 301 review process. In 2019, USTR will conduct a public hearing as part of the review process and will allow hearing participants to provide additional information relevant to the review. At the conclusion of the process, USTR will publish the results of the review in a Special 301 Report.

USTR requests that interested persons identify through the process outlined in this notice those countries whose acts, policies, or practices deny adequate and effective protection for intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.

The Special 301 provisions also require the Trade Representative to identify any act, policy, or practice of Canada that affects cultural industries, was adopted or expanded after December 17, 1992, and is actionable under Article 2106 of the North American Free Trade Agreement (NAFTA). USTR invites the public to submit views relevant to this aspect of the review.

The Special 301 provisions require the Trade Representative to identify all such acts, policies, or practices within 30 days of the publication of the NTE Report. In accordance with this statutory requirement, USTR will publish the annual Special 301 Report about April 26, 2019.

II. Public Comments

To facilitate the review, written comments should be as detailed as possible and provide all necessary information to identify and assess the effect of the acts, policies, and practices. USTR invites written comments that provide specific references to laws, regulations, policy statements, including innovation policies, executive, presidential, or other orders, and administrative, court, or other determinations that should factor in the review. USTR also requests that, where relevant, submissions mention particular regions, provinces, states, or other subdivisions of a country in which an act, policy, or practice is believed to warrant special attention. Finally, submissions proposing countries for review should include data, loss estimates, and other information regarding the economic impact on the United States, U.S. industry, and the U.S. workforce caused by the denial of adequate and effective intellectual property protection. Comments that include quantitative loss claims should include the methodology used to calculate the estimated losses.

III. Public Hearing

The Special 301 Subcommittee will convene a public hearing on February 27, 2019, in Rooms 1 and 2, 1724 F Street NW, Washington DC, at which interested persons, including representatives of foreign governments, may appear to provide oral testimony. If necessary, the hearing may continue on the next business day. Because the hearing will take place in Federal facilities, attendees must show photo identification and will be screened for security purposes. Please consult the USTR website at *https://ustr.gov/issue-areas/intellectual-property/Special-301,* to confirm the date and location of the hearing and to obtain copies of the hearing schedule. USTR also will post the transcript and recording of the hearing on the USTR website as soon after the hearing as possible. Witnesses must deliver prepared oral testimony, which is limited to five minutes, before the Special 301 Subcommittee in person and in English. Subcommittee member agencies may ask questions following the prepared statement.

Notices of intent to testify and hearing statements from the public are due on February 7, 2019, and from foreign governments on February 21, 2019. The submissions must be in English and must include: (1) The name, address, telephone number, fax number, email address, and firm or affiliation of the individual wishing to testify, and (2) a hearing statement that is relevant to the Special 301 review.

IV. Submission Instructions

All submissions must be in English and sent electronically via *www.regulations.gov* using docket number USTR–2018–0037. To submit comments, locate the docket (folder) by entering the number USTR–2018–0037 in the 'Enter Keyword or ID' window at the *www.regulations.gov* home page and click 'Search.' The site will provide a search-results page listing all documents associated with this docket. Locate the reference to this notice by selecting 'Notice' under 'Document Type' on the left side of the search-results page, and click on the link entitled 'Comment Now!'.

USTR requests that you provide comments in an attached document, and that you name the file according to the following protocol, as appropriate: Commenter Name, or Organization_ 2019 Special 301_Review_Comment, or Notice of Intent to Testify or Hearing Testimony. Please include the following information in the 'Type Comment' field: ''2019 Special 301 Review'' and whether the submission is a comment, a request to testify at the hearing, or hearing testimony. Please submit documents prepared in (or compatible with) Microsoft Word (.doc) or Adobe Acrobat (.pdf) formats. If you prepare the submission in a compatible format, please indicate the name of the relevant software application in the 'Type Comment' field. For further information on using the *www.regulations.gov* website, please select 'How to Use Regulations.gov' on the bottom of any page.

Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the comment itself, rather than submitting them as separate files.

For any comments that contains business confidential information, the file name of the business confidential version should begin with the characters 'BC'. Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page and the submission should clearly indicate, via brackets, highlighting, or other means, the specific information that is business confidential. A filer requesting business confidential treatment must certify that the information is business confidential and that they would not customarily released it to the public. Additionally, the filer should type 'Business Confidential' in the 'Type Comment' field.

Filers of comments containing business confidential information also must submit a public version of their comments. The file name of the public version should begin with the character 'P'. The 'BC' and 'P' should be followed by the name of the person or entity submitting the comments. Filers submitting comments containing no business confidential information should name their file using the name of the person or entity submitting the comments.

As noted, USTR strongly urges commenters to submit comments

through *www.regulations.gov.* You must make any alternative arrangements before transmitting a document and in advance of the relevant deadline by contacting USTR at *Special301@ustr.eop.gov.*

USTR will place comments in the docket and they will be open to public inspection, except business confidential information. You can view comments on the *www.regulations.gov* website by entering Docket Number USTR–2018–0037 in the 'Search' field on the home page.

Daniel Lee,

Assistant U.S. Trade Representative for Innovation and Intellectual Property (Acting), Office of the United States Trade Representative.

[FR Doc. 2018–28319 Filed 12–27–18; 8:45 am]

BILLING CODE 3290–F9–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2018–0304]

California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers; Petition for Determination of Preemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Order; grant of petition for determination of preemption.

SUMMARY: The FMCSA grants petitions submitted by the American Trucking Associations and the Specialized Carriers and Rigging Association requesting a determination that the State of California's Meal and Rest Break rules (MRB Rules) are preempted under 49 U.S.C. 31141 as applied to property-carrying commercial motor vehicle (CMV) drivers covered by the FMCSA's hours of service regulations. Federal law provides for preemption of State laws on CMV safety that are additional to or more stringent than Federal regulations if they have no safety benefit; are incompatible with Federal regulations; or would cause an unreasonable burden on interstate commerce. The FMCSA has determined that the MRB Rules are laws on CMV safety, that they are more stringent than the Agency's hours of service regulations, that they have no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations, that they are incompatible with the Federal hours of service regulations, and that they cause an unreasonable burden on interstate commerce. The California MRB Rules, therefore, are preempted under 49 U.S.C. 31141(c).

ADDRESSES: You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on December 29, 2010. 75 FR 82132.

FOR FURTHER INFORMATION CONTACT: Charles J. Fromm, Deputy Chief Counsel, Office of the Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, (202) 366–3551; email *Charles.Fromm@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

On September 24, 2018, the American Trucking Associations (ATA) petitioned the Federal Motor Carrier Safety Administration (FMCSA) to preempt California statutes and rules requiring employers to give their employees meal and rest breaks during the work day, as applied to drivers of commercial motor vehicles (CMVs) subject to the FMCSA's hours of service (HOS) regulations. On October 29, 2018, the Specialized Carriers and Rigging Association (SCRA) also filed a petition seeking a preemption determination concerning the same meal and rest break requirements. The SCRA opted to submit a petition in lieu of comments as part of Docket No. FMCSA–2018–0304; therefore, the Agency will not open a separate docket for the SCRA's petition. For the reasons set forth below, the FMCSA grants the petitions insofar as the provisions at issue apply to drivers of property-carrying CMVs subject to the FMCSA's hours of service regulations.[1]

California Meal and Rest Break Rules (MRB Rules)

Section 512, Meal periods, of the California Labor Code reads, in part, as follows:

''(a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

''(b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.''

Section 516 of the California Labor Code reads, in relevant in part, as follows:

''(a) Except as provided in Section 512, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.''

Section 226.7 of the California Labor Code reads, in relevant part, as follows:

''(b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission . . . .

''(c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, . . . the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.''

Section 11090 of Article 9 (Transport Industry) of Group 2 (Industry and Occupation Orders) of Chapter 5 (Industrial Welfare Commission) of Division 1 (Department of Industrial Relations) of Title 8 (Industrial Relations) of the California Code of

[1] While the Agency received comments in support of the ATA's petition from the American Bus Association, Coach USA, Greyhound Lines, and the United Motorcoach Association, this determination of preemption does not apply to drivers of passenger-carrying CMVs in interstate commerce. The Agency, however, would consider any petition asking for a determination as to whether the MRB Rules are preempted with respect to such drivers.

Regulations, is entitled ''Order Regulating Wages, Hours, and Working Conditions in the Transportation Industry'' (hereafter: ''8 CCR 11090'' or ''section 11090'').[2]

Section 11090(11). Meal Periods, reads as follows:

''(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

''(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

''(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

''(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

''(E) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.''

Section 11090(12). Rest Periods, reads as follows:

''(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

''(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.''

[2] California Industrial Welfare Commission Order No. 9–2001 is identical to 8 CCR 11090.

Although section 11090(3)(L) provides that ''[t]he provisions of this section are not applicable to employees whose hours of service are regulated by: (1) The United States Department of Transportation, Code of Federal Regulations, Title 49, sections 395.1 to 395.13, Hours of Service of Drivers,'' the California courts have interpreted the word ''section'' to refer only to section 11090(3), which regulates ''hours and days of work,'' not to all of section 11090, including meal and rest breaks in section 11090(11) and (12). *See Cicairos* v. *Summit Logistics, Inc.,* 133 Cal App.4th 949 (2006).

Federal Preemption Under the Motor Carrier Safety Act of 1984

Section 31141 of title 49, United States Code, a provision of the Motor Carrier Safety Act of 1984 (the 1984 Act), 49 U.S.C. Chap. 311, Subchap. III, prohibits States from enforcing a law or regulation on CMV safety that the Secretary of Transportation (Secretary) has determined to be preempted. To determine whether a State law or regulation is preempted, the Secretary must decide whether a State law or regulation: (1) Has the same effect as a regulation prescribed under 49 U.S.C. 31136, which is the authority for much of the Federal Motor Carrier Safety Regulations; (2) is less stringent than such a regulation; or (3) is additional to or more stringent than such a regulation. 49 U.S.C. 31141(c)(1). If the Secretary determines that a State law or regulation has the same effect as a regulation based on section 31136, it may be enforced. 49 U.S.C. 31141(c)(2). A State law or regulation that is less stringent may not be enforced. 49 U.S.C. 31141(c)(3). And a State law or regulation the Secretary determines to be additional to or more stringent than a regulation based on section 31136 may be enforced unless the Secretary decides that the State law or regulation (1) has no safety benefit; (2) is incompatible with the regulation prescribed by the Secretary; or (3) would cause an unreasonable burden on interstate commerce. 49 U.S.C. 31141(c)(4). To determine whether a State law or regulation will cause an unreasonable burden on interstate commerce, the Secretary may consider the cumulative effect that the State's law or regulation and all similar laws and regulations of other States will have on interstate commerce. 49 U.S.C. 31141(c)(5). The Secretary need only find that one of the conditions set forth at paragraph (c)(4) exists to preempt State the provision(s) at issue. The Secretary may review a State law or regulation on her own initiative, or on the petition of an interested person. 49 U.S.C. 31141(g). The Secretary's authority under section 31141 is delegated to the FMCSA Administrator by 49 CFR 1.87(f).

Federal Motor Carrier Safety Regulations (FMCSRs) Concerning Breaks, Fatigue, and Coercion

For truck drivers operating a CMV in interstate commerce, the Federal HOS rules impose daily limits on driving time. 49 CFR 395.3. In addition, the HOS rules require long-haul truck drivers operating a CMV in interstate commerce to take at least 30 minutes off duty no later than 8 hours after coming on duty if they wish to continue driving after the 8th hour.[3] 49 CFR 395.3(a)(3)(ii). The HOS regulations also impose both daily and weekly limits after which driving is prohibited. There are separate HOS regulations, imposing different limits on driving time, for drivers of passenger-carrying CMVs. 49 CFR 395.5.

In addition, the FMCSRs also prohibit a driver from operating a CMV, and a motor carrier from requiring a driver to operate a CMV, while the driver is impaired by illness, fatigue, or other cause, such that it is unsafe for the driver to begin or continue operating the CMV. 49 CFR 392.3. The FMCSRs also prohibit a motor carrier, shipper, receiver or transportation intermediary from coercing a driver to operate a CMV in violation of this and other provisions of the FMCSRs or Hazardous Materials Regulations. 49 CFR 390.6.

The ATA and SCRA Petitions and Comments Received

As set forth more fully below, the ATA argues that California's MRB Rules, as applied to CMV drivers working in interstate commerce, are within the scope of the Secretary's preemption authority under section 31141 because they are laws ''on commercial motor vehicle safety.'' In this regard, the ATA acknowledges that the Agency took the position in 2008 that the MRB Rules at issue cannot be regulations ''on commercial motor vehicle safety'' because they ''cover far more than the trucking industry.'' The ATA contends, however, that the Agency's conclusions in the 2008 Decision do not compel the same result here because the Agency's interpretation of section 31141 was wrong as a matter of statutory interpretation. Additionally, the ATA provides evidence purporting to show that the MRB Rules undermine safety. The ATA also contends that the

[3] The 30-minute rest break requirement does not apply to drivers operating under either of the short-haul exemptions in 49 CFR 395.1(e)(1) or (2).

MRB Rules are incompatible with Federal HOS regulations and impose an unreasonable burden on interstate commerce. The ATA's petition seeks an order declaring that California's MRB Rules, as applied to CMV drivers who are subject to DOT's jurisdiction to regulate hours of service, should be preempted pursuant to 49 U.S.C. 31141(c)(4) and, therefore, may not be enforced.

The SCRA explained that it filed a separate petition, rather than submit comments in support of the ATA's petition, to underscore their organization's concern that FMCSA ''be the final arbiter of whether a state has enacted a standard or regulation that is not identical to the federal standard'' and that the Agency should preempt State laws and regulations that are not compatible with the FMCSRs. The SCRA stated that the organization supports the ATA's arguments, and much of the SCRA's petition advanced the argument that the MRB Rules are more stringent than the FMCSRs and are incompatible. The petition requests that the Agency:

> [D]eclar[e] California's Meal and Rest Break requirements are preempted from being applied to drivers subject to the HOS regulations on rest breaks, and order that California, or any representative authorized under the Labor Code Private Attorneys General Act of 2004, is not authorized to legally enforce any conflicting provisions related to California's Meal and Rest Break requirements.

The SCRA also contends that the Agency ''should also be willing to initiate a proceeding under 49 CFR 350.215'' to withhold Motor Carrier Safety Assistance Program grant funds from ''states with non-compatible state motor carrier safety laws.''

The FMCSA published a notice in the **Federal Register** on October 4, 2018 seeking public comment on whether the MRB Rules are preempted by Federal law. 83 FR 50142. Although preemption under section 31141 is a legal determination reserved to the judgment of the Agency, the FMCSA voluntarily sought comment on issues relevant to the preemption determination, including what effect, if any, California's MRB Rules have on interstate motor carrier operations. The public comment period closed on October 29, 2018.

The Agency received more than 700 comments, including submissions from more than 120 organizations.[4] While the public comment period ended on October 29, the Agency continued to accept public comments until November 5. Approximately half of the organizations that commented support preemption of the MRB Rules and half opposed. Of the individuals who commented, approximately 94% support preemption while 6% expressed opposition. In addition, the Agency received 9 letters from 68 members of Congress.

The Agency's Prior Position Regarding Preemption Under Section 31141

I. The FMCSA's December 24, 2008 Decision Rejecting a Petition for a Preemption Determination

On July 3, 2008, a group of motor carriers[5] petitioned the FMCSA for a determination under 49 U.S.C. 31141(c) that: (1) The California MRB Rules are regulations on CMV safety, (2) the putative State regulation imposes limitations on a driver's time that are different from and more stringent than Federal ''hours of service'' regulations governing the time a driver may remain on duty, and (3) that the State law should therefore be preempted. 73 FR 79204. The Agency denied the petition for preemption, reasoning that the MRB Rules are merely one part of California's comprehensive regulation of wages, hours, and working conditions, and that they apply to employers in many other industries in addition to motor carriers. The FMCSA concluded that the MRB Rules were not regulations ''on commercial motor vehicle safety'' within the meaning of 49 U.S.C. 31141 because they applied broadly to all employers and not just motor carriers, and that they therefore were not within the scope of the Secretary's statutory authority to declare unenforceable a State motor vehicle safety regulation that is inconsistent with Federal safety requirements. 73 FR 79204.

II. Dilts v. *Penske Logistics, LLC, United States Court of Appeals for the Ninth Circuit, No. 12–55705 (2014)*

In *Dilts* v. *Penske Logistics,* the plaintiffs, 349 delivery drivers and installers, filed a class action lawsuit against the defendants, Penske Logistics, LLC, and Penske Truck Leasing Co. alleging that they routinely violate the MRB Rules. The defendants argued that the MRB Rules as applied to motor carriers were preempted under the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. 14501(c), because the provisions at issue were related to prices, routes, or services. The United States Court of Appeals for the Ninth Circuit invited the United States to file a brief as amicus curiae (*Dilts* amicus brief).

In the *Dilts* amicus brief, the United States argued that: (1) State laws like California's, which do not directly regulate prices, routes, or services, are not preempted by the FAAAA unless they have a ''significant effect'' on prices, routes, or services; (2) in the absence of explicit instructions from Congress, there is a presumption against preemption in areas of traditional State police power, including employment; (3) there was no showing of an actual or likely significant effect on prices, routes, or services with respect to the short-haul drivers at issue in the case, and so the California laws at issue were not preempted by the FAAAA; and (4) the preemption analysis might be different with respect to long-haul or interstate drivers.

The United States also explained that the FMCSA continued to adhere to the view expressed in the 2008 Decision that the MRB Rules were not preempted by section 31141 of the 1984 Act because they were not laws ''on commercial motor vehicle safety.'' In addition, the United States stated that the MRB provisions, as applied to the plaintiffs in *Dilts,* did not run afoul of general Supremacy Clause principles of conflict preemption because the drivers in question were not subject to the Agency's HOS regulations, as they were either short-haul or intrastate long-haul drivers. Therefore, the *Dilts* amicus brief explained that the application of the MRB Rules had little if any effect on the ability of the *Dilts* plaintiffs to comply with Federal regulatory standards.

The Ninth Circuit concluded that the FAAAA did not preempt California's MRB Rules, as applied to the plaintiff drivers, because those State laws were not ''related to'' the defendants' prices, routes, or services. The Ninth Circuit made no determination whether the MRB Rules were within the scope of the Secretary's preemption authority under section 31141 because that question was not before the Court.

Decision

At the outset, the FMCSA notes that several commenters contend that the MRB Rules are subject to a presumption against preemption. The FMCSA acknowledges that ''in all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [there] is an assumption that the historic

[4] Some comment letters were joined by multiple organizations, including one letter from the Center for Justice and Democracy opposing the ATA's petition, which was joined by 39 organizations.

[5] Affinity Logistics Corp.; Cardinal Logistics Management Corp.; C.R. England, Inc.; Diakon Logistics (Delaware), Inc.; Estenson Logistics, LLC; McLane Company, Inc.; McLane/Suneast, Inc.; Penske Logistics, LLC; Penske Truck Leasing Co., L.P.; Trimac Transportation Services (Western), Inc.; and Velocity Express, Inc.

police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'' *Wyeth* v. *Levine,* 555 U.S. 555, 565 (2009) (alterations omitted). That presumption does not apply here, however, because section 31141 is an express preemption provision. When a ''statute contains an express pre-emption clause, [courts] do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'' *Puerto Rico* v. *Franklin California Tax-Free Trust,* 136 S. Ct. 1938, 1946 (2016) (quotations omitted). Thus, the question that the FMCSA must answer is whether the MRB Rules are subject to preemption under section 31141.

I. The California Meal and Rest Break Provisions Are Laws or Regulations ''On Commercial Motor Vehicle Safety'' Within the Meaning of 49 U.S.C. 31141

The initial question in a preemption analysis under section 31141 is whether the provisions at issue are laws or regulations ''on commercial motor vehicle safety.'' 49 U.S.C. 31141(c)(1). The ATA argues that California's MRB Rules, as applied to CMV drivers subject to the FMCSA's HOS regulations, are rules on commercial motor vehicle safety subject to review under section 31141. In this regard, the ATA contends that both the text of section 31141 and its structural relationship with other statutory provisions make it clear that Congress's intended scope of section 31141 was broader than the construction the Agency gave it in the 2008 Decision. The ATA points out that the language of section 31141 mirrors that of 49 U.S.C. 31136, which instructs the Secretary to ''prescribe regulations on commercial motor vehicle safety.'' 49 U.S.C. 31136(a). Thus, the ATA contends that State laws and regulations covering the same ground as Federal regulations promulgated under section 31136 are precisely what Congress had in mind when it enacted section 31141.

The FMCSA agrees. The ''on commercial motor vehicle safety'' language of section 31141 mirrors that of section 31136, and by tying the scope of the Secretary's preemption authority directly to the scope of the Secretary's authority to regulate the CMV industry, the Agency believes that Congress provided a framework for determining whether a State law or regulation is subject to section 31141. In other words, if the State law or regulation imposes requirements in an area of regulation that is already addressed by a regulation promulgated under 31136, then the State law or regulation is a regulation ''on commercial motor vehicle safety.'' Because California's MRB Rules impose the same types of restrictions on CMV driver duty and driving times as the FMCSA's HOS regulations, which were enacted pursuant to the Secretary's authority in section 31136, they are ''regulations on commercial motor vehicle safety.'' Thus, the MRB Rules are ''State law[s] or regulation[s] on commercial motor vehicle safety,'' and are subject to review under section 31141.

In the 2008 Decision, the Agency narrowly construed section 31141 to conclude that because the MRB Rules are ''one part of California's comprehensive regulations governing wages, hours and working conditions,'' and apply to employers in many other industries in addition to motor carriers, the provisions are not regulations ''on commercial motor vehicle safety,'' and, thus, were not within the scope of the Secretary's preemption authority. The FMCSA has reconsidered this conclusion. There is nothing in the statutory language or legislative history that supports such a limitation. To the contrary, the statutory language refers only to a ''State law or regulation on commercial motor vehicle safety,'' and, the legislative history of the 1984 Act clearly expresses Congress's intent that ''there be as much uniformity as practicable whenever a Federal standard and a State requirement cover the same subject matter.'' *See* S. Rep. No. 98–424, at 14 (1984).

The 2008 Decision rejected the claim, made by the petitioners in that case, that ''the FMCSA has power to preempt any state law or regulation that regulates or affects any matters within the agency's broad Congressional grant of authority.'' 73 FR at 79206. The FMCSA stated that if it ''were to take such a position, any number of State laws would be subject to challenge.'' The Agency observed, for example, that ''it is conceivable that high State taxes and emission controls could affect a motor carrier's financial ability to maintain compliance with the . . . FMCSRs,'' and doubted that the FMCSA has ''the authority to preempt State tax or environmental laws.'' 73 FR at 79206. The FMCSA, however, has determined that its prior position was unnecessarily restrictive and that it can determine that the MRB Rules are subject to section 31141 preemption without deciding whether section 31141 covers State tax laws, environmental laws, or other laws that ''affect'' CMV safety. As explained above, the MRB Rules impose the same types of work limitation requirements as the FMCSA's HOS regulations; thus, just as the HOS regulations are ''regulations on commercial motor vehicle safety'' prescribed under section 31136, the California MRB Rules are ''law[s] or regulation[s] on commercial motor vehicle safety'' covered by section 31141. This determination does not rely on a broad interpretation of section 31141 as applicable to any State law that ''affects'' CMV safety.[6]

California's Labor Commissioner, California's Attorney General, the American Association for Justice (AAJ), the International Brotherhood of Teamsters, and other commenters who oppose the ATA's petition argue that the Agency's analysis and conclusions in the 2008 Decision and in the *Dilts* amicus brief were correct, and that FMCSA should not deviate from its legal position therein regarding the scope of the Secretary's preemption authority under section 31141.

Although the commenters opposing preemption accurately summarize the Agency's prior position on whether California's MRB Rules are preempted, the Agency's position need not forever remain static. It is well-settled that ''[a]n initial agency interpretation is not instantly carved in stone''; on the contrary, an agency must consider varying interpretations and the wisdom of its policy on a continuing basis. *See Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 863–64 (1984). When an agency changes course, it must provide a ''reasoned analysis for the change.'' *See Motor Vehicle Manufacturers* v. *State Farm,* 463 U.S. 29, 42 (1983). The Supreme Court has rejected the idea that an agency interpretation requires greater justification, or is subject to more searching review, merely because it represents a change from the agency's prior view. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514–16 (2009). Instead, an agency advancing a changed interpretation must acknowledge the change, and provide a reasoned explanation of why the agency believes the new interpretation is better than the old. *Ibid.* Here, the FMCSA has reconsidered its interpretation of section 31141 as applied to California's MRB Rules, and this decision explains the

[6] The 2008 Decision also rejected the petitioners' claims that the California MRB Rules undermined safety, and that the rules were subject to preemption because they ''prevent carriers from maximizing their employees' driving and on-duty time.'' 73 FR 79204, 79205 n.3, 79206. It does not appear that the Agency relied on these points when determining that the MRB Rules were not regulations ''on commercial motor vehicle safety.'' To the extent the points are relevant to the other portions of this analysis, they are discussed below.

basis for reconsidering its previous position.[7]

In her comments opposing the ATA's petition, the California Labor Commissioner argues:

> In the decade that the FMCSA has adhered to this position, Congress has failed to amend 49 U.S.C. 31141 to give the FMCSA the power to declare a wider range of State laws and regulations unenforceable. This Congressional inaction suggests the conclusion that FMCSA's views on the limited extent of its authority, as announced in 2008 and again in 2014, has the support of Congress.

The Agency is unpersuaded by this argument. The Supreme Court has explained that ''Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction . . . .'' *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N. A.,* 511 U.S. 164, 187 (1994) (internal quotations omitted); *see also Rapanos* v. *United States,* 547 U.S. 715, 750 (noting that while the Supreme Court has ''sometimes relied on congressional acquiescence when there is evidence that Congress considered and rejected the '*precise* issue' presented before the Court,'' it does so only when there is ''*overwhelming evidence* of acquiescence'') (emphases in original). Here, the California Labor Commissioner presents no evidence that Congress has considered the appropriateness of the 2008 Decision's determination that the California MRB Rules were not covered by section 31141. Thus, what the California Labor Commissioner portrays as the ''support of Congress'' ''should more appropriately be called Congress' failure to express any opinion.'' *Ibid.*

The FMCSA's departure from the 2008 Decision is also supported by intervening events. In December 2011, approximately 3 years after issuing the 2008 Decision, the FMCSA revised the Federal HOS regulations. Among other changes, the 2011 final rule generally prohibits CMV drivers from operating property-carrying commercial motor vehicles if more than eight hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30-minutes, commonly referred to as a ''rest period.'' 76 FR 81134, 81186; 49 CFR 395.3(a)(3)(ii). Prior to the 2011 revisions, the Federal HOS regulations contained no provisions requiring a mandatory rest period. The Agency cited the Secretary's regulatory authority under section 31136 and 49 U.S.C. 31502 as the legal basis for implementing the Federal HOS 30-minute off-duty or sleeper berth rest period. The Federal HOS regulations, including the required 30-minute rest period provision, are unquestionably rules ''on commercial motor vehicle safety'' under section 31136, and are part of the baseline against which Congress instructed the Agency to compare State rules under section 31141. Because the MRB Rules govern the same subject matter as the Federal HOS regulations, the FMCSA considers them to be rules ''on commercial motor vehicle safety'' as applied to property-carrying CMV drivers that are within the Agency's HOS jurisdiction and, thus, they are subject to preemption review under section 31141.

As the California Employment Lawyers Association pointed out, the Federal HOS regulations are within the Secretary's authority because they ''would improve highway safety and the health of CMV drivers.'' The Agency notes that in her comments on this petition, the California Labor Commissioner acknowledged that the MRB Rules improve driver and public safety stating, ''It is beyond doubt that California's meal and rest period requirements promote driver and public safety.'' In addition, the ATA argues in a supplemental submission, that the Labor Commissioner made a similar statement in a preemption proceeding concerning the MRB Rules before the Pipeline and Hazardous Materials Administration. 83 FR 47961. There, she stated that the MRB Rules are ''designed to ensure that workers have sufficient rest and break-time in order to perform their jobs safely.'' The Agency applauds California's commitment to driver and public safety; however, the Labor Commissioner admits that the MRB Rules are, in fact, laws on CMV safety. Thus, the Labor Commissioner's statements are new information, received well after the 2008 Decision, that further demonstrate that the MRB Rules are rules ''on motor carrier safety'' and therefore fall squarely within the scope of the Secretary's preemption authority.

Finally, the AAJ commented that the ATA's petition is inconsistent with its previous position in the ATA's own amicus brief in *Dilts.* Specifically, the AAJ contends that the ATA took the position in *Dilts* that there was no evidence that the break requirements at issue were intended to address motor vehicle safety, and that the break requirements are not responsive to any such concerns. But the question of whether the *ATA* is taking inconsistent positions is not relevant to the *FMCSA's* analysis. While the FMCSA is considering this matter upon a petition, it is not adjudicating a dispute between private parties; instead, it is exercising its own statutory responsibility to review State laws or regulations. Thus, the FMCSA must reach what it believes to be the correct legal conclusion in the matter presently before it, regardless of the ATA's prior positions. The FMCSA notes, moreover, that the prior ATA argument cited by the AAJ related to 49 U.S.C. 14501(c)(2)(A), which provides that the FAAAA's preemption provision ''shall not restrict the safety regulatory authority of a State with respect to motor vehicles''; this language does not necessarily have the same scope as section 31141.[8]

II. The MRB Rules Are ''Additional to or More Stringent Than'' the Agency's HOS Regulations Within the Meaning of Section 31141

Having concluded that the California MRB Rules are rules ''on commercial motor vehicle safety,'' under section 31141, the Agency next must decide whether the MRB Rules have the same effect as, are less stringent than, or are additional to or more stringent than the Federal HOS regulations. 49 U.S.C. 31141(c)(1). The ATA and the SCRA argue that the MRB Rules are ''additional to or more stringent than'' the Agency's HOS regulations because they impose additional obligations. As discussed more fully below, the FMCSA agrees. The MRB Rules require employers to provide CMV drivers with more rest breaks than the Federal HOS regulations, and they allow a smaller window of driving time before a break is required. For these reasons, the MRB Rules do not have the same effect and are not less stringent than the Federal HOS regulations, and instead are additional to or more stringent than the HOS regulations.

Although the California Labor Commissioner contends that the ATA

[7] An agency may also be required to consider whether ''its prior policy has engendered serious reliance interests that must be taken into account.'' *Fox,* 556 U.S. at 515. Here, no commenter has argued that the FMCSA's prior position has ''engendered serious reliance interests,'' and the FMCSA is aware of no such interests. In any event, the existence of reliance interests would not change the FMCSA's view that California's MRB Rules are covered by section 31141.

[8] Sections 14501(c)(2)(A) and 31141 do not necessarily have the same scope because the two provisions were enacted to achieve different purposes. Section 14501(c)(2)(A) serves to ensure that the preemption of States' economic authority over motor carriers of property not infringe upon a State's exercise of its traditional police power over safety. *See City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.,* 536 U.S. 424, 426 (2002). As explained above, however, Congress enacted the 1984 Act, which includes section 31141, to ensure that there be as much uniformity as practicable whenever a Federal standard and a State requirement cover the same subject matter.

exaggerates the requirements imposed by the MRB Rules, she does not deny that the MRB Rules provide for more breaks than the HOS regulations. She argues, however, that the MRB Rules are not ''additional to or more stringent than'' the Agency's HOS regulations, within the meaning of 49 U.S.C. 31141(c), because under the MRB Rules, employers are obligated to either provide required meal and rest periods, or pay higher wages. She further explains that while California permits employers to pay higher wages as an alternative to complying with the MRB Rules, FMCSA's HOS regulations contain a flat prohibition on driving after more than 8 hours on duty without a 30-minute rest period, and thus the MRB Rules are not more stringent that the HOS regulations. Some organizations and drivers who oppose the ATA's petition echo this argument.

The Agency disagrees with this position. California law provides that an employer ''*shall not*'' require an employee to work during a mandated meal or rest break, and provides for additional pay as a remedy for violating that prohibition. Cal. Labor Code 226.7(b)–(c) (emphasis added). The California Supreme Court has held—in a decision not mentioned by the Labor Commissioner—that section 226.7 ''does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay,'' and that ''an employer's provision of an additional hour of pay does not excuse a section 226.7 violation.'' *Kirby* v. *Immoos Fire Protection, Inc.,* 274 P.3d 1160, 1168 (Cal. 2012) (emphasis in original). This ruling is not undercut by the two cases cited by the Labor Commissioner. While it is true that the California Supreme Court stated in *Augustus* v. *ABM Security Services, Inc.* that ''employers who find it especially burdensome to relieve their employees of all duties during rest periods'' could provide the extra hour of pay, it emphasized that this ''option[ ] should be the exception rather than rule, to be used'' only in the context of ''irregular or unexpected circumstances such as emergencies.'' 385 P.3d 823, 834 & n.14 (Cal. 2016). And while the California Supreme Court in *Murphy* v. *Kenneth Cole Prods., Inc.* held that the extra hour of pay is ''wages'' for statute of limitations purposes, that ruling predated *Kirby* by six years, and is not inconsistent with *Kirby's* holding that an employer does not have a lawful choice to ignore the MRB Rules. Indeed, the California Supreme Court in *Kirby* specifically noted that its decision was consistent with *Murphy. See Kirby,* 274 P.3d at 1168 (''[T]o say that a section 226.7 remedy is a wage . . . is not to stay that the *legal violation* triggering the remedy is nonpayment of wages. As explained above, the legal violation is nonprovision of meal or rest breaks . . . .''). Accordingly, the MRB Rules do not give employers the option of either complying with the requirements or providing penalty pay. The MRB Rules therefore are ''additional to or more stringent than'' the HOS regulations.[9]

III. The MRB Rules Have No Safety Benefits That Extend Beyond Those Provided by the FMCSRs

Because the MRB Rules are more stringent than the Federal HOS regulations, they may be enforced *unless* the Agency also decides either that the MRB Rules have no safety benefit, that they are incompatible with the HOS regulations, or that enforcement of the MRB Rules would cause an unreasonable burden on interstate commerce. 49 U.S.C. 31141(c)(4). The Agency need only find that one of the aforementioned conditions exists to preempt the MRB Rules. 49 U.S.C. 31141(c)(4).

Section 31141 authorizes the Secretary to preempt the MRB Rules if they have ''no safety benefit.'' 49 U.S.C. 31141(c)(4)(A). The FMCSA interprets this language as applying to any State law or regulation that provides no safety benefit *beyond* the safety benefit already provided by the relevant FMCSA regulations. While the plain statutory language could be read as applying only to State laws or regulations with no safety benefit *at all,* such a reading would render section 31141(c)(4)(A) a nullity, since every State law or regulation that is ''additional to or more stringent'' than an FMCSA regulation necessarily provides at least the safety benefits of the FMCSA regulation. A State law or regulation need not have a negative safety impact to be preempted under section 31141(c)(4)(A), although a law or regulation with a negative safety impact would be preempted.

A. Fatigue

The ATA and the SCRA argue that imposition of California's MRB Rules on CMV drivers constitutes a threat to highway safety by specifying breaks at arbitrary times rather than when they are most needed. In this regard, the ATA contends that having to take multiple breaks at arbitrary intervals when they are not needed is a strong disincentive for a CMV driver to take breaks when they are needed. In addition, the ATA argues that ''by consuming significant amounts of what would otherwise be productive time permitted under the federal HOS rules, the California rules extend a driver's day significantly.'' [10]

The Labor Commissioner, the AAJ, the Transportation Trades Department/AFL–CIO (TTD), and other commenters dispute the ATA's argument that the MRB Rules provide no safety benefit. Commenters in opposition to the petition overwhelmingly argue that the MRB Rules benefit highway safety because they combat driver fatigue. The Labor Commissioner, Worksafe, and the AAJ cite studies by the National Transportation Safety Board, academia, and others to show that CMV drivers' safety performance can easily deteriorate due to fatigue.

The FMCSA need not resolve the arguments by the ATA and the SCRA that the MRB Rules pose a threat to highway safety with regard to fatigued driving, because the Agency determines that the MRB Rules provide no safety benefit beyond the safety benefit already provided by the Federal HOS regulations and other provisions of the FMCSRs. Here, the MRB Rules generally require that drivers be given a 30-minute meal break every five hours, as well as an additional 10-minute rest break every four hours. The FMCSRs require drivers to take a 30-minute rest break within 8 hours of coming on duty, 49 CFR 395.3(a)(3)(ii), and they provide for rest by prohibiting a driver from operating a CMV if she feels too fatigued or is otherwise unable to safely drive. 49 CFR 392.3. Additionally, employers are prohibited from coercing a driver too fatigued to operate the CMV safely to remain behind the wheel or otherwise violate the FMCSRs. 49 CFR 390.6. The Agency appreciates the dangers of fatigued driving. As the ATA pointed out, the FMCSRs allow the driver a 30-minute rest when needed at any time

[9] Even if employers did have an option of either complying with the MRB Rules or paying a penalty, the MRB Rules would still be ''additional to or more stringent than'' the HOS regulations, since the MRB Rules would either: (1) Require that employers provide breaks not required by the HOS regulations; or (2) pay a penalty not required by the HOS regulations.

[10] To illustrate this point, the ATA cites the example of a driver who starts her day at 7 a.m. Operating solely under the MRB Rules, the driver would have a required 10-minute break as close as practicable to 9 a.m., a 30-minute break some time before noon, a second 10-minute break as close as practicable to 1 p.m., and another 30-minute break some time before 5 p.m., for a total of 80 minutes. The ATA estimated that a driver would also spend an additional 5 minutes on either side of a break to find parking and return to the highway for an additional 30 minutes. Considering the amount of break time required by the MRB Rules, the ATA estimates that a driver's work day would have to be extended by 80 minutes to accomplish the same amount of work.

during an 8-hour driving interval, as well as other breaks, of no set time limit. The FMCSRs, moreover, prohibit drivers of property-carrying vehicles from driving more than 11 hours during a 14-hour shift, require them to take at least 10 hours off between 14-hour shifts, and prohibit them from exceeding certain caps on weekly on-duty time. 49 CFR 395.3. California's additional requirements that breaks be of specific durations, and occur within specific intervals, do not provide additional safety benefits.

In establishing the Federal rest break requirement in 2011, the Agency adjusted its initial proposal from requiring the rest break to occur within the first 7 hours of a work shift in response to ''numerous comments about the breaks, primarily from team drivers.'' 76 FR 81134, 81145. After balancing the need to prevent excessive hours of continuous driving with a driver's need for flexibility in scheduling a rest break, the Agency ultimately determined that an 8-hour driving window was appropriate to provide ''drivers [with] great flexibility in deciding when to take the break . . . [and to] make it significantly easier for team drivers to coordinate their sleeper-berth periods and . . . enable drivers who do not drive late into their work shift to dispense with a break altogether.'' 76 FR 81134, 81146. Here, the MRB Rules abrogate the flexibilities the Agency purposefully built into the Federal HOS Rules regarding when a driver is required to take a 30-minute rest period, and they graft onto the Federal HOS regulations a requirement for additional 10-minute rest breaks. While the Labor Commissioner cites studies, statistics and recommendations from the NTSB, academia, and the FMCSA tending to show that drowsy driving causes crashes, the Agency has reached the same conclusion, hence the off-duty break requirement in the HOS regulations and the explicit prohibition against fatigued driving. Therefore, FMCSA determines that the MRB Rules do not provide a safety benefit not already realized under the FMCSRs.

B. Parking

The ATA argues the MRB Rules also negatively impact safety by arbitrarily forcing trucks off the road more frequently, thus contributing to a critical shortage of safe truck parking. In support, the ATA cites of number recent of studies that were published after the Agency's 2008 Decision and the 2014 *Dilts* amicus brief. In this regard, Congress enacted ''Jason's Law'' in 2012 as part of the Moving Ahead for Progress in the 21st Century Act, Public. Law. 112–141 1401(c), which required the DOT to ''evaluate the capability of [each] State to provide adequate parking and rest facilities for commercial motor vehicles engaged in interstate transportation.'' The Federal Highway Administration (FHWA) issued the report in 2015, which stated:

> Truck parking shortages are a national safety concern. An inadequate supply of truck parking spaces can result in two negative consequences: First, tired truck drivers may continue to drive because they have difficulty finding a place to park for rest and, second, truck drivers may choose to park at unsafe locations, such as on the shoulder of the road, exit ramps, or vacant lots, if they are unable to locate official, available parking.

See Federal Highway Administration, Jason's Law Truck Parking Survey Results and Comparative Analysis 1–2 (Aug. 2015) (Jason's Law Report), available at *https://ops.fhwa.dot.gov/freight/infrastructure/truck_parking/jasons_law/truckparkingsurvey/jasons_law.pdf.*

The FHWA's Jason's Law Report also found that ''[m]ore than 75 percent of truck drivers . . . reported regularly experiencing problems with finding safe parking locations when rest was needed,'' and that ''[n]inety percent reported struggling to find safe and available parking during night hours.'' *Ibid.* at viii. The report further noted that nearly 80% of drivers reported that they have difficulty finding parking at least once per week. *Ibid.* at 66. Additionally, the Jason's Law Report showed that as many as 94% of State motor carrier safety officials surveyed identified locations used by commercial drivers for unofficial or illegal parking. *Ibid.* at 60. Of those locations, over three quarters were highway ramps or shoulders, *Ibid.* at 61, and the vast majority of unofficial parking happened at night or in the early morning hours, *Ibid.* at 62.

The ATA also cited other recent studies and statistics showing the negative safety impacts associated with inadequate parking for CMVs:

- A 2016 report finding that 83.9% of surveyed drivers park in an unauthorized location at least once each week, and nearly half—48.7%—three or more times per week. C. Boris et al., Managing Critical Truck Parking Case Study—Real World Insights from Truck Parking Diaries (2016), available at *http://atri-online.org/wp-content/uploads/2016/12/ATRI-Truck-Parking-Case-Study-Insights-12-2016.pdf.*
- A 2016 survey of drivers by the Washington State Department of Transportation showing that more than 60% of drivers reported that at least three times per week they drive while fatigued because they are unable to find adequate parking when they need to rest. WSDOT Truck Parking Survey (Aug. 2016), available at *http://www.wsdot.wa.gov/NR/rdonlyres/D2A7680F-ED90-47D9-AD13-4965D6D6BD84/114207/TruckParkingSurvey2016_web2.pdf.*
- A 2017 report prepared for the FHWA and the Oregon Department of Transportation that noted that the safety hazard of the truck parking shortage in Oregon ''increases closer to the California border,'' where ''more crashes are occurring,'' likely as ''a result of encountering troubles finding safe and adequate parking in Southern Oregon.'' S. Hernandez & J. Anderson, Truck Parking: An Emerging Safety Hazard to Highway Users (July 2017).

In the 2014 *Dilts* amicus brief, the Agency opined that long haul CMV drivers would be using interstates or other major highways where periodic rest stops capable of accommodating a large truck are available. However, the studies cited by the ATA, of which the Agency did not have the benefit in 2014, show that the shortage of parking for CMVs continues to be a pressing highway safety issue. The studies cited by the ATA demonstrate that inadequate truck parking will often mean that drivers face a choice between driving while fatigued or parking where their vehicles will present a hazard for other motorists. Indeed, as the Washington State Department of Transportation Study shows, of those sampled, most drivers reported spending more time behind the wheel driving fatigued due to a lack of safe parking. The Jason's Law Report also demonstrates that drivers will have to resort to unsafe, unauthorized locations—such as shoulders and ramps—where they present a serious hazard to other highway users due to the shortage of safe, authorized parking spaces. The report explained that ''[v]ehicles parked on the shoulders . . . are a serious potential hazard to other motorists because they are fixed objects within the roadway cross-section that are unprotected by a barrier or horizontal buffer area.'' *See* Jason's Law Report at 7. In addition, ''[w]hen trucks park on shoulders or ramps . . . , maneuvering in and out of traffic . . . poses safety risks to the truck driver and other vehicles due to the mix of higher speed traffic and the slower speeds of the trucks in and out of these areas.'' *Ibid.*

Further illustrating this point, some commenters have also described how the shortage of available parking for CMVs has resulted in drivers having to park in locations that pose a potential

safety hazard. In this regard, the Arkansas Trucking Association, Covenant Transport, Hercules Forwarding, International Foodservice Distributors Association, National Restaurant Association, and the Sysco Corporation commented that their drivers have to park at roadside increasing the risk of motorist accidents and injuries when safer parking options are unavailable due to the CMV parking shortage. In addition, Dealer's Choice Truckaway System, the International Warehouse Logistics Association, Tiger Lines, CRST International, and United Road specifically state that the shortage of available CMV parking in California results in their drivers having to park at unsafe locations. The International Warehouse Logistics Association explained that a member driver was killed when his CMV was struck by another vehicle after he parked on the shoulder of a roadway to take a mandatory rest break. The National Fraternal Order of Police (NFOP) also commented that ''because of a scattered patchwork of State rules on rest breaks and hours of service, some truck drivers have to take breaks in places that are not optimal for the public or highway.'' The NFOP continued, ''Having one clear and enforceable Federal standard in place for commercial drivers engaged in interstate commerce is important from any safety standpoint, especially on our nation's highways.'' The Truckload Carriers Association cited a recent survey where 95% of 5,400 surveyed drivers stated that they park in unauthorized areas when legal parking is not available. *See* Heavy Duty Trucking, August 29, 2018, *https://www.truckinginfo.com/312029/80-of-drivers-say-elds-make-finding-parking-harder.*

The California Employment Lawyers Association commented that the studies the ATA relies upon fail to show causation, stating, ''Despite the fact that truckers taking rest breaks contribute to the demand for parking, the studies are clear that the cause of the problem is a lack of parking, not State meal and rest break regulations.'' This argument is unpersuasive. Under the Federal HOS regulations, a CMV driver would be required to stop and park once during an 8-hour driving period; however, during a shift of more than 6 and up to 10 hours, the MRB Rules would, at a minimum, require drivers to stop and park 3 times, even though they may not be fatigued.[11] Because there is a current shortage of available parking for CMVs, in order to comply with the MRB Rules drivers may resort to parking at roadside or at an unauthorized location if the break does not coincide with a scheduled stop, and the Jason's Law Report illustrates the inherent dangers to the general public and the driver associated with CMV roadside parking. In fact, the FMCSA discussed the safety impacts associated with the parking shortage for CMVs in a 2015 decision granting the SCRA an exemption from the HOS rest break requirement for oversized loads, stating:

> It is also true that parking shortages affect drivers of many types of vehicle . . . . No matter how well marked, trucks parked at roadside, especially at night, are too often mistaken for moving vehicles and struck, frequently with fatal consequences, before an inattentive driver can correct his mistake. 80 FR 34957.

The Agency reiterated this point in a 2016 decision granting the SCRA a second exemption from the HOS rest break requirements. 81 FR 75727. The cited studies need not show that the CMV parking shortage is a result of the MRB Rules. Irrespective of the cause, the fact remains that there is a shortage of safe parking for CMVs, and the Agency believes that requiring CMV drivers to make triple the number of stops during a 10-hour shift under the MRB Rules compared to the Federal HOS rules, when there is a demonstrated inability for some drivers to safely park, has negative safety implications.

The California Labor Commissioner commented, ''If parking is a problem, surely keeping fatigued drivers on the road because there is nowhere to park is not the answer.'' The Agency agrees with the Labor Commissioner's general premise; in fact, the FMCSRs prohibit a driver from operating a CMV when too fatigued to drive safely. However, as explained above, the Agency believes that the increase in required stops to comply with the MRB Rules, when the driver may not be fatigued, will exacerbate the problem of drivers parking at unsafe locations.

IV. The MRB Rules Are Incompatible With the Federal HOS Regulations

As described above, the MRB Rules must be preempted if the Agency decides that they are ''incompatible with the regulation prescribed by the Secretary.'' 49 U.S.C. 31141(c)(4)(B). Here, the Agency determines that the MRB Rules are incompatible with the Federal HOS regulations.

The legislative history of the 1984 Act clearly expresses Congress's intent that ''there be as much uniformity as practicable whenever a Federal standard and a State requirement cover the same subject matter.'' *See* S. Rep. No. 98–424, at 14 (1984). To that end, in determining whether a State law or regulation is compatible, the Agency applies the definition of ''compatible or compatibility'' in accordance with the Agency's regulations implementing the Motor Carrier Safety Assistance Program (MCSAP), which state, ''Compatible or Compatibility means that State laws and regulations applicable to interstate commerce and to intrastate movement of hazardous materials are identical to the FMCSRs and the HMRs or have the same effect as the FMCSRs . . . .'' 49 CFR 355.5.

The MCSAP was first authorized in sections 401–404 of the Surface Transportation Assistance Act of 1982 (STAA). Public Law 97–424, 96 Stat. 2097, 2154. Section 402 of the STAA authorized the Secretary to make grants to States for the development or implementation of programs for the enforcement of State rules, regulations, standards, and orders applicable to commercial motor vehicle safety that were compatible with Federal requirements. The 1984 Act subsequently authorized the Secretary to preempt incompatible State laws and regulations on commercial motor vehicle safety under section 31141. The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Public Law 102–240, 105 Stat. 1914, reauthorized the MCSAP, and in 1992, the FHWA, the FMCSA's predecessor agency, issued a final rule to implement revisions to the MCSAP as required by the ISTEA, including adopting a definition for ''compatible or compatibility.'' 57 FR 40946. The final rule stated that not only did it serve to implement the requirements of the ISTEA, it also explained:

> This rule does implement express preemption provisions contained in the MCSA of 1984. The preemptive authority therein furthers the goal of national uniformity of commercial motor vehicle safety regulations and their enforcement, as intended by Congress. This intention was evidenced in the STAA of 1982, creating the MCSAP; the review of State commercial motor vehicle safety laws and regulations and determinations of compatibility required by the MCSA of 1984; and the intrastate compatibility provision in section 4002 of the ISTEA.

Because the FHWA promulgated the MCSAP regulations at 49 CFR part 355 to implement the compatibility provision in section 4002 of the ISTEA

[11] Drivers working shifts of more than six hours up to ten hours are entitled to two 10-minute rest periods and one 30-minute meal break. *See* 8 CCR 11090 (11) and (12); *Brinker Rest. Corp.* v. *Superior Court,* 273 P.3d 513, 529–30, 536–38 (Cal. 2012).

and the preemption provisions of the 1984 Act, the Agency believes that 49 CFR 355.5 sets forth the appropriate test for determining whether a State law or regulation is compatible under section 31141. The Agency notes that the compatibility test under section 355.5 is different from ''conflict preemption'' under the Supremacy Clause, where conflict arises when it is impossible to comply with both the State and Federal regulations. Under the MCSAP regulations, the ability to comply with both the State law and the FMCSRs does not make the State law compatible.

Here, both the ATA and the SCRA argue that the MRB Rules are not compatible with the HOS regulations; therefore, they may be preempted. In this regard, the ATA argues:

> The California rules are also incompatible with federal HOS rules. In the regulations it adopted ''[t]o provide guidelines for a continuous regulatory review of State laws and regulations,'' 49 CFR 355.1(b), the Agency has defined ''[c]ompatible or compatibility'' to mean, in relevant part, ''that State laws and regulations applicable to interstate commerce . . . are *identical to* the FMCSRs . . . *or have the same effect as* the FMCSRs,'' *Ibid.* at § 355.5 (emphases added). The California break rules cannot meet this standard: They are indisputably not ''identical to'' the federal break rule, and their effect, as discussed above, is far different.

The SCRA explains, ''The petitioners contend that [compatibility] should be interpreted to require [the provision at issue] not exactly to be identical, but almost identical in every meaningful way, so the state standard could be worded differently as long as it achieved identical requirements.'' The SCRA goes on to argue that while California has taken steps to ensure its other regulations on motor carrier safety are compatible with the FMCSRs, it has failed to bring the MRB Rules into compatibility.

The Agency agrees with the ATA and with the SCRA that the MRB Rules are incompatible with the Federal HOS regulations. As described above, the MRB Rules are more stringent than the Federal HOS regulations; therefore, the requirements are not identical. Not only do the MRB Rules require employers to provide CMV drivers with more rest breaks than the Federal HOS regulations, the timing requirements for rest periods under the MRB Rules provide less flexibility than the Federal HOS regulations. As described more fully above, the Agency determined 8 hours was an appropriate window to require driver to take a 30-minute rest while providing great flexibility to do so. The MRB Rule's requirement that drivers be provided a 30-minute break every five hours, as well as an additional 10-minute rest break every four hours, significantly reduces the flexibilities the Agency built into the Federal HOS regulations, and they graft onto the Federal HOS rules additional required rest breaks that the Agency did not see fit to include. The MRB Rules therefore are not compatible with the Federal HOS regulations.

V. Enforcement of the MRB Rules Would Cause an Unreasonable Burden on Interstate Commerce

The MRB Rules may not be enforced if the Agency decides that enforcing them ''would cause an unreasonable burden on interstate commerce.'' 49 U.S.C. 31141(c)(4)(C). Section 31141 does not prohibit enforcement of a State requirement that places an incidental burden on interstate commerce, only burdens which are unreasonable. In determining whether a State law poses an unreasonable burden on interstate commerce, it is well settled that the Agency should consider whether the burden imposed is clearly excessive in relation to the putative local benefits derived from the State law. *See e.g., Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

A. Decreased Productivity, Administrative Burden, and Costs

The ATA contends that California's rules impose an unreasonable burden on interstate commerce because they ''entail an enormous loss in driver productivity by requiring carriers to provide far more off-duty time within a driver's duty window than the Agency has deemed necessary under the federal rules.'' According to its example described above, the ATA calculates that the MRB Rules would add 80 minutes of additional non-productive time to a driver's ten-hour shift beyond the required 30-minute rest period under the Federal HOS rules, thus reducing a driver's productivity by more than 13%. Citing its 2017 American Trucking Trends statistics, the ATA contends that such a productivity reduction is a massive burden on interstate commerce because in 2016 trucks carried 70.6% of primary shipment domestic tonnage, accounting for 79.8% of the nation's primary shipment freight bill. *See* American Trucking Associations, American Trucking Trends 2017. The ATA further cites statistics compiled by the Port of Oakland Seaport showing that California's three major container ports carry approximately 50% of the nation's total container cargo volume. *See* Port of Oakland Seaport, Facts and Figures, available at *http://www.oaklandseaport.com/performance/facts-figures/* (''California's three major container ports carry approximately 50% of the nation's total container cargo volume''). Given California's share of the national economy and the role of its ports in interstate commerce, the ATA argues that the estimated loss of productivity due to the MRB Rules ''would be more than enough to represent an unreasonable burden on interstate commerce.''

The California Labor Commissioner argues that the ATA overstates the loss of productivity and that the ATA's example incorrectly calculated the amount of break time the MRB Rules would require and employer to provide a driver working a 10-hour shift. In this regard, the Labor Commissioner explained that, rather than the 4 breaks totaling 80 minutes calculated by the ATA, an employer would only be required to provide a driver working a 10-hour shift with 3 breaks totaling 50 minutes.[12] The Labor Commissioner further argues that using the ATA's example, an employer would only have to provide two 10-minute breaks beyond the 30 minute off-duty rest period already required by the Federal HOS regulations.

Other commenters opposing the petition, including the TTD and the California Employment Lawyers Association, argue that the ATA's arguments concerning lost productivity are speculative and unsupported. In this regard, the TTD states that the ATA's argument is nothing more than a '' 'back of the napkin' speculation on lost productivity . . . [that] invokes the theoretical specter of damage to

[12] Citing *Brinker,* the Labor Commissioner explains that the MRB Rules require a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of the employee's 10th hour of work. Thus, in the ATA's example, the employer would only be required to provide one meal period no later than noon and two 10-minute rest breaks. While the ATA and the Labor Commissioner disagree about the specific hypothetical at issue, there are many hypotheticals where the California rules require significantly more break time than the Federal HOS regulations. In *Brinker,* the California Supreme Court explained, ''Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.'' 273 P.3d at 529. Regarding meal breaks, the court explained, ''[S]ection 512 requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work.'' *Ibid.* at 537. Thus, the MRB Rules would require an employer to provide an employee working 12 hours with three 10 minute breaks and two 30-minute meal breaks while the Federal HOS regulations would require one 30 minute off-duty break to be taken within the first 8 hours of driving time.

interstate shipping without evidence.'' The California Employment Lawyers Association commented that the ATA's petition ''cannot cite any actual evidence of any burden they have caused on interstate commerce'' and that ''[u]nsupported conjecture is not a basis for finding preemption pursuant to section 31141(c)(4)–(5).''

At the outset, the Agency acknowledges that the State of California has a legitimate interest in promoting driver and public safety, as the Labor Commissioner explained. However, the Federal HOS rules and the provisions in the FMCSRs relating to fatigued driving and employer coercion serve to promote that interest. The Agency does not dismiss as mere speculation the ATA's argument that the MRB Rules will result in decreased productivity. It is indisputable that the MRB Rules decrease each driver's available duty hours, as the Agency recognized in the *Dilts* amicus brief, as compared to the Federal HOS regulations. *See Dilts* Amicus Brief at 19. In addition, some commenters have provided information describing decreased productivity caused by the MRB Rules, thus bolstering the ATA's argument in this regard. For example, CRST International explained that its carriers move time sensitive freight from ports in California across the nation and, by forcing its drivers to shut down for breaks beyond those required by the Federal HOS regulations, the MRB Rules result in decreased productivity, greater fuel consumption, and increased emissions. In the same vein, The FedEx Corporation stated:

> The California rules have resulted in a costly loss to driver productivity by requiring more off-duty time for drivers than what is deemed necessary by federal rules. Though FedEx networks are carefully engineered to ensure the safe and efficient movement of customers' goods, the state-required breaks prevent Fed Ex companies from using efficient network designs to their full potential.

The FedEx Corporation further explained that in order to take off-duty breaks, the ''drivers must slow down, exit the roadway, find a safe and suitable location to park and secure their vehicles, and then exit the vehicle'' and that the company has to build additional time, up to 90 minutes, into the drivers' routes. Similarly, the National Retail Federation explained that a member company reported that due to the MRB Rules, the company's drivers in California had a 3% reduction in productivity compared to drivers in the balance of the country, which cost the company $1.5 million annually.

Citing a recent study by the American Transportation Research Institute (ATRI) to determine the impact of California's MRB Rules on trucking productivity, New Prime commented:

> Under the ATRI study's methodology, GPS data was used to quantify the unproductive time associated with securing parking during prescribed meal and rest break periods. *See* ATRI, California Truck Parking Analysis (Oct. 2018). The ATRI study employed a sample of eleven truck parking areas in California. By tracking ten trucks with each of these truck stop areas, ATRI determined that, on average, it required 12.5 minutes of additional time to locate a spot and then to return to the highway for continued driving. *Ibid.* at 3. Applying ATRI's $66.65 average cost per hour to operate a commercial vehicle, each required stop comes at a price tag of $13.84 in direct costs.

New Prime further explained that applying ATRI's findings to its business, complying with the MRB Rules it could equate to an annual cost of more than $1.8 million, assuming 180 of the company's trucks had an average of two break stops per day, to be borne by New Prime and its independent contractor drivers. The FMCSA acknowledges that even without the MRB Rules, many drivers would take breaks beyond those required by the HOS regulations. It is nevertheless clear that the MRB Rules require drivers to take more breaks than they otherwise would, and may require those breaks to occur at times they otherwise would not occur.

In addition to decreased productivity resulting from the MRB Rules, some commenters have also provided information about the costs and the administrative burden associated with complying with the MRB Rules. In this regard, C.R. England explained that the company regularly considers whether market forces justify the costs associated with conducting interstate commercial business in California, and explained that the MRB Rules have:

> [R]esulted in additional compliance costs such as additional administrative head count, additional operations headcount, adjustments to the timing and costs of freight delivery and logistics, and costs associated with outside vendors and internal programming and product development, among other things. In addition, the ever complicated and onerous regulatory and legal framework in California, including these break rules, results in significant legal fees and costly litigation.

Similarly, Joval Transportation claims to have stopped conducting business in California due to the excessive regulations. The FedEx Corporation commented, ''California rules on meal periods and rest breaks have required FedEx companies to revise routes, as well as compensation plans and policies, at a great operational cost . . . We have been forced to lengthen routes and driver workdays to accommodate compliant break times and locations.''

Based on the numerous comments received, the FMCSA concludes that the MRB Rules impose significant and substantial costs stemming from decreased productivity and administrative burden.

B. Cumulative Effect of the MRB Rules and Other States' Similar Laws

Section 31141 does not limit the Agency to looking only to the State whose rules are the subject of a preemption determination. The FMCSA ''may consider the effect on interstate commerce of implementation of that law or regulation with the implementation of all similar laws and regulations of other States.'' 49 U.S.C. 31141(c)(5). Here, the ATA argues that the Agency should consider what the cumulative effect would be if all States implemented rules similar to California's MRB Rules. In this regard, the ATA states, ''[T]he proliferation of rules like California's in other states, applied to commercial drivers working in interstate commerce, would increase the associated freight productivity loss enormously, and would represent an even larger burden on interstate commerce.''

To date, 20 States in addition to California regulate, in varying degrees, meal and rest break requirements, as the National Conference of State Legislators, the Center for Justice and Democracy, and other commenters have pointed out.[13] For example, Oregon requires employers to provide meal periods of not less than 30 minutes to non-exempt employees who work 6 or more hours in one shift and a 10-minute rest period for every 4 hours worked.[14] *See* Or. Admin. R. 839–020–0050. In the State of Washington, employers are required to provide non-exempt, nonagricultural employees a meal break of 30 minutes

[13] According to the National Conference of State Legislators, the following States have meal and rest laws: California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Washington, and West Virginia.

[14] In Oregon, no meal period is required if the shift is less than 6 hours, additional meal periods are required to be provided to employees who work 14 hours or more. If the shift is less than seven hours, the meal period must commence between two and five hours from the beginning of the shift. If the work period is more than seven hours, the meal period between three and six hours from the beginning of the shift. These rest and meal period requirements apply to employees 18 years of age and older, and Oregon's rest and meal period requirements specific to minors are found at OAR 839–021–0072.

or more for every 5 hours worked and a rest break of 10 minutes or more for every 4 hours worked.[15] *See* WAC 296–126–092. The State of Nevada requires employers to provide nonexempt employees a 30-minute meal period when working a continuous eight hours and a 10-minute break for each four (4) hours worked or major fraction thereof.[16] *See* NRS 608.019; NAC 608.145.

Here, the diversity of State regulation of required meal and rest breaks for CMV drivers has resulted in a patchwork of requirements, and several commenters have described the difficulty navigating them. In this regard, the American Association of Bakers stated that its member companies and drivers who are part of regional distribution networks have had to create ''elaborate schedules to remain in compliance with separate meal and rest break rules that are far less flexible'' than the Federal HOS regulations. C.R. England provided a map showing the patchwork of State-mandated break laws that a driver could encounter on one or more long-haul trips that span the country, and stated that complying with disparate State laws in this regard was costly and time consuming. The National Association of Wholesaler-Distributors commented that one of its member companies that operates in six States must spend ''several thousand dollars annually simply to track the differences in [rest break] rules for the states in which they operate.'' Other commenters, such as the Association of American Railroads, Motor Carriers of Montana, New Prime, and the National Association of Small Trucking Companies, also discussed operating procedure adjustments and other administrative burdens that result from varying State requirements which serve to disrupt the flow of interstate commerce.

The International Brotherhood of Teamsters argues that drivers pass through an assortment of State or local regulations throughout their workday, including varying speed limits, tolling facilities, and enforcement zones for distracted driving and DUI; yet those rules do not constitute an unreasonable burden on interstate commerce. The Agency is not persuaded by this argument. The 1984 Act explicitly prohibits the Agency from ''prescrib[ing] traffic safety regulations or preempt[ing] state traffic regulations'' such as those described. 49 U.S.C. 31147(a). In addition, issues surrounding State taxation and tolling are well outside the scope of the Agency's statutory authority. Therefore, the extent to which the ''assortment of state or local regulations'' cited by the International Brotherhood of Teamsters unreasonably burden interstate commerce, if at all, as compared to the MRB Rules is not part of the Agency's deliberative process.

The Agency determines that enforcing the MRB Rules decreases productivity and results in increased administrative burden and costs. In addition, the Agency believes it to be an unreasonable burden on interstate commerce for motor carriers to have to cull through the varying State requirements, in addition to Federal HOS rules, to remain in compliance, as commenters have described. As explained above, uniform national regulation is less burdensome than individual State regulations, which are often conflicting. Therefore, the Agency concludes that the MRB Rules place an unreasonable burden on interstate commerce.

Preemption Decision

As described above, the FMCSA concludes that: (1) The MRB Rules are State laws or regulations ''on commercial motor vehicle safety,'' to the extent they apply to drivers of property-carrying CMVs subject to the FMCSA's HOS rules; (2) the MRB Rules are additional to or more stringent than the FMCSA's HOS rules; (3) the MRB Rules have no safety benefit; (4) the MRB Rules are incompatible with the FMCSA's HOS rules; and (5) enforcement of the MRB Rules would cause an unreasonable burden on interstate commerce. Accordingly, the FMCSA grants the petitions for preemption of the ATA and the SCRA, and determines that the MRB Rules are preempted pursuant to 49 U.S.C. 31141. California may no longer enforce the MRB Rules with respect to drivers of property-carrying CMVs subject to FMCSA's HOS rules.

Dated: December 21, 2018.

Raymond P. Martinez,

Administrator.

[FR Doc. 2018–28325 Filed 12–21–18; 4:15 pm]

BILLING CODE 4910–EX–P

[15] In Washington, the meal period must commence between two and five hours from the beginning of the shift. The rest break must commence no later than the end of the third hour of the shift. WAC 296–126–092

[16] Nevada requires one 10-minute break if the employee works between 3½ and 7 hours; two 10-minute breaks if the employee works between 7 and 11 hours; three 10-minute breaks if the employee works between 11 and 15 hours; or four 10-minute breaks if the employee works between 15 and 19 hours. *See* NAC 608.145(a)–(d).

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2001–11213, Notice No. 23]

Drug and Alcohol Testing: Determination of Minimum Random Testing Rates for 2019

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notification of determination.

SUMMARY: This notification of determination announces FRA's minimum annual random drug and minimum annual random alcohol testing rates for covered employees and for maintenance-of-way (MOW) employees for calendar year 2019.

DATES: This determination takes effect December 28, 2018.

FOR FURTHER INFORMATION CONTACT: Gerald Powers, FRA Drug and Alcohol Program Manager, W33–310, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone 202–493–6313); or Sam Noe, FRA Drug and Alcohol Program Specialist, Federal Railroad Administration (telephone 615–719–2951).

SUPPLEMENTARY INFORMATION: FRA is announcing the 2019 minimum annual random drug and alcohol testing rates for covered service employees, and the 2019 minimum annual random drug and alcohol testing rates for MOW employees. For calendar year 2019, the minimum annual random testing rates for covered service employees will continue to be 25 percent for drugs and 10 percent for alcohol, while the minimum annual random testing rates for MOW employees will continue to be 50 percent for drugs and 25 percent for alcohol.

To set its minimum annual random testing rates for each year, FRA examines the last two complete calendar years of railroad industry drug and alcohol program data submitted to its Management Information System (MIS). The rail industry's random drug testing positive rate for covered service employees (employees subject to the hours of service laws and regulations) remained below 1.0 percent for 2016 and 2017. The Administrator has therefore determined the minimum annual random drug testing rate for the period January 1, 2019, through December 31, 2019, will remain at 25 percent for covered service employees. The industry-wide random alcohol testing violation rate for covered service

employees remained below 0.5 percent for 2016 and 2017. Therefore, the Administrator has determined the minimum random alcohol testing rate will remain at 10 percent for covered service employees for the period January 1, 2019, through December 31, 2019. Because these rates represent minimums, railroads may conduct FRA random testing at higher rates.

MOW employees became subject to FRA random drug and alcohol testing in June 2017. The Administrator has determined that the minimum annual random testing rates initially established for MOW employees will remain in effect since FRA does not yet have MIS data on their industry-wide performance rates. Therefore, for the period January 1, 2019, through December 31, 2019, the minimum annual random drug testing rate will continue to be 50 percent for MOW employees, and the minimum annual random alcohol testing rate will continue to be 25 percent for MOW employees. As with covered service employees, because these rates represent minimums, railroads may conduct FRA random testing of MOW employees at higher rates.

Issued in Washington, DC.

Ronald L. Batory,

Administrator.

[FR Doc. 2018–28290 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2010–0029]

National Railroad Passenger Corporation's Request for Positive Train Control Safety Plan Approval and System Certification

AGENCY: Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT).

ACTION: Notice of availability and request for comments.

SUMMARY: This document provides the public with notice that on August 9, 2018, the National Railroad Passenger Corporation (Amtrak) submitted its Positive Train Control Safety Plan (PTCSP) Revision 0, dated July 17, 2018, to FRA via the Secure Information Repository. Amtrak asks FRA to approve its PTCSP and issue a Positive Train Control System Certification for Amtrak's Interoperable Electronic Train Management System (I–ETMS).

DATES: FRA will consider comments received by January 28, 2019 before taking final action on the PTCSP. FRA may consider comments received after that date if practicable.

ADDRESSES: All comments concerning this proceeding should identify Docket Number FRA–2010–0029 and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Carolyn Hayward-Williams, Staff Director, Positive Train Control/Signal & Train Control Division, at 202–493–6399 or *c.hayward-williams@dot.gov.*

SUPPLEMENTARY INFORMATION: In its PTCSP, Amtrak asserts that the I–ETMS system it is implementing is designed as an overlay PTC system as defined in Title 49 Code of Federal Regulations (CFR) 236.1015(e). The PTCSP describes Amtrak's I–ETMS implementation and the associated I–ETMS safety processes, safety analyses, and test, validation, and verification processes used during the development of I–ETMS. The PTCSP also contains Amtrak's operational and support requirements and procedures.

Amtrak's PTCSP and the accompanying request for approval and system certification are available for review online at *www.regulations.gov* (Docket Number FRA–2010–0029) and in person at DOT's Docket Operations Facility, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

Interested parties are invited to comment on the PTCSP by submitting written comments or data. During its review of the PTCSP, FRA will consider any comments or data submitted. 49 CFR 236.1011(e). However, FRA may elect not to respond to any particular comment and, under 49 CFR 236.1009(d)(3), FRA maintains the authority to approve or disapprove the PTCSP at its sole discretion.

Privacy Act Notice

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See *https://www.regulations.gov/privacy Notice* for the privacy notice of *regulations.gov.* In order to facilitate comment tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC, on December 21, 2018.

Robert C. Lauby,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2018–28317 Filed 12–27–18; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Notice of Final Federal Agency Actions on Proposed Highway Projects in Texas

AGENCY: Texas Department of Transportation (TxDOT), Federal Highway Administration (FHWA), U.S. Department of Transportation.

ACTION: Notice of limitation on claims for judicial review of actions by TxDOT and Federal agencies.

SUMMARY: This notice announces actions taken by TxDOT and Federal agencies that are final. The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by TxDOT and a Memorandum of Understanding dated December 16, 2014, and executed by FHWA and TxDOT. The actions relate to various proposed highway in the State of Texas. These actions grant licenses, permits, and approvals for the projects.

DATES: By this notice, TxDOT is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of TxDOT and Federal agency actions on the highway project will be barred unless the claim is filed on or before May 27, 2019. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such a claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Carlos Swonke, Environmental Affairs Division, Texas Department of

Transportation, 125 East 11th Street, Austin, Texas 78701; telephone: (512) 416–2734; email: *carlos.swonke@txdot.gov.* TxDOT's normal business hours are 8 a.m.–5 p.m. (central time), Monday through Friday.

SUPPLEMENTARY INFORMATION: Notice is hereby given that TxDOT and Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following highway project in the State of Texas that are listed below.

The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion (CE) or Environmental Assessment (EA) issued in connection with the projects and in other key project documents. The CE or EA, and other key documents for the listed projects are available by contacting TxDOT at the address provided above.

This notice applies to all TxDOT and 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. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act, 42 U.S.C. 7401–7671(q).

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. 319.

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 300101 *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [54 U.S.C. 312501 *et seq.*]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act, 33 U.S.C. 1251–1377 (Section 404, Section 401, Section 319); Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601–4604; Safe Drinking Water Act (SDWA), 42 U.S.C. 300(f)–300(j)(6); Rivers and Harbors Act of 1899, 33 U.S.C. 401–406; Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287; Emergency Wetlands Resources Act, 16 U.S.C. 3921, 3931; TEA–21 Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133(b)(11); Flood Disaster Protection Act, 42 U.S.C. 4001–4128.

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species. (Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction.)

The projects subject to this notice are:

1. Business U.S. Highway (BU) 90–U from Interstate Highway (IH) 610 NE to East of Mesa Road in Harris County, Texas. The project will widen the existing facility from a four-lane undivided rural roadway to a six-lane urban roadway with a continuous left turn lane and sidewalks. The project length is approximately 1.2 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on August 14, 2018 and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Houston District Office located at 7600 Washington Avenue, Houston, Texas 77007; telephone (713) 802–5076.

2. Farm to Market Road (FM) 1463 from Interstate Highway (IH) 10 to FM 1093 in Fort Bend County, Texas. The project will widen FM 1463 from a two-lane urban highway to a four- to six-lane divided facility with curb and gutter, a raised median, and sidewalks on both sides of the roadway. The project length is approximately 6.8 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on July 31, 2018 and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Houston District Office located at 7600 Washington Avenue, Houston, Texas 77007; telephone (713) 802–5076.

3. FM 89 Buffalo Gap Access Management project; from near Bettes Lane to Rebecca Lane in Taylor County, Texas. The project will reconstruct and widen an approximately 1.2 mile long section of FM 89 (Buffalo Gap Road) in Abilene, Texas. The roadway widening will consist of a six-lane divided section from south of US 83 to Rebecca Lane (north section) and a five-lane section with two-way left-turn lane from Rebecca Lane to near Bettes Lane (south section). This will include intersection improvements on frontage road/Industrial Blvd. for US 83/84. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on August 29, 2018, the Categorical Exclusion Determination issued on August 29, 2018, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Abilene District Office at 4250 N. Clack, Abilene, Texas 79601; telephone (325) 676–6817.

4. FM 1110 from IH–10 to SH 20 (Alameda Ave.) in El Paso County, Texas. The project will widen and realign FM 1110 to provide a direct connection between I–10 and SH 20 near the Town of Clint, Texas and the City of San Elizario, Texas. The 2.76 mile long project will include drainage improvements, intersection improvements, a bridge crossing over the floodplain between Salatral Lateral and FM 76, and an overpass at the Union Pacific Railroad (UPRR) crossing. Six-foot wide sidewalks and 5-foot wide bicycle lanes will be constructed on each side of FM 1110. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment (EA) approved on October 12, 2018, the Finding of No Significant Impact (FONSI) issued on October 12, 2018, and other documents in the TxDOT project file. The EA, FONSI, and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT El Paso District Office at 13301 Gateway Blvd. West, El Paso, TX 79928; telephone (915) 790–4340.

5. US 277 from FM 3443 to SL 480 in Maverick County, Texas. The project will reconstruct and widen US 277 in Eagle Pass, Texas. The approximately 2.75 mile long project will also add sidewalks, dual use lanes to accommodate bicycles and curb and gutter drainage improvements. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on January 26, 2017 and other documents in the TxDOT project file that are available by contacting TxDOT at the address provided above or the TxDOT Laredo District Office at 1817 Bob Bullock Loop, Laredo, TX 78043; telephone (956) 712–7416.

6. US 59 (Loop 20) from 0.33 miles west of IH35 to 0.160 miles west of McPherson Road Interchange in Webb County, Texas. The project will extend the Loop 20 mainlanes over the IH35 mainlanes and the Union-Pacific Railroad line and will consist of three 12-ft. travel lanes in each direction, a center concrete traffic barrier, inside and outside shoulders and appropriately placed on-off ramps. The project is approximately 1.25 miles long. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on May 18, 2017 and other documents in the TxDOT project file that are available by contacting TxDOT at the address provided above or the TxDOT Laredo District Office at 1817 Bob Bullock Loop, Laredo, TX 78043; telephone (956) 712–7416.

7. I–35 Eastern Frontage Road from 0.95 Mi. N. of Webb/La Salle County Line to 1000 Ft. South of Martinena Rd. in La Salle County, Texas and Webb County, Texas. The project will reconstruct 0.4 miles of existing I–35 eastern frontage road in La Salle County and construct 0.7 miles of new I–35 eastern

frontage road in both La Salle and Webb Counties. The total distance of the project is approximately 1.5 miles long. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on February 1, 2018 and other documents in the TxDOT project file that are available by contacting TxDOT at the address provided above or the TxDOT Laredo District Office at 1817 Bob Bullock Loop, Laredo, TX 78043; telephone (956) 712–7416.

8. SH 11 from 6.19 miles east of FM 2653 S to SH 19 in Hopkins County, Texas. The project will rehabilitate, widen, and realign a portion of SH 11. The project is approximately 2.5 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on May 23, 2017, the Categorical Exclusion Determination issued on May 23, 2017, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Paris District Office at 1365 North Main Street, Paris, TX 75460; telephone (903) 737–9300.

9. US 82 from 0.5 miles west of SH 121 to 0.5 miles east of SH 56 in Fannin County, Texas. The project will widen the existing two lane rural highway to a divided four lane rural highway and construct overpasses, bridges and dedicated left-turn lanes at 47 crossovers along the project. The project is approximately 19.8 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on May 18, 2018, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Paris District Office at 1365 North Main Street, Paris, TX 75460; telephone (903) 737–9300.

10. FM 2304 from Ravenscroft to FM 1626 in Travis County, Texas. The project will reconstruct the 2-lane roadway to a 4-lane roadway with a center turn lane. The project is approximately 1.14 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on August 24, 2018, the Categorical Exclusion Determination issued on August 24, 2018, and other documents in the TxDOT project file. The CE determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Austin District Office at 7901 North I–35, Austin, TX 78753; telephone (512) 832–7000.

11. I–35 from the Guadalupe River to the Hays/Comal County Line in Comal County, Texas. The project includes operational improvements to I–35 from the Guadalupe River to the Hays/Comal County Line including ramp revisions, intersection improvements, and conversion of frontage roads from two-way to one-way operation. The project is approximately 9.25 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on October 9, 2018, the Categorical Exclusion Determination issued on October 9, 2018, and other documents in the TxDOT project file. The CE determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT San Antonio District Office at 4615 NW Loop 410, San Antonio, TX 78229; telephone (210) 615–5839.

12. SH 71 at Pope Bend Road in Bastrop County, Texas. The project includes constructing an overpass and adding 2-lane, one-way, east bound and west bound frontage roads. The project is approximately 1.12 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on July 27, 2018, the Categorical Exclusion Determination issued on July 27, 2018, and other documents in the TxDOT project file. The CE determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Austin District Office at 7901 North I–35, Austin, TX 78753; telephone (512) 832–7000.

13. SH 71 from the Travis/Bastrop county line to 0.65 miles east of Tucker Hill Lane in Bastrop County, Texas. The project includes constructing an overpass and adding 2-lane, one-way, east bound and west bound frontage roads. The project is approximately 1.75 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on June 20, 2018, the Categorical Exclusion Determination issued on June 20, 2018, and other documents in the TxDOT project file. The CE determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Austin District Office at 7901 North I–35, Austin, TX 78753; telephone (512) 832–7000.

14. Wurzbach Parkway from Lockhill-Selma Road to NW Military Highway in Bexar County, Texas. The project will provide intersection improvements at Lockhill-Selma Road and NW Military Highway and expand Wurzbach Parkway from 4 to 6 lanes from west of Lockhill-Selma Road to NW Military Highway. The project is approximately 1.1 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on August 29, 2018, the Categorical Exclusion Determination issued on August 29, 2018, and other documents in the TxDOT project file. The CE determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT San Antonio District Office at 4615 NW Loop 410, San Antonio, TX 78229; telephone (210) 615–5839.

15. FM 156 (Blue Mound Road), from US 81/US 287 to McLeroy Boulevard/Watauga Road, Tarrant County, Texas. The project will reconstruct and widen FM 156. The facility will include a 14-foot shared use outside lane and a 12-foot inside lane, each direction, within curb and gutter and sidewalks on both sides of the roadway. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on July 10, 2018, the Categorical Exclusion Determination issued on July 10, 2018, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Fort Worth District Office at 2501 S W Loop 820, Fort Worth, Texas 76133; telephone (817) 370–6744.

16. FM 907 from Nolana Rd to IH–2, in the city of Alamo, Hidalgo County, Texas. The project will reconstruct and widen FM 907 to a 64 foot wide roadway with two outer 14 foot wide travel lanes, two inner 11 foot wide travel lanes, a continuous 12 foot wide center turn lane and 5 foot sidewalks. The project length is approximately 2.3 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on June 23, 2017, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Pharr District Office at 600 W. US Expressway 83, Pharr, TX 78577; telephone (956) 702–6100.

17. FM 495 from Abram Road to SH 364, in the city of Palmview, Hidalgo County, Texas. The project will reconstruct and widen SH 495 to an 84-footwide urban roadway with four 12-foot-wide travel lanes, a 16-foot-wide continuous left turn lane, two eight-foot-wide shoulders, and sidewalks on both sides of the roadway. The project length is approximately 2.3 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on November 29, 2017, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Pharr District Office at 600 W. US Expressway 83, Pharr, TX 78577; telephone (956) 702–6100.

18. Taylor Road from US 83 to Mile 2 North Road, in the cities of Mission and McAllen, Hidalgo County, Texas. The project will reconstruct and widen Taylor Road to a 64 foot wide urban roadway with two 11 foot wide travel lanes, two 14 foot wide shared use lanes, a 12 foot wide continuous left turn lane, and sidewalks on both sides of the roadway. The project length is approximately 3.0 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on January 11, 2018, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Pharr District Ofice at 600 W. US Expressway 83, Pharr, TX 78577; telephone (956) 702–6100.

19. US 69/FM 779 Interchange in Wood County, Texas. The project will construct a grade-separated interchange along US 69 over the existing intersection at FM 779. US 69 would be widened from a two-lane roadway to a four-lane divided roadway with depressed median. The project length is approximately 2.17 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on December 7, 2017, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Tyler District Office at 2709 W. Front St., Tyler, TX 75702; telephone (903) 510–9100.

20. IH–20 Ramps from CR 433 to CR 431, in Smith County, Texas. The project will construct westbound and eastbound frontage roads for IH–20 and will include entrance and exit ramp reconfigurations for the IH–20 and US 69 intersection. The project length is approximately 4.0 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on March 19, 2018, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Tyler District Office at 2709 W. Front St., Tyler, TX 75702; telephone (903) 510–9100.

21. US 69 from IH10 to Tram Road, in Jefferson County, Texas. The project will widen US 69 from 4 to 6 lanes as a divided highway with a concrete median barrier, add merging lanes, remove the US69 north bound exit ramp to Delaware Street, relocate ramps at Chinn and Tram Roads and widen overpass bridges. The project length is approximately 5.9 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on June 1, 2018, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Beaumont District Office at 8350 Eastex Freeway, Beaumont, TX 77708; telephone (409) 892–7311.

22. I–10 from FM 365 East to Walden Road (CR 131), in Jefferson County, Texas. The project will reconstruct and widen I–10 to a six-lane highway, with 12-foot wide travel lanes, 10-foot wide outside shoulders, 10-foot wide inside shoulders, and a concrete median barrier. In addition, the Brooks Road Overpass will be replaced and the Boyt Road Overpass will be removed. The project length is approximately 9.9 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Categorical Exclusion approved on June 1, 2018, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting TxDOT at the address provided above or the TxDOT Beaumont District Office at 8350 Eastex Freeway, Beaumont, TX 77708; telephone (409) 892–7311.

Authority: 23 U.S.C. 139(l)(1).

Issued on: December 17, 2018.

Michael T. Leary,

Director, Planning and Program Development, Federal Highway Administration.

[FR Doc. 2018–27698 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2015–0061]

Agency Information Collection Activities: Renewed Approval of Information Collection

AGENCY: Office of the Secretary (OST), DOT.

ACTION: 60-Day Notice and Request for Comments.

SUMMARY: The Department of Transportation (DOT) invites public comments on our intention to request Office of Management and Budget (OMB) approval to renew an information collection (OMB Control Number 2105–0563) in accordance with the requirements of the Paperwork Reduction Act of 1995. The collection is necessary for administration of the BUILD Transportation Discretionary Grants Program. BUILD Transportation grants support surface transportation infrastructure projects that have a significant local or regional impact.

DATES: Written comments should be submitted by February 26, 2019.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room, W12–140, Washington, DC 20590–0001.
- *Hand delivery:* West Building Ground Floor, Room W–12–140 1200 New Jersey Ave. SE, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

Instructions: To ensure proper docketing of your comment, please include the agency name and docket number [DOT–OST–2015–0061] at the beginning of your comments. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Howard Hill, Office of the Under Secretary for Transportation Policy, at 202–366–0301 or *BUILDgrants@dot.gov.*

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 2105–0563.

Title: National Infrastructure Investments or ''BUILD Transportation Discretionary Grants''.

Form Numbers: None.

Type of Review: Revision of a currently approved collection.

Background: The Better Utilizing Investments to Leverage Development or ''BUILD Transportation Discretionary Grants'' program was created as part of the American Recovery and Reinvestment Act of 2009. Through the Recovery Act and nine appropriations acts, Congress provided DOT with funding for ten rounds of competitive grants totaling nearly $5.6 billion for capital and planning investments in surface transportation infrastructure. DOT published a notice in the **Federal Register** on April 27, 2018 announcing the availability of $1.5 billion for the latest round of BUILD Transportation Discretionary Grants (83 FR 18651–01). BUILD recipients provide information to the Government so that the Government may monitor the financial conditions and construction progress of BUILD-supported projects and the effectiveness of those projects using performance measurement metrics negotiated between the recipients and the Government.

This notice seeks comments on the existing information collection, which collects information from grantees that is necessary for grant applications and the reporting requirements agreed to by recipients of TIGER and BUILD Transportation Discretionary Grants.

The reporting requirements for the program is as follows:

In order to be considered to receive a BUILD grant, a project sponsor must submit an application to DOT containing a project narrative, as detailed in the Notice of Funding Opportunity. The project narrative should include the information necessary for the Department to determine that the project satisfies eligibility requirements as warranted by law. This request renews the existing clearance to cover applications solicited for future National Infrastructure Investments appropriations, solicited in a manner similar to the solicitation for TIGER and BUILD applications.

Following the announcement of a funding award, the recipient and DOT

will negotiate and sign a grant agreement. In the grant agreement, the recipient must describe the project that DOT agreed to fund, which is typically the project that was described in the TIGER/BUILD application or a reduced-scope version of that project. The grant agreement must also include a detailed breakdown of the project schedule and a budget listing all major activities that will be completed as part of the project.

During the project management stage, grantees will submit reports on the financial condition of the project and the project's progress. Grantees will submit progress and monitoring reports to the Government on a quarterly basis, beginning on the 20th of the first month of the calendar-year quarter following the execution of a grant agreement, and on the 20th of the first month of each calendar-year quarter thereafter until completion of the project. The report will include an executive summary and sections to show: Project activities; outstanding issues; project schedule; project cost; project funding status; and project quality, along with an SF–425 Federal Financial Report.

This information will be used to monitor grantees' use of Federal funds, ensuring accountability and financial transparency in the TIGER/BUILD program.

Grantees will also submit reports on project performance using certain performance measures that the grantee and the Government select through negotiations. The Grantees will submit a Pre-project Report that will consist of current baseline data for each of the performance measures specified in the grant agreement. The Pre-project Report will include a detailed description of data sources, assumptions, variability, and the estimated level of precision for each measure. The Grantees will submit annual interim Project Performance Measurement Reports to the Government for each of the performance measures. Grantees will submit reports for three years. The Grantees will submit a Project Outcomes Report after the project is completed that will consist of a narrative discussion detailing project successes and/or the influence of external factors on project expectations.

This information collected will be used to analyze project performance.

The Department's estimated burden for this information collection is the following:

Expected Number of Respondents: 850 applications.

Frequency: Quarterly, and Yearly.

Estimated Average Burden per Response: 100 hours for each Application, 1 hour for each Grant Agreement, 6.5 hours for each request for Quarterly Progress and Monitoring Report; 6 hours for each Quarterly Performance Measurement Report.

Estimated Total Annual Burden: 106,325 hours.

The following is detailed information and instructions regarding the specific reporting requirements for each report identified above:

Application

In order to be considered to receive a BUILD Transportation Discretionary Grant, prospective grantees must submit an application to DOT containing a project narrative, as detailed in the Notice of Funding Opportunity, with the following timing and frequency requirements:

- *Frequency:* Typically annually, as funding is appropriated by Congress.
- *Application covers:* Project narrative and information necessary for the Department to determine that the project satisfies eligibility requirements.
- *Start:* At the opening date of the Notice of Funding Opportunity.
- *End:* At the closing date of the Notice of Funding Opportunity.

Grant Agreement

BUILD Transportation Discretionary Grant program grantees will negotiate and sign a grant agreement with DOT, with the following timing and frequency requirements:

- *Frequency:* One time.
- *Grant agreement covers:* Detailed project scope, schedule, and budget, and terms of agreement between DOT and the grantee.
- *Start:* After funding announcements have been made by DOT.
- *End:* At the end of the obligation period, as set by Congress, typically two or three years after funding has been appropriated.

Project Progress and Monitoring Report

BUILD Transportation Discretionary Grant program grantees will submit a Project Progress and Monitoring Report to the Government with the following timing and frequency requirements:

- *Frequency:* Quarterly.
- *Report covers:* Previous quarter.
- *Start:* Upon award of grant.
- *End:* Once construction is complete.

Grantees use the following structure when preparing this report:

The following list enumerates the required sections in the quarterly progress reports. At the discretion of the USDOT, modifications or additions can be made to produce a quarterly reporting format that will most effectively serve both the Recipient and the USDOT. Some projects will have a more extensive quarterly status than others. For smaller projects, the USDOT may determine that the content of the quarterly reports will be streamlined and project status meetings will be held on a less-frequent basis. The first quarterly progress report should include a detailed description, and where appropriate, drawings, of the items funded.

(a) *Project Overall Status.* This section provides an overall status of the project's scope, schedule and budget. The Recipient shall note and explain any deviations from the scope of work described in Attachment A, the schedule described in Attachment B, or the budget described in Attachment C.

(b) *Project Significant Activities and Issues.* This section provides highlights of key activities, accomplishments, and issues occurring on the project during the previous quarter. Activities and deliverables to be reported on should include meetings, audits and other reviews, design packages submitted, advertisements, awards, construction submittals, construction completion milestones, submittals related to any applicable Recovery Act requirements, media or Congressional inquiries, value engineering/constructability reviews, and other items of significance.

(c) *Action Items/Outstanding Issues.* This section should draw attention to, and track the progress of, highly significant or sensitive issues requiring action and direction in order to resolve. In general, issues and administrative requirements that could have a significant or adverse impact to the project's scope, budget, schedule, quality, safety, and/or compliance with Federal requirements should be included. Status, responsible person(s), and due dates should be included for each action item/outstanding issue. Action items requiring action or direction should be included in the quarterly status meeting agenda. The action items/outstanding issues may be dropped from this section upon full implementation of the remedial action, and upon no further monitoring anticipated.

(d) *Project Scope Overview.* The purpose of this section is to provide a further update regarding the project scope. If the original scope contained in the grant agreement is still accurate, this section can simply state that the scope is unchanged.

(e) *Project Schedule.* An updated master program schedule reflecting the current status of the program activities should be included in this section. A Gantt (bar) type chart is probably the most appropriate for quarterly reporting

purposes, with the ultimate format to be agreed upon between the Recipient and the USDOT. It is imperative that the master program schedule be integrated, *i.e.,* the individual contract milestones tied to each other, such that any delays occurring in one activity will be reflected throughout the entire program schedule, with a realistic completion date being reported. Narratives, tables, and/or graphs should accompany the updated master program schedule, basically detailing the current schedule status, delays and potential exposures, and recovery efforts. The following information should also be included:

- Current overall project completion percentage vs. latest plan percentage.
- Completion percentages vs. latest plan percentages for major activities such as right-of-way, major or critical design contracts, major or critical construction contracts, and significant force accounts or task orders. A schedule status description should also be included for each of these major or critical elements.
- Any delays or potential exposures to milestone and final completion dates. The delays and exposures should be quantified, and overall schedule impacts assessed. The reasons for the delays and exposures should be explained, and initiatives being analyzed or implemented in order to recover the schedule should be detailed.

(f) *Project Cost.* An updated cost spreadsheet reflecting the current forecasted cost vs. the latest approved budget vs. the baseline budget should be included in this section. One way to track project cost is to show: (1) Baseline Budget, (2) Latest Approved Budget, (3) Current Forecasted Cost Estimate, (4) Expenditures or Commitments to Date, and (5) Variance between Current Forecasted Cost and Latest Approved Budget. Line items should include all significant cost centers, such as prior costs, right-of-way, preliminary engineering, environmental mitigation, general engineering consultant, section design contracts, construction administration, utilities, construction packages, force accounts/task orders, wrap-up insurance, construction contingencies, management contingencies, and other contingencies. The line items can be broken-up in enough detail such that specific areas of cost change can be sufficiently tracked and future improvements made to the overall cost estimating methodology. A Program Total line should be included at the bottom of the spreadsheet. Narratives, tables, and/or graphs should accompany the updated cost spreadsheet, basically detailing the current cost status, reasons for cost deviations, impacts of cost overruns, and efforts to mitigate cost overruns. The following information should be provided:

- Reasons for each line item deviation from the approved budget, impacts resulting from the deviations, and initiatives being analyzed or implemented in order to recover any cost overruns.
- Transfer of costs to and from contingency line items, and reasons supporting the transfers.
- Speculative cost changes that potentially may develop in the future, a quantified dollar range for each potential cost change, and the current status of the speculative change. Also, a comparison analysis to the available contingency amounts should be included, showing that reasonable and sufficient amounts of contingency remain to keep the project within the latest approved budget.
- Detailed cost breakdown of the general engineering consultant (GEC) services (if applicable), including such line items as contract amounts, task orders issued (amounts), balance remaining for tasks, and accrued (billable) costs.
- Federal obligations and/or disbursements for the project, compared to planned obligations and disbursements.

(g) *Federal Financial Report (SF–425).* The Federal Financial Report (SF–425) is a financial reporting form used throughout the Federal Government Grant system. Recipients shall complete this form and attach it to each quarterly Project Progress and Monitoring Report. The form is available at *http://www.whitehouse.gov/sites/default/files/omb/assets/grants_forms/SF-425.pdf.*

(h) *Certifications.* A certification that the Recipient is in compliance with 2 CFR 200.303 (Internal Controls) and 2 CFR part 200, subpart F (Audit Requirements).

Performance Measurement Reports

BUILD Transportation Discretionary Grant program grantees will submit Performance Measure Reports on the performance (or projected performance) of the project using the performance measures that the grantee and the Government selected through negotiations with the following timing and frequency requirements:

- *Frequency:* Quarterly.
- *Report covers:* Previous year.
- *Start:* Once, upon award of grant; Annual, for three years after construction completes; once, no later than four years after construction completes.
- *End:* At the end of agreed upon performance measurement period.

Grantees should use the following structure when preparing this report:

1. Performance Measure Data Collection. The Recipient shall collect the data necessary to report on each performance measure that is identified in the grant agreement. Grantees may select performance measures from the list available at *https://www.transportation.gov/administrations/office-policy/tiger-performance-measurement-guidance-appendix,* according to the type of project.

2. Pre-project Performance Measurement Report. The Recipient shall submit to DOT, on or before the Pre-project Report Date that is stated in the grant agreement, a Pre-project Performance Measurement Report that contains:

(1) Baseline data for each performance measure that is identified in the grant agreement, accurate as of the Pre-project Measurement Date; and

(2) a detailed description of the data sources, assumptions, variability, and estimated levels of precision for each measure.

3. Interim Performance Measurement Reports. After project completion, the Recipient shall submit to DOT on or before each of the periodic reporting dates specified in the Performance Measurement Table in the grant agreement, an Interim Performance Measurement Report containing data for each performance measure that is identified in that table, accurate as of the final date of the measurement period specified in that table. If an external factor significantly affects the value of a performance measure during a measurement period, then in the Interim Performance Measurement Report the Recipient shall identify that external factor and discuss its influence on the performance measure.

4. Project Outcomes Report. The Recipient shall submit to DOT, on or before the Project Outcomes Report Date that is stated in the grant agreement, a Project Outcomes Report that contains:

(1) A narrative discussion detailing project successes and the influence of external factors on project expectations;

(2) all baseline and interim performance measurement data that the Recipient reported in the Pre-project Performance Measurement Report and the Interim Performance Measurement Reports; and

(3) an *ex post* examination of project effectiveness relative to the baseline data that the Recipient reported in the Pre-project Performance Measurement Report.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for OST's performance; (b) the accuracy of the estimated burden; (c) ways for OST to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1:48.

Issued in Washington, DC, on December, 20, 2018.

John Augustine,

Director of the Office of Infrastructure Finance and Innovation, Office of the Under Secretary for Transportation Policy.

[FR Doc. 2018–28237 Filed 12–27–18; 8:45 am]

BILLING CODE 4910–XX–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network; Bank Secrecy Act Advisory Group; Solicitation of Application for Membership

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Notice and request for nominations.

SUMMARY: FinCEN is inviting the public to nominate financial institutions, trade groups, and non-federal regulators or law enforcement agencies for membership on the Bank Secrecy Act Advisory Group. New members will be selected for three-year membership terms.

DATES: Nominations must be received by January 28, 2019.

ADDRESSES: Nominations must be emailed to *BSAAG@fincen.gov.*

FOR FURTHER INFORMATION CONTACT: FinCEN Resource Center at 800–767–2825.

SUPPLEMENTARY INFORMATION: The Annunzio-Wylie Anti-Money Laundering Act of 1992 required the Secretary of the Treasury to establish a Bank Secrecy Act Advisory Group (BSAAG) consisting of representatives from federal regulatory and law enforcement agencies, financial institutions, and trade groups with members subject to the requirements of the Bank Secrecy Act, 31 CFR 1000–1099 *et seq.* or Section 6050I of the Internal Revenue Code of 1986. The BSAAG is the means by which the Treasury receives advice on the operations of the Bank Secrecy Act. As chair of the BSAAG, the Director of FinCEN is responsible for ensuring that relevant issues are placed before the BSAAG for review, analysis, and discussion.

BSAAG membership is open to financial institutions, trade groups, and non-federal regulators and law enforcement agencies. Membership is granted to organizations, not to individuals. Organizational members will be selected to serve a three-year term and must designate one individual to represent that member at plenary meetings. The designated representative should be knowledgeable about Bank Secrecy Act requirements and the representative's organization must be able and willing to devote the necessary personnel time and effort. Examples of expected effort include actively sharing not just anecdotal perspectives, but also quantifiable insights, on BSA requirements and industry trends in BSAAG discussions. The organization's representative must be able to attend biannual plenary meetings, generally conducted over one or two days, held in Washington, DC, in May and October. Additional BSAAG meetings are held by phone or in person.

It is important to provide complete answers to the following items, as nominations will be evaluated on the information provided through this application process. There is no formal application; interested organizations may submit their nominations via email or email attachment. Nominations should consist of:

- Name of the organization requesting membership
- Point of contact, title, address, email address and phone number
- Description of the financial institution or trade group and its involvement with the Bank Secrecy Act, 31 CFR 1000–1099 *et seq.*
- Reasons why the organization's participation on the BSAAG will bring value to the group

Organizations may nominate themselves, but nominations for individuals who are not representing an organization will not be considered. Members will not be remunerated for their time, services, or travel. In making the selections, FinCEN will seek to complement current BSAAG members in terms of affiliation, industry, and geographic representation. The Director of FinCEN retains full discretion on all membership decisions. The Director may consider prior years' applications when making selections and does not limit consideration to institutions nominated by the public when making selections.

Dated: December 20, 2018.

Kenneth A. Blanco,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2018–28178 Filed 12–27–18; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Emergency Submission for OMB Review; Comment Request; Quarterly Dealer Agenda Survey

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance utilizing emergency review procedures in accordance with the Paperwork Reduction Act of 1995. Emergency review and approval of this collection has been requested from OMB by January 10, 2019. The public is invited to submit comments on this request.

DATES: Comments should be received on or before January 10, 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:

Treasury Departmental Offices (DO)

Title: Quarterly Dealer Agenda Survey.

OMB Control Number: 1505–NEW.

Type of Review: Request for a New OMB Control Number.

Description: The Department of the Treasury (Treasury), Office of Debt

Management (ODM) conducts the Primary Dealer Meeting Agenda (Agenda), which is a quarterly survey sent to all primary dealers, of which there are currently 23 financial institutions. Primary dealers are trading counter parties of the Federal Reserve Bank of New York (FRBNY) in its implementation of monetary policy. Primary dealers are also expected to have a substantial presence as a market maker for Treasury securities and bid on a pro-rata basis in all Treasury auctions. The information in the Agenda is a critical factor to inform ODM's decision to set the securities' issuance sizes for the upcoming quarter. In effect, the information provides a market view of borrowing needs for the U.S. government. In addition, aggregate statistics are made public through Treasury's Quarterly Refunding materials.

Treasury is requesting emergency processing for this collection of information as provided under 5 CFR 1320.13. The Agenda has been used for many years to gather information from primary dealers, however Treasury only recently realized that the survey had not been cleared under the Paperwork Reduction Act (PRA). Though the FRBNY sends and receives the survey to the primary dealers, it does so on Treasury's behalf. As such, Treasury now recognizes that it should be considered the ''sponsor'' of the information collection for purposes of the PRA. Given the next anticipated Agenda release date of January 11 (two weeks prior to the regularly scheduled meeting with primary dealers to discuss feedback before the Quarterly Refunding), the agency cannot reasonably comply with the normal clearance procedures under the PRA. The Treasury's mission to manage the U.S government's finances and resources effectively includes financing the government's borrowing needs at the lowest cost over time. Treasury meets this objective by issuing debt in a regular and predictable pattern, providing transparency in its decision-making process, and seeking continuous improvements in the Treasury auction process. The risks to regular and predictable debt issuance result from unexpected changes in our borrowing requirements, changes in the demand for Treasury securities, and anything that inhibits timely sales of securities. To reduce these risks, Treasury closely monitors economic conditions, market activity, and, if necessary, responds with appropriate changes in debt issuance based on analysis and consultation with market participants, including the primary dealers. Changes in debt management policy are generally developed through the quarterly refunding (*https://www.treasury.gov/resource-center/data-chart-center/quarterly-refunding/Pages/default.aspx*) process near the middle of each calendar quarter. Treasury begins this process by soliciting advice and views from the private sector through questions to primary dealers (*https://www.treasury.gov/resource-center/data-chart-center/quarterly-refunding/Pages/agenda-index.aspx*) in the Agenda. If this information were not collected, Treasury would not have insight into market expectations for debt issuance or other fiscal policy initiatives, nor would the public have the aggregate statistics published after the collection of that information. When making policy decisions, Treasury takes into account market expectations to better understand market demand for Treasury securities, capacity to absorb additional issuance when applicable, and the magnitude of risk from announcing policies in contrast to expectations. Without this information, Treasury's goal of financing the government at the lowest cost to the taxpayer would be at risk.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 23.

Frequency of Response: Quarterly.

Estimated Total Number of Annual Responses: 92.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 184.

Authority: 44 U.S.C. 3501 et seq.

Dated: December 21, 2018.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2018–28286 Filed 12–27–18; 8:45 am]

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FEDERAL REGISTER

Vol. 83 Friday,
No. 248 December 28, 2018

Part II

Department of the Treasury

Internal Revenue Service
26 CFR Part 1
Limitation on Deduction for Business Interest Expense; Proposed Rules

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–106089–18]

RIN 1545–BO73

Limitation on Deduction for Business Interest Expense

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking; notification of public hearing; and withdrawal of notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking provides rules regarding the limitation on the deduction for business interest expense after the enactment of recent tax legislation. Specifically, these regulations provide general rules and definitions. The regulations also provide rules for calculating the limitation in consolidated group, partnership, and international contexts. The regulations affect taxpayers that have deductible business interest expense, other than certain small businesses, electing real property trades or businesses, electing farming businesses, and certain utility businesses. This document also withdraws a notice of proposed rulemaking relating to the disallowance of a deduction for certain interest paid or accrued by a corporation. This document also provides notice of a public hearing on the proposed regulations.

DATES: Written or electronic comments must be received by February 26, 2019. Outlines of topics to be discussed at the public hearing scheduled for February 27, 2019, at 10 a.m. must be received by February 26, 2019. If there is not sufficient time to discuss all of the topics on February 27, 2019, the hearing will continue the following day at 10 a.m. in the same location.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–106089–18), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–106089–18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224, or sent electronically, via the Federal Rulemaking Portal at *http://www.regulations.gov* (indicate IRS and REG–106089–18). The public hearing will be held in the Main IRS Auditorium beginning at 10 a.m. in the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning § 1.163(j)–1, § 1.163(j)–2, § 1.163(j)–3, § 1.163(j)–9, or § 1.263A–9, Zachary King, (202) 317–4875, Charles Gorham, (202) 317–5091, Susie Bird, (202) 317–4860, Jaime Park, (202) 317–4877, or Sophia Wang, (202) 317–4890; concerning § 1.163(j)–4, § 1.163(j)–5, § 1.163(j)–10, § 1.163(j)–11, § 1.381(c)(20)–1, § 1.382–1, § 1.382–2, § 1.382–5, § 1.382–6, § 1.383–0, § 1.383–1, § 1.1502–13, § 1.1502–21, § 1.1502–36, § 1.1502–79, § 1.1502–91, § 1.1502–95, § 1.1502–98, § 1.1502–99, or § 1.1504–4, Kevin M. Jacobs, (202) 317–5332, Russell Jones, (202) 317–5357, or John Lovelace, (202) 317–5363; concerning § 1.163(j)–6 or § 1.469–9(b)(2), Meghan Howard, (202) 317–5055, William Kostak, (202) 317–6852, Anthony McQuillen, (202) 317–5027, Adrienne Mikolashek, (202) 317–5050, or James Quinn (202) 317–5054; concerning § 1.163(j)–7, § 1.163(j)–8, or § 1.882–5, Angela Holland, (202) 317–5474, Steve Jensen, (202) 317–6938, or Charles Rioux, (202) 317–6842; concerning § 1.446–3, RICs, REITs, REMICs, and the definition of the term ''interest'', Michael Chin, (202) 317–5846; concerning submissions of comments and outlines of topics for the public hearing, Regina Johnson (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 163(j) of the Internal Revenue Code (Code). Section 163(j) was amended as part of ''An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018,'' Public Law 115–97 (2017) (TCJA). Section 13301(a) of the TCJA amended section 163(j) by removing prior section 163(j)(1) through (9) and adding section 163(j)(1) through (10). The provisions of section 163(j) as amended by section 13301 of the TCJA are effective for tax years beginning after December 31, 2017. Unless otherwise indicated, all references to section 163(j) in this document are references to section 163(j) as amended by the TCJA.

Section 163(j), prior to the amendment by the TCJA (old section 163(j)), disallowed a deduction for ''disqualified interest'' paid or accrued by a corporation in a taxable year if two threshold tests were satisfied. The first threshold test under old section 163(j) was satisfied if the payor's debt-to-equity ratio exceeded 1.5 to 1.0 (safe harbor ratio). The second threshold test under old section 163(j) was satisfied if the payor's net interest expense exceeded 50 percent of its adjusted taxable income, generally, taxable income computed without regard to deductions for net interest expense, net operating losses, domestic production activities under section 199, depreciation, amortization, and depletion. Disqualified interest for purposes of old section 163(j) included interest paid or accrued to (1) related parties when no Federal income tax was imposed with respect to such interest; (2) unrelated parties in certain instances in which a related party guaranteed the debt; or (3) a real estate investment trust (REIT) by a taxable REIT subsidiary of that REIT. Interest amounts disallowed for any taxable year under old section 163(j) were treated as interest paid or accrued in the succeeding taxable year and could be carried forward indefinitely. In addition, any excess limitation, namely, the excess of 50 percent of the adjusted taxable income of the payor over the payor's net interest expense, could be carried forward three years under old section 163(j)(2)(B). On June 18, 1991, the Department of the Treasury (Treasury Department) and the IRS published in the **Federal Register** (56 FR 27907) a notice of proposed rulemaking (1991–2 C.B. 1040) (Prior Proposed Regulations) to implement the rules under old section 163(j).

In contrast to old section 163(j), for tax years beginning after December 31, 2017, section 163(j) generally limits the amount of business interest expense that can be deducted in the current taxable year (also referred to in this Explanation of Provisions as the current year). Under section 163(j)(1), the amount allowed as a deduction for business interest expense is limited to the sum of (1) the taxpayer's business interest income for the taxable year; (2) 30 percent of the taxpayer's adjusted taxable income (ATI) for the taxable year; and (3) the taxpayer's floor plan financing interest expense for the taxable year. The limitation under section 163(j)(1) applies to all taxpayers, except for certain small businesses that meet the gross receipts test in section 448(c) and certain trades or businesses listed in section 163(j)(7).

Section 163(j)(2) provides that the amount of any business interest not allowed as a deduction for any taxable year as a result of the limitation under section 163(j)(1) is carried forward and treated as business interest paid or accrued in the next taxable year. In contrast to old section 163(j), section

163(j) does not provide for the carryforward of any excess limitation.

Section 163(j)(3) provides that the limitation under section 163(j)(1) does not apply to a taxpayer, other than a tax shelter as defined in section 448(a)(3), with average annual gross receipts of $25 million or less, determined under section 448(c) (including any adjustment for inflation under section 448(c)(4)). For taxpayers other than corporations or partnerships, section 163(j)(3) provides that the gross receipts test is determined for purposes of section 163(j) as if the taxpayer were a corporation or partnership.

Section 163(j)(4) provides special rules for applying section 163(j) in the case of partnerships and S corporations. Section 163(j)(4)(A) requires that the limitation on the deduction for business interest expense be applied at the partnership level, and that a partner's ATI be increased by the partner's share of excess taxable income, as defined in section 163(j)(4)(C), but not by the partner's distributive share of income, gain, deduction, or loss. Section 163(j)(4)(B) provides that the amount of partnership business interest expense limited by section 163(j)(1) is carried forward at the partner-level. Section 163(j)(4)(B)(ii) provides that excess business interest expense allocated to a partner and carried forward is available to be deducted in a subsequent year only if the partnership allocates excess taxable income to the partner. Section 163(j)(4)(B)(iii) provides rules for the adjusted basis in a partnership of a partner that is allocated excess business interest expense. Section 163(j)(4)(D) provides that rules similar to the rules of section 163(j)(4)(A) and (C) apply to S corporations and S corporation shareholders.

Section 163(j)(5) and (6) defines ''business interest'' and ''business interest income,'' respectively, for purposes of section 163(j). Generally, these terms include interest expense and interest includible in gross income that is properly allocable to a trade or business (as defined in section 163(j)(7)). The legislative history states that ''a corporation has neither investment interest nor investment income within the meaning of section 163(d). Thus, interest income and interest expense of a corporation is properly allocable to a trade or business, unless such trade or business is otherwise explicitly excluded from the application of the provision.'' H. Rept. 115–466, at 386, fn. 688 (2017).

Under section 163(j)(7), the limitation on the deduction for business interest expense in section 163(j)(1) does not apply to certain trades or businesses. The excepted trades or businesses are the trade or business of providing services as an employee, electing real property businesses, electing farming businesses, and certain regulated utility businesses.

Section 163(j)(8) defines ATI as the taxable income of the taxpayer without regard to the following: Items not properly allocable to a trade or business; business interest and business interest income; net operating loss deductions; and deductions for qualified business income under section 199A. ATI also generally excludes deductions for depreciation, amortization, and depletion with respect to taxable years beginning before January 1, 2022 and includes other adjustments provided by the Secretary of the Treasury.

Section 163(j)(9) defines ''floor plan financing interest'' as interest paid or accrued on ''floor plan financing indebtedness.'' These provisions allow taxpayers incurring interest expense for the purpose of securing an inventory of motor vehicles held for sale or lease to deduct the full expense without regard to the limitation under section 163(j)(1).

Section 163(j)(10) provides cross references to provisions requiring that electing farming businesses and electing real property businesses excepted from the limitation under section 163(j)(1) use the alternative depreciation system (ADS), rather than the general depreciation system for certain types of property. The required use of ADS results in the inability of these electing trades or businesses to use the additional first-year depreciation deduction under section 168(k) for those types of property.

The Conference Report states that ''[i]n the case of a group of affiliated corporations that file a consolidated return, the limitation applies at the consolidated tax return filing level.'' H. Rept. 115–466, at 386 (2017). Old section 163(j) treated an affiliated group as one taxpayer, and authorized super-affiliation rules for treating certain other groups as one taxpayer. Both of these provisions were removed by the TCJA, and no equivalent provisions are included in section 163(j).

On April 16, 2018, the Treasury Department and the IRS published Notice 2018–28 (2018–16 I.R.B. 492) to announce an intent to issue proposed regulations that will provide guidance to assist taxpayers in complying with section 163(j). Notice 2018–28 further describes certain rules that those proposed regulations will include to provide taxpayers with interim guidance as more comprehensive guidance is developed. In addition, Notice 2018–28 requested comments from taxpayers about the application of section 163(j). Where relevant to the provisions of these proposed regulations, comments are addressed in the Explanation of Provisions section.

Notice 2018–28 also stated the intent of the Treasury Department and the IRS to withdraw the Prior Proposed Regulations issued under old section 163(j).

Explanation of Provisions

These proposed regulations would withdraw the Prior Proposed Regulations and provide guidance regarding the new limitation on the deduction for business interest expense under section 163(j). These proposed regulations also would add or amend regulations under certain other provisions of the Code where necessary to provide conformity across the Income Tax Regulations. A significant number of the terms used throughout these proposed regulations are defined in proposed § 1.163(j)–1. Some of these terms are discussed in this Explanation of Provisions section as they relate to specific provisions of these proposed regulations.

Consistent with section 163(j)(1), these proposed regulations would limit a taxpayer's deduction for business interest expense to the sum of the taxpayer's current-year business interest income, 30 percent of the taxpayer's ATI, and certain floor plan financing interest expense. These proposed regulations would provide that any amount of business interest expense that cannot be deducted because of the limitation under section 163(j)(1) (section 163(j) limitation) can be carried forward and treated as business interest expense in future years. These proposed regulations also would provide special rules related to the business interest expense carried forward (''disallowed business interest expense carryforwards'') by passthrough entities, C corporations, and consolidated groups. Amounts carried forward under old section 163(j) as disallowed disqualified interest are included as disallowed business interest expense carryforwards of a taxpayer to the extent that the amounts otherwise qualify as business interest expense of the taxpayer under these proposed regulations.

These proposed regulations are organized into eleven sections, proposed §§ 1.163(j)–1 through 1.163(j)–11. Proposed § 1.163(j)–1 would provide common definitions used throughout the proposed regulations. Proposed § 1.163(j)–2 would provide general rules relating to the computation of a taxpayer's section 163(j) limitation and

proposed § 1.163(j)–3 would provide ordering and other rules regarding the relationship of the section 163(j) limitation and other provisions of the Code affecting interest. Proposed § 1.163(j)–4 would provide rules applicable to C corporations (including REITs, RICs, and consolidated group members) and tax-exempt corporations, whereas proposed § 1.163(j)–5 would provide rules governing the disallowed business interest expense carryforwards of C corporations. Proposed § 1.163(j)–6 would provide special rules for applying the section 163(j) limitation to partnerships and S corporations. Proposed § 1.163(j)–7 would provide rules regarding the application of section 163(j) to foreign corporations and their shareholders, whereas proposed § 1.163(j)–8 would provide rules regarding the application of section 163(j) to foreign persons with effectively connected income. Proposed § 1.163(j)–9 would provide rules regarding elections for excepted trades or businesses as well as a safe harbor for certain REITs. Proposed § 1.163(j)–10 would provide rules to allocate expense and income between non-excepted and excepted trades or businesses. Finally, proposed § 1.163(j)–11 would provide certain transition rules relating to the application of the section 163(j) limitation. The remainder of this Explanation of Provisions section discusses these eleven sections, as well as related conforming and coordinating provisions set forth in these proposed regulations.

1. Proposed § 1.163(j)–1: Definitions

Proposed § 1.163(j)–1 would provide definitions of terms used in these proposed regulations. This part 1 of the Explanation of Provisions section briefly discusses the most significant definitions contained in proposed § 1.163(j)–1.

A. Adjusted Taxable Income

i. Background

The Prior Proposed Regulations under old section 163(j) defined adjusted taxable income to include a number of adjustments in addition to those set forth in the statutory text of old section 163(j). Some of the additional adjustments resulted in an adjusted taxable income value that approximated cash flow. Two commenters to Notice 2018–28 asked if ATI for purposes of section 163(j) would also attempt to approximate cash flow. Comments on the Prior Proposed Regulations raised a number of administrative concerns with the additions and subtractions to ATI that approximated cash flow in those proposed regulations. The Prior Proposed Regulations were not finalized and therefore did not incorporate the suggestions of these comments to abandon this approach. In addition, because the Prior Proposed Regulations were never finalized, the approach of the Prior Proposed Regulations was never formally required or adopted. Finally, nothing in the Conference Report or the text of section 163(j) requires or suggests that adjustments should be made to ATI in order to approximate cash flow. Such a requirement could have been written into the statutory language or the discussion of section 163(j) contained in the Conference Report if Congress intended ATI to be adjusted in such a manner.

As a result, these proposed regulations would not adopt a cash flow approach to ATI. Instead, proposed § 1.163(j)–1(b)(1) would follow the statutory framework of section 163(j)(8) and define ATI to include the adjustments specified in section 163(j)(8)(A), as well as additional adjustments under the authority granted in section 163(j)(8)(B) to prevent double counting and other distortions of items such as floor plan financing interest expense and certain deductions for depreciation, amortization, or depletion upon the sale or disposition of property.

ii. General Application of the Definition of ATI

To compute ATI, taxpayers would first compute taxable income, as defined in proposed § 1.163(j)–1(b)(37), in accordance with section 63. In computing taxable income for this purpose, taxpayers would treat all business interest expense as deductible without regard to the section 163(j) limitation. Second, taxpayers would add or subtract, as appropriate, the items specified in these proposed regulations as adjustments to taxable income.

iii. Adjustments to ATI Specifically Referenced in Section 163(j)(8)(A)

Proposed § 1.163(j)–1(b)(1) includes as adjustments to taxable income items specifically referenced in section 163(j)(8)(A): Any item of income, gain, deduction, or loss which is not properly allocable to a trade or business; business interest and business interest income; net operating loss deductions under section 172; deductions for qualified business income under section 199A; and, deductions for depreciation, amortization, and depletion, but only with respect to taxable years beginning before January 1, 2022. Net operating losses under section 172 are added to taxable income in determining ATI, including net operating losses arising in taxable years prior to the effective date of these proposed regulations and carried forward. For purposes of computing ATI, it is intended that deductions for depreciation include special allowances under section 168(k). Additionally, to clarify an issue raised by a commenter in response to Notice 2018–28, the Treasury Department and the IRS note that an amount incurred as depreciation, amortization, or depletion, but capitalized to inventory under section 263A and included in cost of goods sold, is not a deduction for depreciation, amortization, or depletion for purposes of section 163(j).

iv. Other Adjustments to ATI Under Section 163(j)(8)(B)

These proposed regulations would include a number of adjustments under the authority granted in section 163(j)(8)(B). For example, these proposed regulations would include special rules that apply in defining the taxable income of: A regulated investment company (RIC) or REIT in proposed § 1.163(j)–4(b)(4)(ii); a consolidated group in proposed § 1.163(j)–4(d)(2)(iv); a partnership in proposed § 1.163(j)–6(d)(1); an S corporation in proposed § 1.163(j)–6(l)(3); and certain controlled foreign corporations in proposed § 1.163(j)–7(c)(1).

Under the authority granted in section 163(j)(8)(B), proposed § 1.163(j)–1(b)(1) also includes additional adjustments to prevent double counting. Thus, in addition to a subtraction for any floor plan financing interest expense, these proposed regulations include adjustments for sales or dispositions of certain property for taxable years beginning before January 1, 2022. Proposed § 1.163(j)–1(b)(1)(i)(D), (E), and (F) would provide that in determining the amount of a taxpayer's ATI for a taxable year, deductions for depreciation under section 167 or 168, the amortization of intangibles and other amortized expenditures, and depletion under section 611 are added back to a taxpayer's taxable income. As a result, the taxpayer would have increased their taxable income by these amounts for section 163(j) purposes. However, the Treasury Department and the IRS note that a taxpayer could receive a double benefit associated with the depreciation, amortization, and depletion, for ATI calculation purposes if the taxpayer's ATI is increased in respect of a deduction associated with depreciation, amortization, or depletion and then the taxpayer sells or otherwise disposes of the property that was depreciated, amortized, or depleted.

This double benefit would result because the amount of the gain that would otherwise be reflected in the ATI in respect of the sale or other disposition would reflect the decreased basis in such assets as a result of the depreciation, amortization, or depletion. Additionally, similar concerns are present if the property was held by either a partnership or a member of a consolidated group and the partnership interest or the stock of the member is sold or otherwise disposed of, because the adjusted basis in the partnership interest or member stock would have been reduced to reflect the depreciation, amortization, or depletion. As a result, these proposed regulations would eliminate the double benefit associated with these sales or other dispositions of property. See proposed § 1.163(j)–1(b)(1)(ii)(C), (D), and (E).

v. Other Rules for Adjusting ATI

Taxpayers can take each adjustment into account only once for purposes of computing ATI; for instance, a deduction for the depreciation of nonbusiness property under section 167 cannot be taken into account as an adjustment to taxable income as both a deduction for depreciation and an item of deduction that is not properly allocable to a trade or business. For purposes of computing ATI, only the adjustments to taxable income that are specified in these proposed regulations may be made. For instance, a deduction under section 243 for dividends received by a C corporation that is neither a RIC nor a REIT reduces the taxable income of the C corporation, and the C corporation cannot add back the amount of such deduction in computing ATI. Proposed § 1.163(j)–4(c)(2) would provide special rules that affect deductions under section 243 for RICs and REITs.

If for a taxable year a taxpayer is allowed a deduction under section 250(a)(1), the taxpayer should take into account the deduction when computing taxable income that is used to calculate ATI, but these proposed regulations would provide that the taxable income limitation in section 250(a)(2) does not apply for this purpose. Taxpayers, however, may be required to make adjustments adding back the section 250(a)(1) deduction to the extent that some or all of the deduction is attributable to an inclusion under section 951A. See proposed § 1.163(j)–7(d).

A separate set of proposed regulations under development will provide general guidance regarding section 250, including the computation of the section 250 deduction and the application of the taxable income limitation in section 250(a)(2).

vi. Comment Request Related To Ordering of Code Provisions

The Treasury Department and the IRS are also aware that various Code provisions in addition to sections 163(j) and 250 (for example, see section 246(b)), affect the amount of taxable income of a taxpayer and are based on, or are limited in some fashion based upon, the taxable income of the taxpayer. As a result, ordering rules are necessary to coordinate application of all of these provisions of the Code with one another. The Treasury Department and the IRS request comments on this matter, which presents broader issues than the ordering of these provisions relative to the application of section 163(j) and may therefore be addressed in guidance unrelated to these proposed regulations.

vii. Comment Request Related to the Computation of ATI

The Treasury Department and the IRS request comments regarding the methodology for computing ATI for purposes of these proposed section 163(j) regulations, including any items that should be included as additional adjustments to taxable income.

B. Interest

There are no generally applicable regulations or statutory provisions addressing when financial instruments are treated as debt for Federal income tax purposes or when a payment is interest. As a result, the proposed regulations draw upon past guidance and case law that address the meaning of interest in the context of Federal tax law. As a general matter, the factors that distinguish debt from equity are described in Notice 94–47, 1994–1 C.B. 357, and interest is defined as compensation for the use or forbearance of money. *Deputy* v. *Dupont,* 308 U.S. 488 (1940). Using these well-established principles regarding the meaning of interest, these proposed regulations would define interest to include any amount paid or accrued as compensation for the use or forbearance of money under the terms of an instrument or contractual arrangement, including a series of transactions, that is treated as a debt instrument for purposes of section 1275(a) and § 1.1275–1(d) (similar to the definition of interest described in *Deputy* v. *Dupont*). Thus, these proposed regulations would apply to interest associated with conventional debt instruments, as well as transactions that are indebtedness in substance although not in form. See *Schering-Plough Corp.* v. *U.S.,* 651 F.Supp. 2d 219 (N.J. Dist. Ct. 2009), aff'd sub nom. *Merck & Co., Inc.* v. *U.S.,* 652 F.3d 475 (3d Cir. 2011); *Mapco Inc.* v. *U.S.,* 556 F.2d 1107 (Ct. Cl. 1977). The interest definition in these proposed regulations also would include any amount treated as interest under other provisions of the Code or the regulations thereunder, such as original issue discount, accrued market discount, and amounts with respect to an integrated transaction under § 1.1275–6.

For purposes of section 163(j), these proposed regulations also would treat as interest certain amounts that are closely related to interest and that affect the economic yield or cost of funds of a transaction involving interest, but that may not be compensation for the use or forbearance of money on a stand-alone basis. Income, deduction, gain, or loss from a transaction used to hedge an interest bearing asset or liability, a substitute interest payment made on a debt instrument under the terms of a securities lending or a sale-repurchase transaction, certain commitment fees, and certain debt issuance costs are examples of amounts that would be treated as interest under these proposed regulations. In addition, in order to prevent transactions that are essentially financing transactions from avoiding the application of section 163(j), these proposed regulations contain an anti-avoidance rule that treats as interest expense for purposes of section 163(j) an expense or loss predominantly incurred in consideration of the time value of money in a transaction or series of integrated or related transactions in which a taxpayer secures the use of funds for a period of time.

Treating amounts that are closely related to interest as interest income or expense when appropriate to achieve a statutory purpose is not new; most of the rules treating such payments as interest in these proposed regulations were developed in §§ 1.861–9T and 1.954–2. As a consequence of these rules, however, in some cases certain items could be tested under section 163(j) that are not treated as interest under other provisions that interpret the definition of interest more narrowly. Thus, for example, in certain cases, an amount that was previously deductible under section 162 without limitation could now be tested as business interest expense under section 163(j).

As previously noted, these proposed regulations address the treatment of a commitment fee paid in connection with a lending transaction. This treatment is based on a rule in § 1.954–2(h). The Treasury Department and the

IRS request comments on whether other types of fees paid in connection with a lending transaction that are not otherwise treated as interest for Federal income tax purposes should be treated as interest for purposes of section 163(j). As also previously noted, these proposed regulations would treat as interest certain amounts that are closely related to interest and that affect the economic yield or cost of funds of transactions involving interest. The Treasury Department and the IRS request comments on whether additional guidance is needed regarding amounts that are covered or not covered by this rule, specific types of amounts that should or should not be covered, how such amounts are linked to related transactions involving interest, and how such amounts are treated for financial reporting or other nontax purposes. More generally, the Treasury Department and the IRS request comments on whether other types of income and expense should be treated as interest income or interest expense for purposes of section 163(j). For example, should income earned by a taxpayer in a transaction in which the taxpayer provides the use of funds be treated as interest income of the taxpayer if such income is earned predominantly in consideration of the time value of money?

Finally, these proposed regulations generally would treat a swap with significant nonperiodic payments as two separate transactions consisting of an on-market, level payment swap and a loan. The loan would be accounted for by the parties to the contract independently of the swap. The time value component associated with the loan, determined in accordance with § 1.446–3(f)(2)(iii)(A), would be recognized as interest expense to the payor and interest income to the recipient. This provision in these proposed regulations would apply in the same manner as § 1.446–3(g)(4) before it was amended on May 8, 2015, by T.D. 9719 (80 FR 26437, as corrected by 80 FR 61308 (October 13, 2015)), except that this provision would not apply to a collateralized swap that is cleared by a derivatives clearing organization or by a clearing agency. The treatment of such collateralized cleared swaps is reserved, and these proposed regulations would not require testing the assets used for collateralization or condition the exception for collateralized cleared swaps on the extent of collateralization. The Treasury Department and the IRS request comments on the proper treatment of swaps that are cleared by a derivatives clearing organization or by a clearing agency, and any requirements with respect to collateralization that would be necessary or appropriate to identify swaps that could be used to effectively advance funds through the use of nonperiodic payments.

The Treasury Department and the IRS considered three options with respect to the definition of interest. The first option considered was to not provide a definition of interest, and thus rely on general tax principles and case law for purposes of defining interest for purposes of section 163(j). While adopting this option might reduce the compliance burden for some taxpayers, not providing an explicit definition of interest would create its own uncertainty as neither taxpayers nor the IRS might have a clear sense of what types of payments are treated as interest income and interest expense for purposes of section 163(j). Such uncertainty could increase burdens to the IRS and taxpayers including with respect to disputes and litigation about whether particular payments are interest for section 163(j) purposes. Importantly, this option could be distortive as it could result in inappropriate outcomes for taxpayers that earn income that is economically similar to interest income but that has not historically been so treated under general tax principles. For example, in the case of the acquisition of a customer receivable at a discount, existing income tax principles may treat the difference between the acquisition price and the amount ultimately paid on the receivable as ordinary income that is not interest income. In addition, such an approach to the definition of interest would incentivize taxpayers to engage in transactions that provide leverage while generating deductions economically similar to interest but make arguments that such deductions fail to be described by existing principles defining interest expense. If successful, such strategies may greatly limit the application of section 163(j), contrary to the Congressional intent of limiting the deductibility of interest of businesses with the greatest levels of leverage. See House Report, H.R. 115–409 at 248. In addition, such an approach may ignore the statutory language of section 163(j)(1) ''[t]he amount allowed as a deduction *under this chapter* for any taxable year for business interest . . .'' (emphasis added), which is, on its face, broader than merely deductions under section 163.

The second option considered would have been to adopt a definition of interest but limit the scope of the definition to cover only amounts associated with conventional debt instruments and amounts that are generally treated as interest under the Code or regulations for all purposes prior to the passage of the TCJA. For example, this is similar to the definition of interest proposed in § 1.163(j)–1(b)(20)(i). While this would bring clarity to many transactions regarding what would be deemed interest for the section 163(j) limitation, the Treasury Department and the IRS believe that this approach would potentially distort future financing transactions. Some taxpayers would choose to use financial instruments and transactions that provide a similar economic result to using a conventional debt instrument, but would avoid the label of interest expense under such a definition, potentially enabling these taxpayers to avoid the section 163(j) limitation without a substantive change in capital structure. As a result, the transactions discussed in the prior paragraph would continue to be possible and incentivized under this approach.

In addition, there are certain transactions where under a specific provision of the Code and regulations, amounts could be characterized as ordinary income when in substance the amounts are interest income. For example, in the case of the acquisition of a customer receivable at a discount, existing income tax principles may treat the difference between the acquisition price and the amount ultimately paid on the receivable as ordinary income that is not interest income; however, such income would count as interest income under economic principles. As another example, the receipt of substitute interest paid on a securities loan arrangement may, under existing income tax principles, also be treated as ordinary income rather than interest income despite the fact that such income would also be treated as interest income under economic principles. Prior to the enactment of the section 163(j) interest limitation in TCJA, whether such amounts were labeled as ordinary income or interest income was not often material to the overall tax liability of most taxpayers, but now this distinction may have a significant impact on a large number of taxpayers.

The final option considered and the one ultimately adopted in these proposed regulations is to provide a complete definition of interest that addresses all transactions that are commonly understood to produce interest income and expense, including transactions that may otherwise have been entered into to avoid the application of section 163(j). This approach has the advantage of also

providing rules that clearly treat amounts as interest in appropriate cases. Although a comprehensive definition of interest requires an unavoidable degree of detail, the benefits of a detailed definition should decidedly outweigh any complexity that results. The proposed regulations also reduce taxpayer burden by adopting definitions of interest that have already been developed and administered in §§ 1.861–9T and 1.954–2, and add several definitions of interest income that were suggested by commenters (such as the rules regarding amounts on contingent payment debt instruments in § 1.163(j)–1(b)(20)(iii)(B)).

The Treasury Department and the IRS invite comments on the definition of interest for purposes of section 163(j) contained in these proposed regulations, whether another definition of interest would be more appropriate in the context of section 163(j), and, generally, what definition of interest would be the most appropriate definition for purposes of section 163(j).

C. Trades or Businesses and Excepted Trades or Businesses

While section 163(j) and the legislative history to section 163(j) provide that certain activities are not treated as trades or businesses, neither section 163(j) nor its legislative history provide a definition of what activities generally constitute a trade or business. The most established and developed definition of trade or business is found under section 162(a), which permits a deduction for ordinary and necessary expenses paid or incurred in carrying on a trade or business. The rules under section 162 for determining the existence of a trade or business are well-established, and there is a large body of case law and administrative guidance interpreting the meaning in section 162 of a trade or business. Therefore, these proposed regulations would define a trade or business as a trade or business within the meaning of section 162, and such definition should aid taxpayers in the proper allocation of interest expense, interest income, and other tax items to a trade or business and an excepted trade or business.

These proposed regulations would also define excepted trades or businesses that are not subject to the limitation of interest expense deduction under section 163(j). These excepted trades or businesses are defined in 163(j)(7)(A), and include (1) the trade or business of providing services as an employee; (2) certain real property businesses that elect to be excepted; (3) certain farming businesses that elect to be excepted; and (4) certain regulated utility businesses. These proposed regulations would provide additional guidance with respect to regulated utility businesses and the allocation of interest expense to such businesses. See proposed §§ 1.163(j)–1(b)(13) and 1.163(j)–10. Proposed regulations under section 469 would provide additional detail with respect to the definition of a real property trade or business. See proposed § 1.469–9(b).

The Treasury Department and the IRS invite comments on whether another definition of trade or business would be preferable or appropriate in the context of section 163(j).

D. Electing Real Property Trade or Business

These proposed regulations would provide that taxpayers can make an election to treat certain trades or businesses as an excepted trade or business if it is a real property trade or business under section 469(c)(7)(C), or certain trades or businesses that are conducted by REITs. Definitions and special rules for REITs would be provided in proposed § 1.163(j)–9.

E. Electing Farming Business

These proposed regulations would provide that taxpayers can make an election to treat a trade or business that is a farming business as defined in section 263A(e)(4) or that is a farming business under § 1.263A–4(a)(4) for capitalization purposes as an excepted farming business for purposes of section 163(j). These proposed regulations would also provide that a trade or business that is a specified agricultural or horticultural cooperative under section 199A(g)(4) and regulations thereunder can elect to be an excepted farming business for purposes of section 163(j). The Treasury Department and the IRS note that section 163(j)(7)(B) cites section 199A(g)(2) for the definition of a specified agricultural or horticultural cooperative. However, after Public Law 115–141 amended section 199A, the correct citation is section 199A(g)(4). Additionally, the Treasury Department and the IRS are developing separate proposed regulations to provide additional guidance under section 199A(g).

F. Regulated Utility Trade or Business

Consistent with section 163(j)(7)(A)(iv), these proposed regulations would provide that an excepted trade or business includes a regulated utility trade or business that furnishes or sells certain regulated items to the extent the rates for such furnishing or sale have been established or approved by a State or political subdivision thereof, by any agency or instrumentality of the United States, by a public service or public utility commission or other similar body of any State or political subdivision thereof, or by the governing or ratemaking body of an electric cooperative. Certain regulated items are electrical energy, water, or sewage disposal services; gas or steam through a local distribution system; or transportation of gas or steam by pipeline.

Section 163(j) does not define the term ''electric cooperative'' either directly or by reference to other provisions of the Code. The tax treatment of an electric cooperative is generally governed by section 501(c)(12) of the Code, sections 1381 through 1388 in subchapter T of chapter 1 of subtitle A of the Code (subchapter T), or the common law applicable to cooperatives prior to the enactment of subchapter T. For purposes of section 163(j), the tax treatment of an electric cooperative is not relevant because the statutory language of section 163(j)(7)(A) only requires that rates be set by the ratemaking body of an electric cooperative and does not impose a requirement that the electric cooperative have any particular tax treatment. Accordingly, for purposes of section 163(j), the term electric cooperative includes an electric cooperative that is exempt from income tax under section 501(c)(12), an electric cooperative that is taxable under subchapter T, and an electric cooperative furnishing electric energy to persons in rural areas that is taxable under pre-subchapter T law.

A commenter suggested that rules similar to those that have been used to define public utility property under section 168(i)(10) be used to determine the trade or business that qualifies as a regulated public utility and to distinguish between a regulated and a non-regulated trade or business. The statutory language of section 163(j)(7)(A)(iv) is very similar to that provided under section 168(i)(10) for the definition of a public utility property. Under section 168(i)(10), public utility property is defined as property that is predominately used in one of the enumerated trades or business, which includes the furnishing or sale of certain regulated items listed in section 163(j)(7)(A)(iv), and where the rates for such furnishing or sale are established or approved on a cost of service and rate of return basis.

The Treasury Department and the IRS are aware that such furnishing or sale of the regulated items may not have been established or approved on a cost of service and rate of return basis by a governing or ratemaking body. For

example, a public utility may sell some of its electrical energy output at market rates. In this situation, the activity related to the sales at market rates would not be treated as activities related to an excepted regulated utility trade or business under these proposed regulations. Thus, these proposed regulations would provide that to the extent a taxpayer is engaged in both excepted and non-excepted regulated utility trades or businesses, the taxpayer must allocate tax items between the trades or businesses if less than 90 percent of the total output is sold on a cost of service and rate of return basis. Some regulated utility trades or businesses with de minimis market rate sales, rather than pursuant to a cost of service and rate of return basis, are treated as entirely excepted trades or businesses. See proposed § 1.163(j)–10(c)(3)(iii)(C)(*3*). Guidance related to the allocation methodology for regulated public utility trades or businesses is also provided in proposed § 1.163(j)–10(c)(3)(ii)(C).

G. Floor Plan Financing Interest Expense

These proposed regulations would provide that certain business interest expense paid or accrued on indebtedness used to acquire an inventory of motor vehicles is deductible without regard to the section 163(j) limitation. These proposed regulations would treat all floor plan financing interest expense as business interest expense for purposes of section 163(j), regardless of whether it would otherwise be considered properly allocable to a trade or business that is not excepted under section 163(j).

One commenter to Notice 2018–28 recommended a rule that debt incurred to purchase construction machinery or equipment for sale or lease to farmers should be considered floor plan financing indebtedness for purposes of section 163(j). While H.R. 1, 115th Cong. (as passed by the House of Representatives, November 16, 2017) included construction machinery and equipment in the definition of ''motor vehicle'' for purposes of floor plan financing indebtedness, the TCJA does not include such machinery and equipment in the statutory definition. The definition of ''motor vehicle'' for purposes of floor plan financing indebtedness is based on the equipment held for sale or lease, not on the kind of business that the purchaser or lessee is engaged in. Therefore, these proposed regulations do not include the rule suggested by the commenter and merely cross-reference the definition of ''motor vehicle'' as set forth in section 163(j)(9)(C).

2. Proposed § 1.163(j)–2: Deduction for Business Interest Expense Limited

A. General Rules

Consistent with section 163(j)(1), these proposed regulations would provide that the deduction for business interest expense for any taxpayer, other than businesses qualifying for the small business exemption, cannot exceed the sum of current-year business interest income, 30 percent of ATI, and current-year floor plan financing interest expense. See proposed § 1.163(j)–2(b).

To the extent that a taxpayer has business interest expense for the taxable year in excess of the section 163(j) limitation, these proposed regulations would allow the taxpayer a disallowed business interest expense carryforward to the next taxable year. See proposed § 1.163(j)–2(c). The limitation under section 163(j)(1) applies to the total amount of business interest expense of the taxpayer in a taxable year (including disallowed business interest expense carryforwards from prior taxable years) and does not directly trace to interest expense in respect of any particular debt obligation of the taxpayer. Similarly, the disallowed business interest expense carryforward allowed in a taxable year represents the total amount of disallowed business interest expense that is carried forward to the taxable year and does not directly trace to a particular debt obligation of a taxpayer.

B. Exemption for Certain Small Taxpayers; Aggregation; Inherently Personal Items

Consistent with section 163(j)(3), these proposed regulations would provide that taxpayers that meet the gross receipts test of section 448(c) are not subject to the section 163(j) limitation. Eligible taxpayers are those, other than tax shelters under section 448(a)(3), with average annual gross receipts of $25 million or less, tested for the three taxable years immediately preceding the current taxable year. Such a taxpayer is not permitted to make an election under either section 163(j)(7)(B) or (C) because the taxpayer is already not subject to the section 163(j) limitation.

The gross receipts test of section 448(c) is an annual determination based on the prior three taxable years. Thus, a taxpayer's status as an exempt small business under section 163(j) may change from year to year. Because the exemption applies to the taxpayer, any interest paid or accrued in the taxable year in which the taxpayer meets the gross receipts test under section 448(c) is not subject to the section 163(j) limitation. Accordingly, and consistent with section 163(j)(2), these proposed regulations would provide that if a taxpayer who is subject to the limitation under section 163(j)(1) carries disallowed business interest expense forward to a taxable year in which the taxpayer qualifies for the small business exemption, the amount of the carryforward is not subject to the section 163(j) limitation in that taxable year and would be deductible in that taxable year unless disallowed, deferred, or capitalized under another provision of the Code.

Consistent with the regulations under section 448(c), for organizations that are exempt from tax under section 501(a), these proposed regulations would provide that only gross receipts from the activities of such organization that constitute unrelated trades or businesses are taken into account in determining whether the gross receipts test is satisfied. The Treasury Department and the IRS request comments on whether additional guidance is needed in the case of any other exempt organizations with respect to the application of the gross receipts test for purposes of section 163(j).

These proposed regulations would also provide that each partner in a partnership includes a share of partnership gross receipts in proportion to such partner's distributive share of items of gross income that were taken into account by the partnership under section 703. With respect to shareholders in S corporations, these regulations would provide that such shareholders include a pro rata share of the S corporation's gross receipts. The Treasury Department and the IRS request comments on this approach, and also whether other approaches to determining the gross receipts of partners and S corporation shareholders for purposes of section 163(j) would more accurately measure the gross receipts of such partners and shareholders.

These proposed regulations would provide that a taxpayer who is not subject to section 448 is treated as though it were a partnership or corporation when applying the section 448(c) gross receipts test for purposes of the section 163(j) small business exemption. The aggregation rules of sections 52 and 414 would apply to determine whether entities should be aggregated for purposes of the gross receipts test. For an individual taxpayer, it is intended that gross receipts include all items that a business entity could receive, including, but not limited to,

business receipts and investment receipts. The only items that an individual taxpayer may exclude from gross receipts for the purpose of the section 163(j) small business exemption are inherently personal items. Inherently personal items include Social Security benefits, personal injury awards and settlements, disability benefits, and wages received as an employee that are reported on Form W–2. Guaranteed payments are not generally equivalent to salaries and wages. See Rev. Rul. 69–187. The Treasury Department and the IRS request comments regarding the scope of inherently personal items.

3. Proposed § 1.163(j)–3: Relationship of Business Interest Deduction Limitation to Other Provisions Affecting Interest

These proposed regulations would provide ordering and operating rules to control the interaction of the section 163(j) limitation with other provisions of the Code. The legislative history to the TCJA shows an intent for section 163(j) to apply after other provisions that defer, capitalize, or disallow interest expense. See H. Rept. 115–466, at 387 (2017). Therefore, these proposed regulations generally would apply to interest expense that could be deducted without regard to the section 163(j) limitation; interest expense that has been disallowed, deferred, or capitalized in the current taxable year, or which has not yet been accrued, would not be taken into account for purposes of section 163(j). However, it is intended that, under these proposed regulations, section 163(j) would apply before the operation of the loss limitation rules in sections 465 and 469 and before the application of section 461(l), consistent with how taxpayers apply old section 163(j)(7). In addition, the Treasury Department and the IRS request comments regarding the interaction between section 163(j) and the rules addressing income from discharge of indebtedness under section 108.

The Treasury Department and the IRS have received comments on the interaction of sections 163(j) and 59A, relating to the tax on the base erosion minimum tax amount. These proposed regulations reserve on the interaction of these provisions. The comments previously received, as well as any additional comments received, will be further considered in conjunction with separate guidance under section 59A.

4. Proposed § 1.163(j)–4: General Rules Applicable to C Corporations (Including REITs, RICs, and Members of Consolidated Groups) and Tax-Exempt Corporations

Proposed § 1.163(j)–4 would provide certain rules regarding the computation of items of income and expense under section 163(j) for taxpayers that are C corporations (including members of a consolidated group, REITs, and RICs) and tax-exempt corporations. Proposed § 1.163(j)–4(b) would provide rules regarding the characterization of items of income, gain, deduction, or loss. Proposed § 1.163(j)–4(c) would provide rules regarding adjustments to earnings and profits. Proposed § 1.163(j)–4(d) would provide special rules applicable to members of a consolidated group.

A. Proposed § 1.163(j)–4(b): Characterization of Items of Income, Gain, Deduction, or Loss

Like other taxpayers, corporations are subject to the limitations on the deductibility of business interest expense in section 163(j). However, unlike other taxpayers, corporations are not subject to the limitations on the deductibility of investment interest expense in section 163(d). In enacting section 163(j), which excludes from the definition of business interest in section 163(j)(5), investment interest within the meaning of section 163(d), and excludes from the definition of business interest income, investment income within the meaning of section 163(d), Congress commented on the interaction between section 163(d) and (j) and the implications thereof for the application of section 163(j) to corporations. More specifically, the legislative history states that—

> [s]ection 163(d) applies in the case of a taxpayer other than a corporation. Thus, a corporation has neither investment interest nor investment income within the meaning of section 163(d). Thus, interest income and interest expense of a corporation is properly allocable to a trade or business, unless such trade or business is otherwise explicitly excluded from the application of the provision.

H. Rept. 115–466, at 386, fn. 688 (2017).

Although the foregoing language could be read to apply to both C corporations and S corporations, it is clear that an S corporation can have investment income and investment expenses within the meaning of section 163(d). These items are separately stated on an S corporation's Schedule K–1, ''Partner's Share of Income, Deductions, Credits, etc.,'' and they are passed through to an S corporation's shareholders. Thus, Congress appears to have made the foregoing statement with C corporations in mind.

Consistent with congressional intent, proposed § 1.163(j)–4(b) would provide that, solely for purposes of section 163(j), and except as otherwise provided in proposed § 1.163(j)–10 (concerning allocations between excepted and non-excepted trades or businesses), all interest paid or accrued by a taxpayer that is a C corporation is treated as business interest expense, and all interest received or accrued by a taxpayer that is a C corporation and that is includible in the taxpayer's gross income is treated as business interest income. Thus, all of a C corporation's interest expense would be subject to limitation under section 163(j), and all of a C corporation's interest income would increase the C corporation's section 163(j) limitation, except to the extent such interest expense or interest income is allocable to an excepted trade or business under proposed § 1.163(j)–10.

To reflect congressional intent, and to achieve consistency with the treatment of interest income and interest expense, proposed § 1.163(j)–4(b) would further provide that, solely for purposes of section 163(j), and except as otherwise provided in proposed § 1.163(j)–10, all other items of income, gain, deduction, or loss of a taxpayer that is a C corporation are properly allocable to a trade or business. As a result, such tax items would be factored into a C corporation's calculation of its ATI (except to the extent such items are allocable to an excepted trade or business).

Although a C corporation cannot have investment interest, investment expenses, or investment income, within the meaning of section 163(d), for purposes of section 163(j), a partnership in which a C corporation is a partner may have such tax items. The partnership will allocate such tax items to its partners, including its C corporation partners, as separately stated items. Thus, the question arises how to treat investment interest, investment expenses, and investment income that is allocated by a partnership to a C corporation partner.

To address this situation, proposed § 1.163(j)–4(b) would recharacterize investment interest expense that a partnership allocates to a C corporation partner as interest expense properly allocable to a trade or business of the C corporation. Similarly, proposed § 1.163(j)–4(b) would treat investment income and investment expenses that a partnership allocates to a C corporation partner as properly allocable to a trade or business of the C corporation. See the

discussion in part 6(G) of this Explanation of Provisions section. However, this rule would not apply to the extent a C corporation partner is allocated a share of a domestic partnership's gross income inclusions under section 951(a) or 951A(a) that are treated as investment income at the partnership level. See § 1.163(j)–7(d)(1)(ii) and the discussion in part 7 of this Explanation of Provisions section.

The recharacterization of investment items at the C corporation partner level under proposed § 1.163(j)–4(b) would not affect the character of these items at the partnership level. It also would not affect the character of the investment interest, investment income, and investment expenses allocated to other (non-C corporation) partners.

Investment interest expense of a partnership that is treated as business interest expense by the C corporation partner would not be treated as excess business interest expense within the meaning of section 163(j)(4)(b)(i) and proposed § 1.163(j)–6. Similarly, investment interest income of a partnership that is treated as business interest income by the C corporation partner would not be treated as excess taxable income within the meaning of section 163(j)(4)(C) and proposed § 1.163(j)–6. This is the case because these items were not treated as business interest expense or factored into the ATI calculation, respectively, at the partnership level. For a discussion of the rules governing excess business interest expense and excess taxable income, see part 6 of this Explanation of Provisions section.

Except as otherwise provided in proposed § 1.163(j)–4(b)(4)(ii) and (iii), the foregoing rules would apply to RICs and REITs. The Treasury Department and the IRS request comments on whether additional special rules are needed for any other entities that are generally taxed as C corporations, including but not limited to cooperatives (as defined in section 1381(a)) and publicly traded partnerships (as defined in section 7704(b)).

These rules also would apply to a corporation that is subject to the unrelated business income tax under section 511, but only with respect to such corporation's items of income, gain, deduction, or loss that are taken into account in computing the corporation's unrelated business taxable income.

B. Proposed § 1.163(j)–4(c): Effect on Earnings and Profits

Distributions by a C corporation to its shareholders out of earnings and profits (E&P) are treated as dividends under section 316(a). Although the Code does not define the term ''earnings and profits,'' the computation of E&P generally is based upon accounting concepts that take into account the economic realities of corporate transactions, in particular, their impact on the corporation's economic ability to pay dividends to its shareholders, and the applicable tax laws.

Proposed § 1.163(j)–4(c) generally would provide that the disallowance and carryforward of a deduction for a C corporation's business interest expense under proposed § 1.163(j)–2 will not affect whether or when such business interest expense reduces the taxpayer's E&P. In other words, C corporations generally should not wait to reduce their E&P for business interest expense until the taxable year in which a deduction for such expense is allowed under section 163(j). This approach, which is the same approach used in the Prior Proposed Regulations under old section 163(j) (see § 1.163(j)–1(e), 56 FR 27907 (June 18, 1991)), reflects the fact that the payment or accrual of business interest expense generally reduces the C corporation's dividend-paying capacity in the year the expense is paid or accrued, without regard to the application of section 163(j). Additionally, disallowed business interest expense carryforwards are somewhat analogous to net operating loss (NOL) carryovers, and taxpayers reduce their E&P in the year the losses that give rise to an NOL are incurred rather than in a subsequent year in which an NOL carryover is absorbed.

However, the section 163(j) regulations would contain several modifications to or clarifications of the general rule regarding E&P. First, if a taxpayer is a RIC or a REIT for the taxable year in which a deduction is disallowed under section 163(j), or in which the RIC or REIT is allocated excess business interest expense from a partnership under section 163(j)(4)(B)(i) and proposed § 1.163(j)–6, then the taxpayer's E&P would not be reduced in the year the expense is paid or accrued without regard to the application of section 163(j). Rather, the taxpayer's E&P would be reduced in the taxable year(s) in which the business interest expense is deductible or, if earlier, in the first taxable year for which the taxpayer no longer is a RIC or a REIT. See proposed § 1.163(j)–4(c)(2) and the discussion of RICs and REITs later in part 4(C) of this Explanation of Provisions section.

Second, a taxpayer would not reduce its E&P in a taxable year beginning after December 31, 2017, to reflect any carryforwards of disallowed disqualified interest (within the meaning of old section 163(j)) to the extent the taxpayer previously reduced its E&P to reflect those interest payments in a prior taxable year. See proposed § 1.163(j)–11(b).

Third, C corporations other than REITs and RICs would make special E&P adjustments with respect to excess business interest expense allocated from a partnership. In general, a C corporation partner must reduce its E&P to reflect expense allocations from the partnership, including allocations of excess business interest expense. However, with respect to excess business interest expense in particular, the C corporation partner also must increase its E&P upon the disposition of the partnership interest to reflect the amount of excess business interest expense that the partner did not take into account while it held the partnership interest.

C. RICs and REITs

RICs and REITs are C corporations and are generally subject to the rules that apply to other C corporations, unless a provision in subchapter M of chapter 1 of the Code makes the rules inapplicable. There are no rules in subchapter M or section 163(j) that make section 163(j) inapplicable to REITs or RICs. Therefore, under these proposed regulations, RICs and REITs would be subject to section 163(j). Some REITs may not have any business interest expense subject to limitation under section 163(j) because they have only electing real property trades or businesses described in section 163(j)(7)(B). Other REITs, however, will have trades or businesses for which the REIT cannot or will not make the election under section 163(j)(7)(B). For example, a mortgage REIT cannot make such an election because real property financing is not an activity described in section 469(c)(7)(C).

RICs and REITs often derive a significant amount (if not all) of their income from property held for investment. However, under these proposed regulations, RICs and REITs would apply the same rules as other C corporations in determining which items are properly allocable to a trade or business. Thus, solely for purposes of 163(j), all of the interest expense and interest income of a RIC or REIT would be treated as business interest expense and business interest income, and all

other items of income, gain, deduction, or loss of a RIC or REIT would be treated as properly allocable to a trade or business under proposed § 1.163(j)–4(b), except as otherwise provided in proposed § 1.163(j)–10.

RICs and REITs differ from other taxpayers because the income tax liability of a RIC or REIT is not based directly on its taxable income. Instead, tax is imposed on a RIC's investment company taxable income (ICTI) and a REIT's real estate investment trust taxable income (REITTI), each of which is determined by making certain adjustments to taxable income. These adjustments include the allowance of the deduction for dividends paid and the disallowance of the special corporate deductions in part VIII of subchapter B of chapter 1 of the Code (sections 241 and following) except section 248. The special corporate deductions include the dividends received deduction and the deductions under section 250 in respect of foreign-derived intangible income and global intangible low-taxed income (GILTI).

Under section 163(j)(8), a taxpayer's ATI generally is based on its taxable income, and there is no statutory requirement under which the ATI of a RIC or REIT would be based on ICTI or REITTI. Therefore, unless regulations provide otherwise, the ATI of a RIC or REIT does not reflect the deduction for dividends paid. A RIC or REIT typically pays dividends sufficient to eliminate all or nearly all ICTI or REITTI. As a result, if the ATI of a RIC or REIT took into account the deduction for dividends paid, the ATI of the RIC or REIT typically would be zero, or close to zero. It would be distortive to treat the deduction for dividends paid as reducing ATI because this deduction is merely the mechanism by which RICs and REITs shift the tax liability associated with their income to their shareholders, as intended pursuant to subchapter M of the Code. Therefore, these proposed regulations would not provide a rule that would cause the ATI of a RIC or REIT to take into account the deduction for dividends paid. The deduction for dividends received and the other special corporate deductions previously mentioned, however, are deductions that should reduce the ATI only of taxpayers that benefit from the deductions in determining tax liability. To reduce ATI for such items for taxpayers that cannot in fact utilize these deductions would be distortive. Therefore, under these proposed regulations, the ATI of a RIC or REIT would be increased by the amounts of these special corporate deductions, which decreased the RIC's or REIT's taxable income, because the deductions do not reduce the tax liability of RICs and REITs (or the amounts that RICs or REITs must distribute to eliminate entity-level tax).

RICs and REITs must meet distribution requirements each year in order to be allowed the deduction for dividends paid. If interest expense paid or accrued by a RIC or REIT is disallowed or deferred under section 163(j), or if a RIC or REIT is allocated any excess business interest expense from a partnership, such expense will not reduce the entity's taxable income, the entity's ICTI or REITTI as the case may be, or the amount of dividends that the entity must pay from its earnings and profits. Therefore, the earnings and profits of the RIC or REIT also should not be reduced. Accordingly, these proposed regulations would contain a special rule for RICs and REITs under which their earnings and profits generally would not be reduced by a disallowed business interest expense deduction in the year it is disallowed, or by any excess business interest expense allocated from a partnership.

D. Proposed § 1.163(j)–4(d): Special Rules for Consolidated Groups

Section 1502 provides broad authority for the Secretary of the Treasury to prescribe such regulations as are necessary in order that the tax liability of any affiliated group of corporations filing a consolidated return may be returned, determined, computed, assessed, collected, and adjusted, in order to clearly reflect the income tax liability of the consolidated group and to prevent the avoidance of such tax liability. The legislative history of section 163(j) states that, ''[i]n the case of a group of affiliated corporations that file a consolidated return, the limitation applies at the consolidated tax return filing level.'' H. Rept. 115–466, at 386 (2017). Consistent with legislative intent, proposed § 1.163(j)–4(d) generally would provide that a consolidated group (as defined in § 1.1502–1(h)) has a single section 163(j) limitation. In contrast, members of an affiliated group that does not file a consolidated return would not be aggregated for purposes of applying the section 163(j) limitation. Additionally, partnerships that are wholly owned by members of a consolidated group would not be aggregated with the consolidated group for purposes of applying the section 163(j) limitation. The Treasury Department and the IRS have determined that non-consolidated entities should not be aggregated for purposes of applying the section 163(j) limitation because, whereas old section 163(j)(6)(C) expressly provided that ''[a]ll members of the same affiliated group (within the meaning of section 1504(a)) shall be treated as 1 taxpayer,'' section 163(j) no longer contains such language, and nothing in the legislative history of section 163(j) suggests that Congress intended non-consolidated entities to be treated as a single taxpayer for purposes of section 163(j).

Proposed § 1.163(j)–4(d) would provide specific rules regarding the calculation of the section 163(j) limitation for a consolidated group. In particular, proposed § 1.163(j)–4(d) would provide that the relevant taxable income in computing the group's ATI is the group's consolidated taxable income determined under § 1.1502–11 without regard to any carryforwards or disallowances under section 163(j). Additionally, if for a taxable year a member of a consolidated group is allowed a deduction under section 250(a)(1) that is properly allocable to a non-excepted trade or business, then, for purposes of calculating ATI, consolidated taxable income for the taxable year is determined as if the deduction were not subject to the limitation in section 250(a)(2) and the regulations thereunder. For this purpose, the amount of the deduction allowed under section 250(a)(1) is determined without regard to the application of section 163(j) and the section 163(j) regulations. Moreover, for purposes of calculating the group's section 163(j) limitation, the group's current-year business interest expense and business interest income, respectively, would be the sum of the current-year business interest expense and business interest income of all members of the group. For purposes of this Explanation of Provisions and the proposed section 163(j) regulations, the term ''current-year business interest expense'' means business interest expense that would be deductible in the current taxable year without regard to section 163(j) and that is not a disallowed business interest expense carryforward from a prior taxable year (see proposed § 1.163(j)–5(a)(2)(i)). Additionally, intercompany obligations (as defined in § 1.1502–13(g)(2)(ii)) would be disregarded for purposes of determining a member's current-year business interest expense and business interest income and for purposes of calculating the consolidated group's ATI, and intercompany items and corresponding items (within the meaning of § 1.1502–13(b)(2)(i) and (b)(3)(i), respectively) would be disregarded for purposes of calculating

the group's ATI to the extent those items offset in amount.

Proposed § 1.163(j)–4(d) also cross-references the rules in § 1.1502–32(b), which govern investment adjustments within a consolidated group. Under those rules, if a member has current-year business interest expense for which a deduction is disallowed in the current taxable year under section 163(j), basis in the member's stock would be adjusted in a later taxable year when the expense is absorbed by the group.

Proposed § 1.163(j)–4(d) would further clarify that the transfer of a partnership interest in an intercompany transaction that does not result in the termination of the partnership is treated as a disposition for purposes of the basis adjustment rule in section 163(j)(4)(B)(iii)(II), regardless of whether the transfer is one in which gain or loss is recognized. Several examples would be added to § 1.1502–13(c)(7)(ii) to illustrate the application of these rules. The Treasury Department and the IRS have determined that intercompany transfers of partnership interests should be treated as dispositions for purposes of section 163(j)(4) because dispositions are broadly defined in section 163(j)(4)(B)(iii)(II), and because ignoring intercompany transfers of partnership interests for purposes of section 163(j)(4) would be inconsistent with the view that an entity whose owners are all members of the same consolidated group can be a partnership. In contrast, a change in status of a member, becoming or ceasing to be a member of a consolidated group, would not be treated as a disposition for these purposes.

The Treasury Department and the IRS request comments as to whether the intercompany transfer of a partnership interest in a nonrecognition transaction should constitute a disposition for purposes of section 163(j)(4)(B)(iii)(II) and, if so, how § 1.1502–13(c) should apply to such a transfer if there is excess taxable income in a succeeding taxable year. The Treasury Department and the IRS also request comments as to the treatment of the transfer of a partnership interest in an intercompany transaction that results in the termination of the partnership.

Additionally, proposed § 1.163(j)–4(d) would provide that a member's allocation of excess business interest expense from a partnership and the resulting decrease in basis in the partnership interest under section 163(j)(4)(B) is not a noncapital, nondeductible expense for purposes of § 1.1502–32(b)(3)(iii). Similarly, an increase in a member's basis in a partnership interest under section 163(j)(4)(B)(iii)(II) to reflect excess business interest expense not deducted by the consolidated group is not tax-exempt income for purposes of § 1.1502–32(b)(3)(ii). These special rules are intended to ensure that the allocations and basis adjustments under proposed § 1.163(j)–6 do not result in investment adjustments within the consolidated group. This result is appropriate because the application of the proposed § 1.163(j)–6 rules does not result in a net reduction in the tax attributes of the member partner; rather, there is an exchange of one type of attribute for another (excess business interest expense allocated from the partnership vs. basis in the partnership interest). The Treasury Department and the IRS request comments as to whether additional rules are needed to prevent loss duplication upon the disposition of stock of a member holding partnership interests.

5. Proposed § 1.163(j)–5: General Rules Governing Disallowed Business Interest Expense Carryforwards for C Corporations

Proposed § 1.163(j)–5 would provide certain rules regarding disallowed business interest expense carryforwards for taxpayers that are C corporations, including members of a consolidated group. Proposed § 1.163(j)–5(b) would provide rules regarding the treatment of disallowed business interest expense carryforwards. Proposed § 1.163(j)–5(c) would provide cross-references to rules regarding disallowed business interest expense carryforwards in transactions to which section 381(a) applies. Proposed § 1.163(j)–5(d) would provide rules regarding limitations on disallowed business interest expense carryforwards from separate return limitation years (SRLYs). Proposed § 1.163(j)–5(e) would provide cross-references to rules regarding the application of section 382. Proposed § 1.163(j)–5(f) would provide rules regarding the overlap of the SRLY limitation with section 382.

A. Proposed § 1.163(j)–5(b): Treatment of Disallowed Business Interest Expense Carryforwards

Proposed § 1.163(j)–2 limits the amount of business interest expense for which a deduction is allowed in the taxable year. Proposed § 1.163(j)–2 further provides that the amount of any business interest expense not allowed as a deduction for any taxable year as a result of the section 163(j) limitation is carried forward to the succeeding taxable year as a disallowed business interest expense carryforward.

Proposed § 1.163(j)–5(b)(2) generally would provide that, for a C corporation taxpayer that is not a member of a consolidated group, current-year business interest expense is deducted in the current taxable year before any disallowed business interest expense carryforwards from a prior taxable year are deducted in that year. Disallowed business interest expense carryforwards are then deducted in the order of the taxable years in which they arose, beginning with the earliest taxable year, subject to certain limitations (for example, the limitation under section 382). S corporations would be subject to similar rules (see proposed § 1.163(j)–6(l)(5)).

Proposed § 1.163(j)–5(b)(3) would provide similar rules applicable to consolidated groups. In addition, disallowed business interest expense carryforwards from prior separate limitation years (as defined in § 1.1502–1(e)) would be subject to the SRLY limitation. See the discussion of the SRLY rules in part 5(C) of this Explanation of Provisions section.

There are several reasons why the Treasury Department and the IRS have determined that current-year business interest expense and disallowed business interest expense carryforwards should be distinguished for taxpayers that are C corporations and S corporations, and why current-year business interest expense should be deducted before carryforwards from prior taxable years.

First, section 163(j) generally reflects an annual accounting approach. The section 163(j) limitation is calculated anew each year based on the taxpayer's taxable income for that year, and no excess limitation from prior taxable years carries forward to succeeding taxable years. By prioritizing the deduction of current-year business interest expense over disallowed business interest expense carryforwards from prior taxable years, this rule conforms to the annual accounting approach of section 163(j).

Second, if taxpayers were required to deduct disallowed business interest expense carryforwards before or simultaneously with current-year business interest expense, they could end up using some or all of their section 382 limitation on disallowed business interest expense carryforwards rather than on NOLs or other tax items subject to the section 382 limitation. For example, assume that X, a stand-alone C corporation, has $40x of disallowed business interest expense carryforwards and $30x of NOL carryovers from Year 1, both subject to a section 382 limitation of $35x. In Year 2, X has $50x of current-year business interest expense and a section 163(j) limitation

of $45x. If X were required to use its disallowed business interest expense carryforwards before its current-year business interest expense, such carryforwards would absorb all of X's section 382 limitation for the current taxable year, and X would not be able to use any of its NOL carryovers. In contrast, under the rule in proposed § 1.163(j)–5(b), X would use $45x of its current-year business interest expense and none of its disallowed business interest expense carryforwards, thus freeing up its section 382 limitation for its NOL carryovers.

Third, taxpayers that file a consolidated return are required to track their losses by taxable year for purposes of applying the NOL carryover and carryback rules of § 1.1502–21(b) and the NOL SRLY limitation rules of § 1.1502–21(c). As noted in part 5(C) of this Explanation of Provisions section, similar SRLY rules would apply to disallowed business interest expense carryforwards. Thus, a non-consolidated corporation must track its disallowed business interest expenses by the year in which such expenses are paid or accrued without regard to section 163(j) so that such corporation can comply with the SRLY limitation rules in the event the corporation joins a consolidated group.

Finally, the Treasury Department and the IRS note that, under proposed § 1.163(j)–4(c), C corporations must track their disallowed business interest expense carryforwards by the year in which such items arose (and in which an E&P adjustment was made; see the discussion of proposed § 1.163(j)–4(c) in part 4 of this Explanation of Provisions section) to ensure that E&P is not further reduced in a subsequent year in which the carryforward is deducted. Thus, the Treasury Department and the IRS have determined that these proposed rules should not create an additional administrative burden for C corporations.

Proposed § 1.163(j)–5(b)(3) would further provide rules regarding which member's business interest expense would be deducted by the consolidated group in the current taxable year. If a group's section 163(j) limitation for the taxable year exceeds the aggregate amount of business interest expense, including disallowed business interest expense carryforwards, of all members, then each member's business interest expense, including carryforwards, would be fully deducted in that year, subject to other limitations, such as the section 382 limitation and the SRLY limitation. However, if the aggregate amount of business interest expense, including carryforwards, of all members exceeds the group's section 163(j) limitation for the year, then certain ordering rules would apply:

- *Step 1:* First, the consolidated group would determine whether its section 163(j) limitation for the current year equals or exceeds the members' aggregate current-year business interest expense. If so, then no amount of the consolidated group's current-year business interest expense would be subject to disallowance in the current year under section 163(j), and the consolidated group would skip Steps 2 and 3 of these ordering rules. If not, then the consolidated group must apply Step 2.
- *Step 2:* If the members' aggregate current-year business interest expense exceeds the group's section 163(j) limitation for the current year, each member with current-year business interest expense and either current-year business interest income or floor plan financing interest expense would deduct its current-year business interest expense up to the amount of its business interest income and floor plan financing interest expense for the year.
- *Step 3:* If the consolidated group has any section 163(j) limitation remaining after the application of Step 2 of these ordering rules, each member with remaining current-year business interest expense would deduct its current-year business interest expense pro rata, based on the relative amounts of remaining current-year business interest expense of all members.
- *Step 4:* If the consolidated group has any section 163(j) limitation remaining after the application of Step 1 of these ordering rules, each member's disallowed business interest expense carryforwards from a prior taxable year would be deducted on a pro rata basis, beginning with the earliest year, subject to certain limitations such as the section 382 limitation and the SRLY limitation. For example, assume that P and S are the only members of a consolidated group with a section 163(j) limitation of $200x for the current year (Year 2). Further assume that the amount of current-year business interest expense deducted in Year 2 is $100x, and that P and S, respectively, have $140x and $60x of disallowed business interest expense carryforwards from Year 1 that are not otherwise subject to limitation (for example, under section 382). Under these facts, P would be allowed to deduct $70x of its carryforwards from Year 1 (($140x/($60x + $140x)) × $100) in Year 2, and S would be allowed to deduct $30x of its carryforwards from Year 1 (($60x/($60x + $140x)) × $100) in Year 2.
- *Step 5:* Any member with remaining business interest expense after applying Steps 1 through 4 of these ordering rules would carry such expense forward to the succeeding taxable year as a disallowed business interest expense carryforward.

If a corporation ceases to be a member during a consolidated return year, the amount of its business interest expense, including carryforwards from prior taxable years, that is neither deducted by the consolidated group in that year nor reduced under § 1.1502–36(d) would be carried forward to the corporation's first separate return year.

The foregoing rules are intended to roughly mirror the rules in § 1.1502–21 governing the absorption of a consolidated net operating loss (CNOL). However, the Treasury Department and the IRS considered various other approaches to allocating disallowed business interest expense carryforwards among members of a consolidated group. For example, one alternative approach under consideration was a regime whereby disallowed business interest expense carryforwards would be allocated based upon the actual use of externally borrowed funds by each member. Under such an approach, intercompany obligations would be taken into account in allocating disallowed business interest expense carryforwards.

The Treasury Department and the IRS do not propose to adopt such an approach, for several reasons. First, requiring taxpayers to trace externally borrowed funds to the member that ultimately uses such funds would create an administrative burden for taxpayers. Second, because money is fungible, a tracing regime would place undue importance on the location of intercompany obligations. Thus, this approach would permit significant manipulation through the creation of intercompany obligations for the purpose of shifting disallowed business interest expense carryforwards among members. Third, this approach could result in the non-economic allocation of disallowed business interest expense carryforwards to members with no business interest expense to creditors outside the consolidated group. This approach would result in value transfers among consolidated group members and require complex rules to account for those transfers. These proposed regulations implement the statute consistent with legislative intent while avoiding these complications.

The Treasury Department and the IRS request comments on the rules in proposed § 1.163(j)–5(b)(3), including comments on whether these rules should be revised to incorporate additional language or principles from the CNOL allocation rules in § 1.1502–21.

B. Proposed § 1.163(j)–5(c): Disallowed Business Interest Expense Carryforwards in Transactions To Which Section 381(a) Applies

In the case of certain asset acquisitions, section 381(a) generally requires the acquiring corporation to succeed to and take into account the tax items described in section 381(c) of the

distributor or transferor corporation. In the TCJA, Congress added disallowed business interest expense carryforwards to the list of items to which the acquiring corporation succeeds in a transaction to which section 381(a) applies (see section 381(c)(20)).

Sections 1.381(c)(1)–1 and 1.381(c)(1)–2 provide rules that, in part, limit the acquiring corporation's ability to use NOL carryforwards in the acquiring corporation's first taxable year ending after the acquisition date. The Treasury Department and the IRS have determined that similar rules should apply to disallowed business interest expense carryforwards. See proposed §§ 1.163(j)–5(c) and 1.381(c)(20)–1.

The Treasury Department and the IRS request comments as to whether section 381(c)(20) and proposed §§ 1.163(j)–5(c) and 1.381(c)(20)–1 should apply to excess business interest expense allocated to a corporate partner.

C. Proposed § 1.163(j)–5(d): Limitations on Disallowed Business Interest Expense Carryforwards From Separate Return Limitation Years

In general, the taxable income of a consolidated group is determined by aggregating the income and losses of each member. Thus, a consolidated group may offset the income earned by profitable members against the losses incurred by other members. However, an exception to this general rule applies to losses incurred by a member in a taxable year in which the member did not join in filing a consolidated return with the current group. The SRLY limitation in § 1.1502–21(c) generally limits the amount of a member's losses arising in a SRLY that may be included in the consolidated group's CNOL to the amount of net income generated by that member. Similar rules in §§ 1.1502–15 and 1.1502–22(c) apply to built-in losses and net capital losses, respectively. Absent a SRLY limitation and other limitations, notably section 382, the consolidated group could reduce its consolidated taxable income simply by acquiring new members with built-in losses, NOLs, net capital losses, or disallowed business interest expense carryforwards.

The Treasury Department and the IRS have determined that rules similar to those in § 1.1502–21(c) should apply to disallowed business interest expense carryforwards. See proposed § 1.163(j)–5(d). However, the calculation of the SRLY limitation for disallowed business interest expense carryforwards would differ from the calculation of the SRLY limitation for NOL carryovers. The SRLY limitation for NOL carryovers is cumulative—in other words, it is based upon a member's aggregate contribution to consolidated taxable income, determined by reference to only the member's tax items, for all consolidated return years of the consolidated group in which the member was included in the group. As a result, a member may carry forward its unused SRLY limitation from one year to the next. In contrast, the SRLY limitation for disallowed business interest expense carryforwards would be calculated annually based upon a member's section 163(j) limitation, determined by reference to only the member's tax items, for any given taxable year. As a result, a member may not carry forward its unused section 163(j) SRLY limitation from one year to the next. The Treasury Department and the IRS have determined that this result is appropriate because Congress did not retain the excess limitation carryforward provisions from old section 163(j). Thus, allowing members to carry forward their unused section 163(j) SRLY limitation would be inconsistent with congressional intent.

Proposed § 1.163(j)–5(d) would provide several additional limitations on a member's ability to use its disallowed business interest expense carryforwards arising in a SRLY. First, such items only may be taken into account by the consolidated group in a taxable year to the extent the group has any remaining section 163(j) limitation for that year after applying the rules in proposed § 1.163(j)–5(b). Second, such items only may be taken into account to the extent the SRLY member's section 163(j) limitation for that year exceeds the amount of the member's business interest expense already taken into account by the group in that year under the rules in proposed § 1.163(j)–5(b). Third, SRLY-limited disallowed business interest expense carryforwards would be deducted on a pro rata basis with non-SRLY limited disallowed business interest expense carryforwards from taxable years ending on the same date.

The Treasury Department and the IRS request comments on the SRLY rules in proposed § 1.163(j)–5(d), including whether a member's SRLY-limited disallowed business interest expense carryforwards should cease to be subject to a SRLY limitation (to the extent of the member's stand-alone section 163(j) limitation) in taxable years in which the member's stand-alone section 163(j) limitation exceeds the consolidated group's section 163(j) limitation.

D. Proposed § 1.163(j)–5(e): Application of Section 382

Like the SRLY limitation, the section 382 limitation limits a taxpayer's ability to reduce its taxable income simply by acquiring a loss corporation. In general, if a loss corporation experiences an ownership change, section 382 limits the amount of the new loss corporation's taxable income that can be offset by pre-change losses to the product of the old loss corporation's value at the time of the ownership change times the long-term tax-exempt rate. For a discussion of the regulations under sections 163(j), 382, and 383 that govern the applicability of section 382 to business interest expense, see parts 11 and 14 through 16 of this Explanation of Provisions section.

E. Proposed § 1.163(j)–5(f): Overlap of SRLY Limitation With Section 382

As noted in parts 5(C) and 5(D) of this Explanation of Provisions section, both the SRLY limitation and the section 382 limitation are intended to prevent taxpayers from trafficking in loss corporations. Moreover, both of these limitations could apply to the same corporation as a result of the same transaction (for example, if a consolidated group acquires a loss corporation in a transaction that is an ownership change for purposes of section 382) or as a result of several transactions that occur within a short period of time.

Section 1.1502–21(g) provides an overlap rule to prevent both the section 382 limitation and the SRLY limitation from applying to NOL carryovers under certain circumstances. The Treasury Department and the IRS have determined that a similar overlap rule should apply with respect to disallowed business interest expense carryforwards. Thus, proposed § 1.163(j)–5(f) would apply the principles of § 1.1502–21(g) to disallowed business interest expense carryforwards when the application of the SRLY limitation would result in an overlap with the application of section 382.

6. Proposed § 1.163(j)–6: Application of the Business Interest Expense Deduction Limitations to Partnerships and Subchapter S Corporations

A. In General

Proposed § 1.163(j)–6 would provide guidance regarding partnership and S corporation deductions and carryforwards under section 163(j). To the extent a partnership is subject to the limitations imposed by section 163(j), the section 163(j) limitation shall be applied at the partnership level and any

deduction for business interest expense not disallowed under section 163(j) is taken into account in determining the nonseparately stated taxable income or loss of the partnership. Similar rules shall apply to an S corporation. See part 6(H) of this Explanation of Provisions section for a discussion of rules specific to S corporations.

The phrase ''nonseparately stated taxable income or loss of the partnership'' has not previously been defined by statute. However, section 1366(a)(2) provides a definition of ''nonseparately computed income or loss'' as applied to S corporations. The legislative history of section 163(j) references ''ordinary business income or loss'' as reflected on Form 1065, ''U.S. Return of Partnership Income,'' and the partner's distributive share as reflected in Box 1 of Schedule K–1. H. Rept. 115–466, at 387, fn. 690 (2017).

One commenter noted that, in general, an item of income or deduction that is included in nonseparately stated income of a partnership, as determined under section 702(a)(8), loses its tax character in the hands of the partner to whom the item is allocated. The Treasury Department and the IRS agree that for purposes of proposed § 1.163(j)–6(a), to the extent a partnership's business interest expense is less than or equal to the partnership's section 163(j) limitation, such business interest expense loses its character as business interest expense at the partner's level for purposes of the partner's section 163(j) calculation (that is, the business interest expense is not subject to further limitations under section 163(j)). See proposed § 1.163(j)–6(c).

For purposes of the Code other than section 163(j), proposed § 1.163(j)–6(c) would provide that business interest expense and, in the case of a partnership, excess business interest expense, retains its character as business interest expense at the partner and S corporation shareholder-level. For purposes of section 469, such interest retains its characterization as either passive or non-passive when allocated to the partner or shareholder. Additionally, for purposes of section 469, business interest expense from a partnership or S corporation and, in the case of a partnership, excess business interest expense, remains interest derived from a trade or business in the hands of a partner or shareholder, even if the partner or shareholder does not materially participate in the partnership or S corporation's trade or business activity. See proposed § 1.163(j)–3 for additional rules regarding the interaction among sections 461(l), 465, 469, and 163(j).

The Treasury Department and the IRS intend to adopt rules for the proper treatment of business interest income and business interest expense with respect to lending transactions between a passthrough entity and an owner of the entity (self-charged lending transactions). Although reserved in these proposed regulations, the Treasury Department and the IRS intend to adopt certain rules to re-characterize, for both the lender and the borrower, the business interest expense and corresponding business interest income arising from a self-charged lending transaction that may be allocable to the owner, to prevent such business interest income and expense from entering or affecting the section 163(j) limitation calculations for both the lender and the borrower in such situations. One possible approach is to adopt rules similar in scope as those contained in § 1.469–7, dealing with the treatment of self-charged lending transactions for purposes of section 469. The Treasury Department and the IRS request comments with respect to any potential rules that may be considered to achieve this result, as well as comments regarding the potential adverse effects that such rules may have with respect to other Code provisions, such as section 163(d), and any methods for mitigating or eliminating those effects.

Guidance on the treatment of excess business interest expense in tiered partnerships has been reserved in these proposed regulations. Section 163(j)(4) requires the section 163(j) limitation to be taken into account at the entity-level and for business interest expense carryforwards to be allocated to partners. The Treasury Department and the IRS request comments regarding whether, in a tiered partnership arrangement, carryforwards should be allocated through upper-tier partnerships. Additionally, comments are requested regarding how and when an upper-tier partner's basis should be adjusted when a lower-tier partnership is subject to a section 163(j) limitation.

Guidance regarding the application of section 163(j) to a partnership merger or division has been also reserved in these proposed regulations. The Treasury Department and the IRS request comments on the effect of partnership mergers and divisions on excess business interest expense, excess taxable income, and excepted trade or business elections in the context of section 163(j).

B. ATI of a Partnership

i. In General

Proposed § 1.163(j)–6(d) would provide guidance on the ATI of a partnership. Subject to the modifications set forth in proposed § 1.163(j)–6(d) and described in this part 6.B of this Explanation of Provisions section, the ATI of a partnership would be calculated in accordance with proposed § 1.163(j)–1(b)(1). The ATI of the partnership would include any items described in section 703(a)(1), including both separately and nonseparately stated items, to the extent such items are otherwise included under proposed § 1.163(j)–1(b)(1).

ii. Section 743(b), Section 704(c)(1)(C), and Remedial Allocations

The Treasury Department and the IRS considered multiple possible approaches to address the treatment of section 743(b) adjustments to the basis of partnership property upon the transfer of a partnership interest, built-in loss amounts with respect to partnership property under section 704(c)(1)(C), and remedial allocations of income, gain, loss or deduction to a partner pursuant to section 704(c) and § 1.704–3(d) (collectively, partner-level adjustments) under section 163(j). One approach would disregard partner-level adjustments when calculating both the partnership's and the partner's ATI for purposes of section 163(j). This approach is consistent with section 743(b) and the accompanying regulations, which mandate that section 743(b) adjustments are not to be taken into account when determining the partnership's income, gain, deduction, or loss under section 703, and that section 743(b) adjustments are not taken into account until after a partner's distributive share of a deduction is determined.

This approach could, however, lead to odd results. For example, if because of positive section 743(b) adjustments, no current partner includes gain in taxable income on the sale of the partnership property, but the partnership still receives the benefit of the taxable income in its ATI, the partners would be allowed to take a larger amount of business interest expense as a current-year deduction than if the partnership's ATI had included the section 743(b) adjustment. Additionally, when the transferor sells its partnership interest, it generally includes in taxable income the gain resulting from the sale and could possibly include the gain in its own ATI calculation for purposes of its own section 163(j) limitation calculation. This situation could result

in the double counting of the income in ATI for section 163(j) purposes, first by the transferor partner on the sale of the partnership interest and again by the partnership on a sale of partnership property.

Under a second approach considered, the partnership would increase or decrease its ATI by the amount of the partner-level adjustments allocated to each partner. Essentially, the partnership would be required to aggregate all partner-level adjustments and take them into account at the partnership level for purposes of section 163(j). The Treasury Department and the IRS viewed taking partner-level adjustments into account at the partnership level as being contrary to the intent of section 743(b), section 704(c)(1)(C), and remedial allocations, and have therefore not adopted this approach.

Under a third approach, (i) partner-level adjustments are not taken into account when computing ATI for purposes of the partnership's section 163(j) limitation; and (ii) each partner's partner-level adjustments are taken into account as items derived directly by the partner in determining its own section 163(j) limitation. This approach takes partner-level adjustments into account at the partner, rather than partnership, level when determining the partner's ATI.

This third approach was recommended by a commenter with respect to section 743(b) adjustments. The commenter argued that if a rule was adopted requiring that a partner's section 743(b) adjustment be included in the computation of a partnership's ATI for purposes of applying section 163(j) at the partnership level, then a particular partner's section 743(b) adjustment could impact the deductibility of partnership interest by other partners, which would be inconsistent with the basic approach taken in the section 743(b) regulations. The Treasury Department and the IRS agree that this approach strikes the best balance between the entity-level calculation under section 163(j) and the aggregate nature of section 743(b) adjustments, as well as other partner-level adjustments. Accordingly, partner-level adjustments are not taken into account when the partnership determines its section 163(j) limitation under proposed § 1.163(j)–6(f). Instead, partner-level adjustments are taken into account by the partner in determining the partner's ATI pursuant to proposed § 1.163(j)–6(e). However, in keeping with the entity approach taken under section 163(j)(4), a partnership shall take adjustments made to the basis of its property pursuant to section 734(b) into account for purposes of calculating its ATI pursuant to proposed § 1.163(j)–6(d).

The commenter acknowledged that this approach would create disparities between the situation where a partnership purchases assets in which, until 2022, depreciation will enter into the partnership's ATI; and a transaction structured as a purchase of partnership interests, where depreciation generated by a section 743(b) basis adjustment or section 704(c) remedial allocation will not enter into a partnership's ATI. The Treasury Department and the IRS are aware of these concerns and request additional comments on the impact of partner-level adjustments on a partnership's ATI calculation under section 163(j), particularly as it relates to publicly traded partnerships.

C. ATI and Business Interest Income of Partners

i. In General

Proposed § 1.163(j)–6(e) would provide that the ATI of a partner shall generally be determined in accordance with proposed § 1.163(j)–1(b)(1) without regard to such partner's distributive share of any items of income, gain, deduction or loss of such partnership, and shall be increased by such partner's share of excess taxable income, as defined in proposed § 1.163(j)–1(b)(13) and determined pursuant to proposed § 1.163(j)–6(f). This provision prohibits the double counting of items in ATI by a partner in its own section 163(j) calculation when a partnership has already taken those items into account under section 163(j). To the extent a partnership has excess taxable income, a partner may include its share of the partnership's excess taxable income, as determined in proposed § 1.163(j)–6(f), in the partner's own ATI for purposes of determining the partner's section 163(j) limitation. For guidance regarding the partner's inclusion of partner-level adjustments, see proposed § 1.163(j)–6(e). For guidance regarding the recharacterization of a partnership's investment interest, investment income, and investment expenses at the C corporation partner-level, see proposed § 1.163(j)–4(b)(3).

ii. Sale of Partnership Interests

Proposed § 1.163(j)–6(e)(3) would provide guidance on the inclusion of the proceeds from the sale of a partnership interest in the selling partner's ATI. In the event a partner sells a partnership interest and the partnership in which the interest is being sold owns only non-excepted trade or business assets, as such term is defined in proposed § 1.163(j)–6(b)(6), the gain or loss on the sale of the partnership interest is included in the partner's ATI. If a partner sells a partnership interest and the partnership in which the interest is being sold owns both excepted assets, as such term is defined in proposed § 1.163(j)–6(b)(7), and non-excepted assets, the partner shall generally use the method set forth in proposed § 1.163(j)–10(c) in order to determine the amount properly allocable to a non-excepted trade or business, and therefore, properly includible in the partner's ATI. Proposed § 1.163(j)–6(e)(4) would also apply to tiered partnerships.

The Treasury Department and the IRS also considered adopting a reasonable method standard by which a partnership could determine the amount properly allocable to a non-excepted trade or business, and therefore, properly includible in the partner's ATI. Such provisions would have adopted tracing rules similar to those set forth in § 1.163–8T, as modified by Notice 88–20, 1988–9 I.R.B. 5 (Feb. 9, 1988), Notice 88–37, 1988–15 I.R.B. 8 (Mar. 16, 1988), and Notice 89–35, 1989–13 I.R.B. 4 (Mar. 9, 1989). The Treasury Department and the IRS request comments on what reasonable methods other than the method set forth in proposed § 1.163(j)–10(c), possibly including a tracing method similar to § 1.163–8T, would be appropriate in order to determine the amount properly allocable to a non-excepted trade or business and under what circumstances such methods would be appropriate.

iii. Double Counting of Business Interest Income Prohibited

Notice 2018–28 stated that for purposes of calculating a partner's annual deduction limitation under section 163(j) for business interest expense paid or accrued by the partner, the partner shall only include business interest income from a partnership in its section 163(j)(1)(A) amount to the extent that business interest income exceeds business interest expense determined at the partnership level under section 163(j). Additionally, a partner shall not include its share of the partnership's floor plan financing for purposes of determining the partner's annual deduction limitation for business interest expense under section 163(j)(1)(C). Proposed § 1.163(j)–6(e)(2) would incorporate these limitations into these proposed regulations.

D. Section 163(j) Partnership Calculation

i. Allocation of Deductible Business Interest Expense and Section 163(j) Excess Items—Made in the Same Manner as the Nonseparately Stated Taxable Income or Loss of the Partnership

Section 163(j)(4)(A)(ii)(II) states that a partner's excess taxable income is determined in the same manner as the nonseparately stated taxable income or loss of the partnership. Section 163(j)(4)(B)(i)(II) states that excess business interest expense is allocated to each partner in the same manner as the nonseparately stated taxable income or loss of the partnership. Similarly, excess business interest income is allocated to each partner in the same manner as the nonseparately stated taxable income or loss of the partnership. The phrase ''nonseparately stated taxable income or loss of the partnership'' is not defined in section 163(j), and as mentioned in part 6(A) of this Explanation of Provisions section, has not previously been defined by statute or regulations. The phrase ''in the same manner as'' is also undefined.

Under the proposed regulations, the manner for allocating excess taxable income, excess business interest income, and excess business interest expense (hereinafter ''section 163(j) excess items'') must be consistent with the Treasury Department and the IRS's resolution of the following three descriptive (1 through 3) and two normative (4 through 5) issues: (1) Section 163(j) is applied at the partnership level; (2) a partnership cannot have both excess taxable income (or excess business interest income) and excess business interest expense in the same taxable year; (3) parity must be preserved between a partnership's deductible business interest expense and section 163(j) excess items and the aggregate of each partner's share of deductible business interest expense and section 163(j) excess items from such partnership; (4) if in a given year a partnership has both deductible business interest expense and excess business interest expense, a partnership should not allocate excess business interest expense to a partner to the extent such partner was allocated the items comprising ATI (or business interest income) that supported the partnership's deductible business interest expense; and (5) if in a given year a partnership has excess taxable income (or excess business interest income), only partners allocated more items comprising ATI (or business interest income) than necessary to support their allocation of business interest expense should be allocated a share of excess taxable income (or excess business interest income).

One commenter proposed a manner for allocating section 163(j) excess items that would require a partnership to allocate each section 163(j) excess item (for example, excess business interest expense) in the same proportion as its underlying section 163(j) item (business interest expense). For example, if partnership AB had $30 of business interest income, which it allocated solely to A, and $40 of business interest expense, which it allocated $20 each to A and B, then A and B would each have $15 of deductible business interest expense and $5 of excess business interest expense. In situations where the partnership does not allocate all of its section 163(j) items pro rata, such as this example, this method could require a partnership to allocate its section 163(j) excess items in a manner inconsistent with the Treasury Department and the IRS's resolution of issues four and five. Because this approach could require a partnership to arguably allocate inappropriate amounts of section 163(j) excess items to its partners, it is not adopted in these proposed regulations.

The calculation adopted in proposed § 1.163(j)–6(f)(2) preserves the entity-level calculation requirement set forth in section 163(j)(4), while also preserving the economics of the partnership and respecting any special allocations made by the partnership in accordance with section 704 and the regulations thereunder. Applying the method in these proposed regulations to the previous example, A would have $20 of deductible business interest expense, and B would have $10 of deductible business interest expense and $10 of excess business interest expense. This result is consistent with the Treasury Department and the IRS's interpretation of section 163(j) as previously discussed.

ii. Allocation of Deductible Business Interest Expense and Section 163(j) Excess Items—General Calculation

Proposed § 1.163(j)–6(f)(2) provides that partnerships must allocate any section 163(j) excess items and any deductible business interest expense in the manner described in paragraphs (f)(2)(i) through (xi). In general, each paragraph (i) through (xi) is a step in a set of instructions that, when completed, provide the partnership with the proper allocation of each of its section 163(j) excess items to each of its partners. This resulting array of allocations is consistent with the Treasury Department and the IRS's resolution of the five key issues described in part 6(D)(i) of this Explanation of Provisions section. Stated otherwise, such prescribed allocations recognize the aggregate nature of partnerships under subchapter K of the Code to the greatest extent possible while remaining consistent with section 163(j) applying at the partnership level.

No rule set forth in proposed § 1.163(j)–6(f)(2) of this section prohibits a partnership from making an allocation to a partner of any section 163(j) item that is otherwise permitted under section 704 and the regulations thereunder. Accordingly, any calculations in proposed § 1.163(j)–6(f)(2)(i) through (xi) are solely for the purpose of determining each partner's deductible business interest expense and section 163(j) excess items, and do not otherwise affect any other provision under the Code, such as section 704(b). Proposed § 1.163(j)–6(f)(2) creates numerous defined terms. These defined terms are solely for the purpose of proposed § 1.163(j)–6(f)(2) and are meant to aid the partnership in its application of proposed § 1.163(j)–6(f)(2) by allowing the calculation to be broken into discrete steps.

Proposed § 1.163(j)–6(f)(2)(i) requires the partnership to calculate its section 163(j) deduction pursuant to proposed § 1.163(j)–2(b). This step is the entity-level calculation required by section 163(j)(4)(A), and it provides the partnership with its total amount of deductible business interest expense, excess business interest income, excess taxable income, and excess business interest expense under section 163(j) for a taxable year. The remaining steps in proposed § 1.163(j)–6(f)(2)(ii) through (xi) determine the allocations a partnership must make of its deductible business interest expense and each section 163(j) excess item to its partners. At the conclusion of the eleven steps set forth in proposed § 1.163(j)–6(f)(2), the total amount of deductible business interest expense and section 163(j) excess items allocated to each partner will equal the partnership's total amount of deductible business interest expense and section 163(j) excess items.

Proposed § 1.163(j)–6(f)(2)(ii) begins the partner-level calculations. It should be noted that the calculations under proposed § 1.163(j)–6(f)(2) do not determine a partner's allocation of business interest expense, business interest income or items comprising ATI, as these allocations are determined under section 704(b) and (c) and the regulations thereunder. Rather, the proposed § 1.163(j)–6(f)(2) partner-level

calculations determine each partner's amount of deductible business interest expense and amount of any section 163(j) excess items. This determination provides the starting point for the remainder of the steps in proposed § 1.163(j)–6(f)(2). Only items that were taken into account in the partnership's section 163(j) calculation are taken into account for the proposed § 1.163(j)–6(f)(2) partner-level calculation. Section 743(b) adjustments, built-in loss amounts with respect to partnership property under section 704(c)(1)(C), section 704(c) remedial allocations, allocations of investment income and expense, and amounts determined for the partner under § 1.882–5 are therefore not taken into account for purposes of the proposed § 1.163(j)–6(f)(2) partner-level calculation. To clarify that only section 163(j) items of the partnership are relevant for the calculations under proposed § 1.163(j)–6(f)(2), paragraph (f)(2)(ii) defines ''allocable ATI'' as a partner's allocable share of the partnership's ATI, ''allocable business interest income'' as a partner's allocable share of the partnership's business interest income, and ''allocable business interest expense'' as a partner's allocable share of the partnership's business interest expense that is not floor plan financing interest expense.

As noted previously, the primary goal of proposed § 1.163(j)–6(f)(2) is to provide the partnership with an array of allocations that recognizes the aggregate nature of partnerships under subchapter K of the Code to the greatest extent possible while still remaining consistent with section 163(j) applying at the partnership level. Proposed § 1.163(j)–6(f)(2)(iii) through (v) contain the adjustment mechanism necessary to achieve this goal. Section 163(j) permits taxpayers with a sufficient amount of appropriate income (ATI and business interest income) to deduct their business interest expense. However, section 163(j) applies at the entity level with respect to partnerships under section 163(j)(4). Proposed § 1.163(j)–6(f)(2)(iii) recognizes this normative principle of the statute, and then proposed § 1.163(j)–6(f)(2)(iv) and (v) reconcile the proposed § 1.163(j)–6(f)(2)(iii) partner-level calculation with the proposed § 1.163(j)–6(f)(2)(i) partnership-level result.

To illustrate the mechanism at work in proposed § 1.163(j)–6(f)(2)(iii) through (v), consider the example used above. Partnership AB has $30 of business interest income, which it allocates solely to A, and $40 of business interest expense, which it allocates $20 each to A and B. Upon applying proposed § 1.163(j)–6(f)(2)(iii), AB determines that A has been allocated more allocable business interest income than necessary to deduct its allocable business interest expense ($10 of allocable business interest income excess), and B has not been allocated enough allocable business interest income to deduct its allocable business interest expense ($20 of allocable business interest income deficit). Because AB cannot have both excess business interest income and excess business interest expense in the same year, proposed § 1.163(j)–6(f)(2)(iv) and (v) reconcile the proposed § 1.163(j)–6(f)(2)(iii) partner-level calculation with the proposed § 1.163(j)–6(f)(2)(i) partnership-level result. This process of reallocating allocable business interest income excess to partners with allocable business interest income deficits is broken into two steps; proposed § 1.163(j)–6(f)(2)(iv) first proportionately reduces each partner's excess amount, and then proposed § 1.163(j)–6(f)(2)(v) proportionately reduces each partner's deficit amount to reflect the reallocation of the benefit of the excess amounts.

Proposed § 1.163(j)–6(f)(2)(vii), (ix), and (x) contain the same adjustment mechanism as proposed § 1.163(j)–6(f)(2)(iii) through (v), except for ATI instead of business interest income. To illustrate, if in the previous example AB had $100 of ATI which it allocated solely to A instead of $30 of business interest income, AB would perform the calculations in proposed § 1.163(j)–6(f)(2)(vii), (ix), and (x)—which parallel the calculations in proposed § 1.163(j)–6(f)(2)(iii) through (v)—and arrive at the same result. The partnership must make the adjustments regarding business interest income (proposed § 1.163(j)–6(f)(2)(iii) through (v)) before the adjustments regarding ATI (proposed § 1.163(j)–6(f)(2)(vii), (ix), and (x)) due to section 163(j)(4)(C), which requires partnerships to first fully offset business interest expense using business interest income before turning to ATI.

Finally, proposed § 1.163(j)–6(f)(2)(xi) allocates section 163(j) excess items and deductible business interest expense to the partners. Excess business interest income as determined in proposed § 1.163(j)–6(f)(2)(i) is allocated dollar for dollar to the partners with final allocable excess business interest income determined pursuant to proposed § 1.163(j)–6(f)(2)(iv). After grossing up each partner's final ATI capacity excess amount by ten-thirds (10/3) (the multiplicative inverse of the 30 percent ATI limitation), excess taxable income, as determined in proposed § 1.163(j)–6(f)(2)(i), is allocated dollar for dollar to partners with final ATI capacity excess amounts determined pursuant to proposed § 1.163(j)–6(f)(2)(ix). It is necessary to gross up the ATI capacity excess amount by ten thirds in order to account for the reduction to ATI capacity that occurred in proposed § 1.163(j)–6(f)(2)(vii). Excess business interest expense is allocated dollar for dollar to partners with final ATI capacity deficit amounts determined pursuant to proposed § 1.163(j)–6(f)(2)(x). A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's share of excess business interest expense.

iii. Allocation of Deductible Business Interest Expense and Section 163(j) Excess Items—Steps 6 and 8

In a given year, if a partnership does not have any partners with a negative allocable ATI under proposed § 1.163(j)–6(f)(2)(vi) (that is, an allocable ATI under proposed § 1.163(j)–6(f)(2)(ii) that is comprised of more items of deduction and loss than income and gain), then the partnership would not have any adjustments under proposed § 1.163(j)–6(f)(2)(vi) and (viii). Thus, the only adjustments and reallocations the partnership would have to perform as part of its proposed § 1.163(j)–6(f)(2) calculation are described in part 6(D)(ii) of this Explanation of Provisions section. However, if a partnership does have a total negative allocable ATI that is greater than zero, then the partnership would have adjustments under proposed § 1.163(j)–6(f)(2)(vi), and may have adjustments under proposed § 1.163(j)–6(f)(2)(viii) as well. Proposed § 1.163(j)–6(f)(2)(vi) and (viii) are closely related. In general, proposed § 1.163(j)–6(f)(2)(viii) corrects distortions that would otherwise occur following certain proposed § 1.163(j)–6(f)(2)(vi) adjustments.

The purpose of proposed § 1.163(j)–6(f)(2)(vi) is to address the situation in which a partner's allocable ATI under proposed § 1.163(j)–6(f)(2)(ii) is comprised of more items of deduction and loss than income and gain—that is, negative allocable ATI. For purposes of the section 163(j) calculation, a partnership that has ATI of less than zero will not be able to deduct business interest expense with respect to ATI under section 163(j)(1). Accordingly, for purposes of the proposed § 1.163(j)–6(f)(2) calculation, the partnership must ensure that each partner has a ''final allocable ATI'' of at least zero before performing the ATI adjustment calculation described in proposed § 1.163(j)–6(f)(2)(vii), (ix), and (x). This is accomplished by proportionately

reallocating positive allocable ATI from partners with positive allocable ATI to partners with negative allocable ATI in order to gross such partners up to zero. Upon completion of the calculation in proposed § 1.163(j)–6(f)(2)(vi), the aggregate of the partners' final allocable ATI amounts will equal the partnership's ATI amount used in calculating its section 163(j) limitation under proposed § 1.163(j)–6(f)(2)(i), and no partner will have a final allocable ATI amount less than zero.

A partnership must always apply proposed § 1.163(j)–6(f)(2)(vi), even if the partnership does not have any numerical adjustment resulting from it. For example, if a partnership has a total negative allocable ATI of $0 in proposed § 1.163(j)–6(f)(2)(vi), then even though the partnership will not reallocate any positive allocable ATI in proposed § 1.163(j)–6(f)(2)(vi), the partnership must still apply proposed § 1.163(j)–6(f)(2)(vi) to convert each partner's positive allocable ATI to final allocable ATI, which is used in subsequent paragraphs as the successor term of allocable ATI.

The purpose of proposed § 1.163(j)–6(f)(2)(viii) is to ensure that any adjustments the partnership was required to make under proposed § 1.163(j)–6(f)(2)(vi) do not result in proposed § 1.163(j)–6(f)(2) requiring the partnership to allocate deductible business interest expense and section 163(j) excess items in an inequitable manner. To illustrate, consider the following example. Partnership ABC has $100 of ATI, comprised of $200 of items of income and gain and $100 of deduction and loss, and $40 of business interest expense. ABC allocates the income and gain $100 each to A and C, and all $100 of the deduction and loss to B. ABC has $40 of business interest expense, which it allocates $20 each to A and B. Upon applying proposed § 1.163(j)–6(f)(2)(i), ABC has $30 of deductible business interest expense and $10 of excess business interest expense.

Given these facts and the Treasury Department and the IRS's interpretation of section 163(j), A is clearly entitled to treat all $20 of its allocable business interest expense as deductible business interest expense in the current year, and B should be allocated the $10 of excess business interest expense. However, in the absence of proposed § 1.163(j)–6(f)(2)(viii), proposed § 1.163(j)–6(f)(2) would require ABC to make different, less equitable, allocations. The issue stems from proposed § 1.163(j)–6(f)(2)(vi). Following the application of proposed § 1.163(j)–6(f)(2)(vi) and (vii), A has an ATI capacity deficit of $5, B has an ATI capacity deficit of $20, and C has an ATI capacity excess of $15. The calculations in proposed § 1.163(j)–6(f)(2)(ix) and (x) reallocate ATI capacity excess to partners with ATI capacity deficits solely based on each partners ATI capacity deficit relative to the total ATI capacity deficit. Because proposed § 1.163(j)–6(f)(2)(ix) and (x) only takes each partner's proportionate share of ATI capacity deficit into account when reallocating ATI capacity excess, proposed § 1.163(j)–6(f)(2)(ix) and (x) always treat all of partners as though they are on equal footing regardless of any adjustments that may have happened in proposed § 1.163(j)–6(f)(2)(vi). As a result, in the absence of proposed § 1.163(j)–6(f)(2)(viii), A would be allocated deductible business interest expense of only $18 (instead of $20), and B would be allocated excess business interest expense of only $8 (instead of $10).

The proposed § 1.163(j)–6(f)(2)(viii) adjustment begins by filtering out partnerships that do not need to make the adjustment using the criteria listed in proposed § 1.163(j)–6(f)(2)(viii)(A). This treatment is possible due to the predictability and limited universe of situations that require a proposed § 1.163(j)–6(f)(2)(viii) adjustment. Specifically, a proposed § 1.163(j)–6(f)(2)(viii) adjustment is always triggered when a positive allocable ATI partner that helped gross up a negative allocable ATI partner in proposed § 1.163(j)–6(f)(2)(vi) is subsequently forced to compete with such partner for a limited amount of ATI capacity excess.

Next, under proposed § 1.163(j)–6(f)(2)(viii)(B), a partnership must determine each partner's priority amount. This priority amount represents what a partner's ATI capacity would have been if such partner had not been required under proposed § 1.163(j)–6(f)(2)(vi) to offset another partner's negative allocable ATI. For purposes of determining whether to apply proposed § 1.163(j)–6(f)(2)(viii)(C) or (D) and performing the calculations under the applicable paragraph, each partner's usable priority amount must be determined. A partner's usable priority amount is the lesser of its priority amount and ATI capacity deficit.

A partnership must use the amounts it determined under proposed § 1.163(j)–6(f)(2)(viii)(B) to determine whether it must perform the calculations in proposed § 1.163(j)–6(f)(2)(viii)(C) or (D). If the total ATI capacity excess amount, as determined under proposed § 1.163(j)–6(f)(2)(vii), is greater than or equal to the total usable priority amount, then the adjustments in proposed § 1.163(j)–6(f)(2)(viii)(C) must occur. If the total usable priority amount is greater than the total ATI capacity excess amount, as determined under proposed § 1.163(j)–6(f)(2)(vii), then the adjustments in proposed § 1.163(j)–6(f)(2)(viii)(D) must occur. The application of proposed § 1.163(j)–6(f)(2)(viii)(C) or (D) may result in adjustments to the partner's ATI capacity excess (and deficit) amounts used in proposed § 1.163(j)–6(f)(2)(ix) and (x).

The purpose of these adjustments is to ensure that the partners who had a negative allocable ATI do not improperly benefit under proposed § 1.163(j)–6(f)(2)(ix) through (xi) to the detriment of the partners who had a positive allocable ATI. In general, proposed § 1.163(j)–6(f)(2)(viii)(C) and (D) correct any artificial distortion of the economics between the partners that may have occurred under proposed § 1.163(j)–6(f)(2)(vi) by modifying the outputs of proposed § 1.163(j)–6(f)(2)(vii) to restore the partners' true economic arrangement before such outputs are used in proposed § 1.163(j)–6(f)(2)(ix) and (x). Stated otherwise, proposed § 1.163(j)–6(f)(2)(viii)(C) and (D) compensate for the assumption made by proposed § 1.163(j)–6(f)(2)(ix) and (x) that all partners are always on equal footing by modifying the outputs of proposed § 1.163(j)–6(f)(2)(vii) to put all partners on equal footing before allowing such outputs to reach proposed § 1.163(j)–6(f)(2)(ix) and (x).

Turning back to the foregoing example, in accordance with proposed § 1.163(j)–6(f)(2)(viii), ABC would first determine whether it has all three attributes in proposed § 1.163(j)–6(f)(2)(viii)(A)(*1*) through (*3*). Because ABC (1) has excess business interest expense under proposed § 1.163(j)–6(f)(2)(i); (2) has total negative allocable ATI greater than $0 under proposed § 1.163(j)–6(f)(2)(vi); and (3) has a total ATI capacity excess amount greater than $0 under proposed § 1.163(j)–6(f)(2)(vii), ABC must perform the calculations and make the necessary adjustments described under proposed § 1.163(j)–6(f)(2)(viii)(B) and (C) or (D). Given ABC's facts, proposed § 1.163(j)–6(f)(2)(viii)(B) would require ABC to perform the calculations in proposed § 1.163(j)–6(f)(2)(viii)(C). As a result, A would be allocated deductible business interest expense of $20, and B would be allocated excess business interest expense of $10 and deductible business interest expense of $10. This result is consistent with the Treasury Department and the IRS's resolution of the five key issues described in part

6(D)(i) of this Explanation of Provisions section.

The Treasury Department and the IRS request comments on the approach described in this part 6(D). Specifically, comments are requested regarding other reasonable methods to allocate deductible business interest expense, excess taxable income, and excess business interest expense in a manner that permits partners that bear the taxable income supporting the deductible business interest expense to be allocated a disproportionate share of deductible business interest expense and excess taxable income. Finally, comments are requested regarding the fungibility of publicly traded partnership interests with respect to the foregoing approach.

E. Business Interest Expense Carryforwards

i. In General

Proposed § 1.163(j)–6(g) would provide that to the extent a partnership has business interest expense in excess of its section 163(j) limitation, such excess business interest expense shall not be carried forward by the partnership. Instead, such excess business interest expense would be allocated to the partners in accordance with proposed § 1.163(j)–6(f).

A commenter requested guidance regarding whether a partner will be permitted to use its share of the partnership's excess business interest income in the current taxable year to absorb the partner's excess business interest expense allocated from such partnership in prior years. The Treasury Department and the IRS believe that it is consistent with section 163(j) to allow excess business interest income allocated to a partner from a partnership to absorb the partner's excess business interest expenses allocated from that same partnership in an earlier taxable year to the extent of the excess business interest income allocated to the partner. This allowance places partners in a similar position to other taxpayers with carryforwards.

Regarding a partner's allocation of excess taxable income, the Treasury Department and the IRS considered three options when drafting guidance on the deductibility of a partner's excess business interest expense carryforward as it relates to a partner's share of excess taxable income. Section 163(j)(4)(B)(ii)(I) provides that the carryforward ''shall be treated as business interest expense paid or accrued by the partner in the next succeeding taxable year in which the partner is allocated excess taxable income from such partnership, but only to the extent of such excess taxable income.'' The first option would apply a plain reading of the statutory language to treat as paid or accrued by the partner the amount of excess business interest expense carryforward from the partnership equal to the excess taxable income the partner is allocated from the partnership, but it would limit the deductibility of the excess business interest expense by a partner to the partner's business interest income and 30 percent of the partner's ATI for the taxable year. Given this interpretation is the most consistent with the plain meaning of the statute, proposed § 1.163(j)–6(g) would provide that to the extent a partner receives an allocation of excess taxable income from a partnership in a taxable year, such partner's excess business interest expense is treated as paid or accrued in that year in an amount equal to the partner's share of the excess taxable income. To the extent the partner's excess business interest expense exceeds its share of the partnership's excess taxable income in a taxable year, it remains excess business interest expense and is carried over to the following taxable year. When the excess business interest expense is treated as paid or accrued, it becomes business interest paid or accrued by the partner and may be deducted by the partner, subject to any partner-level section 163(j) limitation and any other applicable limitations.

The second option considered would entitle a partner to deduct excess business interest expense only to the extent the partner can deduct that excess business interest expense against the excess taxable income received from the partnership (for example, 30 percent of excess taxable income which increases the partner's ATI under section 163(j)(4)(A)(ii)(II)), regardless of any ATI or business interest income that the partner has from sources other than the partnership. This option would produce the same result as if the partnership had paid or accrued all the relevant income and expense in a single year. The legislative history can be read to suggest this result: ''The partner may deduct its share of the partnership's excess business interest in any future year, but only against excess taxable income attributed to the partner by the partnership the activities of which gave rise to the excess business interest carryforward.'' H. Rept. 115–466, at 391 (2017). However, this interpretation does not appear to be consistent with the plain language of the statute, which states that excess business interest expense is treated as paid or accrued to the extent of the partner's excess taxable income.

The third option considered would entitle a partner to fully deduct excess business interest expense to the extent it receives an allocation of excess taxable income from the same partnership (for example, for every dollar of excess taxable income a partner is allocated, the partner is able to deduct one dollar of excess business interest expense). This interpretation would treat all excess business interest expense, to the extent of excess taxable income, as interest deductible under section 163(a). However, this interpretation ignores the possibility that the partner may be subject to its own section 163(j) limitation and ignores the 30 percent limitation on ATI that a partnership would be subject to had the business interest expense been paid or accrued in the current year. Accordingly, this option is not adopted in the proposed regulations.

ii. Ordering Rule

The ordering rule in proposed § 1.163(j)–6(f)(2)(iii) would clarify that to the extent a partner is allocated excess taxable income or excess business interest income from a partnership in the current taxable year and, in a prior year, that partner was allocated excess business interest expense from that same partnership that has not been previously treated as paid or accrued by the partner, the partner must treat that current-year excess taxable income and excess business interest income as causing the excess business interest expense carried forward from the partnership to be treated as paid or accrued in such year to the extent of the excess taxable income and excess business interest income. In the event a partner receives excess taxable income or excess business interest income from a partnership, it cannot choose to keep excess business interest expense as not paid or accrued in the current taxable year.

F. Basis Adjustments

i. Basis and Capital Account Adjustments for Excess Business Interest Expense Allocations

Generally, a partner's adjusted basis in its partnership interest shall be reduced by allocated items of partnership loss or deduction, but not below zero, pursuant to § 1.704–1(d)(2). Deductible business interest expense and excess business interest expense are subject to section 704(d). If a partner is subject to a limitation on loss under

section 704(d) and a partner is allocated losses from a partnership in a taxable year, § 1.704–1(d)(2) requires that the limitation on losses under section 704(d) be apportioned amongst these losses based on the character of each loss (each grouping of losses based on character being a ''section 704(d) loss class''). If there are multiple section 704(d) loss classes in a given year, § 1.704–1(d)(2) requires the partner to apportion the limitation on losses under section 704(d) to each section 704(d) loss class proportionately. For purposes of applying this proportionate rule, any deductible business interest expense (whether allocated to the partner in the current taxable year or suspended under section 704(d) in a prior taxable year), any excess business interest expense allocated to the partner in the current taxable year, and any excess business interest expense from a prior taxable year that was suspended under section 704(d) (''negative section 163(j) expense'') shall comprise the same section 704(d) loss class. Once the partner determines the amount of limitation on losses apportioned to this section 704(d) loss class, any deductible business interest expense is taken into account before any excess business interest expense or negative section 163(j) expense.

The adjusted basis of a partner in a partnership interest is reduced, but not below zero, by the amount of excess business interest expense allocated to the partner pursuant to proposed § 1.163(j)–6(f)(2). Negative section 163(j) expense is not treated as excess business interest expense in any subsequent year until such negative section 163(j) expense is no longer suspended under section 704(d). Consequently, an allocation of excess taxable income or excess business interest income does not result in the negative section 163(j) expense being treated as business interest expense paid or accrued by the partner. Further, unlike excess business interest expense preventing a partner from including excess taxable income in its ATI as described in section 163(j)(4)(B)(ii) flush language, negative section 163(j) expense does not affect, and is not affected by, any allocation of excess taxable income to the partner. Accordingly, any excess taxable income allocated to a partner from a partnership while the partner still has a negative section 163(j) expense will be included in the partner's ATI. However, once the negative section 163(j) expense is no longer suspended under section 704(d), it becomes excess business interest expense, which is subject to the general rules in proposed § 1.163(j)–6(g). Section 163(j) has no effect on the maintenance of capital accounts (for example, a partner's capital account is reduced in the year such partner is allocated excess business interest expense). See § 1.704–1(b)(2)(iv)(*b*).

The guidance provided in proposed § 1.163(j)–6(h)(2) is intended to address situations in which a partner is subject to a limitation under section 704(d) and is also allocated excess taxable income. Pursuant to proposed § 1.163(j)–6(g), excess business interest expense would otherwise be treated as paid or accrued by the partner in an amount equal to the excess taxable income, but the partner's basis in the partnership does not increase in an amount equal to the allocated excess taxable income and, therefore, remains subject to the loss limitation in section 704(d). The approach taken in proposed § 1.163(j)–6(h)(2) attempts to reconcile the competing deduction limitations imposed by sections 704(d) and 163(j) along with section 163(j) treating excess business interest expense as paid or accrued by the partner when the partner is allocated excess taxable income. The Treasury Department and the IRS request comments on this issue.

ii. Basis Adjustments Upon Disposition of Partnership Interests Pursuant to Section 163(j)(4)(B)(iii)(II)

Proposed § 1.163(j)–6(h)(3) would provide that if a partner disposes of all or substantially all of its partnership interest, the adjusted basis of the partner in the partnership interest shall be increased immediately before the disposition by the amount of excess, if any, of the amount of the basis reduction under proposed § 1.163(j)–6(h)(1) over the portion of any excess business interest expense allocated to the partner under proposed § 1.163(j)–6(f)(2) which has not been previously treated under proposed § 1.163(j)–6(g) as business interest expense paid or accrued by the partner, regardless of whether the disposition was as a result of a taxable or non-taxable transaction. No deduction under section 163(j) shall be allowed to the transferor or transferee under chapter 1 of the Code for any excess business interest expense resulting in a basis increase under section 163(j) and these proposed regulations or for any negative section 163(j) expense.

In the event a partner disposes of less than substantially all of its interest in a partnership, proposed § 1.163(j)–6(h)(2) would provide that a partner shall not increase its basis in its partnership by the amount of any excess business interest expense that has not yet been treated as paid or accrued by the partner in accordance with proposed § 1.163(j)–6(g). Any such excess business interest expense would remain excess business interest expense in the hands of the transferor partner until such time as the transferor partner is allocated an appropriate amount of excess taxable income or excess business interest income from the partnership or added to the basis of its partnership interest when the partner fully disposes of the partnership interest. Additionally, any negative section 163(j) expense shall remain negative section 163(j) expense of the transferor partner until such negative section 163(j) expense is no longer suspended under section 704(d). These rules are similar to the rules found under section 469 and the regulations thereunder relating to suspended passive activity loss deductions.

The Treasury Department and the IRS considered alternate approaches when analyzing the effect of partial dispositions on a partner's basis. One alternate approach would add excess business interest expense to the partner's basis in the partnership interest to the extent the partner's capital account is reduced by the transfer or redemption. A second approach would increase the partner's remaining basis in the partnership interest by the amount of excess business interest expense that is proportionate to the amount of the partner's adjusted basis in the partnership interest that was transferred or redeemed. This method would require a partner to track its basis in the partnership interest in a manner similar to that set forth in Rev. Rul. 84–53, 1984–15 I.R.B. 17, 1984–1 C.B. 159 (Apr. 9, 1984). The Treasury Department and the IRS request comments on this issue.

G. Investment Items

Proposed § 1.163(j)–6(j) would provide guidance on the treatment of investment income and expense items under section 163(d) allocated by a partnership to its partners. Notice 2018–28 stated that the Treasury Department and the IRS intend to issue regulations clarifying that, solely for purposes of section 163(j), in the case of a taxpayer that is a C corporation, all interest paid or accrued by the C corporation on indebtedness of such C corporation will be business interest expense within the meaning of section 163(j)(5), and all interest on indebtedness held by the C corporation that is includible in gross income of such C corporation will be business interest income within the meaning of section 163(j)(6). Additionally, comments were received

requesting guidance on the treatment of investment interest expense and investment interest income, as defined in section 163(d), allocated to a C corporation (corporate partner) by a partnership.

The Treasury Department and the IRS considered two approaches to address this issue. Under the first approach, the investment interest expense would be allocated directly from the partnership to the corporate partner without being subject to the section 163(j) limitations of the partnership. This option is most consistent with a plain reading of the statute. The definition of business interest expense under section 163(j)(5) specifically excludes investment interest. Section 163(j)(4) requires the business interest expense deduction to be calculated with respect to the partnership's specific items of income and expense, and the statute does not require any partner-specific considerations to be taken into account when performing the calculation at the partnership level.

The legislative history of section 163(j) indicates that a corporation can never have investment income and expenses, and instead, those items shall be treated as business interest income and expenses: ''Section 163(d) applies in the case of a taxpayer other than a corporation. Thus, a corporation has neither investment interest nor investment income within the meaning of section 163(d). Therefore, interest income and interest expense of a corporation is properly allocable to a trade or business, unless such trade or business is otherwise explicitly excluded from the application of the provision.'' H. Rept. 115–466, at 386, fn. 688 (2017).

This language suggests a legislative intent to transform any interest that would otherwise be classified as investment interest in the hands of the corporate partner into business interest expense, thereby subjecting that interest to the corporate partner's limitations under section 163(j).

The second approach considered would require a partnership to perform a notional calculation under section 163(j) with respect to the investment interest that is allocated to its corporate partners. Based on the text and legislative history, this provision could arguably be interpreted to mean that investment interest expenses should be classified as business interest expenses at the time they are allocated to a corporate partner, and accordingly, the partnership should perform a section 163(j) calculation with respect to those items because section 163(j) requires a partnership to take the business interest expense deduction into account. Because this calculation would be done at the partnership level, any partnership with both corporate and non-corporate partners would need to make two section 163(j) calculations: One for any corporate partners and one for non-corporate partners.

Proposed § 1.163(j)–6(j) would adopt the first approach. Section 163(j)(4) does not require the partnership to look beyond its own tax attributes to that of its partners when making a determination as to whether a section 163(j) calculation is necessary. Accordingly, a plain reading of the statute does not support the partnership treating investment interest as business interest expense prior to allocating the interest to its partners. Instead, the statute appears to require the corporate partner to calculate its section 163(j) limitation while including this investment interest as it would with all other business and investment interest it receives from all sources.

It should be noted that, with respect to passthrough entities, including S corporations, engaged in trades or businesses that are not passive activities and with respect to which certain owners of the passthrough entities do not materially participate for purposes of section 469, as described in section 163(d)(5)(A)(ii) and as illustrated in Rev. Rul. 2008–12, the rules of section 163(j)(4) will apply to business interest expense allocable to such trades or businesses of those passthrough entities if those entities are otherwise subject to section 163(j). To the extent business interest expense of a passthrough entity is not limited under section 163(j), such business interest expense may still be limited by section 163(d) at the passthrough entity owner level in these situations. With respect to partnerships, to the extent that such business interest expense is limited under section 163(j)(4) and becomes a carryover item of partners who do not materially participate with respect to such trades or businesses, those items will be treated as items of investment interest expense in the hands of those owners for purposes of section 163(d) once those carryover items are treated as paid or accrued in a succeeding taxable year. The Treasury Department and the IRS have concluded that this is the result of the statutory rules contained in section 163(d)(4)(B) and (d)(5)(A)(ii) and, therefore, no additional rules are needed in regulations to reach this result.

H. S Corporations

i. In General

Section 163(j)(4)(D) provides that rules similar to those contained in section 163(j)(4)(A), relating to the entity-level treatment of the section 163(j) deduction, and section 163(j)(4)(C), relating to the definition of excess taxable income, apply to S corporations. Accordingly, proposed § 1.163(j)–6(l) would provide that, in the case of any S corporation, (i) the section 163(j) deduction limitation would be applied at the S corporation level, and (ii) any deduction for business interest expense would be taken into account in determining the nonseparately stated taxable income or loss of the S corporation.

An S corporation would determine its amount allowed as a deduction for business interest expense for the taxable year, that is, its section 163(j) deduction limitation, in the same manner as set forth in proposed § 1.163(j)–2(b). Due to the fact that S corporations generally are required to make pro rata distributions of income, allocations of excess taxable income and excess business interest income would be made in accordance with the shareholders' respective interests in the S corporation after the S corporation determines its section 163(j) deduction limitation pursuant to proposed § 1.163(j)–2(b), in accordance with section 1366(a)(1). See section 1361(b)(1)(D); § 1.1361–1(l) (non-pro rata distributions may create a second class of stock). Because partner-level adjustments are not applicable to S corporation shareholders, the ATI of an S corporation generally would be determined in accordance with proposed § 1.163(j)–1(b)(1) without additional modifications.

ii. Dispositions of S Corporation Stock

Proposed §§ 1.163(j)–6(l)(4)(ii) and 1.163(j)–10(b)(4)(ii) would provide guidance regarding the inclusion of the proceeds from the dispositions of S corporation stock in the selling shareholder's ATI. Specifically, proposed § 1.163(j)–6(l)(4)(ii) would provide that, in the event that a shareholder of an S corporation recognizes gain or loss upon the disposition of stock of the S corporation, and the corporation in which the stock is being disposed owns only non-excepted trade or business assets, the gain or loss on the disposition of the stock would be included in the shareholder's ATI. Under proposed § 1.163(j)–10(b)(4)(ii), if a shareholder recognizes gain or loss upon the disposition of stock in an S corporation that owns (1) non-excepted assets and

excepted assets, (2) investment assets, or (3) both, the shareholder would determine the proportionate share of the amount properly allocable to a non-excepted trade or business, in accordance with the allocation rules set forth in proposed § 1.163(j)–10(c)(5)(ii)(B)(*3*), and would include such proportionate share of gain or loss in the shareholder's ATI. Proposed § 1.163(j)–10(b)(4)(ii) would also apply to tiered passthrough entities, as defined in proposed § 1.163(j)–7(f)(13), by looking through each passthrough entity tier (for example, an S corporation that is the partner of the highest-tier partnership would look through each lower-tier partnership), subject to proposed § 1.163(j)–10(c)(5)(ii)(D).

iii Double Counting of Business Interest Income Prohibited

Proposed § 1.163(j)–6(l)(4)(iii) would incorporate the limitations set forth in Notice 2018–28, which the Treasury Department and the IRS issued ''to prevent the double counting of business interest income and floor plan financing interest expense for purposes of the deduction afforded by section 163(j).'' Notice 2018–28, section 7. Consistent with the Notice's statement regarding the application of such limitations to S corporations and their shareholders, proposed § 1.163(j)–6(l)(4)(iii) would provide that, for purposes of calculating an S corporation shareholder's section 163(j) limitation, the shareholder would not include business interest income from an S corporation that is subject to section 163(j) except to the extent it is allocated excess business interest income from that S corporation pursuant to proposed § 1.163(j)–6(l)(1). In addition, proposed § 1.163(j)–6(l)(4)(iii) would provide that an S corporation shareholder could not include its share of the S corporation's floor plan financing interest expense for purposes of calculating a shareholder's section 163(j) limitation because such floor plan financing interest expense would have already have been taken into account by the S corporation in determining its nonseparately stated taxable income or loss for purposes of section 163(j).

iv. Business Interest Expense Carryforwards

Section 163(j)(4) does not indicate the manner by which disallowed business interest expense carryforwards should be treated by an S corporation and its shareholders. However, by virtue of the fact that section 163(j)(4)(D) references both sections 163(j)(4)(A) and (C), but not (B), an inference could be made that Congress intended that disallowed business interest expense carryforwards that arise from an S corporation should be treated differently than excess business interest expense incurred by a partnership. The legislative history appears to support such inference by indicating that the ''special rule for carryforward of disallowed partnership interest'' in section 163(j)(4)(B) ''does not apply to S corporations and their shareholders.'' H. Rept. 115–466, at 391 (2017).

In light of the statutory language and the legislative history, proposed § 1.163(j)–6(l)(5) provides that the rules set forth in proposed § 1.163(j)–2(c) govern the treatment of S corporation business interest expense carryforwards. Consequently, if an S corporation has a disallowed business interest expense carryforward in the year the S corporation terminates, such item will be carried forward to the succeeding C corporation taxable year. The Treasury Department and the IRS request comments regarding the treatment of disallowed business interest expense carryforwards as an attribute of the S corporation, subject to section 382 limitations, as opposed to the shareholders, and the timing for any adjustments to shareholder basis and the S corporation's accumulated adjustment account. By deferring adjustments to shareholder basis and the S corporation's accumulated adjustments account until any carryforwards are deductible at the corporate level, these proposed regulations generally would match the economics of these adjustments to the shareholders holding stock at the time the S corporation's carryforwards would become deductible.

The Treasury Department and the IRS, however, have considered an alternative option to the rules set forth in proposed § 1.163(j)–6(l)(5). This alternative option would allocate carryforwards from an S corporation to its shareholders in a manner similar to proposed § 1.163(j)–6(g) for partnerships and their partners. This option would require shareholders to receive excess taxable income or excess business interest income from the S corporation in order to treat the disallowed business interest carryforwards as paid or accrued by the shareholder. The shareholder's basis and the S corporation's accumulated adjustment account would be reduced upon an allocation of excess business interest expense to the shareholders.

This alternative option would set forth a framework that would be consistent with the flow-through nature of S corporations. For example, S corporations, similar to partnerships, allocate items of deduction and expense in the year that they occur, even if such items might be suspended at the shareholder-level under section 1366(d). In addition, S corporation shareholders calculate their respective bases in a manner similar to partners, except that S corporation shareholders do not take into account entity-level debt. Thus, corporate attributes generally are suspended at the shareholder-level under the existing subchapter S framework. The Treasury Department and the IRS request comments on this alternative approach and the authoritative support for adopting it.

v. Applicability of Section 382 to S Corporations Regarding Disallowed Business Interest Expense Carryforwards

Although the Treasury Department and the IRS have determined that sections 381(c)(20) and 382(d)(3) and (k)(1) apply to S corporations with respect to disallowed business interest expense carryforwards, the Treasury Department and the IRS continue to consider the extent to which section 382 should apply to S corporations for purposes other than section 163(j). The application of section 382 to S corporations for purposes of section 163(j) should not be construed as creating any inference regarding the application of section 382 to S corporations for other purposes. The Treasury Department and the IRS seek comments regarding the proper integration of these two Code sections and subchapter S of the Code (for example, comments regarding the interaction between sections 382 and 1362(e)(6)(D)).

I. Partnership or S Corporation Not Subject to Section 163(j)

Proposed § 1.163(j)–6(m) would provide guidance regarding partnerships and S corporations not subject to section 163(j). If a partnership or S corporation is not subject to section 163(j) by reason of proposed § 1.163(j)–2(d) (exempt entity), the exempt entity would not be required to perform the business interest expense limitation calculations under proposed §§ 1.163(j)–2(b) and 1.163(j)–6. To the extent a partner or shareholder receives business interest expense from an exempt entity, however, that business interest expense will be subject to the partner or shareholder's own section 163(j) deduction. In the event a partner or shareholder is subject to section 163(j) and the S corporation or partnership is not, the partnership or S corporation shall provide the partner or shareholder with the information necessary to inform the partner or shareholder of the partner or

shareholder's share of the partnership or S corporation's business interest expense, business interest income, and items of ATI.

To the extent a partnership or S corporation is not subject to section 163(j) by reason of proposed § 1.163(j)–1(b)(38)(ii) because it has an excepted trade or business (excepted entity), the excepted entity would not have to perform the business interest expense limitation calculations under proposed §§ 1.163(j)–2(b) and 1.163(j)–6 with respect to the business interest expense that is allocated to such electing trade or business. To the extent a partner or shareholder is allocated any section 163(j) item that is allocated to the partnership's excepted trade or business (excepted 163(j) items), such excepted 163(j) items would be excluded from the partner or shareholder's section 163(j) deduction calculation.

In the event a partnership allocates excess business interest expense to one or more of its partners, and in a later taxable year becomes exempt from the requirements of section 163(j)(4), proposed § 1.163(j)–6(l) would provide that the excess business interest expense from the prior taxable years is treated as paid or accrued by the partner in such later taxable year.

7. Proposed § 1.163(j)–7: Application of Section 163(j) to Foreign Corporations and Their Shareholders

A. Overview

The Treasury Department and the IRS received comments requesting clarification on whether section 163(j) applies to a controlled foreign corporation (as defined in section 957) (CFC) and, if so, the manner in which it applies.

These proposed regulations would provide the general rule that section 163(j) and the section 163(j) regulations apply to determine the deductibility of a CFC's business interest expense in the same manner as those provisions apply to determine the deductibility of a domestic C corporation's business interest expense. See proposed § 1.163(j)–7(b)(2). Thus, a CFC with business interest expense would apply section 163(j) to determine the extent to which that expense is deductible for purposes of computing subpart F income as defined under section 952, tested income as defined under section 951A(c)(2)(A), and income which is effectively connected with the conduct of a U.S. trade or business (ECI), as applicable. Additional guidance for a CFC (and other foreign persons) with ECI is provided in proposed § 1.163(j)–8 and discussed in part 8 of this Explanation of Provisions section.

Notwithstanding the general applicability of section 163(j) to CFCs under these proposed regulations, the Treasury Department and the IRS have determined that it is appropriate in certain cases to modify its application. As discussed in part 7(B) and part 7(C) of this Explanation of Provisions section, these proposed regulations would, in certain cases, limit the amount of a CFC's business interest expense subject to the section 163(j) limitation and modify the computation of a CFC's ATI, respectively.

The Treasury Department and the IRS continue to study whether it would be appropriate to provide additional modifications to the application of section 163(j) to CFCs and whether there are particular circumstances in which it may be appropriate to exempt a CFC from the application of section 163(j). The Treasury Department and the IRS request comments on this matter.

B. Computation of Amount of Business Interest Expense Subject to Section 163(j)

The Treasury Department and the IRS are aware that if business interest expense is paid by one CFC to a related CFC, the application of section 163(j) could result in an inappropriate mismatch of a deduction and payee income item. Such mismatch could inappropriately impact the calculation of the tax liability of a United States shareholder, as defined in section 951(b), under section 951A or the GILTI provision. Consider an example where a United States person (USP) wholly owns two CFCs (CFC1 and CFC2), and CFC1 has made a loan to CFC2 with respect to which CFC1 annually accrues $100x of business interest income that is included in CFC1's tested income, and CFC2 pays or accrues $100x of business interest expense, which absent section 163(j), would be fully deductible in computing CFC2's tested income or tested loss, as applicable. Thus, the intercompany business interest income and business interest expense would fully offset one another for purposes of computing USP's inclusion under section 951A(a). To the extent section 163(j) were to disallow a deduction for business interest expense to CFC2 while the business interest income would be included in CFC1's tested income, the amounts would not fully offset, and USP's inclusion under section 951A(a) may be increased solely due to the use of intercompany debt between CFC1 and CFC2.

The Treasury Department and the IRS considered the possibility of completely disregarding all business interest income and business interest expense with respect to intercompany debt between related CFCs for purposes of computing the section 163(j) limitation of the lender CFC and borrower CFC (the disregard approach). However, the disregard approach was rejected because it could cause inappropriate results where, for example, one CFC (CFC finco) borrows from a third party and on-lends the debt proceeds to one or more other CFCs within a group (funded CFCs). Assume for purposes of simplicity that a CFC finco charges interest on loans to the funded CFCs at the same rate that it is charged by the third party. If intercompany business interest income received by CFC finco and business interest expense paid or accrued by the funded CFCs were disregarded in determining each CFC's section 163(j) limitation, then CFC finco would have no business interest income, and all of CFC finco's business interest expense paid to the third party would be subject to the section 163(j) limitation. Furthermore, all of the funded CFCs would have no business interest expense subject to the section 163(j) limitation. This would be the case, even though the funded CFCs have borrowed from CFC finco and have the use of the funds originally borrowed from the third party.

The Treasury Department and the IRS have determined that an approach that better reflects the reality of borrowings by related CFCs is one that takes into account the principle that money is fungible within a group of highly related CFCs (such a group, a ''CFC group'' and a CFC that is a member of the group, a ''CFC group member''). Accordingly, these proposed regulations would provide for an election to apply an alternative method that would limit the amount of business interest expense of a CFC group member subject to the section 163(j) limitation to the amount of the CFC group member's allocable share of the CFC group's applicable net business interest expense. See proposed § 1.163(j)–7(b)(3). The applicable net business interest expense of a CFC group is the excess, if any, of the sum of the amounts of business interest expense of each CFC group member over the sum of the amounts of business interest income of each CFC group member. See proposed § 1.163(j)–7(f)(3). A CFC group member's allocable share is computed by multiplying the applicable net business interest expense of the CFC group by a fraction, the numerator of which is the CFC group member's net business interest expense (computed on a separate company

basis), and the denominator of which is the sum of the amounts of the net business interest expense of each CFC group member with net business interest expense (computed on a separate company basis). See proposed § 1.163(j)–7(f)(1).

Thus, if an election is made to apply the alternative method and if a CFC group has only intercompany debt within the CFC group, then the amount of the CFC group's applicable net business interest expense is zero, and no business interest expense of any CFC group member would be subject to the section 163(j) limitation. As a result, for example, there would be no increase in an inclusion under section 951A(a) solely by reason of the use of intercompany debt within a CFC group. On the other hand, if a CFC group has applicable net business interest expense, then, consistent with the principle that money is fungible, each CFC group member that has net business interest expense, computed on a separate company basis, will determine its allocable share of the applicable net business interest expense, and such allocable share is the amount of business interest expense of the CFC group member that is subject to the section 163(j) limitation. Using its allocable share of the CFC group's applicable net business interest expense, a CFC group member computes its section 163(j) limitation on a separate company basis. However, as discussed in part 7(C) of this Explanation of Provisions section, under these proposed regulations, for purposes of computing a CFC's ATI, an upper-tier CFC group member takes into account a proportionate share of the ''excess'' ATI of a lower-tier CFC group member.

In general, for purposes of these proposed regulations, a CFC group means two or more CFCs, if at least 80 percent of the stock by value of each CFC is owned, within the meaning of section 958(a), by a single U.S. shareholder or, in aggregate, by related U.S. shareholders that own stock of each member in the same proportion. See proposed § 1.163(j)–7(f)(6). For purposes of identifying a CFC group, members of a consolidated group are treated as a single person, as are individuals filing a joint return, and stock owned by certain passthrough entities is treated as owned by the owners or beneficiaries of the passthrough entity. The Treasury Department and the IRS determined that the alternative method is appropriately limited to situations in which a payor CFC and payee CFC have substantially identical ownership by United States shareholders because the alternative is based on the principle that money is fungible. The alternative is based on the principle that money is fungible, but fungibility should only apply in cases of close relationship where borrowings essentially support the entire group. Furthermore, the mismatch of a deduction and a payee income item is most significant when the payee and payor CFC have substantially identical ownership by United States shareholders. These proposed regulations narrow the scope of foreign corporations that are CFCs for this purpose to those foreign corporations in which at a least one United States shareholder owns stock, within the meaning of section 958. These proposed regulations refer to such a CFC as an ''applicable CFC.'' See proposed § 1.163(j)–7(f)(2).

If one or more CFC group members conduct a financial services business, the alternative method is applied by treating those entities as comprising a separate subgroup (such a subgroup, a ''financial services subgroup'' and such a member, a ''financial services subgroup member''). For this purpose, an entity conducts a financial services business if it is an eligible controlled foreign corporation, as defined in section 954(h)(2)(A), is a qualified insurance company, as defined in section 953(e)(3), or is eligible for the dealer exception in computing foreign personal holding company income as described in section 954(c)(2)(C). The Treasury Department and the IRS determined that it is appropriate to apply the alternative method separately for entities that conduct financial services businesses, because those businesses are typically highly leveraged with significant amounts of business interest income and business interest expense and could reasonably be expected to cause distortion if included in the alternative method with other, non-financial services business CFC group members.

These proposed regulations generally treat a controlled partnership (in general, a partnership in which CFC group members own, in aggregate, at least 80 percent of the interests) as a CFC group member and the interest in the controlled partnership is treated as stock. Thus, for example, if a U.S. person wholly owns two applicable CFCs, which each own a 50–percent interest in a partnership, then, if an election is made to apply the alternative method, the partnership will also apply the alternative method. The Treasury Department and the IRS determined that it is appropriate to extend the relief to partnerships that are substantially owned by CFC group members because the principle that money is fungible is not limited to corporate entities. Furthermore, absent such a rule, a partnership could be used to inappropriately exclude an applicable CFC from the CFC group by having the partnership own the applicable CFC.

These proposed regulations exclude from the definition of a CFC group member an applicable CFC that has ECI. Thus, an applicable CFC with ECI may not compute its section 163(j) limitation under the alternative method, and furthermore, the CFC group, and any financial services subgroup, must exclude such CFC from all group-level computations (for example, in determining the amount of the CFC group's applicable net business interest expense). The Treasury Department and the IRS determined that it is appropriate to exclude an applicable CFC with ECI from application of the alternative method so that section 163(j) applies to a CFC with ECI in the same manner as it does to a domestic C corporation. However, although an applicable CFC with ECI cannot use the alternative method, an applicable CFC with ECI is treated as a CFC group member solely for purposes of determining a CFC group. Thus, for example, if an applicable CFC with ECI is wholly owned by an upper-tier CFC and the applicable CFC with ECI wholly owns a lower-tier CFC, the lower-tier CFC may still qualify as a CFC group member.

If not all CFC group members have the same taxable year, then, if the election is made, these proposed regulations require that all group-level computations be made with respect to a majority U.S. shareholder taxable year. See proposed § 1.163(j)–7(f)(11). Thus, if, for example, USP, a domestic corporation with a calendar taxable year, wholly owns two applicable CFCs, one with a calendar year and one with a November 30 fiscal year, then, with respect to USP's 2019 calendar year, the group-level computations must be determined using amounts for the taxable year ending November 30, 2019, for the one applicable CFC, and amounts for the taxable year ending December 31, 2019, for the other applicable CFC.

Finally, these proposed regulations provide rules concerning the election (referred to as a ''CFC group election''), including the requirements for making the CFC group election, the manner for making the CFC group election, and the duration of the CFC group election. See proposed § 1.163(j)–7(b)(5). The Treasury Department and the IRS determined that the alternative method should be elective, rather than required, because for certain situations, the

general application of section 163(j) may be preferable to taxpayers.

C. Rules for Computing the ATI of an Applicable CFC

Proposed § 1.163(j)–7(c) would provide rules for computing the ATI of an applicable CFC. The principles of § 1.952–2 for determining the CFC's income and deductions or, for CFCs with ECI, the rules of section 882, apply for purposes of computing the CFC's taxable income. See proposed § 1.163(j)–7(c)(1). The Treasury Department and the IRS request comments on the application of the rules under § 1.952–2 for purposes of determining a CFC's taxable income for purposes of section 163(j). In particular, comments are requested as to whether these rules should allow a CFC a deduction, or require a CFC to take into account income, that is expressly limited to domestic corporations under the Code. For example, questions have arisen as to whether a CFC should be allowed a dividends-received deduction under section 245A, even though section 245A by its terms applies only to dividends received by a domestic corporation.

To mitigate potential double-counting of income in ATI, any dividend received by an applicable CFC from a related person is subtracted from the distributee's taxable income for purposes of computing ATI as the dividend represents income that could be part of the distributing corporation's ATI. See proposed § 1.163(j)–7(c)(2).

If a CFC group election is in effect with respect to a CFC group, then an upper-tier CFC group member takes into account a proportionate share of the ''excess'' ATI (referred to in these proposed regulations as ''CFC excess taxable income'') of each lower-tier member in which it directly owns stock for purposes of computing the upper-tier member's ATI. See proposed § 1.163(j)–7(c)(3). The meaning of the term CFC excess taxable income is analogous to the meaning of the term ''excess taxable income'' in the context of a partnership and S corporation, and, in general, means the amount of a CFC group member's ATI in excess of the amount needed before there would be disallowed business interest expense. See proposed § 1.163(j)–7(f)(5). A CFC group member that is a partnership does not have CFC excess taxable income because under the statute and proposed § 1.163(j)–6, the partnership has excess taxable income and such excess taxable income is allocated to the partners of the partnership. For a discussion of the computation of a partnership's excess taxable income and the treatment of a partner's distributive share of any such excess taxable income, see the discussion in part 6 of this Explanation of Provisions section.

The process of computing and ''rolling up'' CFC excess taxable income among CFC group members for purposes of computing ATI of each of the CFC group members begins with a lowest-tier member and continues through the chain of ownership to a highest-tier member of the CFC group (referred to in these proposed regulations as a ''specified highest-tier member''). Thus, a lowest-tier member computes its section 163(j) limitation, and if the lowest-tier member has CFC excess taxable income, the CFC excess taxable income is taken into account proportionately by one or more higher-tier members that directly own stock of the lower-tier member for purposes of computing ATI; and, if such a higher-tier member has CFC excess taxable income, such CFC excess taxable income is taken into account by a next higher-tier member, and so forth.

A higher-tier member that is a partnership may take into account a pro rata share of the CFC excess taxable income of a lower-tier member, other than a partnership, which does not have CFC excess taxable income, for purposes of computing the higher-tier member partnership's ATI and determining if the higher-tier member partnership has excess taxable income that may be allocated to CFC group members that are partners.

D. Rules for Computing ATI of a United States Shareholder

i. General Rules

In general, a United States shareholder that owns, within the meaning of section 958(a), stock of a CFC is required to include in its gross income each year its pro rata share of the CFC's subpart F income, and investments in U.S. property, as defined in section 956. In addition, a United States shareholder that owns stock of a CFC is required to include in its gross income for each year its GILTI. Thus, these income inclusions are included in the United States shareholder's taxable income, and absent an exercise of regulatory authority, would be included in ATI.

To avoid double counting of the taxable income of a CFC already taken into account to determine the CFC's section 163(j) limitation, proposed § 1.163(j)–7(d)(1)(i) would provide the general rule (the double counting rule) that the ATI of a United States shareholder is computed without regard to any amounts included in gross income under sections 78, 951(a), and 951A(a) that are properly allocable to a non-excepted trade or business of the United States shareholder (each amount, a ''specified deemed inclusion'' and such amounts, collectively ''specified deemed inclusions'') and any deduction allowable under section 250(a)(1)(B), without regard to the taxable income limitation in section 250(a)(2), by reason of a specified deemed inclusion (such a deduction, a ''specified section 250 deduction'').

To the extent a United States shareholder includes amounts in gross income under section 78, 951(a), or 951A(a) that are not properly allocable to a non-excepted trade or business, for example, because such amounts are treated as investment income, within the meaning of section 163(d), of the United States shareholder, then such amounts are not included in ATI (see proposed § 1.163(j)–1(b)(1)(ii)(F)). Thus, for example, if a United States shareholder that is a domestic partnership includes amounts in gross income under section 951(a) or 951A(a) that are treated as investment income with respect to the domestic partnership and therefore are not properly allocable to a trade or business, then such amounts are not included in the ATI of the domestic partnership. However, absent a special rule, to the extent such income inclusions are taken into account as a distributive share of a C corporation partner, the income inclusions would be included in the ATI of the C corporation partner (see proposed § 1.163(j)–4(b)(3)). This result would be contrary to the purpose of the double counting rule. Accordingly, to prevent income inclusions under sections 951(a) and 951A(a) that are treated as investment income with respect to a domestic partnership from being included in the ATI of a corporate partner, these proposed regulations provide that a C corporation partner may not treat such amounts as properly allocable to a trade or business of the C corporation partner. See proposed § 1.163(j)–7(d)(1)(ii).

ii. Rules for a United States Shareholder of a CFC Group Member With a CFC Group Election in Effect

If a United States shareholder owns directly or indirectly through one or more foreign partnerships stock of a CFC group member that is a specified highest-tier member for which a CFC group election is in effect, and the specified highest-tier member has CFC excess taxable income that is treated as being attributable to taxable income of the CFC group that resulted in the United States shareholder having specified income inclusions, the United

States shareholder may add to its taxable income an amount equal to its proportionate share of the ''eligible'' CFC excess taxable income of the specified highest-tier member and any other highest-tier members (the addback rule). See proposed § 1.163(j)–7(d)(2). However, the addition to taxable income under the addback rule is limited to the portion of the specified deemed inclusions, all of which are subtracted from taxable income of any United States shareholder under the double-counting rule, that is with respect to CFC group members, reduced by the portion of any specified section 250 deduction that is allowable by reason of such specified deemed inclusions. These proposed regulations refer to the portion described in the preceding sentence as ''CFC group inclusions'' (see proposed § 1.163(j)–7(d)(2)(iii)). Furthermore, the limitation is computed without regard to amounts included in gross income by reason of section 78 with respect to CFC group members. This result is appropriate because section 78 requires a deemed inclusion only in order to carry out the purposes of the foreign tax credit provisions.

To determine the amount of ''eligible'' CFC excess taxable income (ETI) of a specified highest-tier member (defined under proposed § 1.163(j)–7(d)(2)(ii) as ''eligible CFC group ETI''), the CFC excess taxable income is multiplied by the specified ETI ratio. The specified ETI ratio is a fraction (expressed as a percentage) that compares the amounts of taxable income of each specified highest-tier member and each specified lower-tier member of the specified highest-tier member to the portions of such taxable income that gave rise to inclusions under section 951(a) or 951A(a). The specified ETI ratio includes in the numerator and the denominator of the fraction only taxable income amounts with respect to CFC group members that have CFC excess taxable income without regard to the ''roll up'' of CFC excess taxable income from a lower-tier member. See proposed § 1.163(j)–7(f)(14). The purpose of the specified ETI ratio is to address the fact that within the CFC group, income of a lower-tier member CFC that is neither subpart F income nor tested income to the extent of GILTI is included in CFC excess taxable income and may be used by an upper-tier CFC group member. It would be distortive for a United States shareholder to obtain an increase in ATI in respect of such income because this income is not taxed in the United States. The specified ETI ratio is intended to provide an estimate of the portion of CFC excess taxable income attributable to this income. The Treasury Department and the IRS determined that this formulaic approach is superior to a tracing approach, because a tracing approach would increase complexity and therefore also generally increase administrative and compliance burdens.

If a United States shareholder of a CFC group member with a CFC group election in effect is a domestic partnership (a U.S. shareholder partnership), the addback rule does not apply to determine the ATI of the U.S. shareholder partnership. See proposed § 1.163(j)–7(d)(3). This is because the Treasury Department and the IRS are of the view that if a U.S. shareholder partnership includes amounts in gross income under section 951(a) or 951A(a) with respect to stock of a CFC group member, then such amounts will, in virtually all fact patterns, be treated as investment income with respect to the partnership, and therefore interest expense of the partnership that is allocable to stock of a CFC group member will be treated as investment interest expense that is not subject to section 163(j) at the partnership-level. In this case, however, if a U.S. shareholder partnership has a domestic C corporation partner (a U.S. corporate partner), the addback rule is applied, with certain modifications, to the U.S. corporate partner for purposes of computing the U.S. corporate partner's ATI. In particular, for purposes of computing the amount of the addition to taxable income of the U.S. corporate partner allowed under the addback rule, the addback rule is modified to provide that the U.S. corporate partner takes into account not only its own specified deemed inclusions with respect to stock of a CFC group member, but for this purpose also its distributive share, if any, of amounts included in gross income under section 951(a) or 951A(a) of the U.S. shareholder partnership with respect to stock of a CFC group member. In addition, the addback rule is modified to provide that for purposes of determining a U.S. corporate partner's pro rata share of eligible CFC excess taxable income of a specified highest-tier member, the U.S. shareholder partnership is treated as if it were a foreign partnership.

E. Effect on Earnings and Profits

Under proposed § 1.163(j)–7(e), and consistent with the rules in proposed § 1.163(j)–4(c), the disallowance and carryforward of a deduction for a foreign corporation's business interest expense does not affect whether and when such business interest expense reduces the corporation's earnings and profits. For example, in the case of a passive foreign investment company (PFIC), the disallowance and carryforward of a deduction will not impact the amount of inclusions of earnings under section 1293 if the PFIC is treated as a qualified electing fund. Similarly, the disallowance and carryforward of a deduction for an applicable CFC's business interest expense will not affect the limitation of subpart F income to earnings and profits under section 952(c).

8. Proposed § 1.163(j)–8: Application of Section 163(j) to Foreign Persons With Effectively Connected Income

In general, unlike U.S. citizens or residents that are subject to U.S. tax on their worldwide income, a nonresident alien individual or foreign corporation is subject to net basis income taxation only with respect to its income that is or is treated as effectively connected with a trade or business (ECI) conducted in the United States as provided under section 872 or 882. Deductions are allowed only to the extent that they are connected with such income. In certain circumstances, the tax liability may be reduced or eliminated by the provisions of an income tax treaty entered into by the United States with a foreign country. While a nonresident alien individual or foreign corporation that is not an applicable CFC (hereafter a non-CFC FC) that has ECI is still subject to section 163(j) and the section 163(j) regulations, the rules need to be modified since these foreign persons are only taxed on their ECI. Accordingly, the definitions for ATI, business interest expense, business interest income, and floor plan financing interest expense in § 1.163(j)–1 are modified to limit such amounts to income which is effectively connected income and expenses properly allocable to effectively connected income. See proposed § 1.163(j)–8(b).

As discussed in part 6 of this Explanation of Provisions section, section 163(j)(4) provides that in the case of a partnership, section 163(j) is applied at the partnership level. The partner's ATI is increased by the partnership's excess taxable income, and the partnership's excess business interest expense is allocated to the partner as disallowed business interest expense carryforward that can be deducted when the partners are allocated excess taxable income from the partnership, but only to the extent of such excess. Pursuant to section 163(j)(8)(B), which permits adjustments to the computation of ATI, a nonresident alien individual or non-CFC FC that is a partner in a partnership that is engaged in a U.S. trade or business modifies the application of the

general allocation rules in § 1.163(j)–6 with respect to excess taxable income, excess business interest expense, and excess business interest income of the partnership to take into account the limitation of such foreign person's liability for U.S. tax to its ECI. The excess amounts of the partnership, therefore, can be used by the nonresident alien individual or non-CFC FC only to the extent of the partnership's income that would be effectively connected income with respect to the foreign partner. The amount of excess taxable income and excess business interest expense that can be used by such partner is determined by multiplying the amount of the excess taxable income or the excess business interest allocated under § 1.163(j)–6 by a ratio equal to the ATI of the partnership, with the adjustments described previously to limit such amount to only effectively connected income or expense items, over the ATI of the partnership determined under § 1.163(j)–6(d). The amount of excess business interest income that can be used by such partner is limited to ECI business interest income over allocable ECI business interest expense. See proposed § 1.163(j)–8(c).

Proposed § 1.163(j)–8(e) would also include rules coordinating section 163(j) and § 1.882–5. Section 1.882–5 provides rules for determining the amount of a foreign corporation's interest expense that is allocable under section 882(c) to ECI. These proposed regulations require that a foreign corporation that has ECI must first determine its business interest expense allocable to ECI under § 1.882–5 before applying section 163(j). The foreign corporation then applies section 163(j) to its business interest expense to determine if any of that business interest expense is disallowed business interest expense. If the foreign corporation is also a partner in a partnership that has ECI, the foreign corporation must back out that portion of the business interest expense determined under § 1.882–5 which is deemed to have come from the partnership as such business interest expense has already been subject to section 163(j) at the partnership level and the foreign corporation is then left with only the non-partnership business interest expense. If the partnership also had disallowed business interest expense, a portion of the partnership-level interest expense that was backed out of the amount determined under § 1.882–5 will also be disallowed business interest expense. Disallowed business interest expense determined at either the partner-level or partnership level, as appropriate, will not be taken into account for the purpose of determining interest expense under § 1.882–5 in subsequent tax years, but rather will be subject to the limitations of section 163(j).

As provided in proposed § 1.163(j)–8(d), an applicable CFC (as defined in proposed § 1.163(j)–8(g)(1)) that has ECI must first apply the general rules of section 163(j) and the section 163(j) regulations, pursuant to § 1.163(j)–7(b)(2), to determine how section 163(j) applies to the applicable CFC. If, after applying section 163(j) and the section 163(j) regulations, the applicable CFC has disallowed business interest expense, the applicable CFC then must apportion a part of its disallowed business interest expense to interest expense allocable to effectively connected income as determined under § 1.882–5.

These proposed regulations also provide that disallowed business interest expense and disallowed business interest expense carryforwards will not affect the determination of effectively connected earnings and profits or U.S. net equity for purposes of the branch profits tax under section 884. These rules are consistent with the general principles of these proposed regulations with respect to earnings and profits. See proposed §§ 1.163(j)–4(c) and 1.163(j)–8(f).

9. Proposed § 1.163(j)–9: Elections for Excepted Trades or Businesses; Safe Harbor for Certain REITs

A. Election Procedure

Proposed § 1.163(j)–9 would provide guidance relating to the election to be treated as an excepted trade or business for real property or farming trades or businesses. These proposed regulations clarify that an election is made for a particular trade or business, not necessarily for a particular entity, and would apply for the taxable year that the election is made and all subsequent years.

Proposed § 1.163(j)–9 would provide the time and manner in which to make the election. Taxpayers making the election should attach an election statement to their timely filed original Federal income tax return, including extensions. The statement should include basic information of the taxpayer and the electing trade or business. Where a taxpayer has multiple trades or businesses that may be eligible for the election, an election must be made for each trade or business, and the election statement must specify or describe the different electing trades or businesses. The election statement is necessary in order for taxpayers and for the IRS to identify each electing trade or business. The Treasury Department and the IRS request comments on whether the information required to be included in the statement is sufficient, or whether additional information should be included to reduce any potential audit controversy.

Because the election applies to the particular trade or business, the election generally terminates automatically if the taxpayer ceases to exist, or ceases the operation of the electing trade or business. However, these proposed regulations would also provide that where a taxpayer transfers all of the assets of an electing trade or business to a related party, the election does not terminate for that trade or business, and transfers to the related party. The purpose of this rule is to disregard a transaction that purports to be a termination or cessation of a trade or business, but is merely a change in the form of conducting the trade or business where the taxpayer (through a related party) retains a relationship to such trade or business. For this purpose, a related party means any person who bears a relationship to the taxpayer which is described in section 267(b) or 707(b)(1). Additional guidance may be provided detailing transactions in which an election might terminate.

Additionally, these proposed regulations would contain an anti-abuse rule to prevent a situation where the taxpayer attempts to terminate the election through a transfer of the assets in the trade or business, but with the intent of resuming a trade or business of a similar nature. These proposed regulations would provide that if a taxpayer re-acquires substantially all of the assets used in the trade or business, or substantially similar assets, and resumes conducting such prior trade or business within 60 months of ceasing the trade or business, the election will be revived with the resumed trade or business.

The Treasury Department and the IRS request comments on the method by which certain taxpayers can make the election under section 163(j)(7)(B) or (C), and the types of transactions in which the election should terminate.

B. Safe Harbor for Certain REITs

Proposed § 1.163(j)–9(g) provides a special safe harbor for REITs. For REITs that take advantage of this safe harbor, the rules applicable to REITs are substantially similar to the general rules provided for other taxpayers. However, these proposed regulations provide certain modifications to take into

account the existing rules governing REIT taxation.

If a REIT holds real property, interests in partnerships holding real property, or shares in other REITs holding real property, the safe harbor provides that the REIT is eligible to make an election to be an electing real property trade or business for all or part of its assets. For this purpose, the term ''real property'' is defined consistently with the definition of real property under section 856, rather than the more restrictive definition set forth under the proposed section 469 regulations.

The term ''real property trade or business'' in section 469(c)(7)(C) does not include real property financing and, for purposes of the section 163(j) regulations, any assets used in a real property financing trade or business are generally allocated to a non-excepted trade or business. Under proposed § 1.163(j)–9(g), REIT real property financing assets include mortgages, guaranteed mortgage pass-thru certificates, real estate mortgage investment conduit (REMIC) regular interests, and debt instruments issued by publicly offered REITs.

If a REIT makes an election to be an electing real property trade or business, and the value of the REIT's real property financing assets is 10 percent or less of the value of the REIT's total assets, then, under the safe harbor, all of the REIT's assets are treated as assets of an excepted trade or business. This determination is based on the same values used for the REIT asset test under section 856(c)(4) as of the close of the REIT's taxable year. If a REIT makes an election to be an electing real property trade or business, and the value of a REIT's real property financing assets is more than 10 percent of the value of the REIT's total assets, then, under the safe harbor, the REIT's business interest income, business interest expense, and other items of expense and gross income are allocated between excepted and non-excepted trades or businesses under the rules set forth in proposed § 1.163(j)–10, as modified by proposed § 1.163(j)–9(g)(4).

For purposes of valuing a REIT's assets, REIT real property financing assets also include partnership assets that a REIT is deemed to hold under § 1.856–3(g) and the portion of a REIT's interest in another REIT attributable to that other REIT's real property financing assets. The Treasury Department and the IRS request comments on whether the list of real property financing assets in these proposed regulations includes all direct and indirect investments that REITs make to finance real property.

Under the safe harbor, the definition of real property under § 1.856–10 applies to determine whether the assets of a REIT are properly allocable to an excepted trade or business. If a REIT holds an interest in a partnership, in applying the partnership look-through rule described in proposed § 1.163(j)–10(c)(5)(ii)(A)(*2*), the REIT also applies this definition of real property to determine whether the partnership's assets are allocable to an excepted trade or business.

Under section 856(c)(5)(B), shares in other REITs qualify as real estate assets without regard to the portion of the REIT owned. Under the safe harbor, if a REIT (shareholder REIT) owns shares in another REIT and all of the other REIT's assets are treated as assets of an excepted trade or business, then all of shareholder REIT's adjusted basis in the shares of the other REIT is properly allocable to an excepted trade or business of shareholder REIT. If this is not the case, the safe harbor provides that shareholder REIT applies the partnership look-through rule described in proposed § 1.163(j)–10(c)(5)(ii)(A)(*2*) (as if the other REIT were a partnership) in determining the extent to which shareholder REIT's adjusted basis in the shares of the other REIT is properly allocable to an excepted trade or business of shareholder REIT. If shareholder REIT does not receive the information from the other REIT that is necessary to apply the look-through rule, then shareholder REIT's shares of the other REIT are properly allocable to a non-excepted trade or business of shareholder REIT.

C. Anti-Abuse Rule for Certain Real Property Trades or Businesses

The Treasury Department and the IRS have determined that it would be inappropriate to allow an election to be an excepted real property trade or business for a trade or business that leases substantially all of its real property to the owner of the real property trade or business, or to a related party of the owner. To permit such an election would encourage a taxpayer to enter into non-economic structures where the real estate components of non-real estate businesses are separated from the rest of such businesses in order to artificially reduce the application of section 163(j) by leasing the real property to the taxpayer or a related party of the taxpayer and electing for this ''business'' to be an excepted real property trade or business. As a result, these proposed regulations would also contain an anti-abuse rule. If at least 80 percent of the business's real property, determined by fair market value, is leased to a trade or business under common control with the real property trade or business, the trade or business will not be eligible for the election. Common control in this case means that 50 percent of the direct and indirect ownership interests in both businesses are held by related parties within the meaning of sections 267(b) and 707(b). REITs that lease qualified lodging facilities, as defined in section 856(d)(9)(D), and qualified healthcare properties, as defined in section 856(e)(6)(D), are generally permitted pursuant to section 856(d)(8)(B) to lease these properties to a taxable REIT subsidiary; thus, this anti-abuse rule does not apply to these types of REITs. The Treasury Department and the IRS request comments on whether other exceptions to the anti-abuse rule (such as, for example, an exception for certain fact patterns where real property that is leased from a related party is ultimately sub-leased to a third party) would be appropriate.

10. Proposed § 1.163(j)–10: Allocation of Expense and Income to an Excepted Trade or Business

As provided in section 163(j)(7) and proposed § 1.163(j)–2, certain trades or businesses are excepted from the application of section 163(j), including electing real property trades or businesses, electing farming businesses, regulated utility trades or businesses, and the trade or business of performing services as an employee. Section 1.163(j)–10 would provide rules for determining the amount of a taxpayer's interest expense, interest income, and other tax items that is properly allocable to excepted and non-excepted trades or businesses for purposes of section 163(j). It is not necessary for a taxpayer to undertake any allocations under proposed § 1.163(j)–10 if all of the taxpayer's items are properly allocable to non-excepted trades or businesses, or if all of the taxpayer's items are properly allocable to excepted trades or businesses.

Proposed § 1.163(j)–10(a) would provide an overview of the section and certain general rules, including rules regarding the application of the allocation rules to members of a consolidated group. Proposed § 1.163(j)–10(b) would provide rules regarding the allocation of tax items other than interest expense and interest income between excepted and non-excepted trades or businesses. Proposed § 1.163(j)–10(c) would provide the general method of allocating interest expense and interest income between excepted and non-excepted trades or

businesses using asset basis, as well as various special rules that would apply under this general method. Proposed § 1.163(j)–10(d) would describe several limited situations in which tracing rather than asset-based allocation is required.

Organizations subject to tax under section 511 are required to compute their unrelated business taxable income separately with respect to each trade or business, resulting in a more granular allocation than is required for purposes of the section 163(j) regulations. Accordingly, proposed § 1.163(j)–10(a)(5) would provide that such organizations would apply the allocation rules under section 512 and the regulations thereunder in determining whether items of income or expense are allocable to an excepted trade or business. The Treasury Department and the IRS request comments as to whether additional guidance is needed regarding the allocation of income and expenses of an organization subject to tax under section 511 to an excepted trade or business for purposes of section 163(j).

A. Proposed § 1.163(j)–10(a): Overview

Before applying the allocation rules in proposed § 1.163(j)–10, a taxpayer first must determine whether any interest paid or accrued is properly allocable to a trade or business. If so, and if the taxpayer does not qualify for the small business exemption under section 163(j)(3) and proposed § 1.163(j)–2, the taxpayer must apply the allocation rules of proposed § 1.163(j)–10 if the taxpayer has tax items from both excepted and non-excepted trades or businesses. The taxpayer must do so in order to determine the amount of interest expense that is business interest expense subject to limitation under section 163(j) and to determine which items are included or excluded in computing its section 163(j) limitation.

For purposes of the allocation rules in proposed § 1.163(j)–10, a taxpayer's activities are not treated as a trade or business if those activities do not involve the provision of services or products to a person other than the taxpayer. For example, if a taxpayer engaged in a manufacturing trade or business has in-house legal personnel that provide legal services solely to the taxpayer, the taxpayer is not treated as also engaged in the trade or business of providing legal services.

Additionally, for purposes of the allocation rules in proposed § 1.163(j)–10, a consolidated group would be treated as a single corporation. Thus, stock of a member that is owned by another member of the same group would not be treated as an asset for purposes of proposed § 1.163(j)–10, and the transfer of member stock to a non-member would be treated by the group as the transfer of the member's assets. Additionally, the group, rather than a particular member, would be treated as engaged in excepted or non-excepted trades or businesses. Intercompany obligations issued by a member borrower would not be considered an asset of the creditor member for purposes of allocating asset basis between excepted and non-excepted trades or businesses. Moreover, intercompany transactions would be disregarded for purposes of proposed § 1.163(j)–10, along with the resulting offsetting items.

The Treasury Department and the IRS have determined that this approach to consolidated groups is necessary for purposes of proposed § 1.163(j)–10 because a particular trade or business may be conducted by multiple group members that also are engaged in other trades or businesses. Under these proposed regulations, the distinction between excepted and non-excepted trades or businesses applies at the level of the trade or business, not at the level of the group member; thus, the allocation rules in this section apply without regard to which member conducts a trade or business or possesses assets used in a trade or business.

The Treasury Department and the IRS considered an approach to the allocation rules in proposed § 1.163(j)–10 that would have taken into account intercompany transactions between consolidated group members engaged in excepted trades or businesses and members engaged in non-excepted trades or businesses. However, this approach would have resulted in different treatment for consolidated groups in which each member conducts a single trade or business and consolidated groups in which a single member engages in multiple trades or businesses. Moreover, if intercompany transactions were taken into account for purposes of proposed § 1.163(j)–10, then taxpayers potentially could increase the amount of interest allocable to an excepted trade or business or increase their section 163(j) limitation by engaging in intercompany transactions. Thus, the Treasury Department and the IRS have determined that intercompany transactions should be disregarded for purposes of proposed § 1.163(j)–10.

After a consolidated group has determined the percentage of the group's interest expense that is allocable to an excepted trade or business and thus is not subject to limitation under section 163(j), this exempt percentage would be applied proportionally to each member that has paid or accrued interest to a person other than a group member during the taxable year. Thus, in general, each member with interest paid or accrued to a lender that is not a group member will have the same percentage of interest allocable to excepted trades or businesses, regardless of whether any particular member actually engaged in an excepted trade or business. For rules regarding the deduction of interest expense paid or accrued by group members, see the discussion of proposed § 1.163(j)–5(b) in part 5 of this Explanation of Provisions section.

B. Proposed § 1.163(j)–10(b): Allocating Tax Items Other Than Interest Income and Interest Expense

In general, gross income other than dividends and interest income would be allocated to the trade or business that generated such gross income. The Treasury Department and the IRS request comments regarding this method of allocating items of income other than dividends and interest, including comments as to how this rule should be expanded or clarified.

With regard to dividend income, the Treasury Department and the IRS have determined that, if a taxpayer's ownership interest in a corporation equals or exceeds a certain threshold, the taxpayer generally should look through to the business activities of the corporation that paid the dividend. More specifically, if a taxpayer owns at least 80 percent of the stock of a domestic C corporation or a CFC (by vote and value; see section 1504(a)(2)) that is not eligible for the small business exemption under section 163(j)(3) and proposed § 1.163(j)–2(d)(1), then the taxpayer's dividend income would be treated as allocable to excepted or non-excepted trades or businesses based upon the relative amounts of the payor corporation's adjusted basis in the assets used in such trades or businesses. Additionally, if at least 90 percent of the payor corporation's adjusted basis in its assets is allocable to either excepted trades or businesses or non-excepted trades or businesses, then all of the taxpayer's dividend income from such corporation for the taxable year would be treated as allocable to either excepted or non-excepted trades or businesses, respectively.

If a shareholder in an S corporation looks through to the S corporation's basis in its assets for purposes of the basis allocation rules in proposed § 1.163(j)–10(c), the shareholder also would be required to look through to the

S corporation's basis in its assets for purposes of characterizing any dividends received from the S corporation.

If a taxpayer receives a dividend that is not investment income, and if the dividend look-through rule is inapplicable to the taxpayer, then the taxpayer would treat the dividend income as allocable to a non-excepted trade or business. The Treasury Department and the IRS request comments on this proposed rule, including whether taxpayers that are C corporations or tax-exempt corporations should treat dividend income as allocable to a non-excepted trade or business if they fail to meet the minimum ownership threshold for dividends from domestic C corporations and CFCs.

With regard to dispositions of stock in a corporation or interests in a partnership, if a taxpayer recognizes gain or loss upon the disposition of stock in a non-consolidated C corporation that is not property held for investment, within the meaning of section 163(d)(5), and if the taxpayer looks through to the corporation's basis in its assets for purposes of the basis allocation rules in proposed § 1.163(j)–10(c), then the taxpayer would allocate the gain or loss to excepted or non-excepted trades or businesses based upon the relative amounts of the corporation's adjusted basis in the assets used in its trades or businesses, determined pursuant to proposed § 1.163(j)–10(c). If the taxpayer does not look through to the corporation's basis in its assets, the taxpayer would treat the gain or loss as allocable to a non-excepted trade or business. If a taxpayer recognizes gain or loss upon the disposition of interests in a partnership or stock in an S corporation that owns (1) non-excepted assets and excepted assets, (2) investment assets, or (3) both, the taxpayer would determine the proportionate share of the amount of basis properly allocable to a non-excepted trade or business in accordance with the allocation rules set forth in proposed § 1.163(j)–10(c)(5)(ii)(A) or proposed § 1.163(j)–10(c)(5)(ii)(B)(*3*), as appropriate, and include such proportionate amount of gain or loss in the taxpayer's ATI.

With regard to expenses, losses, and deductions other than interest, any such items that are definitely related to a trade or business, within the meaning of § 1.861–8(b), would be allocable to that trade or business. All other expenses would be ratably apportioned to gross income. The Treasury Department and the IRS request comments on this proposed method of allocating expenses other than interest expense, including whether this proposed rule should incorporate any of the special allocation rules in § 1.861–8(e).

C. Proposed § 1.163(j)–10(c): Allocating Interest Expense and Interest Income

Proposed § 1.163(j)–10(c) would set forth the general rule for allocating interest expense and interest income between excepted and non-excepted trades or businesses. Under this general rule, interest expense and interest income would be allocated between excepted and non-excepted trades or businesses based upon the relative amounts of the taxpayer's adjusted basis in the assets used in its excepted and non-excepted trades or businesses. This general method of allocation reflects the fact that money is fungible and the view that interest expense is attributable to all activities and property, regardless of any specific purpose for incurring an obligation on which interest is paid.

Under proposed § 1.163(j)–10(c), a taxpayer would determine the adjusted basis in its assets on a quarterly basis (each such quarterly period, a ''determination period'') and average those amounts to determine the relative amounts of asset basis for its excepted and non-excepted trades or businesses for a taxable year. The Treasury Department and the IRS request comments on the frequency of asset basis determinations required under proposed § 1.163(j)–10(c).

Proposed § 1.163(j)–10(c)(1) contains a general de minimis rule. Under this rule, if at least 90 percent of a taxpayer's basis in its assets for the taxable year is allocable to either excepted or non-excepted trades or businesses, determined under proposed § 1.163(j)–10(c), then all of the taxpayer's interest expense and interest income for that year that is properly allocable to a trade or business would be treated as allocable to excepted or non-excepted trades or businesses, respectively. The Treasury Department and the IRS request comments as to whether the application of this de minimis rule should be elective.

If an asset is used in more than one trade or business during a determination period, the taxpayer's basis in such asset would be allocated to each trade or business using the permissible methodology (see the following paragraph) that most reasonably reflects the use of the asset in each trade or business during the determination period. An allocation methodology most reasonably reflects the use of the asset in each trade or business if the methodology most properly reflects the proportionate benefit derived from the use of the asset in each trade or business.

Proposed § 1.163(j)–10(c) would provide several permissible methodologies for allocating basis in an asset used in more than one trade or business during a determination period, including the following: The relative amounts of gross income that an asset generates, has generated, or may reasonably be expected to generate with respect to the trades or businesses; the relative amounts of physical space used by each trade or business if the asset is land or an inherently permanent structure; and the relative amounts of output of each trade or business if each trade or business generates the same unit of output. The choice of method would be subject to de minimis exceptions, and taxpayers generally would not be permitted to vary their allocation methodology across determination periods within a taxable year or from one year to the next. Additionally, if none of the permissible methodologies reasonably reflects the use of an asset in each trade or business, the taxpayer's basis in the asset would not be taken into account for purposes of proposed § 1.163(j)–10(c). The Treasury Department and the IRS request comments on these proposed methods of allocating basis in an asset used in more than one trade or business.

Proposed § 1.163(j)–10(c)(3)(iii) would provide that for utility trades or businesses, the only permissible method for allocating asset basis between excepted and non-excepted utility activities is the relative amounts of output of the trades or businesses. For example, if an asset is used to furnish or sell electric energy, and a portion of the energy is sold to wholesale customers where rates are not set on a cost of service and rate of return basis while the remaining portion is sold at a rate established by a ratemaking body described in proposed § 1.163(j)–1(b)(13), the taxpayer must allocate the basis in the asset between the taxpayer's excepted and non-excepted trades or businesses. The Treasury Department and the IRS believe that other methods listed in proposed § 1.163(j)–10(c) that do not take into account the relative amounts of regulated and unregulated utility activities do not properly reflect the proportionate benefit derived from the use of the asset in each trade or business. The Treasury Department and the IRS request comments on this allocation methodology, including whether another methodology would more accurately reflect the extent to which a trade or business is an excepted utility business for this purpose.

These proposed regulations also would provide a de minimis rule for utility trades or businesses. Under the proposed de minimis rule, if more than 90 percent of the output of a trade or business is sold at rates described in the exception for regulated utility trades or businesses, the taxpayer would treat the entire trade or business as an excepted trade or business. The Treasury Department and the IRS request comments with respect to the de minimis rule for assets used in a utility trade or business, including whether another percentage threshold with respect to the de minimis rule would be more appropriate.

The allocation of asset basis between excepted and non-excepted trades or businesses under proposed § 1.163(j)–10(c) would be subject to numerous additional special rules. First, a taxpayer's adjusted basis in tangible depreciable property other than inherently permanent structures for which a deduction is allowable under section 167 would be determined using the alternative depreciation system under section 168(g). Additional first year depreciation, for example under section 168(k), would not be taken into account for purposes of the basis allocation rule in proposed § 1.163(j)–10(c) due to the distortive effects that such depreciation would have upon the relative adjusted basis of assets. Further, a taxpayer's adjusted basis in tangible depreciable property other than inherently permanent structures for which a deduction is allowable under section 168 of the 1954 Code (former section 168) would be determined using the taxpayer's method of computing depreciation for the property under former section 168. Additionally, a taxpayer's adjusted basis in any intangible asset with respect to which a deduction is allowable under section 167 or section 197 would be determined in accordance with section 167 or section 197, as applicable. Self-created intangibles would not be taken into account for purposes of the allocation rules in proposed § 1.163(j)–10(c). The Treasury Department and the IRS request comments on these proposed rules regarding asset basis in depreciable property, including whether taxpayers should be permitted to use other methods of depreciation, such as the general depreciation system under section 168(a), for purposes of proposed § 1.163(j)–10(c).

Second, the adjusted basis of any asset that is land, including nondepreciable improvements to land, or an inherently permanent structure used in a trade or business generally would be its unadjusted basis rather than its adjusted basis. This special rule, which would not apply to land or inherently permanent structures that fall within the special rule described in the following paragraph, is intended to provide taxpayers with a readily ascertainable figure that better reflects the relative underlying value of this limited class of assets—which, in some cases, are held for many years—than adjusted basis. The Treasury Department and the IRS request comments regarding this approach to allocating basis to land and inherently permanent structures, including whether this rule should be elective, and whether taxpayers should be able to use fair market value rather than acquisition basis for land or inherently permanent structures used in a trade or business.

Third, assets that have been acquired or that are under development but that are not yet used in a trade or business would not be taken into account for purposes of proposed § 1.163(j)–10(c). Such assets would include (but would not be limited to) construction works in progress, such as buildings, airplanes, or ships, prior to their completion, and land that was acquired by a taxpayer for construction of a building by the taxpayer to be used in a trade or business if the building is not yet placed in service. This rule would not apply to stock in a corporation or interests in a partnership. The Treasury Department and the IRS request comments on this special rule, including whether and to what extent exceptions are needed (for example, with respect to start-up businesses).

Fourth, trusts required by law to fund specific liabilities (for example, pension trusts and plant decommissioning trusts) would not be taken into account for purposes of proposed § 1.163(j)–10(c).

Fifth, taxpayers generally would be permitted to look through their interests in partnerships or S corporations, and taxpayers that satisfy a minimum ownership threshold in non-consolidated domestic C corporations and CFCs would be required to look through their interests in such corporations, in determining the extent to which their basis in a partnership interest or corporate stock is allocable to excepted or non-excepted trades or businesses. For domestic C corporations and CFCs, the minimum ownership threshold would be 80 percent by vote and value (see section 1504(a)(2)). Partners that own 80 percent or more of the capital or profits interests in a partnership, and shareholders that own 80 percent or more of S corporation stock by vote and value, generally would be required, rather than merely permitted, to look through their interests in the partnership or S corporation for this purpose.

These look-through rules would not apply to a taxpayer with an interest in a partnership or non-consolidated subsidiary that is eligible for the small business exemption under section 163(j)(3) and proposed § 1.163(j)–2(d)(1). The Treasury Department and the IRS have determined that the look-through rules should not be available in these cases because of the administrative burden that would be imposed on small businesses from collecting and providing information to their shareholders or partners regarding inside asset basis when those small businesses are themselves exempt from the application of section 163(j). The Treasury Department and the IRS also have determined that small businesses that are exempt under section 163(j)(3) and proposed § 1.163(j)–2(d)(1) may not make an election under proposed § 1.163(j)–9.

If a taxpayer does not look through a C corporation for purposes of the allocation rules in § 1.163(j)–10(c), and if the taxpayer is not a C corporation or tax-exempt corporation, the taxpayer generally would treat its basis in the stock as an asset held for investment; if the taxpayer is a C corporation or tax-exempt corporation, the taxpayer would treat its entire basis in the C corporation stock as allocable to a non-excepted trade or business. If a taxpayer does not look through a partnership or S corporation, and if the taxpayer is not a C corporation or tax-exempt corporation, the taxpayer would generally treat its basis in a partnership interest or S corporation stock as either an investment asset or a non-excepted trade or business asset. If the taxpayer does not look through a partnership or S corporation, and if the taxpayer is a C corporation or a tax-exempt corporation, the taxpayer would treat its entire basis in the partnership interest or S corporation stock as allocable to a non-excepted trade or business.

The Treasury Department and the IRS request comments on these proposed look-through rules, including whether any further adjustments should be made to the taxpayer's basis in its partnership interest or corporate stock (for example, under § 1.861–12(c)(2)) and whether the minimum ownership threshold for nonconsolidated domestic C corporations and CFCs should be modified.

Sixth, a taxpayer's basis in its customer receivables and cash and cash equivalents would be disregarded for purposes of proposed § 1.163(j)–10(c).

This rule is intended to discourage taxpayers from moving cash to excepted trades or businesses to increase the amount of asset basis therein. For these purposes, the term ''cash and cash equivalents'' would include cash, foreign currency, commercial paper, interests in certain investment companies, government obligations, derivatives that are substantially secured by an obligation of a government, and similar assets. The Treasury Department and the IRS request comments on this special rule, including the list of assets to which it would apply, and whether any exceptions should apply, such as for working capital.

Seventh, solely for purposes of determining the amount of basis allocable to excepted and non-excepted trades or businesses under proposed § 1.163(j)–10(c), an election under section 336, 338, or 754, as applicable, would be deemed to have been made for any acquisition of corporate stock or partnership interests with respect to which the taxpayer demonstrates to the satisfaction of the Commissioner of the Internal Revenue Service (the Commissioner) that the taxpayer was eligible to make such an election but was actually or effectively precluded from doing so by a regulatory agency with respect to a regulated utility trade or business. The Treasury Department and the IRS have determined that such a rule is necessary to place taxpayers that are actually or effectively precluded from making an election under section 336, 338, or 754 on the same footing for purposes of the basis allocation rules in proposed § 1.163(j)–10(c) as taxpayers that are not subject to such limitations. The Treasury Department and the IRS request comments on this special rule.

Eighth, taxpayers would be required to comply with certain reporting requirements regarding their asset basis allocation under proposed § 1.163(j)–10(c). Additionally, taxpayers would be required to keep books of account and other records and data as necessary to substantiate the taxpayer's use of an asset in an excepted trade or business (see § 1.6001–1). If the taxpayer fails to provide the required information, proposed § 1.163(j)–10(c) would permit the Commissioner to treat all of the taxpayer's interest expense as properly allocable to a non-excepted trade or business, unless the taxpayer shows that there was reasonable cause for failing to comply with, and the taxpayer acted in good faith with respect to, these reporting requirements. The Treasury Department and the IRS request comments on these proposed reporting requirements and the consequences of failing to satisfy these requirements.

Finally, proposed § 1.163(j)–10(c) would provide that a taxpayer's adjusted basis in an asset will not be taken into account for purposes of this section if one of the principal purposes for the acquisition, disposition, or change in use of that asset is to increase artificially the amount of basis allocable to excepted or non-excepted trades or businesses.

The foregoing basis allocation rules would not apply to disallowed business interest expense carryforwards, with the exception of disallowed disqualified interest. Disallowed business interest expense carryforwards other than disallowed disqualified interest would have been allocated during the year in which they were first disallowed under section 163(j). On becoming carryforwards, these disallowed expenses would retain their allocation from prior taxable years and would not be reallocated in a subsequent taxable year. The Treasury Department and the IRS request comments as to how the allocation rules in proposed § 1.163(j)–10 should apply to disallowed disqualified interest.

These basis allocation rules also would not apply to floor plan financing interest expense. As provided in section 163(j)(1)(C) and proposed § 1.163(j)–2, taxpayers are entitled to deduct their business interest expense to the full extent of their floor plan financing interest expense.

The Treasury Department and the IRS considered various alternatives to asset basis in determining how interest expense should be allocated between excepted and non-excepted trades or businesses. One such alternative was a tracing regime whereby taxpayers would be required to trace disbursements of debt proceeds to specific expenditures. However, tracing would impose a significant administrative burden upon taxpayers. Further, it is not clear how taxpayers would retroactively apply a tracing regime to existing debt. In particular, because C corporations would have had no reason to trace the proceeds of any existing indebtedness, imposing a tracing regime on existing indebtedness would require corporations to reconstruct the use of funds within their treasury operations at the time such indebtedness was issued, even if the issuance occurred many years ago, and even if the funds were used for a myriad of purposes across a large number of entities. Such an approach would involve a great deal of administrative cost and may be impractical or even impossible for indebtedness issued years ago.

Moreover, because money is fungible, the Treasury Department and the IRS have determined that a tracing regime would be distortive and subject to manipulation, and thus would not be appropriate. Although taxpayers are impacted from both a commercial and tax perspective by the amount of capital raised through the issuance of equity and indebtedness, any trade or business conducted by a taxpayer is generally indifferent to the source of funds. As a result, if taxpayers were allowed to use a tracing regime to allocate indebtedness to excepted trades or businesses, there would be an incentive to treat excepted trades or businesses as funded largely from indebtedness, and to treat non-excepted trades or businesses as funded largely from other types of funding, such as equity funding, despite the fact that, as an economic matter, all of a taxpayer's trades or businesses are funded based on the taxpayer's overall capital structure.

The assumption that a trade or business is indifferent to its source of funds may not be appropriate in cases in which certain indebtedness is secured by the assets of the trade or business and cash flow from those assets is expected to support the payments required on the indebtedness. These proposed regulations would provide for a limited tracing rule in those cases. See the discussion of qualified non-recourse indebtedness in proposed § 1.163(j)–10(d) in part 10(D) of this Explanation of Provisions section.

The Treasury Department and the IRS also considered allocating interest expense based upon the relative fair market value of the assets used in excepted and non-excepted trades or businesses. However, determinations of fair market value frequently are burdensome for taxpayers, which may have numerous assets without a readily established market price, and for the IRS. For this reason, disputes between taxpayers and the IRS over the fair market value of an asset are a common and costly occurrence. In the TCJA, Congress repealed the use of fair market value in the apportionment of interest expense under section 864 of the Code (see section 14502(a) of the TCJA). Thus, the Treasury Department and the IRS have determined that allocating interest expense based upon the relative fair market value of assets is a less viable approach than a regime based upon relative amounts of asset basis.

The Treasury Department and the IRS also considered allocating interest expense to excepted and non-excepted trades or businesses based on the relative amounts of gross income

generated by such trades or businesses. However, gross income is more variable and volatile than asset basis, in part because it is based on an annual measurement. Methods could be developed to look at multiple years of gross income through an averaging or other smoothing methodology, but any such approach would necessarily create a number of difficult technical questions because the income of different trades or businesses may be subject to differing business cycles and the timing of income items may be within taxpayers' control. In the TCJA, Congress also repealed the use of gross income in the apportionment of interest expense under section 864 of the Code (see section 14502(a) of the TCJA).

Thus, although allocating interest expense between excepted and non-excepted trades or businesses using asset basis is not without its shortcomings, the Treasury Department and the IRS have determined that this approach represents the most viable option. The Treasury Department and the IRS also note that various commenters recommended using this approach to allocate interest expense between excepted and non-excepted trades or businesses.

The Treasury Department and the IRS have determined that the same approach should be used to allocate interest income, for several reasons. Such an approach is simpler to administer than applying a separate regime to interest income. Additionally, using the same regime for both interest expense and interest income reduces the likelihood that the IRS or taxpayers will be whipsawed. Under this rule, the greater the amount of basis in assets used in excepted trades or businesses, the greater the amount of both interest expense that is not subject to the section 163(j) limitation and interest income that is not properly allocable to a trade or business and that, as a result, is not factored into the taxpayer's calculation of ATI, which reduces the amount of interest expense that may be deducted.

The Treasury Department and the IRS request comments on the use of asset basis to allocate interest expense and interest income between excepted and non-excepted trades or businesses, including whether other measures, such as gross income, should be used in addition to, or instead of, asset basis. The Treasury Department and the IRS also request comments on the special rules contained in proposed § 1.163(j)–10(c), including whether additional special rules are needed (for example, for financial instruments that are marked to market within the meaning of section 475, or additional rules contained in § 1.861–12T).

D. Proposed § 1.163(j)–10(d): Direct Allocations

The basis allocation rules in proposed § 1.163(j)–10(c) would not apply to interest expense and interest income in several circumstances. First, a taxpayer with qualified nonrecourse indebtedness would be required to directly allocate interest expense from such indebtedness to the taxpayer's assets, as provided in § 1.861–10T(b). Second, a taxpayer that is engaged in the trade or business of banking, insurance, financing, or a similar business would be required to directly allocate interest expense and interest income from such business to the taxpayer's assets used in that business. The special rule for cash and cash equivalents under proposed § 1.163(j)–10(c) would not apply to such taxpayers.

A taxpayer to which both proposed § 1.163(j)–10(c) and (d) apply would be required to reduce its asset basis for purposes of proposed § 1.163(j)–10(c) to reflect assets to which interest expense is directly allocated under proposed § 1.163(j)–10(d).

The Treasury Department and the IRS request comments as to whether direct allocation should be required in any other circumstances, including but not limited to circumstances in which a taxpayer with both excepted and non-excepted trades or businesses is subject to significant limitations on transferring borrowed funds outside the excepted trade or business. The Treasury Department and the IRS also request comments on whether a taxpayer should be permitted to elect to treat all of its interest expense and interest income as properly allocable to non-excepted trades or businesses for purposes of section 163(j), in lieu of applying the allocation rules in proposed § 1.163(j)–10(c) and (d).

11. Proposed § 1.163(j)–11: Transition Rules

Proposed § 1.163(j)–11 would provide certain transition rules. Proposed § 1.163(j)–11(a) would provide rules that apply if a corporation (S) that is subject to the section 163(j) limitation joins a consolidated group whose taxable year began before January 1, 2018, and thus is not currently subject to the section 163(j) limitation. For example, assume that S is a calendar-year, stand-alone C corporation, and that S is acquired by Acquiring Group (with a November 30 fiscal year) on May 31, 2018. Acquiring Group is not subject to the section 163(j) limitation during its taxable year beginning December 1, 2017, but S is subject to the section 163(j) limitation for its short taxable year beginning January 1, 2018. Is S subject to the section 163(j) limitation for the taxable period beginning June 1, 2018? What happens to any disallowed business interest expense carryforwards from S's short taxable year ending May 31, 2018?

Proposed § 1.163(j)–11(a) would provide that, in those situations to which proposed § 1.163(j)–11(a) applies, the status of the acquiring group will control the application of section 163(j) to a target during the period that the target is included in the group. Therefore, if S is subject to the section 163(j) limitation at the time of its acquisition by a consolidated group with a taxable year beginning before January 1, 2018, then S will not be subject to the section 163(j) limitation for the portion of the acquiring group's taxable year in which S is a member. Additionally, any disallowed business interest expense carryforwards from S's taxable year that ended on the date of S's change in status will be carried forward to the acquiring group's first taxable year beginning after December 31, 2017.

Proposed § 1.163(j)–11(b) of this section would provide special rules for taxpayers with carryforwards under old section 163(j). Old section 163(j)(1)(A) disallowed a deduction to a corporation for disqualified interest (within the meaning of old section 163(j)(3)) paid or accrued by the corporation during the taxable year if old section 163(j) applied to such year. Old section 163(j)(1)(B) provided that any amount disallowed under old section 163(j)(1)(A) for any taxable year would be treated as disqualified interest paid or accrued in the succeeding taxable year.

Proposed § 1.163(j)–11(b) would provide that a taxpayer's interest expense for which a deduction was disallowed under old section 163(j) is carried forward to the taxpayer's first taxable year beginning after December 31, 2017, and is subject to disallowance under section 163(j) and proposed § 1.163(j)–2, except to the extent such interest is allocable to an excepted trade or business under proposed § 1.163(j)–10.

As noted in part 4(D) of this Explanation of Provisions section, old section 163(j) treated all members of the same affiliated group as a single taxpayer regardless of whether such members filed a consolidated return, but the section 163(j) regulations would treat members of the same affiliated group as one taxpayer only if such members file a consolidated return. Proposed § 1.163(j)–11(b) would provide

rules based upon the rules in § 1.163(j)–5(c)(2) of the Prior Proposed Regulations for allocating disallowed disqualified interest carryforwards among members of an affiliated group that was treated as a single taxpayer under old section 163(j).

Proposed § 1.163(j)–11(b) also would clarify the application of section 382 to disallowed disqualified interest carryforwards. For example, disallowed disqualified interest would not be treated as a pre-change loss subject to a section 382 limitation under section 382(d)(3) with regard to an ownership change on a change date occurring before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, unless the disallowed disqualified interest is carried forward under section 163(j)(2). But see section 382(h)(6)(B) regarding built-in deduction items.

Similarly, for purposes of section 382(k)(1), regarding determination of status as a loss corporation, disallowed disqualified interest would not be treated as a carryforward of disallowed interest described in section 381(c)(20) with regard to an ownership change on a change date occurring before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, unless the disallowed disqualified interest is carried forward under section 163(j)(2). But see section 382(h)(6) regarding built-in deductions. For a description of changes to regulations under section 382, see the discussion of proposed §§ 1.382–2 and 1.382–6 in parts 14 and 15 of this Explanation of Provisions section.

Finally, whereas old section 163(j)(2)(B)(ii) permitted taxpayers with excess limitation, within the meaning of old section 163(j)(2)(B)(iii), to carry such limitation forward, section 163(j) contains no such language. Thus, the Treasury Department and the IRS have determined that no amount of excess limitation under old section 163(j)(2)(B) may be carried forward to taxable years beginning after December 31, 2017.

12. Proposed § 1.263A–9

Because of the amendments to section 163(j), a conforming amendment to § 1.263A–9(g) is required. Proposed § 1.263A–9 would update references to section 163(j) to reflect current law.

13. Proposed § 1.381(c)(20)–1

As noted in part 5 of this Explanation of Provisions section, Congress added disallowed business interest expense carryforwards to the list of items to which the acquiring corporation succeeds in a transaction to which section 381(a) applies. See section 381(c)(20). Sections 1.381(c)(1)–1 and 1.381(c)(1)–2 provide rules that, in part, limit the acquiring corporation's ability to use NOL carryforwards in the acquiring corporation's first taxable year ending after the acquisition date. The Treasury Department and the IRS have determined that similar rules should apply to disallowed business interest expense carryforwards.

Proposed § 1.381(c)(20)–1 also would provide that, for purposes of section 381(c)(20), the term ''carryover of disallowed business interest described in section 163(j)(2)'' includes disallowed disqualified interest.

14. Proposed § 1.382–2

In the TCJA, Congress added section 382(d)(3) and a new sentence to section 382(k)(1) for taxable years beginning after December 31, 2017. Section 1.382–2 contains certain definitions for purposes of sections 382 and 383 and the regulations thereunder, including definitions of the terms ''pre-change loss'' and ''loss corporation.''

Section 382(d)(3) provides that, for purposes of section 382, the term ''pre-change loss'' includes carryovers of disallowed interest described in section 163(j)(2) ''under rules similar to the rules'' in section 382(d)(1). Section 163(j)(2) provides that interest expense paid or accrued in a taxable year that is not allowed as a deduction pursuant to section 163(j)(1) is carried forward to the succeeding taxable year. Section 382(d)(1) treats as a ''pre-change loss'' both (i) net operating loss carryforwards to the taxable year in which the change date occurs (change year), and (ii) the net operating loss carryforward for the change year, to the extent such loss is allocable to the pre-change period. Proposed § 1.382–2 would clarify the equivalent treatment of items under section 382(d)(1) and (3) by providing that a ''pre-change loss'' includes the portion of any disallowed business interest expense of the old loss corporation paid or accrued in the taxable year of the testing date that is attributable to the pre-change period.

For purposes of determining the portion of disallowed business interest expense that is attributable to the pre-change period, proposed § 1.382–2 would require that disallowed business interest expense be ratably allocated to each day in the year, regardless of whether the loss corporation makes a closing-of-the-books election under § 1.382–6(b)(2) with regard to allocating its other taxable items to the pre-change period and the post-change period within the change year. This ratable allocation of disallowed business interest expense is consistent with the allocation of the loss corporation's deduction for business interest expense in the taxable year of the ownership change (see proposed § 1.382–6). Ratable allocation also is consistent with the general application of the section 163(j) regulations, which apply without regard to any particular debt instrument or particular date of payment or accrual of interest. See the discussion in part 2(A) of this Explanation of Provisions section.

The TCJA also modified section 382(k)(1) to provide that the term ''loss corporation'' includes a corporation entitled to use a disallowed business interest expense carryforward. These proposed regulations would revise § 1.382–2 to reflect the changes to the definitions of the terms ''pre-change loss'' and ''loss corporation.'' These provisions would be applicable with regard to ownership changes occurring on or after the date on which the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**.

15. Proposed § 1.382–6

When a loss corporation experiences an ownership change, § 1.382–6(a) provides that, in general, the loss corporation must allocate its NOL or taxable income and its net capital loss or modified capital gain net income for the change year between the pre-change period and the post-change period by ratably allocating an equal portion to each day in the year. However, instead of using ratable allocation, a loss corporation may elect to use the closing-of-the-books method in § 1.382–6(b). A closing-of-the-books election applies only for purposes of certain allocations, such as NOL or taxable income allocations, and does not terminate the loss corporation's taxable year as of the change date.

Proposed § 1.382–6 would clarify that, for purposes of section 163(j), a loss corporation's current-year business interest expense may not be allocated under the closing-of-the-books method. Thus, even if a taxpayer generally has a closing-of-the-books election in effect for the change year, the taxpayer would be required to ratably allocate its current-year business interest expense for which a deduction is allowable under section 163(j) in that year between the pre-change period and the post-change period. For example, if X, a calendar-year loss corporation, experiences an ownership change on May 26, 2019, and if X has $100x of current-year business interest expense for which a deduction is allowable

under section 163(j) for that year, $40x of X's business interest expense deduction would be allocated to the pre-change period, and $60x of X's business interest expense deduction would be allocated to the post-change period, regardless of which of the two general allocation methods—ratable allocation or closing-of-the-books—X uses. Under this approach, taxpayers would not need to compute ATI separately for the pre-change and post-change periods.

The Treasury Department and the IRS are considering publishing a separate notice of proposed rulemaking to address, among other issues, the treatment of a corporate partner's excess business interest expense (including negative section 163(j) expense) under section 382.

16. Proposed § 1.383–1

Section 1.383–1(d) provides ordering rules for the utilization of pre-change losses and pre-change credits and for the absorption of the section 382 limitation and the section 383 credit limitation. Generally, pre-change capital losses are absorbed first for these purposes, followed by NOLs and recognized built-in losses, other pre-change losses and, finally, pre-change credits.

The Treasury Department and the IRS have determined that disallowed business interest expense carryforwards should be absorbed after pre-change capital losses and all recognized built-in losses, but before NOLs. Disallowed business interest expense carryforwards should be absorbed before NOLs because taxpayers must calculate their current-year income or loss in order to determine whether and to what extent they can use an NOL in that year, and deductions for business interest expense, including carryforwards from prior taxable years, factor into the calculation of current-year income or loss.

Proposed § 1.383–1 would reflect the addition of disallowed business interest expense to the ordering rules, would make conforming changes to other provisions, and would update other provisions to reflect additional changes effectuated by the TCJA. The ordering rules in proposed § 1.383–1 include alternative rules that reflect the fact that certain regulations pertaining to the interaction between sections 163(j) and 382 may not be applicable to all ownership changes.

17. Proposed § 1.469–9(b)

These proposed regulations would also propose amendments to § 1.469–9(b) to provide rules relating to the definition of real property trade or business under section 469(c)(7)(C). Specifically, these proposed regulations would provide guidance on the meaning of real property and on the types of trades or businesses that qualify as ''real property trades or businesses'' for purposes of section 469(c)(7).

Section 469(a) of the Code disallows passive activity losses or credits. In general, a passive activity loss is the excess of the aggregate losses over the aggregate income from all passive activities in a taxable year. A passive activity is defined as any trade or business activity in which the taxpayer does not materially participate, and any rental activity subject to the exception for rental real estate under section 469(c)(7). Generally, under section 469(c)(2), a rental activity is treated as a per se passive activity regardless of whether the taxpayer materially participates in the activity.

The Omnibus Budget Reconciliation Act of 1993, Public Law 103–66, sec. 13143(a), added section 469(c)(7) to the Code effective for tax years beginning after December 31, 1993. In doing so, Congress expressed the belief that applying the ''per se'' passive rule to all rental real estate activities disadvantaged taxpayers who were otherwise actively engaged in real estate businesses and who also owned rental real estate. According to H. Rept. 103–111, 103rd Cong., 1st sess. (May 25, 1993), ''[t]he committee considers it unfair that a person who performs personal services in a real estate trade or business in which he materially participates may not offset losses from rental real estate activities against income from nonrental real estate activities or against other types of income such as portfolio investment income.'' Section 469(c)(7) was added to alleviate this unfair treatment.

Section 469(c)(7) provides that the rental real estate activities of qualifying taxpayers who are actively engaged in real property trades or businesses are not subject to the ''per se'' passive rule in section 469(c)(2). Instead, under section 469(c)(7), a rental real estate activity of a qualifying taxpayer will not be a passive activity if the taxpayer materially participates in the rental real estate activity.

In section 469(c)(7)(C), Congress defined ''real property trade or business'' as ''any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business.'' However, neither section 469 nor the legislative history defines any of the terms contained in section 469(c)(7)(C).

These proposed regulations would amend the regulations under section 469 to provide a definition of the term ''real property'' along with certain other terms contained in section 469(c)(7)(C). Consistent with ordinary usage, these proposed regulations would define ''real property'' to include land, buildings, and other inherently permanent structures that are permanently affixed to land, and exclude from the definition certain other items, such as machines and equipment that serve an active function, which may be permanently affixed to real property.

Given Congress's focus in enacting section 469(c)(7) to provide relief to entrepreneurs in real property trades or businesses with some nexus to or involvement with rental real estate, these proposed regulations would not include trades or businesses that generally do not play a significant or substantial role in the creation, acquisition, or management of rental real estate in the definition of real property trade or business under section 469(c)(7)(C). Therefore, taxpayers engaged in trades or businesses that are not directly or substantially involved in the creation, acquisition, or management of rental real estate, or that provide personal services which are merely ancillary to a real property trade or business, will generally not be treated as engaged in real property trades or businesses for this purpose. In addition, machinery, equipment, and other assets or items that are not generally viewed as items of real property until after their installation or permanent affixation to real property (for example, HVAC systems, elevators, escalators, solar panels, glass fixtures, doors, windows, tiling, etc.) will not be treated as real property for these purposes and, accordingly, taxpayers engaged in trades or businesses of manufacturing, installing, operating, maintaining, or repairing such items generally will not be treated as engaged in real property trades or businesses within the meaning of section 469(c)(7)(C).

As the Treasury Department and the IRS have previously recognized (see Notice of Proposed Rulemaking, ''Definition of Real Estate Investment Trust Real Property,'' published in the **Federal Register** (79 FR 27508, 27510) on May 14, 2014), the term ''real property'' appears in numerous Code provisions, which could ordinarily imply that, absent specific statutory modifications, the term ''real property'' should have the same meaning throughout the Code. However, the context and legislative purpose underlying a specific Code provision may necessitate a broader or narrower

definition of the term ''real property'' than may be applied for other Code provisions. These proposed regulations under section 469 provide a definition of real property that is, for example, narrower than the one provided in the REIT context. The definition provided in these proposed regulations would apply solely for purposes of section 469(c)(7), and these regulations should not be construed in any way as applying to, or changing, the definitions in other Code provisions.

These proposed regulations would also define ''real property operation'' to mean the work done on a day-to-day basis by a direct, or indirect, owner of the real property, in a trade or business relating to the maintenance and occupancy of the real property to make the property available to be used, or held out for use, by customers. Similarly, these proposed regulations would define ''real property management'' to mean work performed by third party managers on behalf of owners in a trade or business relating to the day-to-day maintenance and occupancy of the real property to make it available to be used, or held out for use, by customers. In both instances, the principal purpose of the trade or business must be the provision of the use of the real property (or physical space accorded by or within the real property) to one or more customers, and not the provision of other significant or extraordinary services to customers in conjunction with the customers' incidental use of the real property or physical space accorded by or within the real property.

These proposed regulations would reserve on the remaining terms in section 469(c)(7)(C). Comments are requested as to whether further definitions are needed.

18. Proposed § 1.860C–2

Because REMICs are not treated as carrying on a trade or business for purposes of section 162 and are not C corporations, the Treasury Department and the IRS have determined that section 163(j) should not apply to REMICs, and these proposed regulations would amend § 1.860C–2 to provide that a REMIC is allowed a deduction, determined without regard to section 163(j), for any interest expense accrued during the taxable year. Section 1.860C–2(b)(2)(ii) of these proposed regulations would apply for taxable years beginning after December 31, 2017. However, taxpayers may rely on proposed § 1.860C–2(b)(2)(ii) prior to the date final regulations are published in the **Federal Register**.

19. Proposed § 1.1502–36

Section 1.1502–36 contains the unified loss rule, which limits the ability of a consolidated group to recognize non-economic or duplicated losses on subsidiary stock. The rule applies when a consolidated group member transfers subsidiary (S) stock that has a loss. If § 1.1502–36(d) applies to the transfer of a loss share, the attributes of S and its lower-tier subsidiaries are reduced as needed to prevent the duplication of any loss recognized on the transferred stock. Such attributes include capital loss carryovers, NOL carryovers, deferred deductions, and basis of assets other than cash and general deposit accounts. See § 1.1502–36(d)(4).

The Treasury Department and the IRS have determined that, for purposes of § 1.1502–36(d), disallowed business interest expenses should be treated as deferred deductions. Section 1.1502–36 would be modified accordingly.

20. Proposed §§ 1.1502–91 Through 1.1502–99

As discussed in parts 11 and 14 through 16 of this Explanation of Provisions section, the section 163(j) regulations and §§ 1.382–2, 1.382–6, and 1.383–1 of these proposed regulations would address the application of section 382 to business interest expense, including disallowed business interest expense carryforwards. Sections 1.1502–90 through 1.1502–99 contain rules applying section 382 to a consolidated group. These proposed regulations would add a new coordination rule in § 1.1502–98(b) pursuant to which the rules in §§ 1.1502–91 through 1.1502–96 would apply to business interest expense, including disallowed business interest expense carryforwards, of members of a consolidated group (or corporations that join or leave a consolidated group), with appropriate adjustments.

The Treasury Department and the IRS request comments on the new coordination rule in § 1.1502–98(b), including whether additional examples should be added to clarify the application of this rule.

21. Areas Where the Proposed Regulations Have Reserved on Issues

The proposed regulations reserve on a number of issues, either where the reserved issue is expected to be addressed in other guidance, where comments would be helpful in determining the best manner of addressing an issue, or where the Treasury Department and the IRS are unsure whether additional guidance would be helpful.

A. Reservations Made Because Other Guidance May Address the Reserved Issue

The proposed regulations reserve on the interaction of sections 163(j) and 59A because separate guidance under section 59A is expected to address these issues.

The proposed regulations under sections 382 and 383 also reserve on a number of paragraphs related to the treatment of a corporate partner's excess business interest expense (including negative section 163(j) expense) under section 382. The Treasury Department and the IRS are considering publishing a separate notice of proposed rulemaking to address these and other issues related to section 382.

B. Reservations Made Where Comments Would Be Helpful in Determining the Best Manner of Addressing an Issue

The proposed regulations reserve on the treatment of collateralized cleared swaps and the types of fees that should be treated as interest for purposes of the interest definition because comments would be helpful in determining the best manner of addressing these issues. The proposed regulations also reserve on the coordination with certain other statutory provisions based on or limited by the income of taxpayers because determining the best approach for ordering such provisions would benefit from comments.

For similar reasons, the proposed regulations also reserve on the proper treatment of business interest income and business interest expense with respect to lending transactions between a passthrough entity and an owner of the entity (self-charged lending transactions), the treatment of excess business interest expense in tiered partnerships has been reserved in these proposed regulations, and the application of section 163(j) to a partnership merger or division.

C. Reservations Made Where the Treasury Department and the IRS Are Unsure Whether Additional Guidance Would Be Helpful

The proposed regulations reserve on nine of the eleven terms listed in section 469(c)(7)(C). Comments are requested as to whether further definitions are needed. However, in the absence of comments requesting additional guidance with respect to these terms, it is unclear whether such additional guidance would be helpful.

Finally, the proposed regulations also reserve on additional guidance in the case of certain exempt organizations with respect to the application of the

gross receipts test for purposes of section 163(j) because in the absence of comments it is unclear whether any such rules are necessary.

Statement of Availability of IRS Documents

The IRS Notices and Revenue Procedures cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov*.

Proposed Applicability/Effective Dates

Except as otherwise provided in this section, the regulations are proposed to be effective for taxable years ending after the date the Treasury decision adopting these regulations as final is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of these regulations to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of §§ 1.163(j)–1, 1.163(j)–2, 1.163(j)–3, 1.163(j)–4, 1.163(j)–5, 1.163(j)–6, 1.163(j)–7, 1.163(j)–8, 1.163(j)–9, 1.163(j)–10, and 1.163(j)–11, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

With respect to proposed §§ 1.382–2, 1.382–5, and 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–2 and 1.382–5), if applicable, the regulations are proposed to be effective for ownership changes occurring on or after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of §§ 1.382–2 and 1.382–5, and 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–2 and 1.382–5), if applicable, to an ownership change that occurs in a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of §§ 1.163(j)–1, 1.163(j)–2, 1.163(j)–3, 1.163(j)–4, 1.163(j)–5, 1.163(j)–6, 1.163(j)–7, 1.163(j)–8, 1.163(j)–9, 1.163(j)–10, and 1.163(j)–11, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, and 1.1504–4 to taxable years beginning after Decembers 31, 2017.

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Executive Orders 13771, 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

These proposed regulations have been designated by the Office of Information and Regulatory Affairs (OIRA) as Economically Significant under section 1(c) of the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations and thereby subject to review under Executive Order 12866. Accordingly, these proposed regulations have been reviewed by OIRA. In addition, the Treasury Department and the IRS expect the proposed regulations, when final, to be an Executive Order 13771 regulatory action and request comment on this designation. For more detail on the economic analysis, please refer to the following analysis.

A. Background and Overview

The TCJA substantially modified the statutory rules of section 163(j) to limit the amount of net business interest expense that can be deducted in the current taxable year of any taxpayer with only limited exceptions. As previously described in this preamble, section 163(j) prior to TCJA generally applied to domestic corporations with interest paid or accrued to related persons that were not subject to Federal income tax. As described in the Explanation of Provisions section, the amount allowed under section 163(j)(1) as a deduction for business interest expense is limited to the sum of (1) the taxpayer's business interest income for the taxable year; (2) 30 percent of the taxpayer's ATI for the taxable year; and (3) the taxpayer's floor plan financing interest expense for the taxable year. The section 163(j) limitation applies to all taxpayers, except for certain small businesses with average annual gross receipts of $25 million or less and certain trades or businesses. Any amount of business interest not allowed as a deduction for any taxable year as a result of the limitation under section 163(j)(1) is carried forward and treated as business interest paid or accrued in the next taxable year under section 163(j)(2).

Congress modified section 163(j) under TCJA, in part, out of concern that prior law treated debt-financed investment more favorably than equity-financed investment. This debt bias generally encouraged taxpayers to utilize more leverage than would occur in the absence of the Code. Limiting the deduction of business interest is meant to reduce the relative favorability of debt and hence encourage a more efficient capital structure for firms. Congress also believed it necessary to apply the limit broadly across different types of taxpayers so as not to distort the choice of entity (see H. Rept. 115–409, at 247 (2017)).

B. Need for the Proposed Regulations

Because the section 163(j) limitation has been substantially modified, a large number of the relevant terms and necessary calculations that taxpayers are currently required to apply under the statute can benefit from greater specificity. Among other benefits, the clarity provided by the proposed regulations generally helps ensure that all taxpayers calculate the business interest expense limitation in a similar manner.

For example, there is no universal definition for the term ''interest'' under the Code. In general, because section 163(j) applies to limit certain deductions for interest under chapter A of the Code, the proposed regulations' definition of the term ''interest'' is relatively broad to create a balanced application of section 163(j). This definition limits tax-avoidance incentives for taxpayers to, in form, label payments as something other than interest that, in substance, are economically interest. At the same time, this definition allows taxpayers to treat certain amounts of income as business interest income for purposes of calculating the section 163(j) limitation that they may be required to, for non-tax reasons, label as something other than interest, so that taxpayers with such income are not unduly impacted by the section 163(j) limitation.

Pursuant to section 163(j)(8)(B), the proposed regulations prescribe adjustments to the calculation of ATI to prevent double counting of deductions and to provide relief for particular types

of taxpayers or taxpayers in particular circumstances to ensure that such taxpayers are treated similarly to other taxpayers when calculating ATI.

The statute applies broadly to different types of entities, including passthrough entities such as partnerships and S corporations. The statute specifies that the section 163(j) limitation applies at the entity level for a partnership but that items such as excess business interest expense and excess taxable income must be allocated to partners for a variety of reasons including to compute their own 163(j) limitation. The statute further specifies that the items should be allocated in the same manner as ''nonseparately stated taxable income or loss of the partnership''; however, this concept has not previously been defined by statute or regulations. Without the specified method of allocating these excess items provided by the proposed regulations, partnerships would likely have both significant flexibility but also uncertainty in determining which partners receive excess items. This flexibility could potentially lead partnerships to specially allocate items of income or expense such that they are separately stated to change the partner's allocation of excess interest expense or excess taxable income.

There are a number of potential uncertainties in how taxpayers should apply the section 163(j) limitation to CFCs in a manner consistent with other provisions of the Code. For example, interest deductions of individual CFCs may be limited by section 163(j) but might not be if the interest deductions of CFCs were computed on a group basis. The proposed regulations provide an election for treating related CFCs similarly to a consolidated group for the purpose of calculating the amount of business interest expense for purposes of the section 163(j) limitation. This election also provides clarity that in performing a CFC group calculation, finance and non-finance businesses are largely treated as separate groups (because of the dual role of interest payments as a cost of goods or services sold as well as a payment for debt finance and because of possible distortions in the case of conglomerate companies with financial and non-financial businesses in their CFCs, due to financial businesses' outsize amounts of interest expense and income). The proposed regulations also provide clarity by permitting the bottom-up transfer within chains of CFCs of excess taxable income for electing groups of CFCs.

Other areas where clarity is provided under the proposed regulations for CFCs include adjustments for partnerships held by CFCs, the treatment of CFCs with effectively connected income (ECI), the treatment of intergroup dividends (to avoid double counting of ATI), the effect of deemed inclusions (from branch income, Subpart F income, and GILTI) (also to avoid double counting of ATI), and the effect foreign derived intangible income (FDII) on ATI.

For purposes of section 163(j), the statute states in section 163(j)(7) that the term ''trade or business'' does not include certain regulated utilities, or an electing real property trade or business or an electing farming business. While the statute does reference other places in the Code where a farming business and a real property trade or business are described or defined, regulations have not previously been issued under section 469(c)(7)(C), the rule that section 163(j) refers to in order to define a real property trade or business. The proposed regulations provide such a definition, which clarifies whether a trade or business could elect as a real property trade or business to be excepted from section 163(j). In addition, the proposed regulations describe procedures for allocating income and business interest income and expense between excepted and non-excepted trades or businesses of the taxpayer. The proposed regulations provide a uniform method for allocating income and business interest income and expense which should lower administrative and compliance costs relative to no guidance being provided.

C. Economic Analysis

1. Baseline

The analysis in this section compares the proposed regulations to a no-action baseline reflecting anticipated Federal income tax-related and other economic behavior in the absence of these proposed regulations.

2. Anticipated Benefits

a. In General

The Treasury Department and the IRS expect that the definitions and guidance provided in the proposed regulations will enhance U.S. economic performance relative to the baseline. An economically efficient tax system generally aims to treat income and expense derived from similar economic decisions similarly in order to reduce incentives to make choices based on tax rather than market incentives. In this context, an important benefit of this part of the proposed regulations is to reduce taxpayer uncertainty regarding the calculation of the section 163(j) limitation relative to an alternative scenario in which no such regulations were issued and thus to help ensure that all taxpayers interpret the statutory rules of section 163(j) in a similar manner, a tenet of economic efficiency.

b. Proposed §§ 1.163(j)–1 Through 1.163(j)–5

The proposed regulations make several adjustments to the calculation of ATI. One of these adjustments prevents the double counting of depreciation deductions when a depreciable asset is sold (only relevant for taxable years beginning before January 1, 2022). Other adjustments apply to particular types of taxpayers, such as RICs, REITs, or consolidated groups. These adjustments ensure that the section 163(j) limitation is applied evenly across different types of taxpayers in a manner consistent with the Code. Without such adjustments, certain taxpayers may be disadvantaged relative to otherwise similar taxpayers. For example, if RICs and REITs included the dividends paid deduction when calculating ATI, then these taxpayers would almost always have ATI of zero or close to zero, which would limit the ability of such taxpayers to ever deduct business interest expense for Federal income tax purposes.

In addition, the proposed regulations define the term ''interest.'' There are several places in the Code and regulations where interest expense or interest income is defined, such as in the regulations that allocate and apportion interest expense (§ 1.861–9T) and in the subpart F regulations (§ 1.954–2). However, these rules only apply to particular taxpayers in particular situations. As described in the Explanation of Provisions section, there are no generally applicable statutory provisions or regulations addressing when financial instruments are treated as debt for Federal income tax purposes or when a payment is interest. The approach taken to defining interest for the section 163(j) limitation in these proposed regulations is to (1) include amounts associated with conventional debt instruments and amounts already treated as interest for all purposes under existing statutory provisions or regulations; (2) add some additional amounts that are functionally similar to interest, such as the rules regarding amounts on contingent payment debt instruments in § 1.163(j)–1(b)(20)(iii)(B), which was drafted in response to comments, or amounts treated as interest for certain purposes, such as amounts described in §§ 1.861–9T and 1.954–2; and (3) provide an anti-avoidance rule based on the economic principle that any expense or loss predominantly incurred in

consideration of the time value of money is treated as an interest expense for section 163(j). Thus, the proposed regulations would apply to interest associated with conventional debt instruments, as well as transactions that are indebtedness in substance even if not in form.

Other options for defining interest were considered by the Treasury Department and the IRS but were determined to be less beneficial and not chosen. The first option considered would be to not provide a definition of interest in the proposed regulations, and thus rely on general tax principles and case law for purposes of defining interest for purposes of section 163(j). While adopting this option might reduce the compliance burden for some taxpayers, not providing an explicit definition of interest would create its own uncertainty (as neither taxpayers nor the IRS might have a clear sense of what types of payments are treated as interest income and interest expense for purposes of section 163(j)). Such uncertainty could increase burdens to the IRS and taxpayers including with respect to disputes and litigation about whether particular payments are interest for section 163(j) purposes.

In addition, such an approach to the definition of interest could encourage taxpayers to engage in transactions that provide financing while generating deductions economically similar to interest but make arguments that such deductions fail to be described by existing principles defining interest expense. There are several reasons why curbing such taxpayer behavior would be beneficial. First, taxpayer use of such transactions is likely to be uneven and dependent in part on the subjective understanding of taxpayers regarding whether such transactions would be allowable under the statute. Second, the ability of taxpayers to engage in such transactions would likely be correlated with size of the trade or business, with large businesses more likely to benefit from such avoidance strategies than small businesses. Third, when the deciding factor for using such transactions is the tax benefit of avoiding a section 163(j) limitation, then such transactions would impose more cost or risk on the taxpayer than using a traditional debt instrument. Engaging in such transactions is an inefficient use of resources. Fourth, such avoidance strategies may also discourage taxpayers from shifting to a less leveraged capital structure, and thus would counteract the intention of the statute to reduce the prevalence of highly-leveraged firms and the probability of systemic financial distress. Fifth, greater use of financing outside of conventional debt instruments may make it more difficult for financial institutions to determine the overall level of leverage and credit risk of firms seeking financing, which may distort the allocation of capital across businesses away from firms and investments with less credit risk.

The second option considered would have been to adopt a definition of interest but limit it to amounts associated with conventional debt instruments and amounts that were already treated as interest under the Code or regulations for all purposes prior to the passage of the TCJA. For example, this is similar to the definition of interest proposed in § 1.163(j)–1(b)(20)(i). While this would bring clarity to many transactions regarding what would be deemed interest for the section 163(j) limitation, it would potentially distort future financing transactions. Some taxpayers would choose to use financial instruments and transactions that provide a similar economic result of using a conventional debt instrument, but would avoid the label of business interest expense, potentially enabling these taxpayers to avoid the section 163(j) limitation without a substantive change in capital structure. The arguments discussed above regarding the costs of this situation would continue to apply.

In addition, there are certain transactions where under a specific provision of the Code and regulations, amounts could be deemed ordinary income when in substance the amounts are interest income. For example, the receipt of substitute interest paid on a securities loan arrangement may, under existing income tax principles, be treated as ordinary income rather than interest income despite the fact that such income is economically equivalent to interest income. Prior to the enactment of the 163(j) interest limitation, whether the amount was labeled as ordinary income or interest was not material to the overall tax liability of the taxpayer, but now this distinction matters.

Because of the tax-motivated financing distortions that would arise from a less comprehensive definition of interest, the Treasury Department and the IRS consider the best approach to the definition of interest is to expand the definition beyond § 1.163(j)–1(b)(20)(i). Under § 1.163(j)–1(b)(20)(ii) and (iii), the Treasury Department and the IRS identified existing financial transactions that have the economic substance of debt and interest, but under the existing Code and regulations may have been deemed ordinary income or gain or may have been treated as interest for limited purposes, and clarifies that such amounts would be considered interest income or expense for the purpose of the new section 163(j) limitation.

In addition, it is difficult for the Treasury Department and the IRS to specifically identify every type of transaction already in practice or to anticipate future innovations in financial transactions, therefore, proposed § 1.163(j)–1(b)(20)(iv) provides an anti-avoidance rule that any expense or loss predominately incurred in consideration of the time value of money is treated as an interest expense for purposes of section 163(j). This should help limit the ability of taxpayers to structure transactions in such a way that would allow deductible expenses that are economically similar to interest and frustrate the application of the statute.

In summary, the definition of interest in these proposed regulations provides clarity to taxpayers and the IRS regarding which specific transactions and types of transactions generate interest subject to the section 163(j) limitation, which should lower compliance and administrative costs relative to providing no definition or a more limited definition of interest. Also, the proposed definition should encourage a more efficient allocation of capital and use of financing across taxpayers.

c. Proposed § 1.163(j)–6

The proposed regulations § 1.163(j)–6 provide guidance on how to allocate partnership excess business interest expense, excess business interest income, and excess taxable income to partners. The statute specifies that the limitation applies at the partnership level but that these items must be allocated to partners for their own 163(j) limitation and because carryforwards of these items occurs at the partner level. Without a specified method of allocating these excess items, partnerships would likely have significant freedom to determine which partners receive excess items. While the statute specifies that the items should be allocated in the same manner as ''nonseparately stated taxable income or loss of the partnership'', this concept has not previously been defined by statute or regulations. Partnerships have significant control over what items are separately and nonseparately stated for each partner and could potentially reclassify income to be separately stated to favorably change the partner's allocation of excess interest expense or excess taxable income.

The allocation method detailed in the proposed regulations follows a number of principles. First, it ensures that the sum of the excess items at the partner level is equal to the partnership level. Second, it ensures that the partnership does not allocate excess business interest expense to a partner that was allocated items comprising ATI and business interest income that supported the partnership's deductible business interest expense (unless the partner was allocated more interest expense than its share of deductible business interest expense). Finally, it ensures that the partnership allocates any excess taxable income or excess business interest income to partners that are allocated more items comprising ATI or business interest income than necessary to support their allocation of business interest expense. The proposed regulations provide a method to ensure that all partnerships allocate these items consistently and in a way that matches income and interest expense, thus promoting economically efficient investment decisions. Equivalently, they address tax motivated allocations of excess items to avoid the section 163(j) limitation.

The proposed regulations also ensure that, for owners of partnerships and S corporations, business interest income is used only once, at the entity level, in offsetting business interest expenses. This eliminates the incentive to create tiered partnerships purely to double-count interest income in order to avoid the Section 163(j) limitation. It also avoids exacerbating the incentive to seek out interest income relative to other forms of income in order to avoid the Section 163(j) limitation. By avoiding these incentives, the proposed regulations would reduce economically inefficient uses of resources.

d. Proposed §§ 1.163(j)–7 Through 1.163(j)–8

The Treasury Department and the IRS expect that proposed §§ 1.163(j)–7 through 1.163(j)–8 will implement the section 163(j) limitation consistent with preserving the integrity of the international tax system reflected in the Code after TCJA. As described in the Explanation of Provisions section, business interest deductions of individual CFCs may be limited by section 163(j) even when, if calculated on a group basis, business interest deductions would not be limited. The application of section 163(j) to CFCs on an individual basis can result in inappropriate results in certain cases. In particular, to the extent section 163(j) were to disallow a deduction for business interest expense to a CFC that has borrowed from a related CFC, the interest paid to the lender CFC would be included in the income of the lender CFC, the amounts would not fully offset, and the United States shareholder's inclusion under subpart F and GILTI may be increased solely due to the use of intercompany debt between these CFCs. Taxpayers could restructure or ''self-help'' to reduce this problem, but that option involves economically wasteful restructuring costs to the taxpayer. Another option is to ignore within-group interest payments (the ''disregard approach''), but that could lead to inappropriate results, for example, a CFC group member borrowing from a third party and using the loan proceeds to lend to related CFCs (borrowing CFCs) would not be able to have interest income from the loans to the borrowing CFCs offset the interest expense to the third party lender for purposes of the section 163(j) limitation while the borrowing CFCs would not have any interest expense subject to the section 163(j) limitation, even though they are benefiting from the capital provided by the third party loan. The Treasury Department and the IRS consider a preferable option within the authority of the Treasury Department and the IRS to be to allow an election to treat related CFCs and their U.S. shareholders as a group for purposes of calculating the amount of business interest expense subject to the section 163(j) limitation (the ''alternative method'').

e. Proposed §§ 1.163(j)–9 Through 1.163(j)–11

Proposed § 1.163(j)–9 provides (1) guidance in applying the rules for farming and real property trade or business elections and (2) guidance in use of a safe harbor for REITs. For electing real property trade or business and electing farming business, the statue specifies that ''any such election shall be made at such time and in such manner as the Secretary shall prescribe, and once made, shall be irrevocable.'' Therefore proposed § 1.163(j)–9 provides taxpayers with the time and manner for electing real property trades or businesses and electing farming businesses. In addition, proposed § 1.163(j)–9 defines the conditions under which an election terminates. Without these conditions specified, taxpayers may engage in behavior which counteracts the intention of the statute and would not otherwise be taken except to game the irrevocable nature of the election the statute specified. The conditions specified increase the likelihood that all similarly situated taxpayers interpret the 'irrevocable' designation similarly and will not engage in tax-motivated behavior to appear to cease operations in an effort to change an irrevocable designation.

Proposed § 1.163(j)–9(g) provides a safe harbor for certain REITs to elect to be electing real property trades or businesses. In addition, a special rule applies to REITs for which 10 percent or less of the value of the REIT's assets are real property financing assets. Under this rule, all of the assets of the REIT are treated as real property trade or business assets. The benefit of the safe harbor is to provide REITs the same tax treatment and apply the same general rules as apply to other taxpayers, an economically efficient approach. The special rule threshold of 10 percent for real property financing assets has the benefit of maintaining consistency with section 856(c)(4), which uses the same values for the REIT asset test at the close of the REIT's taxable year. Taxpayers will benefit in reduced time and cost applying new rules if they are familiar and consistent with other rules that they must comply with under the Code.

Proposed § 1.163(j)–9 provides a rule that stipulates that if at least 80 percent of a trade or business's real property (by fair market value) is leased to a trade or business under common control with the real property trade or business, the trade or business cannot make an election to be an electing real trade or business. In the absence of such a rule, taxpayers could restructure their business such that real estate components of non-real estate businesses are separated from the rest of their business to artificially reduce the application of section 163(j) by leasing the real property to the taxpayer and electing this ''business'' to be an excepted real property trade or business. Therefore, the prime benefit of this rule is to preserve the intent of the statute of allowing elections in the real property sector without incentivizing other sectors of the economy to restructure their business for the sole intent of avoiding the section 163(j) limitation. This guidance ensures that taxpayers face more uniform incentives when making economic decisions, a tenet of economic efficiency. Rules that maintain consistent structuring activity across taxpayers also increases IRS's ability to consistently enforce the tax rules, thus decreasing opportunities for tax evasion.

Proposed § 1.163(j)–10 provides rules for allocations of ATI and interest expense and interest income between excepted and non-excepted trades or businesses. The proposed regulations allocate interest expense and interest income between the related excepted

and non-excepted trades or businesses based upon the relative amounts of the taxpayer's adjusted tax basis in the assets used in its excepted and non-excepted trades or businesses. As discussed in the Explanation of Provisions section, this general method of allocation reflects the fact that money is fungible and the view that interest expense is attributable to all activities and property, regardless of any specific purpose for incurring an obligation on which interest is paid. Since any allocation method will require an increase in compliance costs for taxpayers, an allocation is only required when the share of the asset tax basis in the excepted or non-excepted business exceeds 10 percent. Finally, this asset basis approach provides consistency with the regulations under section 861. By providing taxpayer guidance that is already familiar to them and consistent with other parts of the Code, taxpayers benefit in reduced time and cost spent learning and applying new rules.

The Treasury Department and the IRS considered several alternatives to this asset basis approach for allocating interest income and expense. First, a tracing approach was considered whereby taxpayers would be required to trace disbursements of debt proceeds to specific expenditures. However, tracing would impose a significant administrative burden upon taxpayers due to the complexity of matching interest income and expense among related companies. Further, it is not clear how taxpayers would retroactively apply a tracing regime to existing debt. In particular, because C corporations would have had no reason to trace the proceeds of any existing indebtedness, imposing a tracing regime on existing indebtedness would require corporations to reconstruct the use of funds within their treasury operations at the time such indebtedness was issued, even if the issuance occurred many years ago, and even if the funds were used for a myriad of purposes across a large number of entities. Such an approach would involve a great deal of administrative cost and may be impractical or even impossible for indebtedness issued years ago.

Moreover, because money is fungible, a tracing regime would be distortive and subject to manipulation. Although taxpayers are impacted from both a commercial and tax perspective by the amount of capital raised through the issuance of equity and indebtedness, any trade or business conducted by a taxpayer is generally indifferent to the source of funds. As a result, if taxpayers were allowed to use a tracing regime to allocate indebtedness to excepted trades or businesses, there would be an incentive to treat excepted trades or businesses as funded largely from indebtedness, and to treat non-excepted trades or businesses as funded largely from other types of funding, such as equity funding, despite the fact that, as an economic matter, all of a taxpayer's trades or businesses are funded based on the taxpayer's overall capital structure.

The Treasury Department and the IRS rejected a tracing approach because the complexity of such an approach could be more difficult for taxpayers and the IRS to administer and would create too great an incentive to structure financing with the sole purpose of avoiding the application of the statute. The assumption that a trade or business is indifferent to its source of funds may not be appropriate in cases in which certain indebtedness is secured by the assets of the trade or business and cash flow from those assets is expected to support the payments required on the indebtedness. These proposed regulations would provide for a limited tracing rule in those cases. See the discussion of qualified non-recourse indebtedness in proposed § 1.163(j)–10(d) in part 10(D) of the Explanation of Provisions section.

Second, the Treasury Department and the IRS also considered allocating interest expense based upon the relative fair market value of the assets used in excepted and non-excepted trades or businesses. However, determinations of fair market value frequently are burdensome for taxpayers, which may have numerous assets without a readily established market price, and for the IRS. For this reason, disputes between taxpayers and the IRS over the fair market value of an asset are a common and costly occurrence. In the TCJA, Congress repealed the use of fair market value in the apportionment of interest expense under section 864 of the Code (see section 14502(a) of the TCJA). Thus, the Treasury Department and the IRS have determined that allocating interest expense based upon the relative fair market value of assets is a less viable approach than a regime based upon relative amounts of asset basis.

Third, the Treasury Department and the IRS also considered allocating interest expense to excepted and non-excepted trades or businesses based on the relative amounts of gross income generated by such trades or businesses. However, gross income is more variable and volatile than asset basis, in part because it is based on an annual measurement. Methods could be developed to look at multiple years of gross income through an averaging or other smoothing methodology, but any such approach would necessarily create a number of difficult technical questions because the income of different trades or businesses may be subject to differing business cycles and the timing of income items may be within taxpayers' control. In the TCJA, Congress also repealed the use of gross income in the apportionment of interest expense under section 864 of the Code (see section 14502(a) of the TCJA). The Treasury Department and the IRS request comment on the approaches and decisions discussed in this section.

3. Anticipated Impacts on Administrative and Compliance Costs

The proposed regulations include requirements about how excess interest income, interest expense, and taxable income should be allocated to partners. This allocation method will require some partnerships to do a number of calculations to figure out the appropriate allocations.

The proposed regulations as applied to CFCs involve additional tax calculations, such as aggregating CFC income, separating finance from non-finance businesses, and eliminating intra-group dividends, but these calculations are relatively simple and involve data that are already collected. Hence, the increase in compliance costs should not be substantial. Furthermore, because the alternative method is elective, the associated compliance costs would be avoided if the election is not made.

As the compliance costs in both of these cases would be part of the cost of filing tax Form 8990, ''Limitation on Business Interest Expense,'' the estimate of the cost of these calculations will be included as part of the overall reporting burden of Form 8990, as is further discussed in the next section.

D. Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are

confidential, as required by section 6103.

1. Collections of Information

The collection of information in these proposed regulations is in §§ 1.163(j)–9 and 1.163(j)–10. The collection of information in proposed § 1.163(j)–9 is required for taxpayers to make a one-time election to treat their real property or farming trade or business as an electing real property trade or business or an electing farming trade or business under section 163(j)(7)(B) and (C). The collection of information in proposed § 1.163(j)–10 is required for taxpayers to demonstrate how they allocated their interest expense, interest income, and other items of income and deduction between excepted and non-excepted trades or businesses. It is necessary to report this information to the IRS to ensure that taxpayers properly report the amount of interest that is potentially subject to the limitation.

The collection of information is necessary to ensure tax compliance but is not expected to be available as a finalized IRS form by the end of the calendar year. When available, draft revised versions of the affected IRS forms will be posted for comment at *https://apps.irs.gov/app/picklist/list/draftTaxForms.html.* All of the information collections mentioned in §§ 1.163(j)–9 and 1.163(j)–10 may eventually be reported on a form. The specific forms that are expected to change as a result of these proposed regulations are described in more detail in the next section.

2. Future Expected Modifications To Forms To Collect Information

In order to collect necessary information, we are modifying four forms (Forms 1120, 1120S, 1065, and 1120–REIT) and creating one new form (Form 8990). We are modifying Forms 1120, 1120S, 1065, and 1120–REIT to ask filers about the applicability of section 163(j) and the need to file the new Form 8990, as well as the related one-time election statement. When the changes to the IRS forms are finalized, every taxpayer who deducts business interest beginning in tax year 2018 generally will be required to file a new tax Form 8990, ''Limitation on Business Interest Expense IRC 163(j),'' except for taxpayers with average annual gross receipts of $25 million or less for the three prior tax years (as determined under section 448(c) principles, and as adjusted for inflation starting in 2019). For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the reporting burden of tax form 8990 is associated with OMB control number 1545–0123. Tax form 8990 is estimated to be required by fewer than 92,500 taxpayers in 2018.

The draft forms are available on the IRS website at:

Draft form	IRS website link
Form 1120	*https://www.irs.gov/pub/irs-dft/f1120-dft.pdf* (Draft instructions: *https://www.irs.gov/pub/irs-dft/i1120-dft.pdf*)
Form 1120S	*https://www.irs.gov/pub/irs-dft/f1120s-dft.pdf* (Draft instructions: *https://www.irs.gov/pub/irs-dft/i1120s-dft.pdf*)
Form 1065	*https://www.irs.gov/pub/irs-dft/f1065-dft.pdf* (Draft instructions: *https://www.irs.gov/pub/irs-dft/i1065-dft.pdf*)
Form 1120–REIT	*https://www.irs.gov/pub/irs-dft/f1120rei-dft.pdf* (Draft instructions: *https://www.irs.gov/pub/irs-dft/i1120rei-dft.pdf*)
Form 8990	*https://www.irs.gov/pub/irs-dft/f8990-dft.pdf*

A draft of the Form 8990 instructions is not available at the time of the proposed rule-making. When available, a draft of the IRS Form 8990 instructions will be posted for comment at *https://www.irs.gov/pub/irs-dft/f8990-dft.pdf.*

3. Burden Estimates

The following estimates are based on the information that is available to the IRS. The most recently available 2015 Statistics of Income (SOI) tax data indicates that 80,702 firms would have contemplated a one-time election to opt out of the section 163(j) limitation as an electing real property trade or business or as an electing farming business were the statute then in effect. The Treasury Department and the IRS anticipate that these proposed regulations will apply to a similar proportion of taxpayers going forward. This estimate is based on a count of filers of Forms 1120, 1120S, 1065, and 1120–REIT in the real estate and farming industries that had over $25 million in gross receipts in taxable year 2015. Each of these forms for taxable years after 2017 will ask filers about the applicability of 163(j) and the need to file Form 8890 as well as the related one-time election. Similarly, using the 2015 SOI tax data, we estimate that 82,755 firms would have allocated interest income and expenses among multiple trades or businesses, some of which are excepted from the section 163(j) limitation and some that are not. This estimate is a count of all tax Forms 1120, 1120S, and 1065 in real estate, farming, and public utilities industries that had over $25 million in gross receipts. While the number of affected taxpayers will increase with growth in the economy, the Treasury Department and the IRS expect that the portion of affected taxpayers will remain approximately the same over the foreseeable future.

The time and dollar compliance burden are derived from the Business Taxpayers Burden model provided by the IRS's Office of Research, Applied Analytics, and Statistics (RAAS). This model relates the time and out-of-pocket costs of business tax preparation, derived from survey data, to assets and receipts of affected taxpayers along with other relevant variables. See Tax Compliance Burden (John Guyton et al, July 2018) at *https://www.irs.gov/pub/irs-soi/d13315.pdf.* A respondent may require more or less time than the estimated burden, depending on the circumstances.

The burden estimates listed in the below table attempt to capture only those discretionary changes made in these proposed regulations, and may not include burden estimates for forms associated with the statute. Changes made by the Act or through new information collections are captured separately in forthcoming published Supporting Statements for each of these forms and will be aggregated with the estimates provided below to summarize the total burden estimates for each information collection listed below. Those total burden estimates will be available for review and public comment at *https://www.reginfo.gov/public/Forward?SearchTarget=PRA&textfield.* The Treasury Department and the IRS request comment on these estimates.

	Likely respondents	Estimated number of respondents (2015 levels)	Estimated average annual burden hours per respondent	Estimated total annual reporting burden (hours) (2015 levels)	Estimated monetized burden @ $95/hour ($2017 millions)	Estimated frequency of responses
§ 1.163(j)–9 (one-time election statement).	Individuals, corporations, and partnerships with real property or farming trades or businesses with gross receipts exceeding the statutory threshold of $25 million.	80,702 business respondents (including Forms 1120, 1120–REIT, 1120–S, and 1065 filers).	0 to 30 minutes (estimated average:15 minutes).	20,176	$1.9	One-time.
§ 1.163(j)–10 (annual allocation statement).	Individuals, corporations, and partnerships (1) with more than one trade or business (at least one of which is a real property or farming trade or business), and (2) public utilities, with gross receipts exceeding the statutory threshold of $25 million.	82,755 business respondents (including Forms 1120, 1120–S, and 1065 filers).	15 minutes to 2 hours. (estimated average: 1 hour).	82,755	7.9	Annually.
§ 1.163(j)–10 (one-time start-up cost to develop procedures for filing an annual allocation statement).	Same as above	82,755	4 hours (start-up burden)	331,020	31.4	One-time.
Three year monetized burden estimate.					19.0	Three year annual average.

The three-year annual average of the monetized burden for the information collection and resulting from discretionary requirements contained in this rulemaking is estimated to be 19.0 million ($2017) ([($1.9 million+ $31.4 million) + ($7.9 million × 3)]/3). To ensure more accuracy and consistency across its information collections, the IRS is currently in the process of revising the methodology it uses to estimate burden and costs. Once this methodology is complete, the IRS will provide this information to reflect a more precise estimate of burdens and costs.

The Treasury Department and the IRS request comment on the assumptions, methodology, and burden estimates related to this information collection. Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by February 26, 2019.

Comments are specifically requested concerning—

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

II. Regulatory Flexibility Act

It is hereby certified that these proposed regulations, if adopted as final, will not have a significant economic impact on a substantial number of small entities. Although the Treasury Department and the IRS believe that the proposed regulations may impact small entities, the number of small entities impacted is low.

Section 163(j) provides exceptions for which many small entities will qualify. First, under section 163(j)(3), the limitation does not apply to any taxpayer, other than a tax shelter under section 448(a)(3), which meets the gross receipts test under section 448(c) for any taxable year. A taxpayer meets the gross receipts test under section 448(c) if the taxpayer has average annual gross receipts for the 3–taxable year period ending with the taxable year that precedes the current taxable year that do not exceed $25,000,000. Second, section 163(j) provides that certain trades or businesses are not subject to the limitation, including the trade or business of performing services as an employee, electing real property trades or businesses, electing farming businesses, and certain utilities as defined in section 163(j)(7)(A)(iv). Lastly, certain REITs, as described in proposed § 1.163(j)–9(g), are eligible to make the election out of the limitation as a real property trades or businesses.

Any economic impact on any small entities as a result of the requirements in this notice of proposed rulemaking are not expected to be significant. The small entities potentially subject to the provision in proposed § 1.163(j)–9 are individuals, corporations, including S corporations, and partnerships that (1) have average annual gross receipts for the 3–taxable year period ending with the taxable year that precedes the current taxable year exceeding $25,000,000, and (2) want to make the election out of the limitation as an electing real property trade or business under section 163(j)(7)(B) or electing farming business under section 163(j)(7)(C). Proposed § 1.163(j)–9 requires such taxpayers to attach a one-time statement to their return providing the taxpayer's name, address, social security number (SSN) or employer identification number (EIN), a description of the taxpayer's electing trade or business, including the principal business activity code, a statement that the taxpayer acknowledges the election is irrevocable, and a statement that the taxpayer is making an election under section 163(j)(7)(B) or (C), as applicable.

The small entities potentially subject to the requirements in proposed § 1.163(j)–10 are individuals, corporations (including S corporations), and partnerships that (1) have average

annual gross receipts for the 3–taxable year period ending with the taxable year that precedes the current taxable year exceeding $25,000,000, and (2) have multiple trades or businesses, some of which are excepted from the limitation and some of which are not excepted from the limitation, for which the taxpayer must properly allocate business interest expense. Proposed § 1.163(j)–10 requires such taxpayers to attach an annual statement to their return demonstrating the following: (1) The taxpayer's adjusted basis in the aggregated assets used in its excepted and non-excepted businesses, (2) the determination dates on which asset basis was measured during the taxable year, (3) the names and TINs of all entities for which basis information is being provided, (4) asset basis information for corporations or partnerships if the taxpayer looks through to the corporation's or partnership's basis in the corporation's or partnership's assets under proposed § 1.163(j)–10(c)(5)(ii), and (5) a summary of the method or methods used to determine asset basis in property used in both excepted and non-excepted businesses.

As discussed elsewhere in this preamble, the reporting burden for the one-time election statement is estimated at 0 to 30 minutes, depending on individual circumstances, with an estimated average of 15 minutes for all affected entities, regardless of size. The reporting burden for the annual allocation statement is estimated at 15 minutes to 2 hours, depending on individual circumstances, with an estimated average of 1 hour. The estimated monetized burden for compliance is $95 per hour.

For these reasons, the Treasury Department and the IRS have determined that the collections of information in this notice of proposed rulemaking will not have a significant economic impact. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Notwithstanding this certification, the Treasury Department and the IRS invite comments from interested members of the public on both the number of entities affected and the economic impact on small entities.

It is hereby certified that proposed §§ 1.163(j)–4, 1.163(j)–5, and 1.163(j)–6 will not have a significant economic impact on a substantial number of small entities. Although the Treasury Department and the IRS believe that the proposed regulations may affect small entities, the economic impact on small entities as a result of the notice of proposed rulemaking is not expected to be significant. In particular, only firms with more than $25 million in gross receipts are required to file a tax Form 8990. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Notwithstanding this certification, the Treasury Department and the IRS invite comments from interested members of the public on both the number of entities affected and the economic impact on small entities.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed rules.

All comments submitted will be made available at *http://www.regulations.gov* for public inspection and copying. A public hearing has been scheduled for February 27, 2019, beginning at 10 a.m. in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC 20224. If there is not sufficient time to discuss all of the topics on February 27, 2019, the hearing will continue the following day at 10 a.m. in the same location. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For more information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the time to be devoted to each topic by February 26, 2019. Submit a signed paper or electronic copy of the outline as prescribed in this preamble under the **ADDRESSES** heading. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are Susie Bird, Charles Gorham, Zachary King, Jaime Park, Kathy Reed, and Sophia Wang, Office of the Associate Chief Counsel (Income Tax and Accounting); Kevin M. Jacobs, Russell Jones, and John Lovelace, Office of the Associate Chief Counsel (Corporate); Meghan Howard, William Kostak, Anthony McQuillen, Adrienne Mikolashek, and James Quinn, Office of the Associate Chief Counsel (Passthroughs and Special Industries); Angela Holland, Steve Jensen, and Charles Rioux, Office of the Associate Chief Counsel (International); William E. Blanchard, Michael Chin, Steven Harrison, Andrea Hoffenson, and Diana Imholtz, Office of the Associate Chief Counsel (Financial Institutions and Products). Other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Withdrawal of Proposed Regulations

Under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking that was published in the **Federal Register** on Tuesday, June 18, 1991, (56 FR 27907, as corrected by 56 FR 40285 (August 14, 1991)) is withdrawn.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by:
■ 1. Adding entries in numerical order for §§ 1.163(j)–1 through 1.163(j)–11;
■ 2. Revising the entry for §§ 1.263A–8 through 1.263A–15;
■ 3. Adding entries in numerical order for §§ 1.382–1 and 1.383–0;
■ 4. Revising the entry for § 1.383–1; and
■ 5. Adding entries in numerical order for §§ 1.860C–2 and 1.1502–90.

The additions and revisions read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Section 1.163(j)–1 also issued under 26 U.S.C. 163(j)(8)(B) and 26 U.S.C. 1502.

Section 1.163(j)–2 also issued under 26 U.S.C. 1502.

Section 1.163(j)–3 also issued under 26 U.S.C. 1502.

Section 1.163(j)–4 also issued under 26 U.S.C. 163(j)(8)(B) and 26 U.S.C. 1502.

Section 1.163(j)–5 also issued under 26 U.S.C. 1502.

Section 1.163(j)–6 also issued under 26 U.S.C. 163(j)(8)(B) and 26 U.S.C. 1502.

Section 1.163(j)–7 also issued under 26 U.S.C. 163(j)(8)(B) and 26 U.S.C. 1502.

Section 1.163(j)–8 also issued under 26 U.S.C. 163(j)(8)(B).

Section 1.163(j)–9 also issued under 26 U.S.C. 163(j)(7)(B) and (C) and 26 U.S.C. 1502.

Section 1.163(j)–10 also issued under 26 U.S.C. 163(j)(8)(B) and 26 U.S.C. 1502.

Section 1.163(j)–11 also issued under 26 U.S.C. 1502.

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Sections 1.263A–8 through 1.263A–15 also issued under 26 U.S.C. 263A(j).

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Section 1.382–1 also issued under 26 U.S.C. 382(m).

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Section 1.383–0 also issued under 26 U.S.C. 382(m) and 26 U.S.C. 383.

Section 1.383–1 also issued under 26 U.S.C. 382(m) and 26 U.S.C. 383.

* * * * *

Section 1.860C–2 also issued under 26 U.S.C. 860C(b)(1).

* * * * *

Section 1.1502–90 also issued under 26 U.S.C. 382(m) and 26 U.S.C. 1502.

* * * * *

■ **Par. 2.** Section 1.163(j)–0 is added to read as follows:

§ 1.163(j)–0 Table of contents.

This section lists the table of contents for §§ 1.163(j)–1 through 1.163(j)–11.

§ 1.163(j)–1 Definitions.

(a) In general.

(b) Definitions.

(1) Adjusted taxable income.

(i) Additions.

(ii) Subtractions.

(iii) Depreciation, amortization, or depletion expenses capitalized to inventory under section 263A.

(iv) Other adjustments.

(v) Additional rules relating to adjusted taxable income in other sections.

(2) Business interest expense.

(i) In general.

(ii) Special rules.

(3) Business interest income.

(i) In general.

(ii) Special rules.

(4) C corporation.

(5) Cleared swap.

(6) Consolidated group.

(7) Consolidated return year.

(8) Disallowed business interest expense.

(9) Disallowed business interest expense carryforward.

(10) Disallowed disqualified interest.

(11) Electing farming business.

(12) Electing real property trade or business.

(13) Excepted regulated utility trade or business.

(i) In general.

(ii) Excepted and non-excepted utility trades or businesses.

(14) Excess business interest expense.

(15) Excess taxable income.

(16) Floor plan financing indebtedness.

(17) Floor plan financing interest expense.

(18) Group.

(19) Intercompany transaction.

(20) Interest.

(i) In general.

(ii) Swaps with significant nonperiodic payments.

(A) Non-cleared swaps.

(B) [Reserved]

(iii) Other amounts treated as interest.

(A) Treatment of premium.

(*1*) Issuer.

(*2*) Holder.

(B) Treatment of ordinary income or loss on certain debt instruments.

(C) Substitute interest payments.

(D) Section 1258 gain.

(E) Amounts affecting a taxpayer's effective cost of borrowing.

(F) Yield adjustments.

(G) Certain amounts labeled as fees.

(*1*) Commitment fees.

(*2*) [Reserved]

(H) Debt issuance costs.

(I) Guaranteed payments.

(J) Factoring income.

(iv) Anti-avoidance rule for amounts predominantly associated with the time value of money.

(v) Examples.

(21) Interest expense.

(22) Interest income.

(23) Inventory.

(24) Member.

(25) Motor vehicle.

(26) Old section 163(j).

(27) Real estate investment trust.

(28) Real property.

(29) Regulated investment company.

(30) S corporation.

(31) Section 163(j) limitation.

(32) Section 163(j) regulations.

(33) Separate return limitation year.

(34) Separate return year.

(35) Separate taxable income.

(36) Tax-exempt corporation.

(37) Taxable income.

(i) In general.

(ii) General rules to coordinate the application of sections 163(j) and 250.

(iii) [Reserved]

(iv) Special rules for defining taxable income.

(38) Trade or business.

(i) In general.

(ii) Excepted trade or business.

(iii) Non-excepted trade or business.

(39) Unadjusted basis.

(c) Applicability date.

§ 1.163(j)–2 Deduction for business interest expense limited.

(a) Overview.

(b) General rule.

(c) Disallowed business interest expense carryforward.

(1) In general.

(2) Coordination with small business exemption.

(3) Cross-references.

(d) Small business exemption.

(1) Exemption.

(2) Application of the gross receipts test.

(i) In general.

(ii) Gross receipts of individuals.

(iii) Partners and S corporation shareholders.

(iv) Tax-exempt organizations.

(e) REMICs.

(f) Calculation of ATI with respect to certain beneficiaries.

(g) Examples.

(h) Anti-avoidance rule.

(i) Applicability date.

§ 1.163(j)–3 Relationship of business interest deduction limitation to other provisions affecting interest.

(a) Overview.

(b) Coordination of section 163(j) with certain other provisions.

(1) In general.

(2) Disallowed interest provisions.

(3) Deferred interest provisions.

(4) At risk rules, passive activity loss provisions, and limitation on excess business losses of noncorporate taxpayers.

(5) Capitalized interest expenses under sections 263A and 263(g).

(6) Reductions under section 246A.

(7) Section 381.

(8) Section 382.

(9) Other types of interest provisions.

(10) [Reserved]

(c) Examples.

(d) Applicability date.

§ 1.163(j)–4 General rules applicable to C corporations (including REITs, RICs, and members of consolidated groups) and tax-exempt corporations.

(a) Scope.

(b) Characterization of items of income, gain, deduction, or loss.

(1) Interest expense and interest income.

(2) Adjusted taxable income.

(3) Investment interest, investment income, and investment expenses of a partnership with a C corporation partner.

(i) Characterization as expense or income properly allocable to a trade or business.

(ii) Impact of characterization on partnership.

(iii) Investment interest expense and investment interest income of a partnership not treated as excess business interest expense or excess taxable income of a C corporation partner.

(4) Application to RICs and REITs.

(i) In general.

(ii) Taxable income for purposes of calculating the adjusted taxable income of RICs and REITs.

(iii) Other adjustments to adjusted taxable income for RICs and REITs.

(5) Application to tax-exempt corporations.

(6) Examples.

(c) Effect on earnings and profits.

(1) In general.

(2) Special rule for RICs and REITs.

(3) Special rule for partners that are C corporations.

(4) Examples.

(d) Special rules for consolidated groups.

(1) Scope.

(2) Calculation of the section 163(j) limitation for members of a consolidated group.

(i) In general.

(ii) Interest.

(iii) Calculation of business interest expense and business interest income for a consolidated group.

(iv) Calculation of adjusted taxable income.

(v) Treatment of intercompany obligations.
(3) Investment adjustments.
(4) Ownership of partnership interests by members of a consolidated group.
(i) Dispositions of partnership interests.
(ii) Basis adjustments under § 1.1502–32.
(iii) [Reserved]
(5) Examples.
(e) Cross-references.
(f) Applicability date.

§ 1.163(j)–5 General rules governing disallowed business interest expense carryforwards for C corporations.

(a) Scope and definitions.
(1) Scope.
(2) Definitions.
(i) Current-year business interest expense.
(ii) Allocable share of the consolidated group's remaining section 163(j) limitation.
(iii) Consolidated group's remaining section 163(j) limitation.
(iv) Remaining current-year interest ratio.
(b) Treatment of disallowed business interest expense carryforwards.
(1) In general.
(2) Deduction of business interest expense.
(3) Consolidated groups.
(i) In general.
(ii) Deduction of business interest expense.
(A) General rule.
(B) Section 163(j) limitation is equal to or exceeds the current-year business interest expense and disallowed business interest expense carryforwards from prior taxable years.
(C) Current-year business interest expense and disallowed business interest expense carryforwards exceed section 163(j) limitation.
(iii) Departure from group.
(iv) Example.
(c) Disallowed business interest expense carryforwards in transactions to which section 381(a) applies.
(d) Limitations on disallowed business interest expense carryforwards from separate return limitation years.
(1) General rule.
(2) Deduction of disallowed business interest expense carryforwards arising in a SRLY.
(3) Examples.
(e) Application of section 382.
(1) Pre-change loss.
(2) Loss corporation.
(3) Ordering rules for utilization of pre-change losses and for absorption of the section 382 limitation.
(4) Disallowed business interest expense from the pre-change period in the year of a testing date.
(f) Overlap of SRLY limitation with section 382.
(g) Additional limitations.
(h) Applicability date.

§ 1.163(j)–6 Application of the business interest deduction limitation to partnerships and subchapter S corporations.

(a) Overview.
(b) Definitions.
(1) Section 163(j) items.
(2) Partner basis items.
(3) Remedial items.
(4) Excess business interest income.
(5) Deductible business interest expense.
(6) Section 163(j) excess items.
(7) Non-excepted assets.
(8) Excepted assets.
(c) Character of business interest expense.
(d) Adjusted taxable income of the partnership.
(1) Modification of adjusted taxable income for partnerships.
(2) Section 734(b), partner basis items, and remedial items.
(e) Adjusted taxable income and business interest income of partners.
(1) Modification of adjusted taxable income for partners.
(2) Partner basis items and remedial items.
(3) Disposition of partnership interests.
(4) Double counting of business interest income and floor plan financing interest expense prohibited.
(f) Allocation and determination of section 163(j) excess items made in the same manner as nonseparately stated taxable income or loss of the partnership.
(1) Overview.
(i) In general.
(ii) Relevance solely for purposes of section 163(j).
(2) Steps for allocating deductible business interest expense and section 163(j) excess items.
(i) Partnership-level calculation required by section 163(j)(4)(A).
(ii) Determination of each partner's relevant section 163(j) items.
(iii) Partner-level comparison of business interest income and business interest expense.
(iv) Matching partnership and aggregate partner excess business interest income.
(v) Remaining business interest expense determination.
(vi) Determination of final allocable ATI.
(A) Positive allocable ATI.
(B) Negative allocable ATI.
(C) Final allocable ATI.
(vii) Partner-level comparison of thirty percent of adjusted taxable income and remaining business interest expense.
(viii) Partner priority right to ATI capacity excess determination.
(ix) Matching partnership and aggregate partner excess taxable income.
(x) Matching partnership and aggregate partner excess business interest expense.
(xi) Final section 163(j) excess item and deductible business interest expense allocation.
(g) Carryforwards.
(1) In general.
(2) Treatment of excess of business interest expense allocated to partners.
(3) Excess taxable income and excess business interest income ordering rule.
(h) Basis adjustments.
(1) Section 704(d) ordering.
(2) Excess business interest expense basis adjustments.
(3) Basis adjustments upon disposition of partnership interest.
(i) Complete disposition of partnership interest.
(ii) Partial disposition of partnership interest.
(i) [Reserved]
(j) Investment items.
(k) [Reserved]
(l) S corporations.
(1) In general.
(2) Character of deductible business interest expense.
(3) Adjusted taxable income of an S corporation.
(4) Adjusted taxable income and business interest income of S corporation shareholders.
(i) Adjusted taxable income of S corporation shareholders.
(ii) Disposition of S corporation stock.
(iii) Double counting of business interest income and floor plan financing interest expense prohibited.
(5) Carryforwards.
(6) Basis adjustments and disallowed business interest expense carryforwards.
(7) Accumulated adjustment accounts.
(8) Termination of qualified subchapter S subsidiary election.
(9) Investment items.
(m) Partnerships and S corporations not subject to section 163(j).
(1) Partnerships and S corporations not subject to section 163(j) by reason of the small business exemption.
(2) Partnerships and S corporations not subject to section 163(j) by reason of an excepted trade or business.
(3) Partnerships that allocated excess business interest expense prior to becoming not subject to section 163(j).
(4) S corporations with disallowed business interest expense carryforwards prior to becoming not subject to section 163(j).
(n) [Reserved]
(o) Examples.
(p) Applicability date.

§ 1.163(j)–7 Application of the business interest deduction limitation to foreign corporations and United States shareholders.

(a) Overview.
(b) Application of section 163(j) to an applicable CFC and certain partnerships.
(1) Scope.
(2) General application of section 163(j) to an applicable CFC and a partnership with at least one partner that is an applicable CFC.
(3) Alternative approach for computing the deduction for business interest expense.
(4) Treatment of certain partnerships as a CFC group member.
(i) General rule.
(ii) Exception for certain partnerships engaged in a United States trade or business.
(5) CFC group election.
(i) Manner of making a CFC group election.
(ii) Consistency requirement.
(iii) Duration of a CFC group election.
(c) Rules concerning the computation of adjusted taxable income of an applicable CFC and certain CFC group members.
(1) Computation of taxable income.
(2) Treatment of certain dividends.
(3) Treatment of CFC excess taxable income.
(i) In general.
(ii) Ordering rules.
(d) Rules concerning the computation of adjusted taxable income of a United States shareholder.
(1) In general.

(i) Treatment of gross income inclusions that are properly allocable to a non-excepted trade or business.
(ii) Treatment of deemed inclusions of a domestic partnership that are not allocable to any trade or business.
(2) Additional rule after application of paragraph (d)(1) of this section for a United States shareholder of a CFC group member with a CFC group election in effect.
(i) In general.
(ii) Eligible CFC group ETI.
(iii) CFC group inclusions.
(3) Special rules if a domestic partnership is a United States shareholder of a CFC group member with a CFC group election in effect.
(4) Inclusions under section 951A(a).
(e) Effect on earnings and profits.
(f) Definitions.
(1) Allocable share.
(i) General rule.
(ii) Special rule if there is a financial services subgroup.
(2) Applicable CFC.
(3) Applicable net business interest expense.
(4) Applicable subgroup net business interest expense.
(5) CFC excess taxable income.
(i) In general.
(ii) CFC group member is a partnership.
(6) CFC group.
(i) In general.
(ii) Aggregation rules.
(7) CFC group election.
(8) CFC group member.
(9) Financial services subgroup.
(10) Financial services subgroup member.
(11) Majority U.S. shareholder taxable year.
(12) Net business interest expense.
(13) Passthrough entity.
(14) Specified ETI ratio.
(i) In general.
(ii) Includable CFC group members.
(iii) Numerator.
(iv) Denominator.
(15) Specified highest-tier member.
(16) Specified lower-tier member.
(17) Specified taxable year.
(18) United States shareholder.
(g) Examples.
(h) Applicability date.
§ 1.163(j)–8 Application of the business interest deduction limitation to foreign persons with effectively connected income.
(a) Overview.
(b) Application of section 163(j) and the section 163(j) regulations to specified foreign persons with effectively connected taxable income.
(1) In general.
(2) Modification of adjusted taxable income.
(3) Modification of business interest expense.
(i) General rule.
(ii) Exclusion of certain business interest expense of a specified foreign partner.
(4) Modification of business interest income.
(5) Modification of floor plan financing interest expense.
(6) Modification of allocation of interest expense and interest income that is properly allocable to trade or business.
(c) Partner-level modifications to § 1.163(j)–6 for partnerships engaged in a U.S. trade or business.
(1) Modification related to a partnership's excess taxable income.
(2) Modification related to a partnership's excess business interest expense.
(3) Modification related to a partnership's excess business interest income.
(d) An applicable CFC with effectively connected taxable income.
(e) Coordination of section 163(j) and § 1.882–5.
(1) General rules.
(i) Ordering rule.
(ii) Treatment of disallowed business interest expense carryforward.
(iii) Treatment of allocable excess business interest expense.
(iv) Scaling ratio.
(2) Amount of interest determined under § 1.882–5 that is disallowed business interest expense.
(i) Foreign corporation is not a specified foreign partner.
(ii) Foreign corporation is a specified foreign partner.
(f) Coordination with branch profits tax.
(1) Effect on effectively connected earnings and profits.
(2) Effect on U.S. net equity.
(g) Definitions.
(1) Applicable CFC.
(2) ECI excess business interest income.
(3) Effectively connected taxable income.
(4) Specified excess business interest expense.
(5) Specified excess taxable income.
(6) Specified foreign partner.
(7) Specified foreign person.
(8) Specified ratio.
(h) Examples.
(i) Applicability date.
§ 1.163(j)–9 Elections for excepted trades or businesses; safe harbor for certain REITs.
(a) Overview.
(b) Scope and effect of election.
(1) In general.
(2) Irrevocability.
(c) Time and manner of making election.
(1) In general.
(2) Election statement contents.
(3) Consolidated group's trade or business.
(4) Partnership's trade or business.
(d) Termination of election.
(1) In general.
(2) Taxable asset transfer defined.
(3) Related party defined.
(4) Anti-abuse rule.
(e) Additional guidance.
(f) Examples.
(g) Safe harbor for REITs.
(1) In general.
(2) REITs that do not significantly invest in real property financing assets.
(3) REITs that significantly invest in real property financing assets.
(4) REIT real property assets, interests in partnerships, and shares in other REITs.
(i) Real property assets.
(ii) Partnership interests.
(iii) Shares in other REITs.
(5) Value of shares in other REITs.
(6) Real property financing assets.
(h) Special anti-abuse rule for certain real property trades or businesses.
(1) In general.
(2) Exception for certain REITs.
(i) Applicability date.
§ 1.163(j)–10 Allocation of interest expense, interest income, and other items of expense and gross income to an excepted trade or business.
(a) Overview.
(1) In general.
(i) Purposes.
(ii) Application of section.
(2) Coordination with other rules.
(i) In general.
(ii) Treatment of investment interest, investment income, and investment expenses of a partnership with a C corporation or tax-exempt corporation as a partner.
(3) Application of allocation rules to foreign corporations and foreign partnerships.
(4) Application of allocation rules to members of a consolidated group.
(i) In general.
(ii) Application of excepted business percentage to members of a consolidated group.
(iii) Basis in assets transferred in an intercompany transaction.
(5) Tax-exempt organizations.
(6) [Reserved]
(7) Examples.
(b) Allocation of tax items other than interest expense and interest income.
(1) In general.
(2) Gross income other than dividends and interest income.
(3) Dividends.
(i) Look-through rule.
(ii) Inapplicability of the look-through rule.
(4) Gain or loss from the disposition of non-consolidated C corporation stock, partnership interests, or S corporation stock.
(i) Non-consolidated C corporations.
(ii) Partnerships and S corporations.
(5) Expenses, losses, and other deductions.
(i) Expenses, losses, and other deductions that are definitely related to a trade or business.
(ii) Other deductions.
(6) Treatment of certain investment items of a partnership with a C corporation partner.
(7) Example—Allocation of income and expense.
(c) Allocating interest expense and interest income that is properly allocable to a trade or business.
(1) General rule.
(i) In general.
(ii) De minimis exception.
(2) Example.
(3) Asset used in more than one trade or business.
(i) General rule.
(ii) Permissible methodologies for allocating asset basis between or among two or more trades or businesses.
(iii) Special rules.
(A) Consistent allocation methodologies.
(*1*) In general.
(*2*) Consent to change allocation methodology.
(B) De minimis exceptions.
(*1*) De minimis amount of gross income from trades or businesses.
(*2*) De minimis amount of asset basis allocable to a trade or business.

(C) Allocations of excepted regulated utility trades or businesses.
(*1*) In general.
(*2*) Permissible method for allocating asset basis for utility trades or businesses.
(*3*) De minimis rule for excepted utility trades or businesses.
(*4*) Example.
(4) Disallowed business interest expense carryforwards; floor plan financing interest expense.
(5) Additional rules relating to basis.
(i) Calculation of adjusted basis.
(A) Non-depreciable property other than land.
(B) Depreciable property other than inherently permanent structures.
(C) Special rule for land and inherently permanent structures.
(D) Depreciable or amortizable intangible property and depreciable income forecast method property.
(E) Assets not yet used in a trade or business.
(F) Trusts established to fund specific liabilities.
(G) Inherently permanent structure.
(ii) Partnership interests; stock in non-consolidated domestic corporations.
(A) Partnership interests.
(*1*) Calculation of asset basis.
(*2*) Allocation of asset basis.
(*i*) In general.
(*ii*) De minimis rule.
(*iii*) Partnership assets not properly allocable to a trade or business.
(*iv*) Inapplicability of partnership look-through rule.
(B) Stock in non-consolidated domestic corporations.
(*1*) In general.
(*2*) Domestic non-consolidated C corporations.
(*i*) Allocation of asset basis.
(*ii*) De minimis rule.
(*iii*) Inapplicability of corporate look-through rule.
(*3*) S corporations.
(*i*) Calculation of asset basis.
(*ii*) Allocation of asset basis.
(*iii*) De minimis rule.
(i*v*) Inapplicability of S corporation look-through rule.
(C) Stock in CFCs.
(D) Inapplicability of look-through rule to partnerships or non-consolidated corporations to which the small business exemption applies.
(E) Tiered entities.
(iii) Cash and cash equivalents and customer receivables.
(iv) Deemed asset sale.
(v) Other adjustments.
(6) Determination dates; determination periods; reporting requirements.
(i) Definitions.
(ii) Application of look-through rules.
(iii) Reporting requirements.
(A) Books and records.
(B) Information statement.
(iv) Failure to file statement.
(*7*) Ownership threshold for look-through rules.
(i) Corporations.
(A) Asset basis.
(B) Dividends.
(ii) Partnerships.
(iii) Inapplicability of look-through rule.
(8) Anti-abuse rule.
(d) Direct allocations.
(1) In general.
(2) Financial services entities.
(3) Assets used in more than one trade or business.
(4) Adjustments to basis of assets to account for direct allocations.
(5) Example.
(e) Examples.
(f) Applicability date.

§ 1.163(j)–11 Transition rules.

(a) Application of section 163(j) limitation if a corporation joins a consolidated group with a taxable year beginning before January 1, 2018.
(1) In general.
(2) Example.
(b) Treatment of disallowed disqualified interest.
(1) In general.
(2) Earnings and profits.
(3) Disallowed disqualified interest of members of an affiliated group.
(i) Scope.
(ii) Allocation of disallowed disqualified interest to members of the affiliated group.
(A) In general.
(B) Definitions.
(*1*) Allocable share of the affiliated group's disallowed disqualified interest.
(*2*) Disallowed disqualified interest ratio.
(*3*) Exempt related person interest expense.
(iii) Treatment of carryforwards.
(4) Application of section 382.
(i) Ownership change occurring before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**.
(A) Pre-change loss.
(B) Loss corporation.
(ii) Ownership change occurring on or after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**.
(A) Pre-change loss.
(B) Loss corporation.
(iii) Definitions.
(5) [Reserved]
(6) Treatment of excess limitation from taxable years beginning before January 1, 2018.
(7) Example.
(c) Applicability date.

■ **Par. 3.** Sections 1.163(j)–1 through 1.163(j)–11 are added to read as follows:

Sec.

* * * * *
1.163(j)–1 Definitions.
1.163(j)–2 Deduction for business interest expense limited.
1.163(j)–3 Relationship of business interest deduction limitation to other provisions affecting interest.
1.163(j)–4 General rules applicable to C corporations (including REITs, RICs, and members of consolidated groups) and tax-exempt corporations.
1.163(j)–5 General rules governing disallowed business interest expense carryforwards for C corporations.
1.163(j)–6 Application of the business interest deduction limitation to partnerships and subchapter S corporations.
1.163(j)–7 Application of the business interest deduction limitation to foreign corporations and United States shareholders.
1.163(j)–8 Application of the business interest deduction limitation to foreign persons with effectively connected income.
1.163(j)–9 Elections for excepted trades or businesses; safe harbor for certain REITs.
1.163(j)–10 Allocation of interest expense, interest income, and other items of expense and gross income to an excepted trade or business.
1.163(j)–11 Transition rules.
* * * * *

§ 1.163(j)–1 Definitions.

(a) *In general.* This section defines terms used in the section 163(j) regulations. For purposes of the rules sets forth in §§ 1.163(j)–2 through 1.163(j)–11, additional definitions for certain terms are provided in those sections.

(b) *Definitions*—(1) *Adjusted taxable income.* The term *adjusted taxable income* (ATI) means the taxable income of the taxpayer for the taxable year, with the adjustments in this paragraph (b).

(i) *Additions.* The amounts of the following items (if any) are added to taxable income to determine ATI—

(A) Any business interest expense;

(B) Any net operating loss deduction under section 172;

(C) Any deduction under section 199A;

(D) For taxable years beginning before January 1, 2022, any deduction for depreciation under section 167, section 168, or section 168 of the Internal Revenue Code of 1954 (former section 168);

(E) For taxable years beginning before January 1, 2022, any deduction for the amortization of intangibles (for example, under section 167 or 197) and other amortized expenditures (for example, under section 195(b)(1)(B), 248, or 1245(a)(2)(C));

(F) For taxable years beginning before January 1, 2022, any deduction for depletion under section 611;

(G) Any deduction for a capital loss carryback or carryover; and

(H) Any deduction or loss that is not properly allocable to a non-excepted trade or business (for rules governing the allocation of items to an excepted trade or business, see §§ 1.163(j)–1(b)(38) and 1.163(j)–10).

(ii) *Subtractions.* The amounts of the following items (if any) are subtracted from taxable income to determine ATI—

(A) Any business interest income;

(B) Any floor plan financing interest expense for the taxable year;

(C) With respect to the sale or other disposition of property, the lesser of:

(*1*) Any gain recognized on the sale or other disposition of such property; and

(*2*) Any depreciation, amortization, or depletion deductions for the taxable years beginning after December 31, 2017, and before January 1, 2022, with respect to such property;

(D) With respect to the sale or other disposition of stock of a member of a consolidated group that includes the selling member, the investment adjustments, as defined under § 1.1502–32, with respect to such stock that are attributable to deductions described in paragraph (b)(1)(ii)(C) of this section;

(E) With respect to the sale or other disposition of an interest in a partnership, the taxpayer's distributive share of deductions described in paragraph (b)(1)(ii)(C) of this section with respect to property held by the partnership at the time of such sale or other disposition to the extent such deductions were allowable under section 704(d); and

(F) Any income or gain that is not properly allocable to a non-excepted trade or business (for rules governing the allocation of items to an excepted trade or business, see §§ 1.163(j)–1(b)(38) and 1.163(j)–10)).

(iii) *Depreciation, amortization, or depletion expenses capitalized to inventory under section 263A.* Depreciation, amortization, or depletion expense that is capitalized to inventory under section 263A is not a depreciation, amortization, or depletion deduction for purposes of this paragraph (b)(1).

(iv) *Other adjustments.* ATI is computed with the other adjustments provided in §§ 1.163(j)–2 through 1.163(j)–11.

(v) *Additional rules relating to adjusted taxable income in other sections.* (A) For rules governing the ATI of C corporations, see §§ 1.163(j)–4(b)(2) and (3) and 1.163(j)–10(a)(2)(ii).

(B) For rules governing the ATI of RICs and REITs, see § 1.163(j)–4(b)(4).

(C) For rules governing the ATI of tax-exempt corporations, see § 1.163(j)–4(b)(5).

(D) For rules governing the ATI of consolidated groups, see § 1.163(j)–4(d)(2)(iv) and (v).

(E) For rules governing the ATI of partnerships, see § 1.163(j)–6(d).

(F) For rules governing the ATI of partners, see § 1.163(j)–6(e).

(G) For rules governing partnership basis adjustments impacting ATI, see § 1.163(j)–6(h)(2).

(H) For rules governing the ATI of S corporations, see § 1.163(j)–6(l)(3).

(I) For rules governing the ATI of S corporation shareholders, see § 1.163(j)–6(l)(4).

(J) For rules governing the ATI of applicable CFCs and certain CFC group members, as defined in § 1.163(j)–7(f), see § 1.163(j)–7(c).

(K) For rules governing the ATI of United States shareholders of applicable CFCs, including the treatment of inclusions under sections 78, 951(a), and 951A(a), see § 1.163(j)–7(d).

(L) For rules governing the ATI of specified foreign persons, as defined in § 1.163(j)–8(g)(7), with effectively connected income, see § 1.163(j)–8(b)(2).

(M) For rules governing the ATI of specified foreign partners, as defined in § 1.163(j)–8(g)(6), other than applicable CFCs, as defined in § 1.163(j)–8(g)(1), see § 1.163(j)–8(c)(1).

(N) For rules governing the ATI of certain beneficiaries of trusts and estates, see § 1.163(j)–2(f).

(2) *Business interest expense*—(i) *In general.* The term *business interest expense* means interest expense that is properly allocable to a non-excepted trade or business or that is floor plan financing interest expense. Business interest expense also includes disallowed business interest expense carryforwards (as defined in paragraph (b)(9) of this section). For the treatment of investment interest, see section 163(d); and for the treatment of personal interest, see section 163(h).

(ii) *Special rules.* For special rules for defining business interest expense in certain circumstances, see §§ 1.163(j)–3(b)(2) (regarding disallowed interest expense), 1.163(j)–4(b) (regarding C corporations) and (d)(2)(iii) (regarding consolidated groups), and 1.163(j)–8(b)(3) (regarding foreign persons engaged in a U.S. trade or business).

(3) *Business interest income*—(i) *In general.* The term *business interest income* means interest income which is properly allocable to a non-excepted trade or business. For the treatment of investment income, see section 163(d).

(ii) *Special rules.* For special rules defining business interest income in certain circumstances, see §§ 1.163(j)–4(b) (regarding C corporations) and (d)(2)(iii) (regarding consolidated groups) and 1.163(j)–8(b)(4) (regarding foreign persons engaged in a U.S. trade or business).

(4) *C corporation.* The term *C corporation* has the meaning provided in section 1361(a)(2).

(5) *Cleared swap.* The term *cleared swap* means a swap that is cleared by a derivatives clearing organization, as such term is defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a), or by a clearing agency, as such term is defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), that is registered as a derivatives clearing organization under the Commodity Exchange Act or as a clearing agency under the Securities Exchange Act of 1934, respectively, if the derivatives clearing organization or clearing agency requires the parties to the swap to post and collect margin or collateral.

(6) *Consolidated group.* The term *consolidated group* has the meaning provided in § 1.1502–1(h).

(7) *Consolidated return year.* The term *consolidated return year* has the meaning provided in § 1.1502–1(d).

(8) *Disallowed business interest expense.* The term *disallowed business interest expense* means the amount of business interest expense for a taxable year in excess of the amount allowed as a deduction for the taxable year under section 163(j)(1) and § 1.163(j)–2(b).

(9) *Disallowed business interest expense carryforward.* The term *disallowed business interest expense carryforward* means any business interest expense described in § 1.163(j)–2(c).

(10) *Disallowed disqualified interest.* The term *disallowed disqualified interest* means interest expense, including carryforwards, for which a deduction was disallowed under old section 163(j) (as defined in paragraph (b)(26) of this section) in the taxpayer's last taxable year beginning before January 1, 2018, and that was carried forward pursuant to old section 163(j).

(11) *Electing farming business.* The term *electing farming business* means a trade or business that makes an election as provided in § 1.163(j)–9 or other published guidance and that is—

(i) A farming business, as defined in section 263A(e)(4) or § 1.263A–4(a)(4); or

(ii) Any trade or business of a specified agricultural or horticultural cooperative, as defined in section 199A(g)(4).

(12) *Electing real property trade or business.* The term *electing real property trade or business* means a trade or business that makes an election as provided in § 1.163(j)–9 or other published guidance and that is described in—

(i) Section 469(c)(7)(C) and § 1.469–9(b)(2); or

(ii) Section 1.163(j)–9(g).

(13) *Excepted regulated utility trade or business*—(i) *In general.* The term *excepted regulated utility trade or business* means a trade or business—

(A) That furnishes or sells:

(*1*) Electrical energy, water, or sewage disposal services;

(*2*) Gas or steam through a local distribution system; or

(*3*) Transportation of gas or steam by pipeline; and

(B) To the extent that the rates for the furnishing or sale of the items in paragraph (b)(13)(i)(A) of this section—

(*1*) Have been established or approved by a State or political subdivision thereof, by any agency or instrumentality of the United States, or by a public service or public utility commission or other similar body of any State or political subdivision thereof and are determined on a cost of service and rate of return basis; or

(*2*) Have been established or approved by the governing or ratemaking body of an electric cooperative.

(ii) *Excepted and non-excepted utility trades or businesses.* If a taxpayer is engaged in both an excepted trade or business and a non-excepted trade or business described in this paragraph (b)(13), the taxpayer must allocate items between the trades or businesses. See §§ 1.163(j)–1(b)(38) and 1.163(j)–10(c)(3)(iii)(C). Some trades or businesses with de minimis furnishing or sales of items described in paragraph (b)(13)(i)(A) of this section that are not sold pursuant to rates determined on a cost of service and rate of return basis as required in paragraph (b)(13)(i)(B)(*1*) of this section, or by the governing or ratemaking body of an electric cooperative as required in paragraph (b)(13)(i)(B)(*2*) of this section are treated as excepted trades or businesses. See § 1.163(j)–10(c)(3)(iii)(C)(*3*).

(14) *Excess business interest expense.* The term *excess business interest expense* means, with respect to a partnership, the amount of disallowed business interest expense of the partnership for a taxable year under section § 1.163(j)–2(b), except as provided in § 1.163(j)–6(h)(2).

(15) *Excess taxable income.* With respect to any partnership or S corporation, the term *excess taxable income* means the amount which bears the same ratio to the partnership's ATI as—

(i) The excess (if any) of—

(A) The amount determined for the partnership or S corporation under section 163(j)(1)(B); over

(B) The amount (if any) by which the business interest expense of the partnership, reduced by the floor plan financing interest expense, exceeds the business interest income of the partnership or S corporation; bears to

(ii) The amount determined for the partnership or S corporation under section 163(j)(1)(B).

(16) *Floor plan financing indebtedness.* The term floor plan financing indebtedness means indebtedness—

(i) Used to finance the acquisition of motor vehicles held for sale or lease; and

(ii) Secured by the inventory so acquired.

(17) *Floor plan financing interest expense.* The term *floor plan financing interest expense* means interest paid or accrued on floor plan financing indebtedness. For purposes of the section 163(j) regulations, all floor plan financing interest expense is treated as business interest expense. See paragraph (b)(2) of this section.

(18) *Group.* The term *group* has the meaning provided in § 1.1502–1(a).

(19) *Intercompany transaction.* The term *intercompany transaction* has the meaning provided in § 1.1502–13(b)(1)(i).

(20) *Interest.* The term *interest* means any amount described in paragraph (b)(20)(i), (ii), (iii), or (iv) of this section.

(i) *In general.* Interest is an amount paid, received, or accrued as compensation for the use or forbearance of money under the terms of an instrument or contractual arrangement, including a series of transactions, that is treated as a debt instrument for purposes of section 1275(a) and § 1.1275–1(d), and not treated as stock under § 1.385–3, or an amount that is treated as interest under other provisions of the Internal Revenue Code (Code) or the regulations thereunder. Thus, for example, interest includes—

(A) Original issue discount (OID), as adjusted by the holder for any acquisition premium or amortizable bond premium;

(B) Qualified stated interest, as adjusted by the holder for any amortizable bond premium or by the issuer for any bond issuance premium;

(C) Acquisition discount;

(D) Amounts treated as taxable OID under section 1286 (relating to stripped bonds and stripped coupons);

(E) Accrued market discount on a market discount bond to the extent includible in income by the holder under either section 1276(a) or 1278(b);

(F) OID includible in income by a holder that has made an election under § 1.1272–3 to treat all interest on a debt instrument as OID;

(G) OID on a synthetic debt instrument arising from an integrated transaction under § 1.1275–6;

(H) Repurchase premium to the extent deductible by the issuer under § 1.163–7(c);

(I) Deferred payments treated as interest under section 483;

(J) Amounts treated as interest under a section 467 rental agreement;

(K) Amounts treated as interest under section 988;

(L) Forgone interest under section 7872;

(M) De minimis OID taken into account by the issuer;

(N) Amounts paid or received in connection with a sale-repurchase agreement treated as indebtedness under Federal tax principles; in the case of a sale-repurchase agreement relating to tax-exempt bonds, however, the amount is not tax-exempt interest;

(O) Redeemable ground rent treated as interest under section 163(c); and

(P) Amounts treated as interest under section 636.

(ii) *Swaps with significant nonperiodic payments*—(A) *Non-cleared swaps.* A swap other than a cleared swap with significant nonperiodic payments is treated as two separate transactions consisting of an on-market, level payment swap and a loan. The loan must be accounted for by the parties to the contract independently of the swap. The time value component associated with the loan, determined in accordance with § 1.446–3(f)(2)(iii)(A), is recognized as interest expense to the payor and interest income to the recipient.

(B) [Reserved]

(iii) *Other amounts treated as interest*—(A) *Treatment of premium*—(*1*) *Issuer.* If a debt instrument is issued at a premium within the meaning of § 1.163–13, any ordinary income under § 1.163–13(d)(4) is treated as interest income of the issuer.

(*2*) *Holder.* If a taxable debt instrument is acquired at a premium within the meaning of § 1.171–1 and the holder elects to amortize the premium, any amount otherwise deductible under section 171(a)(1) as a bond premium deduction under § 1.171–2(a)(4)(i)(A) or (C) is treated as interest expense of the holder.

(B) *Treatment of ordinary income or loss on certain debt instruments.* If an issuer of a contingent payment debt instrument subject to § 1.1275–4(b), a nonfunctional currency contingent payment debt instrument subject to § 1.988–6, or an inflation-indexed debt instrument subject to § 1.1275–7 recognizes ordinary income on the debt instrument in accordance with the rules in § 1.1275–4(b), § 1.988–6(b)(2), or § 1.1275–7(f), whichever is applicable, the ordinary income is treated as interest income of the issuer. If a holder of a contingent payment debt instrument subject to § 1.1275–4(b), a nonfunctional currency contingent payment debt instrument subject to § 1.988–6, or an inflation-indexed debt instrument subject to § 1.1275–7

recognizes an ordinary loss on the debt instrument in accordance with the rules in § 1.1275–4(b), § 1.988–6(b)(2), or § 1.1275–7(f), whichever is applicable, the ordinary loss is treated as interest expense of the holder.

(C) *Substitute interest payments.* A substitute interest payment described in § 1.861–2(a)(7) is treated as interest expense to the payor or interest income to the recipient; in the case of a sale-repurchase agreement or a securities lending transaction relating to tax-exempt bonds, however, the recipient of a substitute payment does not receive tax-exempt interest income.

(D) *Section 1258 gain.* Any gain treated as ordinary gain under section 1258 is treated as interest income.

(E) *Amounts affecting a taxpayer's effective cost of borrowing.* Income, deduction, gain, or loss from a derivative, as defined in section 59A(h)(4)(A), that alters a taxpayer's effective cost of borrowing with respect to a liability of the taxpayer is treated as an adjustment to interest expense of the taxpayer. For example, a taxpayer that is obligated to pay interest at a floating rate on a note and enters into an interest rate swap that entitles the taxpayer to receive an amount that is equal to or that closely approximates the interest rate on the note in exchange for a fixed amount is, in effect, paying interest expense at a fixed rate by entering into the interest rate swap. Income, deduction, gain, or loss from the swap is treated as an adjustment to interest expense. Similarly, any gain or loss resulting from a termination or other disposition of the swap is an adjustment to interest expense, with the timing of gain or loss subject to the rules of § 1.446–4.

(F) *Yield adjustments.* Income, deduction, gain, or loss from a derivative, as defined in section 59A(h)(4)(A), that alters a taxpayer's effective yield with respect to a debt instrument held by the taxpayer is treated as an adjustment to interest income by the taxpayer.

(G) *Certain amounts labeled as fees*—(*1*) *Commitment fees.* Any fees in respect of a lender commitment to provide financing are treated as interest if any portion of such financing is actually provided.

(*2*) [Reserved]

(H) *Debt issuance costs.* Any debt issuance costs subject to § 1.446–5 are treated as interest expense of the issuer.

(I) *Guaranteed payments.* Any guaranteed payments for the use of capital under section 707(c) are treated as interest.

(J) *Factoring income.* The excess of the amount that a taxpayer collects on a factored receivable (or realizes upon the sale or other disposition of the factored receivable) over the amount paid for the factored receivable by the taxpayer is treated as interest income. For purposes of this paragraph (b)(20)(iii)(J), the term *factored receivable* includes any account receivable or other evidence of indebtedness, whether or not issued at a discount and whether or not bearing stated interest, arising out of the disposition of property or the performance of services by any person, if such account receivable or evidence of indebtedness is acquired by a person other than the person who disposed of the property or provided the services that gave rise to the account receivable or evidence of indebtedness.

(iv) *Anti-avoidance rule for amounts predominantly associated with the time value of money.* Any expense or loss, to the extent deductible, incurred by a taxpayer in a transaction or series of integrated or related transactions in which the taxpayer secures the use of funds for a period of time is treated as interest expense of the taxpayer if such expense or loss is predominantly incurred in consideration of the time value of money.

(v) *Examples.* The examples in this paragraph (b)(20)(v) illustrate the application of paragraphs (b)(20)(i) through (iv) of this section. Unless otherwise indicated, assume the following: A, B, C, D, and Bank are domestic C corporations that are publicly traded; the exemption for certain small businesses in § 1.163(j)–2(d) does not apply; A is not engaged in an excepted trade or business; and all amounts of interest expense are deductible except for the potential application of section 163(j).

(A) *Example 1*—(*1*) *Facts.* (*i*) A is a calendar year taxpayer that is engaged in a manufacturing business. In January 2019, A, which has an investment-grade credit rating, enters into the following transactions (the transactions): Bank transfers a portfolio of U.S. Treasury bonds (the Treasury portfolio) to A; A agrees to pay Bank an amount equivalent to any interest paid on the Treasury portfolio during the transactions and a fee for lending the Treasury portfolio to A; A agrees to return to Bank securities that are substantially identical to the Treasury portfolio upon request, regardless of any value increases or decreases in the market value of the Treasury portfolio; A rehypothecates the Treasury portfolio in exchange for cash, which A uses to purchase a portfolio of corporate bonds (the debt portfolio); and the transactions remain in place for the duration of the 2019 calendar year until Bank delivers a notice to A recalling the Treasury portfolio 5 business days before December 31, 2019.

(*ii*) The obligations undertaken with respect to the transactions are not collateralized. Assume that the transactions do not result in a sale-repurchase agreement treated as indebtedness under Federal tax principles. During the course of the transactions, the debt portfolio generates $70x of interest income. The Treasury portfolio generates $60x of interest income during the course of the transactions and A pays $60x to Bank under its obligation to pay amounts equivalent to the interest paid on the Treasury portfolio.

(*2*) *Analysis.* The transactions involving Bank and A are transactions described in paragraph (b)(20)(iii)(C) of this section. Consequently, the $60x of substitute interest payments that A paid to Bank in 2019 is treated as interest expense for purposes of section 163(j). In addition, the $70x of interest income generated by the debt portfolio is interest income to A.

(B) *Example 2*—(*1*) *Facts.* A is a calendar year taxpayer that is engaged in a manufacturing business. In early 2019, A enters into the following transactions:

(*i*) A enters into a loan obligation in which A borrows Japanese yen from Bank in an amount equivalent to $2000x with an interest rate of 1 percent (at the time of the loan, the U.S. dollar equivalent interest rate on a loan of $2,000x is 5 percent); and

(*ii*) A enters into a foreign currency swap transaction (FX Swap) with Bank with a notional principal amount of $2000x under which A receives Japanese yen at 1 percent multiplied by the amount of Japanese yen borrowed from Bank (which for 2019 equals $20x) and pays U.S. dollars at 5 percent multiplied by a notional amount of $2000x ($100x per year). The FX Swap is not integrated with the loan obligation under § 1.988–5.

(*2*) *Analysis.* The FX Swap alters A's cost of borrowing within the meaning of paragraph (b)(20)(iii)(E) of this section. As a result, for purposes of section 163(j), the $100x paid by A to Bank on the FX Swap is treated by A as interest expense and the $20x paid by Bank to A on the FX Swap is treated by A as a reduction of interest expense.

(C) *Example 3*—(*1*) *Facts.* A borrows from B two ounces of gold at a time when the spot price for gold is $500x per ounce. A agrees to return the two ounces of gold in six months. A sells the two ounces of gold to C for $1,000x. A then enters into a contract with D to purchase two ounces of gold six months in the future for $1,013x. In exchange for the use of $1,000x in cash, A has sustained a loss of $13x on related transactions.

(*2*) *Analysis.* A has obtained the use of $1,000x and, in a series of related transactions, created a loss of $13x predominantly associated with the time value of money. As a result, for purposes of section 163(j), the loss of $13x is treated as interest expense under paragraph (b)(20)(iv) of this section.

(21) *Interest expense.* The term *interest expense* means interest that is paid or accrued, or treated as paid or accrued, for the taxable year.

(22) *Interest income.* The term *interest income* means interest that is included in gross income for the taxable year.

(23) *Inventory.* The term *inventory* means property held for sale or for lease, or both, by a taxpayer in the ordinary course of its trade or business.

(24) *Member.* The term *member* has the meaning provided in § 1.1502–1(b).

(25) *Motor vehicle.* The term *motor vehicle* means a motor vehicle as defined in section 163(j)(9)(C).

(26) *Old section 163(j).* The term *old section 163(j)* means section 163(j) immediately prior to its amendment by Public Law 115–97, 131 Stat. 2054 (2017).

(27) *Real estate investment trust.* The term *real estate investment trust* (REIT) has the meaning provided in section 856.

(28) *Real property.* The term *real property* includes—

(i) Real property as defined in § 1.469–9(b)(2); and

(ii) Any direct or indirect right, including a license or other contractual right, to share in the appreciation in value of, or the gross or net proceeds or profits generated by, an interest in real property, including net proceeds or profits associated with tolls, rents or other similar fees.

(29) *Regulated investment company.* The term *regulated investment company* (RIC) has the meaning provided in section 851.

(30) *S corporation.* The term *S corporation* has the meaning provided in section 1361(a)(1).

(31) *Section 163(j) limitation.* The term *section 163(j) limitation* means the limit on the amount of business interest expense that a taxpayer may deduct in a taxable year under section 163(j) and § 1.163(j)–2(b).

(32) *Section 163(j) regulations.* The term *section 163(j) regulations* means this section and §§ 1.163(j)–2 through 1.163(j)–11.

(33) *Separate return limitation year.* The term *separate return limitation year* (SRLY) has the meaning provided in § 1.1502–1(f).

(34) *Separate return year.* The term *separate return year* has the meaning provided in § 1.1502–1(e).

(35) *Separate taxable income.* The term *separate taxable income* has the meaning provided in § 1.1502–12.

(36) *Tax-exempt corporation.* The term *tax-exempt corporation* means any corporation subject to tax under section 511.

(37) *Taxable income*—(i) *In general.* The term *taxable income,* with respect to a taxpayer and a taxable year, has the meaning provided in section 63, but for this purpose computed without regard to the application of section 163(j) and the section 163(j) regulations.

(ii) *General rules to coordinate the application of sections 163(j) and 250.* If for a taxable year a taxpayer is allowed a deduction under section 250(a)(1) that is properly allocable to a non-excepted trade or business, then taxable income for the taxable year is determined without regard to the limitation in section 250(a)(2). For this purpose, the amount of the deduction allowed under section 250(a)(1), without regard to the limitation in section 250(a)(2), is determined without regard to the application of section 163(j) and the section 163(j) regulations.

(iii) [Reserved]

(iv) *Special rules for defining taxable income.* (A) For special rules defining the taxable income of a RIC or REIT, see § 1.163(j)–4(b)(4)(ii).

(B) For special rules defining the taxable income of consolidated groups, see § 1.163(j)–4(d)(2)(iv).

(C) For special rules defining the taxable income of a partnership, see § 1.163(j)–6(d)(1).

(D) For special rules defining the taxable income of an S corporation, see § 1.163(j)–6(l)(3).

(E) For special rules defining the taxable income of certain controlled foreign corporations, see § 1.163(j)–7(c)(1).

(38) *Trade or business*—(i) *In general.* The term *trade or business* means a trade or business within the meaning of section 162.

(ii) *Excepted trade or business.* The term *excepted trade or business* means a trade or business that is described in paragraphs (b)(38)(ii)(A) through (D) of this section. For additional rules related to excepted trades or businesses, including elections made under section 163(j)(7)(B) and (C), see § 1.163(j)–9.

(A) The trade or business of performing services as an employee.

(B) Any electing real property trade or business.

(C) Any electing farming business.

(D) Any excepted regulated utility trade or business.

(iii) *Non-excepted trade or business.* The term *non-excepted trade or business* means any trade or business that is not an excepted trade or business.

(39) *Unadjusted basis.* The term *unadjusted basis* means the basis as determined under section 1012 or other applicable sections of chapter 1 of subtitle A of the Code, including subchapters O (relating to gain or loss on dispositions of property), C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses) of the Code. Unadjusted basis is determined without regard to any adjustments described in section 1016(a)(2) or (3), to any adjustments for tax credits claimed by the taxpayer (for example, under section 50(c)), or to any adjustments for any portion of the basis for which the taxpayer has elected to treat as an expense (for example, under section 179, 179B, or 179C).

(c) *Applicability date.* This section applies to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99, (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

§ 1.163(j)–2 Deduction for business interest expense limited.

(a) *Overview.* This section provides general rules regarding the section 163(j) limitation. Paragraph (b) of this section provides rules regarding the basic computation of the section 163(j) limitation. Paragraph (c) of this section provides rules for disallowed business interest expense carryforwards. Paragraph (d) of this section provides rules regarding the small business exemption from the section 163(j) limitation. Paragraph (e) of this section provides rules regarding real estate mortgage investment conduits (REMICs). Paragraph (f) of this section provides examples illustrating the application of this section. Paragraph (g) of this section provides an anti-avoidance rule.

(b) *General rule.* Except as otherwise provided in this section or in §§ 1.163(j)–3 through 1.163(j)–11, the amount allowed as a deduction for business interest expense for the taxable year cannot exceed the sum of—

(1) The taxpayer's business interest income for the taxable year;

(2) 30 percent of the taxpayer's ATI for the taxable year, or zero if the taxpayer's ATI for the taxable year is less than zero; and

(3) The taxpayer's floor plan financing interest expense for the taxable year.

(c) *Disallowed business interest expense carryforward*—(1) *In general.*

Under section 163(j)(2), any business interest expense disallowed under paragraph (b) of this section, or any disallowed disqualified interest that is properly allocable to a non-excepted trade or business under § 1.163(j)–10, is carried forward to the succeeding taxable year as business interest expense that is subject to paragraph (b) of this section in such succeeding taxable year (a disallowed business interest expense carryforward).

(2) *Coordination with small business exemption.* If disallowed business interest expense is carried forward under the rules of paragraph (c)(1) of this section to a taxable year in which the small business exemption in paragraph (d) of this section applies to the taxpayer, then the general rule in paragraph (b) of this section does not apply to limit the deduction of the disallowed business interest expense carryforward in that taxable year.

(3) *Cross-references*—(i) For special rules regarding disallowed business interest expense carryforwards for taxpayers that are C corporations, including members of a consolidated group, see § 1.163(j)–5.

(ii) For special rules regarding disallowed business interest expense carryforwards of S corporations, see §§ 1.163(j)–5(b)(2) and 1.163(j)–6(l)(5).

(iii) For special rules regarding disallowed business interest expense carryforwards from partnerships, see § 1.163(j)–6.

(iv) For special rules regarding disallowed business interest expense carryforwards from partnerships engaged in a U.S. trade or business, see § 1.163(j)–8(c)(2).

(d) *Small business exemption*—(1) *Exemption.* The general rule in paragraph (b) of this section does not apply to any taxpayer, other than a tax shelter as defined in section 448(d)(3), in any taxable year if the taxpayer meets the gross receipts test of section 448(c) and the regulations thereunder for the taxable year.

(2) *Application of the gross receipts test*—(i) *In general.* In the case of any taxpayer that is not a corporation or a partnership, and except as provided in paragraphs (d)(2)(ii), (iii), and (iv) of this section, the gross receipts test and aggregation rules of section 448(c) and the regulations thereunder are applied in the same manner as if such taxpayer were a corporation or partnership.

(ii) *Gross receipts of individuals.* Except as provided in paragraph (d)(2)(iii) of this section regarding partnership and S corporation interests and when the aggregation rules of section 448(c) apply, an individual taxpayer's gross receipts include all items specified as gross receipts in regulations under section 448(c), whether or not derived in the ordinary course of the taxpayer's trade or business. For purposes of section 163(j), an individual taxpayer's gross receipts do not include inherently personal amounts, including, but not limited to, personal injury awards or settlements with respect to an injury of the individual taxpayer, disability benefits, Social Security benefits received by the taxpayer during the taxable year, and wages received as an employee that are reported on Form W–2.

(iii) *Partners and S corporation shareholders.* Except when the aggregation rules of section 448(c) apply, each partner in a partnership includes a share of partnership gross receipts in proportion to such partner's distributive share (as determined under section 704) of items of gross income that were taken into account by the partnership under section 703. Additionally, each shareholder in an S corporation includes a pro rata share of S corporation gross receipts.

(iv) *Tax-exempt organizations.* For purposes of section 163(j), the gross receipts of an organization subject to tax under section 511 includes only gross receipts taken into account in determining its unrelated business taxable income.

(e) *REMICs.* For the treatment of interest expense by a REMIC as defined in section 860D, see § 1.860C–2(b)(2)(ii).

(f) *Calculation of ATI with respect to certain beneficiaries.* The ATI of a trust or estate beneficiary is reduced by any income (including any distributable net income) received from the trust or estate by the beneficiary to the extent such income supported a deduction for business interest expense under section 163(j)(1)(B) or § 1.163(j)–2(b)(2) in computing the trust or estate's taxable income.

(g) *Examples.* The examples of this paragraph (g) illustrate the application of section 163(j) and the provisions of this section. Unless otherwise indicated, assume the following: X and Y are domestic C corporations; C and D are U.S. resident individuals not subject to any foreign income tax; PRS is a domestic partnership with partners who are all individuals; all taxpayers use a calendar taxable year; the exemption for certain small businesses in section 163(j)(3) and paragraph (d) of this section does not apply; and the interest expense would be deductible but for section 163(j).

(1) *Example 1: Limitation on business interest expense deduction*—(i) *Facts.* During its taxable year ending December 31, 2019, X has ATI of $100x. X has business interest expense of $50x, which includes $10x of floor plan financing interest expense, and business interest income of $20x.

(ii) *Analysis.* X's section 163(j) limitation is $60x, which is the sum of its business interest income ($20x), plus 30 percent of its ATI ($100x × 30 percent = $30x), plus its floor plan financing interest expense ($10x). See § 1.163(j)–2(b). Because X's business interest expense ($50x) does not exceed X's section 163(j) limitation ($60x), X can deduct all $50x of its business interest expense for the 2019 taxable year.

(2) *Example 2: Carryforward of business interest expense*—(i) *Facts.*

The facts are the same as in *Example 1* in paragraph (g)(1)(i) of this section, except that X has $80x of business interest expense, which includes $10x of floor plan financing interest expense.

(ii) *Analysis.* As in *Example 1* in paragraph (g)(1)(ii) of this section, X's section 163(j) limitation is $60x. Because X's business interest expense ($80x) exceeds X's section 163(j) limitation ($60x), X may only deduct $60x of its business interest expense for the 2019 taxable year, and the remaining $20x of its business interest expense will be carried forward to the succeeding taxable year as a disallowed business interest expense carryforward. See § 1.163(j)–2(c).

(3) *Example 3: ATI computation*—(i) *Facts.* During the 2019 taxable year, Y has taxable income of $30x (without regard to the application of section 163(j)), which includes the following: $20x of business interest income; $50x of business interest expense, which includes $10x of floor plan financing interest expense; $25x of net operating loss deduction under section 172; and $15x of depreciation deduction under section 167.

(ii) *Analysis.* (A) For purposes of determining the section 163(j) limitation, Y's ATI is $90x, calculated as follows:

TABLE 1 TO PARAGRAPH (g)(3)(ii)(A)

Taxable income:	$30x
Less:	
Floor plan financing interest	10x
Business interest income	20x
	0x

(B) Plus:

TABLE 1 TO PARAGRAPH (g)(3)(ii)(B)

Business interest expense	$50x
Net operating loss deduction	25x
Depreciation deduction	15x
ATI	90x

(4) *Example 4: Floor plan financing interest expense*—(i) *Facts.* C is the sole proprietor of an automobile dealership that uses a cash method of accounting. In the 2019 taxable year, C paid $30x of interest on a loan that was obtained to purchase sedans for sale by the dealership. The indebtedness is secured by the sedans purchased with the

loan proceeds. In addition, C paid $20x of interest on a loan, secured by the dealership's office equipment, which C obtained to purchase convertibles for sale by the dealership.

(ii) *Analysis.* For the purpose of calculating C's section 163(j) limitation, only the $30x of interest paid on the loan to purchase the sedans is floor plan financing interest expense. The $20x paid on the loan to purchase the convertibles is not floor plan financing interest expense for purposes of section 163(j) because the indebtedness was not secured by the inventory of convertibles. However, because under § 1.163(j)–10 the interest paid on the loan to purchase the convertibles is properly allocable to C's dealership trade or business, and because floor plan financing interest expense is also business interest expense, C has $50x of business interest expense for the 2019 taxable year.

(5) *Example 5: Interest not properly allocable to non-excepted trade or business*—(i) *Facts.* The facts are the same as in *Example 4* in paragraph (g)(4)(i) of this section, except that the $20x of interest C pays is on acquisition indebtedness obtained to purchase C's personal residence and not to purchase convertibles for C's dealership trade or business.

(ii) *Analysis.* Because the $20x of interest expense is not properly allocable to a non-excepted trade or business, and therefore is not business interest expense as defined in § 1.163(j)–1(b)(2), C's only business interest expense is the $30x that C pays on the loan used to purchase sedans for sale in C's dealership trade or business. C deducts the $20x of interest related to his residence under the rules of section 163(h), without regard to section 163(j).

(6) *Example 6: Small business exemption*—(i) *Facts.* During the 2019 taxable year, D, the sole proprietor of a trade or business reported on Schedule C, has interest expense properly allocable to that trade or business. D also earns gross income from providing services as an employee that is reported on a Form W–2. Under section 448(c) and the regulations thereunder, D has average annual gross receipts of $21 million, including $1 million of wages in each of the three prior taxable years and $2 million of income from investments not related to a trade or business in each of the three prior taxable years. Also, in each of the three prior taxable years, D received $5 million in periodic payments of compensatory damages awarded in a personal injury lawsuit.

(ii) *Analysis.* Section 163(j) does not apply to D for the taxable year, because D qualifies for the small business exemption under § 1.163(j)–2(d). The wages that D receives as an employee and the compensatory damages that D received from D's personal injury lawsuit are not gross receipts, as provided in § 1.163(j)–2(d)(2)(ii). D may deduct all of its business interest expense for the 2019 taxable year without regard to section 163(j).

(7) *Example 7: Aggregation of gross receipts*—(i) *Facts.* X and Y are domestic C corporations under common control, within the meaning of section 52(a) and § 1.52–1(b). X's only trade or business is a farming business described in § 1.263A–4(a)(4). During the taxable year ending December 31, 2019, X has average annual gross receipts under section 448(c) of $6 million. During the same taxable year, Y has average annual gross receipts under section 448(c) of $21 million.

(ii) *Analysis.* Because X and Y are under common control, they must aggregate gross receipts for purposes of section 448(c) and the small business exemption in § 1.163(j)–2(d). See section 448(c)(2). Therefore, X and Y are both considered to have $27 million in average annual gross receipts for 2019. X and Y must separately apply section 163(j) to determine any limitation on the deduction for business interest expense. Assuming X otherwise meets the requirements in § 1.163(j)–9 in 2019, X may elect for its farming business to be an excepted trade or business.

(h) *Anti-avoidance rule.* Arrangements entered into with a principal purpose of avoiding the rules of section 163(j) or the section 163(j) regulations, including the use of multiple entities to avoid the gross receipts test of section 448(c), may be disregarded or recharacterized by the Commissioner of the IRS to the extent necessary to carry out the purposes of section 163(j).

(i) *Applicability date.* This section applies to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99, (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

§ 1.163(j)–3 Relationship of business interest deduction limitation to other provisions affecting interest.

(a) *Overview.* This section contains rules regarding the relationship between section 163(j) and certain other provisions of the Code. Paragraph (b) of this section provides the general rules concerning the relationship between section 163(j) and certain other provisions of the Code. Paragraph (c) of this section provides examples illustrating the application of this section. For rules regarding the relationship between sections 163(j) and 704(d), see § 1.163(j)–6(h)(1) and (2).

(b) *Coordination of section 163(j) with certain other provisions*—(1) *In general.* Section 163(j) and the section 163(j) regulations generally apply only to business interest expense that would be deductible in the current taxable year without regard to section 163(j). Except as otherwise provided in this section, section 163(j) applies after the application of provisions that subject interest expense to disallowance, deferral, capitalization, or other limitation. For the rules that must be applied in determining whether excess business interest is paid or accrued by a partner, see section 163(j)(4)(B)(ii) and § 1.163(j)–6.

(2) *Disallowed interest provisions.* For purposes of section 163(j), business interest expense does not include interest expense that is permanently disallowed as a deduction under another provision of the Code, such as in section 163(e)(5)(A)(i), (f), (l), or (m), or section 264(a), 265, 267A, or 279.

(3) *Deferred interest provisions.* Other than sections 461(l), 465, and 469, Code provisions that defer the deductibility of interest expense, such as section 163(e)(3) and (e)(5)(A)(ii), 267(a)(2) and (3), 1277, or 1282, apply before the application of section 163(j). For purposes other than sections 465 and 469, interest expense is taken into account for section 163(j) purposes in the taxable year when it is no longer deferred under another section of the Code.

(4) *At risk rules, passive activity loss provisions, and limitation on excess business losses of noncorporate taxpayers.* Section 163(j) applies before the application of sections 461(l), 465, and 469.

(5) *Capitalized interest expenses under sections 263A and 263(g).* Sections 263A and 263(g) apply before the application of section 163(j). Capitalized interest expense under those sections is not treated as business interest expense for purposes of section 163(j). For ordering rules that determine whether interest expense is capitalized under section 263A(f), see the regulations under section 263A(f), including § 1.263A–9(g).

(6) *Reductions under section 246A.* Section 246A applies before section 163(j). Any reduction in the dividends received deduction under section 246A reduces the amount of business interest expense taken into account under section 163(j).

(7) *Section 381.* Disallowed business interest expense carryforwards are items to which an acquiring corporation succeeds under section 381(a). See section 381(c)(20), and §§ 1.163(j)–5(c) and 1.381(c)(20)–1.

(8) *Section 382.* For rules governing the interaction of sections 163(j) and 382, see section 382(d)(3) and (k)(1),

§§ 1.163(j)–5(e) and 1.163(j)–11(b), the regulations under sections 382 and 383, and §§ 1.1502–91 through 1.1502–99.

(9) *Other types of interest provisions.* Except as otherwise provided in the section 163(j) regulations, provisions that characterize interest expense as something other than business interest expense under section 163(j), such as section 163(d), govern the treatment of that interest expense, and such interest expense will not be treated as business interest expense for any purpose under section 163(j).

(10) [Reserved]

(c) *Examples.* The examples of this paragraph (c) illustrate the application of section 163(j) and the provisions of this section. Unless otherwise indicated, assume the following: X and Y are domestic C corporations with a calendar taxable year; D is a U.S. resident individual not subject to any foreign income tax; none of the taxpayers have floor plan financing interest expense; and the exemption for small businesses in § 1.163(j)–2(d) does not apply.

(1) *Example 1: Disallowed interest expense*—(i) *Facts.* In 2019, X has $30x of interest expense. Of X's interest expense, $10x is permanently disallowed under section 265. X's business interest income is $3x and X's ATI is $90x.

(ii) *Analysis.* Under paragraph (b)(2) of this section, the $10x interest expense that is permanently disallowed under section 265 cannot be taken into consideration for purposes of section 163(j) in the 2019 taxable year. X's section 163(j) limitation, or the amount of business interest expense that X may deduct is limited to $30x under § 1.163(j)–2(b), determined by adding X's business interest income ($3x) and 30 percent of X's 2018 ATI ($27x). Therefore, in the 2019 taxable year, none of the $20x of X's deduction for its business interest expense is disallowed under section 163(j).

(2) *Example 2: Deferred interest expense*—(i) *Facts.* In 2019, Y has no business interest income, $120x of ATI, and $70x of interest expense. Of Y's interest expense, $30x is not currently deductible under section 267(a)(2). Assume that the $30x expense will be allowed as a deduction under section 267(a)(2) in 2020.

(ii) *Analysis.* Under paragraph (b)(3) of this section, section 267(a)(2) is applied before section 163(j). Accordingly, $30x of Y's interest expense cannot be taken into consideration for purposes of section 163(j) in 2019 because it is not currently deductible under section 267(a)(2). Accordingly, in 2019, if the interest expense is properly allocable to a non-excepted trade or business, Y will have $4x of disallowed business interest expense because the $40x of business interest expense in 2019 ($70x − $30x) exceeds 30 percent of its ATI for the taxable year ($36x). The $30x of interest expense not allowed as a deduction in the 2019 taxable year under section 267(a)(2) will be taken into account in determining the business interest expense deduction under section 163(j) in 2020, the taxable year in which it is allowed as a deduction under section 267(a)(2), if it is allocable to a trade or business. Additionally, the $4x of disallowed business interest expense in 2019 will be carried forward to 2020 as a disallowed business interest expense carryforward. See § 1.163(j)–2(c).

(3) *Example 3: Passive activity loss*—(i) *Facts.* D is engaged in a rental activity treated as a passive activity within the meaning of section 469. For tax year 2019, D receives $200x of rental income and incurs $300x of expenses all properly allocable to the rental activity, consisting of $150x of interest expense, $60x of maintenance expenses, and $90x of depreciation expense. D's ATI is $400x.

(ii) *Analysis.* Under paragraph (b)(4) of this section, section 163(j) is applied before the section 469 passive loss rules apply. D's section 163(j) limitation is $120x, determined by adding to D's business interest income ($0), floor plan financing ($0), and 30 percent of D's ATI ($120x). See § 1.163(j)–2(b). Because D's business interest expense of $150x exceeds D's section 163(j) limitation for 2019, $30x of D's business interest expense is disallowed under section 163(j) and will be carried forward as a disallowed business interest expense carryforward. See § 1.163(j)–2(c). Because the section 163(j) limitation is applied before the limitation under section 469, only $120x of the business interest expense allowable under section 163(j) is included in determining D's passive activity loss limitation for the 2019 tax year under section 469. The $30x of disallowed business interest expense is not an allowable deduction under section 163(j) and, therefore, is not a deduction under section 469 in the current taxable year. See § 1.469–2(d)(8).

(4) *Example 4: Passive activity loss by taxpayer that also participates in a non-passive activity*—(i) *Facts.* For 2019, D has no business interest income and ATI of $1,000x, entirely attributable to a passive activity within the meaning of section 469. D has business interest expense of $1,000x, $900x of which is properly allocable to a passive activity and $100x of which is properly allocable to a non-passive activity in which D materially participates. D has other business deductions that are not subject to section 469 of $600x, and a section 469 passive loss from the previous year of $250x.

(ii) *Analysis.* Under paragraph (b)(4) of this section, section 163(j) is applied before the section 469 passive loss rules apply. D's section 163(j) limitation is $300x, determined by adding D's business interest income ($0), floor plan financing ($0), and 30 percent of D's ATI ($300x)). Next, applying the limitation under section 469 to the $300x business interest expense deduction allowable under sections 163(a) and (j), $270x (a proportionate amount of the $300x (0.90 x $300x)) is business interest expense included in determining D's passive activity loss limitation under section 469, and $30x (a proportionate amount of the $300x (0.10 x $300)) is business interest expense not included in determining D's passive activity loss limitation under section 469. Because D's interest expense of $1,000x exceeds 30 percent of its ATI for 2019, $700x of D's interest expense is disallowed under section 163(j) and will be carried forward as a disallowed business interest expense carryforward. Section 469 does not apply to any portion of the $700x disallowed business interest expense because that business interest expense is not an allowable deduction under section 163(j) and, therefore, is not an allowable deduction under section 469 in the current taxable year. See § 1.469–2(d)(8).

(d) *Applicability date.* The provisions of this section apply to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

§ 1.163(j)–4 General rules applicable to C corporations (including REITs, RICs, and members of consolidated groups) and tax-exempt corporations.

(a) *Scope.* This section provides certain rules regarding the computation of items of income and expense under section 163(j) for taxpayers that are C corporations (including members of a consolidated group, REITs, and RICs) and tax-exempt corporations. Paragraph (b) of this section provides rules regarding the characterization of items of income, gain, deduction, or loss. Paragraph (c) of this section provides rules regarding adjustments to earnings and profits. Paragraph (d) of this section provides special rules applicable to members of a consolidated group. Paragraph (e) of this section provides cross-references to other rules within the 163(j) regulations that may be applicable to C corporations.

(b) *Characterization of items of income, gain, deduction, or loss*—(1) *Interest expense and interest income.* Solely for purposes of section 163(j), all interest expense of a taxpayer that is a C corporation is treated as properly allocable to a trade or business. Similarly, solely for purposes of section 163(j), all interest income of a taxpayer that is a C corporation is treated as properly allocable to a trade or business. For rules governing the allocation of interest expense and interest income

between excepted and non-excepted trades or businesses, see § 1.163(j)–10.

(2) *Adjusted taxable income.* Solely for purposes of section 163(j), all items of income, gain, deduction, or loss of a taxpayer that is a C corporation are treated as properly allocable to a trade or business. For rules governing the allocation of tax items between excepted and non-excepted trades or businesses, see § 1.163(j)–10.

(3) *Investment interest, investment income, and investment expenses of a partnership with a C corporation partner*—(i) *Characterization as expense or income properly allocable to a trade or business.* For purposes of section 163(j), any investment interest, within the meaning of section 163(d), that a partnership pays or accrues and that is allocated to a C corporation partner is treated by the C corporation as interest expense that is properly allocable to a trade or business of that partner. Similarly, for purposes of section 163(j), except as provided in § 1.163(j)–7(d)(1)(ii), any investment income or investment expenses, within the meaning of section 163(d), that a partnership receives, pays, or accrues and that is allocated to a C corporation partner is treated by the C corporation as properly allocable to a trade or business of that partner.

(ii) *Impact of characterization on partnership.* The characterization of a partner's investment interest, investment income, or investment expenses pursuant to paragraph (b)(3)(i) of this section will not affect the characterization of these items as investment interest, investment income, or investment expenses at the partnership level.

(iii) *Investment interest expense and investment interest income of a partnership not treated as excess business interest expense or excess taxable income of a C corporation partner.* Investment interest expense of a partnership that is treated as business interest expense by a C corporation partner is not treated as excess business interest expense. Investment interest income of a partnership that is treated as business interest income by a C corporation partner is not treated as excess taxable income. For rules governing excess business interest expense and excess taxable income, see § 1.163(j)–6.

(4) *Application to RICs and REITs*—(i) *In general.* Except as otherwise provided in paragraphs (b)(4)(ii) and (iii) of this section, the rules in this paragraph (b) apply to RICs and REITs.

(ii) *Taxable income for purposes of calculating the adjusted taxable income of RICs and REITs.* The taxable income of a RIC or REIT for purposes of calculating adjusted taxable income (ATI) is the taxable income of the corporation, without any adjustment that would be made under section 852(b)(2) or 857(b)(2) to compute investment company taxable income or real estate investment trust taxable income, respectively. For example, the taxable income of a RIC or REIT is not reduced by the deduction for dividends paid, but is reduced by the dividends received deduction (DRD) and the other deductions described in sections 852(b)(2)(C) and 857(b)(2)(A), taking into account § 1.163(j)–1(b)(37)(ii). See paragraph (b)(4)(iii) of this section for an adjustment to adjusted taxable income in respect of these items.

(iii) *Other adjustments to adjusted taxable income for RICs and REITs.* In the case of a taxpayer that, for a taxable year, is a RIC to which section 852(b) applies or a REIT to which section 857(b) applies, the taxpayer's ATI for the taxable year is increased by the amounts of any deductions described in section 852(b)(2)(C) or 857(b)(2)(A), taking into account § 1.163(j)–1(b)(37)(ii).

(5) *Application to tax-exempt corporations.* The rules in this paragraph (b) apply to a corporation that is subject to the unrelated business income tax under section 511 only with respect to that corporation's items of income, gain, deduction, or loss that are taken into account in computing the corporation's unrelated business taxable income, as defined in section 512.

(6) *Examples.* The principles of this paragraph (b) are illustrated by the following examples. For purposes of the examples in this paragraph (b)(6), T is a taxable domestic C corporation whose taxable year ends on December 31; T is neither a consolidated group member nor a RIC or a REIT; neither T nor PS1, a domestic partnership, owns at least 80 percent of the stock of any corporation; neither T nor PS1 qualifies for the small business exemption in § 1.163(j)–2(d) or is engaged in an excepted trade or business; T has no floor plan financing expense; all interest expense is deductible except for the potential application of section 163(j); and the facts set forth the only corporate or partnership activity.

(i) *Example 1: C corporation items properly allocable to a trade or business*—(A) *Facts.* In taxable year 2019, T's taxable income (without regard to the application of section 163(j)) is $320x. This amount is comprised of the following tax items: $1,000x of revenue from inventory sales; $500x of ordinary and necessary business expenses (excluding interest and depreciation); $200x of interest expense; $50x of interest income; $50x of depreciation deductions under section 168; and a $20x gain on the sale of stock.

(B) *Analysis.* For purposes of section 163(j), each of T's tax items is treated as properly allocable to a trade or business. Thus, T's ATI for the 2019 taxable year is $520x ($320x of taxable income + $200x business interest expense − $50x business interest income + $50x depreciation deductions = $520x), and its section 163(j) limitation for the 2019 taxable year is $206x ($50x of business interest income + 30 percent of its ATI (30 percent × $520x) = $206x). As a result, all $200x of T's interest expense is deductible in the 2019 taxable year under section 163(j).

(C) *Taxable year beginning in 2022.* The facts are the same as in *Example 1* in paragraph (b)(6)(i)(A) of this section, except that the taxable year is 2022 and therefore depreciation deductions are not added back to ATI under § 1.163(j)–1(b)(1)(i)(E). As a result, T's ATI for 2022 is $470x ($320x of taxable income + $200x business interest expense − $50x business interest income = $470x), and its section 163(j) limitation for the 2022 taxable year is $191x ($50x of business interest income + 30 percent of its ATI (30 percent × $470x) = $191x). As a result, T may only deduct $191x of its business interest expense for the taxable year, and the remaining $9x will be carried forward to the 2023 taxable year as a disallowed business interest expense carryforward. See § 1.163(j)–2(c).

(ii) *Example 2: C corporation partner*—(A) *Facts.* T and individual A each own a 50 percent interest in PS1, a general partnership. PS1 borrows funds from a third party (Loan 1) and uses those funds to buy stock in publicly-traded corporation X. PS1's only activities are holding X stock (and receiving dividends) and making payments on Loan 1. In the 2019 taxable year, PS1 receives $150x in dividends and pays $100x in interest on Loan 1.

(B) *Analysis.* For purposes of section 163(d) and (j), PS1 has investment interest expense of $100x and investment income of $150x, and PS1 has no interest expense or interest income that is properly allocable to a trade or business. PS1 allocates its investment interest expense and investment income to its two partners pursuant to § 1.163(j)–6(j). Pursuant to paragraph (b)(3) of this section, T's allocable share of PS1's investment interest expense is treated as a business interest expense of T, and T's allocable share of PS1's investment income is treated as properly allocable to a trade or business of T. This business interest expense is not treated as excess business interest expense, and this income is not treated as excess taxable income. See paragraph (b)(3)(iii) of this section. T's treatment of its allocable share of PS1's investment interest expense and investment income as business interest expense and income properly allocable to a trade or business, respectively, does not affect the character of these items at the PS1 level and does not affect the character of A's allocable share of PS1's investment interest and investment income.

(C) *Partnership engaged in a trade or business.* The facts are the same as in *Example 2* in paragraph (b)(6)(ii)(A) of this

section, except that PS1 also is engaged in Business 1, and PS1 borrows funds from a third party to finance Business 1 (Loan 2). In 2019, Business 1 earns $150x of net income (excluding interest expense and depreciation), and PS1 pays $100x of interest on Loan 2. For purposes of § 1.163–8T, the interest paid on Loan 2 is allocated to a trade or business (and is therefore not treated as investment interest expense under section 163(d)). As a result, PS1 has investment interest expense of $100x (attributable to Loan 1), business interest expense of $100x (attributable to Loan 2), $150x of investment income, and $150x of income from Business 1. PS1's ATI is $150x (its net income from Business 1 excluding interest and depreciation), and its section 163(j) limitation is $45x (30 percent × $150x). Pursuant to § 1.163(j)–6, PS1 has $55x of excess business interest expense ($100x − $45x), half of which ($27.5x) is allocable to T. Additionally, pursuant to paragraph (b)(3)(i) of this section, T's allocable share of PS1's investment interest expense ($50x) is treated as a business interest expense of T for purposes of section 163(j), and T's allocable share of PS1's investment income ($75x) is treated as properly allocable to a trade or business of T. Therefore, with respect to T's interest in PS1, T is treated as having $50x of business interest expense that is not treated as excess business interest expense, $75x of income that is properly allocable to a trade or business, and $27.5x of excess business interest expense.

(c) *Effect on earnings and profits*—(1) *In general.* In the case of a taxpayer that is a C corporation, except as otherwise provided in paragraph (c)(2) of this section, the disallowance and carryforward of a deduction for the taxpayer's business interest expense under § 1.163(j)–2 will not affect whether or when the business interest expense reduces the taxpayer's earnings and profits.

(2) *Special rule for RICs and REITs.* In the case of a taxpayer that is a RIC or a REIT for the taxable year in which a deduction for the taxpayer's business interest expense is disallowed under § 1.163(j)–2(b), or in which the RIC or REIT is allocated any excess business interest expense from a partnership under section 163(j)(4)(B)(i) and § 1.163(j)–6, the taxpayer's earnings and profits are adjusted in the taxable year or years in which the business interest expense is deductible or, if earlier, in the first taxable year for which the taxpayer no longer is a RIC or a REIT.

(3) *Special rule for partners that are C corporations.* If a taxpayer that is a C corporation is allocated any excess business interest expense from a partnership under section 163(j)(4)(B)(i) and § 1.163(j)–6, and if any amount of the excess business interest expense has not yet been treated as business interest expense by the taxpayer at the time of the taxpayer's disposition of all or substantially all of its interest in the partnership, then the taxpayer must increase its earnings and profits by that amount immediately prior to its disposition of the partnership interest.

(4) *Examples.* The principles of this paragraph (c) are illustrated by the following examples. For purposes of the examples in this paragraph (c)(4), except as otherwise provided in the examples, X is a taxable domestic C corporation whose taxable year ends on December 31; X is not a member of a consolidated group; X does not qualify for the small business exemption under § 1.163(j)–2(d); X is not engaged in an excepted trade or business; X has no floor plan financing indebtedness; all interest expense is deductible except for the potential application of section 163(j); X has no accumulated earnings and profits at the beginning of the 2019 taxable year; and the facts set forth the only corporate activity.

(i) *Example 1: Earnings and profits of a taxable domestic C corporation other than a RIC or a REIT*—(A) *Facts.* X is a corporation that does not intend to qualify as a RIC or a REIT for its 2019 taxable year. In that year, X has taxable income (without regard to the application of section 163(j)) of $0, which includes $100x of gross income and $100x of interest expense on a loan from an unrelated third party. X also makes a $100x distribution to its shareholders that year.

(B) *Analysis.* The $100x of interest expense is business interest expense for purposes of section 163(j) (see paragraph (b)(1) of this section). X's ATI in the 2019 taxable year is $100x ($0 of taxable income computed without regard to $100x of business interest expense). Thus, X may deduct $30x of its $100x of business interest expense in the 2019 taxable year under § 1.163(j)–2(b) (30 percent × $100x), and X may carry forward the remainder ($70x) to X's 2020 taxable year as a disallowed business interest expense carryforward under § 1.163(j)–2(c). Although X may not currently deduct all $100x of its business interest expense in the 2019 taxable year, X must reduce its earnings and profits in that taxable year by the full amount of its business interest expense ($100x) in that taxable year. As a result, no portion of X's distribution of $100x to its shareholders in the 2019 taxable year is a dividend within the meaning of section 316(a).

(ii) *Example 2: RIC adjusted taxable income and earnings and profits*—(A) *Facts.* X is a corporation that intends to qualify as a RIC for its 2019 taxable year. In that taxable year, X's only items are $100x of interest income, $50x of dividend income from C corporations that only issue common stock and in which X has less than a twenty percent interest (by vote and value), $10x of net capital gain, and $125x of interest expense. None of the dividends are received on debt financed portfolio stock under section 246A. The DRD determined under section 243(a) with respect to X's $50x of dividend income is $25x. X pays $42x in dividends to its shareholders, meeting the requirements of section 562 during X's 2019 taxable year, including $10x that X reports as capital gain dividends in written statements furnished to X's shareholders.

(B) *Analysis.* (*1*) Under paragraph (b) of this section, all of X's interest expense is considered business interest expense, all of X's interest income is considered business interest income, and all of X's other income is considered to be properly allocable to a trade or business. Under paragraph (b)(4)(ii) of this section, prior to the application of section 163(j), X's taxable income is $10x ($100x business interest income + $50x dividend income + $10x net capital gain − $125x business interest expense − $25x DRD = $10x). Under paragraph (b)(4)(iii) of this section, X's ATI is increased by the DRD. As such, X's ATI for the 2019 taxable year is $60x ($10x taxable income + $125x business interest expense − $100x business interest income + $25x DRD = $60x).

(*2*) X may deduct $118x of its $125x of business interest expense in the 2019 taxable year under section 163(j)(1) ($100x business interest income + (30 percent × $60x of ATI) = $118x), and X may carry forward the remainder ($7x) to X's taxable year ending December 31, 2020. See § 1.163(j)–2(b) and (c).

(*3*) After the application of section 163(j), X has taxable income of $17x ($100x interest income + $50x dividend income + $10x capital gain − $25x DRD − $118x allowable interest expense = $17x) for the 2019 taxable year. X will have investment company taxable income (ICTI) in the amount of $0 ($17x taxable income − $10x capital gain + $25x DRD − $32x dividends paid deduction for ordinary dividends = 0). The excess of X's net capital gain ($10x) over X's dividends paid deduction determined with reference to capital gain dividends ($10x) is also $0.

(*4*) Under paragraph (c)(2) of this section, X will not reduce its earnings and profits by the amount of interest expense disallowed as a deduction in the 2019 taxable year under section 163(j). Thus, X has current earnings and profits in the amount of $42x ($100x interest income + $50x dividend income + $10x capital gain − $118x allowable business interest expense = $42x) before giving effect to dividends paid during the 2019 taxable year.

(iii) *Example 3: Carryforward of disallowed interest expense*—(A) *Facts.* The facts are the same as the facts in Example 2 in paragraph (c)(4)(ii)(A) of this section for the 2019 taxable year. In addition, X has $50x of interest income and $20x of interest expense for the 2020 taxable year.

(B) *Analysis.* Under paragraph (b) of this section, all of X's interest expense is considered business interest expense, all of X's interest income is considered business interest income, and all of X's other income is considered to be properly allocable to a trade or business. Because X's $50x of business interest income exceeds the $20x of business interest expense from the 2020 taxable year and the $7x of disallowed business interest expense carryforward from the 2019 taxable year, X may deduct $27x of business interest expense in the 2020 taxable year. Under paragraph (c)(2) of this section,

X must reduce its current earnings and profits for the 2020 taxable year by the full amount of the deductible business interest expense ($27x).

(iv) *Example 4: REIT adjusted taxable income and earnings and profits*—(A) *Facts.* X is a corporation that intends to qualify as a REIT for its 2019 taxable year. X is not engaged in an excepted trade or business and is not engaged in a trade or business that is eligible to make any election under section 163(j)(7). In that year, X's only items are $100x of mortgage interest income, $30x of dividend income from C corporations that only issue common stock and in which X has less than a ten percent interest (by vote and value) in each C corporation, $10x of net capital gain from the sale of mortgages on real property that is not property described in section 1221(a)(1), and $125x of interest expense. None of the dividends are received on debt financed portfolio stock under section 246A. The DRD determined under section 243(a) with respect to X's $30x of dividend income is $15x. X pays $28x in dividends meeting the requirements of section 562 during X's 2019 taxable year, including $10x that X properly designates as capital gain dividends under section 857(b)(3)(B).

(B) *Analysis.* (*1*) Under paragraph (b) of this section, all of X's interest expense is considered business interest expense, all of X's interest income is considered business interest income, and all of X's other income is considered to be properly allocable to a trade or business. Under paragraph (b)(4)(ii) of this section, prior to the application of section 163(j), X's taxable income is $0 ($100x business interest income + $30x dividend income + $10x net capital gain − $125x business interest expense − $15x DRD = $0). Under paragraph (b)(4)(iii) of this section, X's ATI is increased by the DRD. As such, X's ATI for the 2019 taxable year is $40x ($0 taxable income + $125x business interest expense − $100x business interest income + $15x DRD = $40x).

(*2*) X may deduct $112x of its $125x of business interest expense in the 2019 taxable year under section 163(j)(1) ($100x business interest income + (30 percent × $40x of ATI) = $112x), and X may carry forward the remainder of its business interest expense ($13x) to X's 2020 taxable year.

(*3*) After the application of section 163(j), X has taxable income of $13x ($100x business interest income + $30x dividend income + $10x capital gain − $15x DRD − $112x allowable business interest expense = $13x) for the 2019 taxable year. X will have real estate investment trust taxable income (REITTI) in the amount of $0 ($13x taxable income + $15x of DRD − $28x dividends paid deduction = $0).

(*4*) Under paragraph (c)(2) of this section, X will not reduce earnings and profits by the amount of business interest expense disallowed as a deduction in the 2019 taxable year. Thus, X has current earnings and profits in the amount of $28x ($100x business interest income + $30x dividend income + $10x capital gain − $112x allowable business interest expense = $28x) before giving effect to dividends paid during X's 2019 taxable year.

(v) *Example 5: Carryforward of disallowed interest expense*—(A) *Facts.* The facts are the same as in *Example 4* in paragraph (c)(4)(iv)(A) of this section for the 2019 taxable year. In addition, X has $50x of mortgage interest income and $20x of interest expense for the 2020 taxable year. X has no other tax items for the 2020 taxable year.

(B) *Analysis.* Because X's $50x of business interest income exceeds the $20x of business interest expense from the 2020 taxable year and the $13x of disallowed business interest expense carryforwards from the 2019 taxable year, X may deduct $33x of business interest expense in 2020. Under paragraph (c)(2) of this section, X must reduce its current earnings and profits for 2020 by the full amount of the deductible interest expense ($33x).

(d) *Special rules for consolidated groups*—(1) *Scope.* This paragraph (d) provides certain rules applicable to members of a consolidated group. For all members of a consolidated group for a consolidated return year, the computations required by section 163(j) and the section 163(j) regulations are made in accordance with the rules of this paragraph (d) unless otherwise provided elsewhere in the section 163(j) regulations. For rules governing the carryforward of disallowed business interest expense, including rules governing the treatment of disallowed business interest expense carryforwards when members enter or leave a group, see § 1.163(j)–5.

(2) *Calculation of the section 163(j) limitation for members of a consolidated group*—(i) *In general.* A consolidated group has a single section 163(j) limitation, the absorption of which is governed by § 1.163(j)–5(b)(3)(ii).

(ii) *Interest.* For purposes of determining whether amounts, other than amounts in respect of intercompany obligations, as defined in § 1.1502–13(g)(2)(ii), intercompany items, as defined in § 1.1502–13(b)(2), or corresponding items, as defined in § 1.1502–13(b)(3), are treated as interest within the meaning of § 1.163(j)–1(b)(20), all members of a consolidated group are treated as a single taxpayer.

(iii) *Calculation of business interest expense and business interest income for a consolidated group.* For purposes of calculating the section 163(j) limitation for a consolidated group, the consolidated group's current-year business interest expense (as defined in § 1.163(j)–5(a)(2)(i)) and business interest income, respectively, are the sum of each member's current-year business interest expense and business interest income, including amounts treated as business interest expense and business interest income under paragraph (b)(3) of this section.

(iv) *Calculation of adjusted taxable income.* For purposes of calculating the ATI for a consolidated group, the relevant taxable income is the consolidated group's consolidated taxable income, determined under § 1.1502–11 without regard to any carryforwards or disallowances under section 163(j). Additionally, if for a taxable year a member of a consolidated group is allowed a deduction under section 250(a)(1) that is properly allocable to a non-excepted trade or business, then, for purposes of calculating ATI, consolidated taxable income for the taxable year is determined as if the deduction were not subject to the limitation in section 250(a)(2). For this purpose, the amount of the deduction allowed under section 250(a)(1) is determined without regard to the application of section 163(j) and the section 163(j) regulations. Further, for purposes of calculating the ATI of the group, intercompany items and corresponding items are disregarded to the extent that they offset in amount. Thus, for example, certain portions of the intercompany items and corresponding items of a group member engaged in a non-excepted trade or business will not be included in ATI to the extent that the counterparties to the relevant intercompany transactions are engaged in one or more excepted trades or businesses.

(v) *Treatment of intercompany obligations.* For purposes of determining a member's business interest expense and business interest income, and for purposes of calculating the consolidated group's ATI, all intercompany obligations, as defined in § 1.1502–13(g)(2)(ii), are disregarded. Therefore, interest expense and interest income from intercompany obligations are not treated as business interest expense and business interest income.

(3) *Investment adjustments.* For rules governing investment adjustments within a consolidated group, see § 1.1502–32(b).

(4) *Ownership of partnership interests by members of a consolidated group*—(i) *Dispositions of partnership interests.* The transfer of a partnership interest in an intercompany transaction that does not result in the termination of the partnership is treated as a disposition for purposes of the basis adjustment rule in section 163(j)(4)(B)(iii)(II), regardless of whether the transfer is one in which gain or loss is recognized. See § 1.1502–13 for rules applicable to the redetermination of attributes of group members. A change in status of a member (becoming or ceasing to be a member) is not treated as a disposition

for purposes of section 163(j)(4)(B)(iii)(II).

(ii) *Basis adjustments under § 1.1502–32.* A member's allocation of excess business interest expense from a partnership and the resulting decrease in basis in the partnership interest under section 163(j)(4)(B) is not a noncapital, nondeductible expense for purposes of § 1.1502–32(b)(3)(iii). Additionally, an increase in a member's basis in a partnership interest under section 163(j)(4)(B)(iii)(II) to reflect excess business interest expense not deducted by the consolidated group is not tax-exempt income for purposes of § 1.1502–32(b)(3)(ii). Investment adjustments are made under § 1.1502–32(b)(3)(i) when the excess business interest expense from the partnership is absorbed by the consolidated group. See § 1.1502–32(b).

(iii) [Reserved]

(5) *Examples.* The principles of this paragraph (d) are illustrated by the following examples (see also § 1.1502–13(c)(7)(ii)(R) and (S)). For purposes of the examples in this paragraph (d)(5), S is a member of the calendar-year consolidated group of which P is the common parent; the P group does not qualify for the small business exemption in § 1.163(j)–2(d); no member of the P group is engaged in an excepted trade or business; all interest expense is deductible except for the potential application of section 163(j); and the facts set forth the only corporate activity.

(i) *Example 1: Calculation of the section 163(j) limitation*—(A) *Facts.* In the 2019 taxable year, P has $50x of separate taxable income after taking into account $65x of interest paid on a loan from a third party (without regard to any disallowance under section 163(j)) and $35x of depreciation deductions under section 168. In turn, S has $40x of separate taxable income in the 2019 taxable year after taking into account $10x of depreciation deductions under section 168. S has no interest expense in the 2019 taxable year. The P group's consolidated taxable income for the 2019 taxable year is $90x, determined under § 1.1502–11 without regard to any disallowance under section 163(j).

(B) *Analysis.* As provided in paragraph (b)(1) of this section, P's interest expense is treated as business interest expense for purposes of section 163(j). If P and S were to apply the section 163(j) limitation on a separate-entity basis, then P's ATI would be $150x ($50x + $65x + $35x = $150x), its section 163(j) limitation would be $45x (30 percent × $150x = $45x), and a deduction for $20x of its $65x of business interest expense would be disallowed in the 2019 taxable year under section 163(j). However, as provided in paragraph (d)(2) of this section, the P group computes a single section 163(j) limitation, and that computation begins with the P group's consolidated taxable income (as determined prior to the application of section 163(j)), or $90x. The P group's ATI is $200x ($50x + $40x + $65x + $35x + $10x = $200x). Thus, the P group's section 163(j) limitation for the 2019 taxable year is $60x (30 percent × $200x = $60x). As a result, all but $5x of the P group's business interest expense is deductible in the 2019 taxable year. P carries over the $5x of disallowed business interest expense to the succeeding taxable year.

(ii) *Example 2: Intercompany obligations*—(A) *Facts.* On January 1, 2019, G, a corporation unrelated to P and S, lends P $100x in exchange for a note that accrues interest at a 10 percent annual rate. A month later, P lends $100x to S in exchange for a note that accrues interest at a 12 percent annual rate. In 2019, P accrues and pays $10x of interest to G on P's note, and S accrues and pays $12x of interest to P on S's note. For that year, the P group's only other items of income, gain, deduction, and loss are $40x of income earned by S from the sale of inventory, and a $30x deductible expense arising from P's payment of tort liability claims.

(B) *Analysis.* As provided in paragraph (d)(2)(v) of this section, the intercompany obligation between P and S is disregarded in determining P and S's business interest expense and business interest income and in determining the P group's ATI. For purposes of section 163(j), P has $10x of business interest expense and a $30x deduction for the payment of tort liability claims, and S has $40x of income. The P group's ATI is $10x ($40x − $30x = $10x), and its section 163(j) limitation is $3x (30 percent x $10x = $3x). The P group may deduct $3x of its business interest expense in the 2019 taxable year. A deduction for P's remaining $7x of business interest expense is disallowed in the 2019 taxable year, and this amount is carried forward to the 2020 taxable year.

(e) *Cross-references.* For rules governing the treatment of disallowed business interest expense carryforwards for C corporations, see § 1.163(j)–5. For rules governing the application of section 163(j) to a C corporation or a consolidated group engaged in both excepted and non-excepted trades or businesses, see § 1.163(j)–10.

(f) *Applicability date.* The provisions of this section apply to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

§ 1.163(j)–5 General rules governing disallowed business interest expense carryforwards for C corporations.

(a) *Scope and definitions*—(1) *Scope.* This section provides certain rules regarding disallowed business interest expense carryforwards for taxpayers that are C corporations, including members of a consolidated group. Paragraph (b) of this section provides rules regarding the treatment of disallowed business interest expense carryforwards. Paragraph (c) of this section provides cross-references to other rules regarding disallowed business interest expense carryforwards in transactions to which section 381(a) applies. Paragraph (d) of this section provides rules regarding limitations on disallowed business interest expense carryforwards from separate return limitation years (SRLYs). Paragraph (e) of this section provides cross-references to other rules regarding the application of section 382 to disallowed business interest expense carryforwards. Paragraph (f) of this section provides rules regarding the overlap of the SRLY limitation with section 382.

(2) *Definitions*—(i) *Current-year business interest expense.* The term *current-year business interest expense* means business interest expense (as defined in § 1.163(j)–1(b)(2)) that would be deductible in the current taxable year without regard to section 163(j) and that is not a disallowed business interest expense carryforward (as defined in § 1.163(j)–1(b)(9)) from a prior taxable year.

(ii) *Allocable share of the consolidated group's remaining section 163(j) limitation.* The term *allocable share of the consolidated group's remaining section 163(j) limitation* means, with respect to any member of a consolidated group, the product of the consolidated group's remaining section 163(j) limitation and the member's remaining current-year interest ratio.

(iii) *Consolidated group's remaining section 163(j) limitation.* The term *consolidated group's remaining section 163(j) limitation* means the amount of the consolidated group's section 163(j) limitation calculated pursuant to § 1.163(j)–4(d)(2), reduced by the amount of interest deducted by members of the consolidated group pursuant to paragraph (b)(3)(ii)(C)(*2*) of this section.

(iv) *Remaining current-year interest ratio.* The term *remaining current-year interest ratio* means, with respect to any member of a consolidated group for a particular taxable year, the ratio of the

remaining current-year business interest expense of the member after applying the rule in paragraph (b)(3)(ii)(C)(*2*) of this section, to the sum of the amounts of remaining current-year business interest expense for all members of the consolidated group after applying the rule in paragraph (b)(3)(ii)(C)(*2*) of this section.

(b) *Treatment of disallowed business interest expense carryforwards*—(1) *In general.* The amount of any business interest expense of a C corporation not allowed as a deduction for any taxable year as a result of the limitation under section 163(j)(1) and § 1.163(j)–2(b) is carried forward to the succeeding taxable year as a disallowed business interest expense carryforward under section 163(j)(2) and § 1.163(j)–2(c).

(2) *Deduction of business interest expense.* For a taxpayer that is a C corporation, current-year business interest expense is deducted in the current taxable year before any disallowed business interest expense carryforwards from a prior taxable year are deducted in that year. Disallowed business interest expense carryforwards are deducted in the order of the taxable years in which they arose, beginning with the earliest taxable year, subject to certain limitations (for example, the limitation under section 382). For purposes of section 163(j), disallowed disqualified interest is treated as carried forward from the taxable year in which a deduction was disallowed under old section 163(j).

(3) *Consolidated groups*—(i) *In general.* A consolidated group's disallowed business interest expense carryforwards for the current consolidated return year (the current year) are the carryforwards from the group's prior consolidated return years plus any carryforwards from separate return years.

(ii) *Deduction of business interest expense*—(A) *General rule.* All current-year business interest expense of members of a consolidated group is deducted in the current year before any disallowed business interest expense carryforwards from prior taxable years are deducted in the current year. Disallowed business interest expense carryforwards from prior taxable years are deducted in the order of the taxable years in which they arose, beginning with the earliest taxable year, subject to the limitations described in this section.

(B) *Section 163(j) limitation is equal to or exceeds the current-year business interest expense and disallowed business interest expense carryforwards from prior taxable years.* If a consolidated group's section 163(j) limitation for the current year is equal to or exceeds the aggregate amount of its members' current-year business interest expense and disallowed business interest expense carryforwards from prior taxable years that are available for deduction, then none of the current-year business interest expense or disallowed business interest expense carryforwards will be subject to disallowance in the current year under section 163(j). However, a deduction for the members' business interest expense may be subject to limitation under other provisions of the Code or the regulations promulgated thereunder (see, for example, paragraphs (c), (d), (e), and (f) of this section).

(C) *Current-year business interest expense and disallowed business interest expense carryforwards exceed section 163(j) limitation.* If the aggregate amount of members' current-year business interest expense and disallowed business interest expense carryforwards from prior taxable years exceeds the consolidated group's section 163(j) limitation for the current year, then the following rules apply in the order provided.

(*1*) The group first determines whether its section 163(j) limitation for the current year equals or exceeds the aggregate amount of the members' current-year business interest expense.

(*i*) If the group's section 163(j) limitation for the current year equals or exceeds the aggregate amount of the members' current-year business interest expense, then no amount of the group's current-year business interest expense will be subject to disallowance in the current year under section 163(j). Once the group has taken into account its members' current-year business interest expense, the group applies the rules of paragraph (b)(3)(ii)(C)(*4*) of this section.

(*ii*) If the aggregate amount of members' current-year business interest expense exceeds the group's section 163(j) limitation for the current year, then the group applies the rule in paragraph (b)(3)(ii)(C)(*2*) of this section.

(*2*) If this paragraph (b)(3)(ii)(C)(*2*) applies (see paragraph (b)(3)(ii)(C)(*1*)(*ii*) of this section), then each member with current-year business interest expense and with current-year business interest income or floor plan financing interest deducts current-year business interest expense in an amount that does not exceed the sum of the member's business interest income and floor plan financing interest expense for the current year.

(*3*) After applying the rule in paragraph (b)(3)(ii)(C)(*2*) of this section, if the group has any section 163(j) limitation remaining for the current year, then each member with remaining current-year business interest expense deducts a portion of its expense based on its allocable share of the consolidated group's remaining section 163(j) limitation.

(*4*) If this paragraph (b)(3)(ii)(C)(*4*) applies (see paragraph (b)(3)(ii)(C)(*1*)(*i*) of this section), and if the group has any section 163(j) limitation remaining for the current year after applying the rules in paragraph (b)(3)(ii)(C)(*1*) of this section, then disallowed business interest expense carryforwards permitted to be deducted in the current year will be deducted in the order of the taxable years in which they arose, beginning with the earliest taxable year. Disallowed business interest expense carryforwards from taxable years ending on the same date that are available to offset consolidated taxable income for the current year generally will be deducted on a pro rata basis, under the principles of paragraph (b)(3)(ii)(C)(*3*) of this section. For example, assume that P and S are the only members of a consolidated group with a section 163(j) limitation for the current year (Year 2) of $200x; the amount of current-year business interest expense deducted in Year 2 is $100x; and P and S, respectively, have $140x and $60x of disallowed business interest expense carryforwards from Year 1 that are not subject to limitation under paragraph (c), (d), or (e) of this section. Under these facts, P would be allowed to deduct $70x of its carryforwards from Year 1 ($100x × ($140x/($60x + $140x)) = $70x), and S would be allowed to deduct $30x of its carryforwards from Year 1 ($100x × ($60x/($60x + $140x)) = $30x). But see § 1.383–1(d)(1)(ii), providing that, if losses subject to and not subject to the section 382 limitation are carried from the same taxable year, losses subject to the limitation are deducted before losses not subject to the limitation.

(*5*) Each member with remaining business interest expense after applying the rules of this paragraph (b)(3)(ii), taking into account the limitations in paragraphs (c), (d), (e), and (f) of this section, will carry the expense forward to the succeeding taxable year as a disallowed business interest expense carryforward under section 163(j)(2) and § 1.163(j)–2(c).

(iii) *Departure from group.* If a corporation ceases to be a member during a consolidated return year, the corporation's current-year business interest expense from the taxable period ending on the day of the corporation's change in status as a member, as well as the corporation's disallowed business interest expense carryforwards from prior taxable years that are available to

offset consolidated taxable income in the consolidated return year, are first made available for deduction during that consolidated return year. See § 1.1502–76(b)(1)(i); see also § 1.1502–36(d) (regarding reductions of deferred deductions on the transfer of loss shares of subsidiary stock). Only the amount that is neither deducted by the group in that consolidated return year nor otherwise reduced under the Code or regulations may be carried to the corporation's first separate return year after its change in status.

(iv) *Example: Deduction of interest expense*—(A) *Facts.* (1) P wholly owns A, which is a member of the consolidated group of which P is the common parent. P and A each borrow money from Z, an unrelated third party. The business interest expense of P and A in Years 1, 2, and 3, and the P group's section 163(j) limitation for those years, are as follows:

TABLE 1 TO PARAGRAPH (b)(3)(iv)(A)(*1*)

Year	P's business interest expense	A's business interest expense	P group's section 163(j) limitation
1	$150x	$50x	$100x
2	60x	90x	120x
3	25x	50x	185x

(*2*) P and A have neither business interest income nor floor plan financing interest expense in Years 1, 2, and 3. Additionally, the P group is neither eligible for the small business exemption in § 1.163(j)–2(d) nor engaged in an excepted trade or business within the meaning of § 1.163(j)–1(b)(38)(ii).

(B) *Analysis*—(*1*) *Year 1.* In Year 1, the aggregate amount of the P group members' current-year business interest expense ($150x + $50x) exceeds the P group's section 163(j) limitation ($100x). As a result, the rules of paragraph (b)(3)(ii)(C) of this section apply. Because the P group members' current-year business interest expense exceeds the group's section 163(j) limitation for Year 1, P and A must apply the rule in paragraph (b)(3)(ii)(C)(*2*) of this section. Pursuant to paragraph (b)(3)(ii)(C)(*2*) of this section, each of P and A must deduct its current-year business interest expense to the extent of its business interest income and floor plan financing interest expense. Neither P nor A has business interest income or floor plan financing interest expense in Year 1. Next, pursuant to paragraph (b)(3)(ii)(C)(*3*) of this section, each of P and A must deduct a portion of its current-year business interest expense based on its allocable share of the consolidated group's remaining section 163(j) limitation ($100x). P's allocable share is $75x ($100x × ($150x/$200x) = $75x), and A's allocable share is $25x ($100x × ($50x/$200x) = $25x). Accordingly, in Year 1, P deducts $75x of its current-year business interest expense, and A deducts $25x of its current-year business interest expense. P has a disallowed business interest expense carryforward from Year 1 of $75x ($150x − $75x = $75x), and A has a disallowed business interest expense carryforward from Year 1 of $25x ($50x − $25x = $25x).

(*2*) *Year 2.* In Year 2, the aggregate amount of the P group members' current-year business interest expense ($60x + $90x) and disallowed business interest expense carryforwards ($75x + $25x) exceeds the P group's section 163(j) limitation ($120x). As a result, the rules of paragraph (b)(3)(ii)(C) of this section apply. Because the P group members' current-year business interest expense exceeds the group's section 163(j) limitation for Year 2, P and A must apply the rule in paragraph (b)(3)(ii)(C)(*2*) of this section. Pursuant to paragraph (b)(3)(ii)(C)(*2*) of this section, each of P and A must deduct its current-year business interest expense to the extent of its business interest income and floor plan financing interest expense. Neither P nor A has business interest income or floor plan financing interest expense in Year 2. Next, pursuant to paragraph (b)(3)(ii)(C)(*3*) of this section, each of P and A must deduct a portion of its current-year business interest expense based on its allocable share of the consolidated group's remaining section 163(j) limitation ($120x). P's allocable share is $48x (($120x × ($60x/$150x)) = $48x), and A's allocable share is $72x (($120x × ($90x/$150x)) = $72x). Accordingly, in Year 2, P deducts $48x of current-year business interest expense, and A deducts $72x of current-year business interest expense. P has a disallowed business interest expense carryforward from Year 2 of $12x ($60x − $48x = $12x), and A has a disallowed business interest expense carryforward from Year 2 of $18x ($90x − $72x = $18x). Additionally, because the P group has no section 163(j) limitation remaining after deducting current-year business interest expense in Year 2, the full amount of P and A's disallowed business interest expense carryforwards from Year 1 ($75x and $25x, respectively) also are carried forward to Year 3. As a result, at the beginning of Year 3, P and A's respective disallowed business interest expense carryforwards are as follows:

TABLE 1 TO PARAGRAPH (b)(3)(iv)(B)(*2*)

	Year 1 disallowed business interest expense carryforwards	Year 2 disallowed business interest expense carryforwards	Total disallowed business interest expense carryforwards
P	$75x	$12x	$87x
A	*25x*	*18x*	*43x*
Total	100x	30x	130x

(*3*) *Year 3.* In Year 3, the aggregate amount of the P group members' current-year business interest expense ($25x + $50x = $75x) and disallowed business interest expense carryforwards ($130x) exceeds the P group's section 163(j) limitation ($185x). As a result, the rules of paragraph (b)(3)(ii)(C) of this section apply. Because the P group's section 163(j) limitation for Year 3 equals or exceeds the P group members' current-year business interest expense, no amount of the members' current-year business interest expense will be subject to disallowance under section 163(j) (see paragraph (b)(3)(ii)(C)(*1*) of this section). After each of P and A deducts its current-year business interest expense, the P group has $110x of section 163(j) limitation remaining for Year 3 ($185x − $25x − $50x = $110x). Next, pursuant to paragraph (b)(3)(ii)(C)(*4*) of this section, $110x of disallowed business interest expense carryforwards are deducted on a pro rata basis, beginning with carryforwards from Year 1. Because the total amount of carryforwards from Year 1 ($100x) is less than the section 163(j) limitation remaining after the deduction of Year 3 business interest expense ($110x), all of the Year 1 carryforwards are deducted in Year 3. After current-year business interest expense and Year 1 carryforwards are deducted, the P group's remaining section 163(j) limitation in Year 3 is $10x. Because the Year 2 carryforwards ($30x) exceed the remaining section 163(j) limitation ($10x), under paragraph (b)(3)(ii)(C)(*4*) of this section, each

of P and A will deduct a portion of its Year 2 carryforwards based on its allocable share of the consolidated group's remaining section 163(j) limitation. P's allocable share is $4x (($10x x ($12x/$30x)) = $4x), and A's allocable share is $6x (($10x x ($18x/$30x)) = $6x). Accordingly, P and A may deduct $4x and $6x, respectively, of their Year 2 carryforwards. For Year 4, P and A have $8x and $12x of disallowed business interest expense carryforwards from Year 2, respectively.

(c) *Disallowed business interest expense carryforwards in transactions to which section 381(a) applies.* For rules governing the application of section 381(c)(20) to disallowed business interest expense carryforwards, including limitations on an acquiring corporation's use of the disallowed business interest expense carryforwards of the transferor or distributor corporation in the acquiring corporation's first taxable year ending after the date of distribution or transfer, see § 1.381(c)(20)–1.

(d) *Limitations on disallowed business interest expense carryforwards from separate return limitation years*—(1) *General rule.* Except as provided in paragraph (f) of this section (relating to an overlap with section 382), the disallowed business interest expense carryforwards of a member arising in a separate return limitation year (or SRLY (see § 1.1502–1(f))) that are included in the consolidated group's business interest expense deduction for any taxable year under paragraph (b) of this section may not exceed the group's section 163(j) limitation for that year, determined by reference only to the member's items of income, gain, deduction, and loss for that year (section 163(j) SRLY limitation). For purposes of this paragraph (d), the SRLY subgroup principles of § 1.1502–21(c)(2) apply with appropriate adjustments.

(2) *Deduction of disallowed business interest expense carryforwards arising in a SRLY.* Notwithstanding paragraph (d)(1) of this section, disallowed business interest expense carryforwards of a member arising in a SRLY are available for deduction by the consolidated group in the current year only to the extent the group has any remaining section 163(j) limitation for the current year after the deduction of current-year business interest expense and disallowed business interest expense carryforwards from earlier taxable years that are permitted to be deducted in the current year (see paragraph (b)(3)(ii)(A) of this section), and only to the extent the section 163(j) SRLY limitation for the current year exceeds the amount of the member's business interest expense already deducted by the group in that year under paragraph (b)(3)(ii) of this section. SRLY-limited disallowed business interest expense carryforwards are deducted on a pro rata basis (under the principles of paragraph (b)(3)(ii)(C)(*3*) of this section) with non-SRLY limited disallowed business interest expense carryforwards from taxable years ending on the same date.

(3) *Examples.* The principles of this paragraph (d) are illustrated by the following examples. For purposes of the examples in this paragraph (d)(3), unless otherwise stated, P, R, S, and T are taxable domestic C corporations that are not regulated investment companies (RICs) or real estate investment trusts (REITs) and that file their tax returns on a calendar-year basis; none of P, R, S, or T qualifies for the small business exemption under section 163(j)(3) or is engaged in an excepted trade or business; all interest expense is deductible except for the potential application of section 163(j); and the facts set forth the only corporate activity.

(i) *Example 1: Determination of SRLY limitation*—(A) *Facts.* Individual A owns P. In 2019, A forms T, which pays or accrues a $100x business interest expense for which a deduction is disallowed under section 163(j) and that is carried forward to 2020. P does not pay or accrue business interest expense in 2019, and P has no disallowed business interest expense carryforwards from prior taxable years. At the close of 2019, P acquires all of the stock of T, which joins with P in filing a consolidated return beginning in 2020. Neither P nor T pays or accrues business interest expense in 2020, and the P group has a section 163(j) limitation of $300x in that year. This limitation would be $70x if determined by reference solely to T's items for 2020.

(B) *Analysis.* T's $100x of disallowed business interest expense carryforwards from 2019 arose in a SRLY. P's acquisition of T was not an ownership change as defined by section 382(g); thus, T's disallowed business interest expense carryforwards are subject to the SRLY limitation in paragraph (d)(1) of this section. The section 163(j) SRLY limitation for 2020 is the P group's section 163(j) limitation, determined by reference solely to T's items for 2020 ($70x). See paragraph (d)(1) of this section. Thus, $70x of T's disallowed business interest expense carryforwards are available to be deducted by the P group in 2020, and the remaining $30x of T's disallowed business interest expense carryforwards are carried forward to 2021.

(C) *Section 163(j) limitation of $0.* The facts are the same as in paragraph (A) of this *Example 1,* except that the section 163(j) SRLY limitation for 2020 (computed by reference solely to T's items for that year) is $0. Because the amount of T's disallowed business interest expense carryforwards that may be deducted by the P group in 2020 may not exceed the section 163(j) SRLY limitation for that year, none of T's carryforwards from 2019 may be deducted by the P group in 2020.

(ii) *Example 2: Deduction of disallowed business interest expense carryforwards arising in a SRLY*—(A) *Facts.* P and S are the only members of a consolidated group. P has neither current-year business interest expense nor disallowed business interest expense carryforwards. S has $100x of disallowed business interest expense carryforwards that arose in a SRLY and $150x of current-year business interest. The section 163(j) SRLY limitation for the current year (computed by reference solely to S's items for that year) is $200x. Assume that the P group's section 163(j) limitation for the current year would permit all of S's current-year business interest expense and disallowed business interest expense carryforwards to be deducted in the current year but for the rules of this paragraph (d).

(B) *Analysis.* Under paragraph (d)(1) of this section, the section 163(j) SRLY limitation for the current year of $200x (computed by reference solely to S's items for that year) exceeds the amount of S's business interest expense taken into account by the P group in the current year under paragraph (b)(3)(ii) of this section ($150x) by $50x. Thus, $50x of S's disallowed business interest expense carryforwards that arose in a SRLY may be taken into account by the P group in the current year.

(e) *Application of section 382*—(1) *Pre-change loss.* For rules governing the treatment of a disallowed business interest expense as a pre-change loss for purposes of section 382, see §§ 1.382–2(a) and 1.382–6. For rules governing the application of section 382 to disallowed disqualified interest carryforwards, see § 1.163(j)–11(b)(4).

(2) *Loss corporation.* For rules governing when a disallowed business interest expense causes a corporation to be a loss corporation within the meaning of section 382(k)(1), see § 1.382–2(a). For the application of section 382 to disallowed disqualified interest carryforwards, see § 1.163(j)–11(b)(4).

(3) *Ordering rules for utilization of pre-change losses and for absorption of the section 382 limitation.* For ordering rules for the utilization of disallowed business interest expense, net operating losses, and other pre-change losses, and for the absorption of the section 382 limitation, see § 1.383–1(d).

(4) *Disallowed business interest expense from the pre-change period in the year of a testing date.* For rules governing the treatment of disallowed business interest expense from the pre-change period (within the meaning of § 1.382–6(g)(2)) in the year of a testing date, see § 1.382–2.

(f) *Overlap of SRLY limitation with section 382.* The limitation provided in paragraph (d) of this section does not apply to disallowed business interest expense carryforwards when the

application of paragraph (d) of this section results in an overlap with the application of section 382. For purposes of applying this paragraph (f), the principles of § 1.1502–21(g) apply with appropriate adjustments.

(g) *Additional limitations.* Additional rules provided under the Code or regulations also apply to limit the use of disallowed business interest expense carryforwards. For rules governing the relationship between section 163(j) and other provisions affecting the deductibility of interest, see § 1.163(j)–3.

(h) *Applicability date.* This section applies to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

§ 1.163(j)–6 Application of the business interest deduction limitation to partnerships and subchapter S corporations.

(a) *Overview.* If a deduction for business interest expense of a partnership or S corporation is subject to limitation under section 163(j), section 163(j)(4) provides that the section 163(j) limitation applies at the partnership or S corporation level and any deduction for business interest expense within the meaning of section 163(j) is taken into account in determining the nonseparately stated taxable income or loss of the partnership or S corporation. Once a partnership or S corporation determines its business interest expense, business interest income, ATI, and floor plan financing interest expense, the partnership or S corporation calculates its section 163(j) limitation by applying the rules of § 1.163(j)–2(b) and this section. Paragraph (b) of this section provides definitions used in this section. Paragraph (c) of this section provides rules regarding the character of a partnership's deductible business interest expense and excess business interest expense. Paragraph (d) of this section provides rules regarding the calculation of a partnership's ATI and floor plan financing interest expense. Paragraph (e) of this section provides rules regarding a partner's ATI and business interest income. Paragraph (f) of this section provides an eleven-step computation necessary for properly allocating a partnership's deductible business interest expense and section 163(j) excess items to its partners. Paragraph (g) of this section applies carryforward rules at the partner level if a partnership has excess business interest expense, as defined in § 1.163(j)–1(b)(14). Paragraph (h) of this section provides basis adjustment rules and paragraph (j) of this section provides rules regarding investment items of a partnership. Paragraph (l) of this section provides rules regarding S corporations. Paragraph (m) of this section provides rules for partnerships and S corporations not subject to section 163(j). Paragraph (o) of this section provides examples illustrating the rules of this section. Paragraph (p) provides the applicability date of the rules in this section.

(b) *Definitions.* In addition to the definitions contained in § 1.163(j)–1, the following definitions apply for purposes of this section.

(1) *Section 163(j) items.* The term *section 163(j) items* means the partnership or S corporation's business interest expense, business interest income, and items comprising ATI, as defined in § 1.163(j)–1(b)(1).

(2) *Partner basis items.* The term *partner basis items* means any items of income, gain, loss, or deduction resulting from either an adjustment to the basis of partnership property used in a non-excepted trade or business made pursuant to section 743(b) or the operation of section 704(c)(1)(C)(i) with respect to such property. Partner basis items also include section 743(b) basis adjustments used to increase or decrease a partner's share of partnership gain or loss on the sale of partnership property used in a non-excepted trade or business (as described in § 1.743–1(j)(3)(i)) and amounts resulting from the operation of section 704(c)(1)(C)(i) used to decrease a partner's share of partnership gain or increase a partner's share of partnership loss on the sale of such property.

(3) *Remedial items.* The term *remedial items* means any allocation to a partner of remedial items of income, gain, loss, or deduction pursuant to section 704(c) and § 1.704–3(d).

(4) *Excess business interest income.* The term *excess business interest income* means the amount by which a partnership's or S corporation's business interest income exceeds its business interest expense in a taxable year.

(5) *Deductible business interest expense.* The term *deductible business interest expense* means the amount of a partnership's or S corporation's business interest expense that is deductible under section 163(j) in the current taxable year following the application of the limitation contained in § 1.163(j)–2(b).

(6) *Section 163(j) excess items.* The term *section 163(j) excess items* means the partnership's excess business interest expense, excess taxable income, and excess business interest income.

(7) *Non-excepted assets.* The term *non-excepted assets* means assets from a trade or business other than assets from an excepted regulated utility trade or business, electing farming business, or electing real property trade or business, as such terms are defined in § 1.163(j)–1.

(8) *Excepted assets.* The term *excepted assets* means assets from an excepted regulated utility trade or business, electing farming business, or electing real property trade or business, as such terms are defined in § 1.163(j)–1.

(c) *Character of business interest expense.* If a partnership has deductible business interest expense, such deductible business interest expense is not subject to any additional application of section 163(j) at the partner-level because it is taken into account in determining the nonseparately stated taxable income or loss of the partnership. For all other purposes of the Code, however, deductible business interest expense and excess business interest expense retain their character as business interest expense at the partner-level. For example, for purposes of section 469, such business interest expense retains its character as either passive or non-passive in the hands of the partner. Additionally, for purposes of section 469, deductible business interest expense and excess business interest expense from a partnership remain interest derived from a trade or business in the hands of a partner even if the partner does not materially participate in the partnership's trade or business activity. For additional rules regarding the interaction between sections 465, 469, and 163(j), see § 1.163(j)–3.

(d) *Adjusted taxable income of the partnership*—(1) *Modification of adjusted taxable income for partnerships.* The ATI of the partnership generally is determined in accordance with § 1.163(j)–1(b)(1). For purposes of computing the partnership's ATI, the taxable income of the partnership is determined under section 703(a) and includes any items described

in section 703(a)(1) to the extent such items are otherwise included under § 1.163(j)–1(b)(1).

(2) *Section 734(b), partner basis items, and remedial items.* A partnership takes into account items resulting from adjustments made to the basis of its property pursuant to section 734(b) for purposes of calculating its ATI pursuant to § 1.163(j)–1(b)(1). However, partner basis items and remedial items are not taken into account in determining a partnership's ATI under § 1.163(j)–1(b)(1). Instead, partner basis items and remedial items are taken into account by the partner in determining the partner's ATI pursuant to § 1.163(j)–1(b)(1). See *Example 8* in paragraph (o)(8) of this section.

(e) *Adjusted taxable income and business interest income of partners*—(1) *Modification of adjusted taxable income for partners.* The ATI of a partner in a partnership generally is determined in accordance with § 1.163(j)–1(b)(1) without regard to such partner's distributive share of any items of income, gain, deduction, or loss of such partnership, and is increased by such partner's distributive share of such partnership's excess taxable income determined under paragraph (f) of this section. For rules regarding corporate partners, see § 1.163(j)–4(b)(3).

(2) *Partner basis items and remedial items.* Partner basis items and remedial items are taken into account as items derived directly by the partner in determining the partner's ATI for purposes of the partner's section 163(j) limitation. If a partner is allocated remedial items, such partner's ATI is increased or decreased by the amount of such items. Additionally, to the extent a partner is allocated partner basis items, such partner's ATI is increased or decreased by the amount of such item. See *Example 8* in paragraph (o)(8) of this section.

(3) *Disposition of partnership interests.* If a partner recognizes gain or loss upon the disposition of interests in a partnership, and the partnership in which the interest is being disposed owns only non-excepted trade or business assets, the gain or loss on the disposition of the partnership interest is included in the partner's ATI. For dispositions of interests in partnerships that own:

(i) Non-excepted assets and excepted assets; or

(ii) Investment assets; or

(iii) Both. See § 1.163(j)–10(b)(4)(ii).

(4) *Double counting of business interest income and floor plan financing interest expense prohibited.* For purposes of calculating a partner's section 163(j) limitation, the partner does not include—

(i) Business interest income from a partnership that is subject to section 163(j) except to the extent it is allocated excess business interest income from that partnership pursuant to paragraph (f)(2) of this section; and

(ii) The partner's allocable share of the partnership's floor plan financing interest expense because such floor plan financing interest expense has already been taken into account by the partnership in determining its nonseparately stated taxable income or loss for purposes of section 163(j).

(f) *Allocation and determination of section 163(j) excess items made in the same manner as nonseparately stated taxable income or loss of the partnership*—(1) *Overview*—(i) *In general.* The purpose of this section is to provide guidance regarding how a partnership must allocate its deductible business interest expense and section 163(j) excess items, if any, among its partners. For purposes of section 163(j)(4) and this section, allocations and determinations of deductible business interest expense and section 163(j) excess items are considered made in the same manner as the nonseparately stated taxable income or loss of the partnership if, and only if, such allocations and determinations are made in accordance with the eleven-step computation set forth in paragraphs (f)(2)(i) through (xi) of this section. A partnership first determines its section 163(j) limitation, total amount of deductible business interest expense, and section 163(j) excess items under paragraph (f)(2)(i) of this section. The partnership then applies paragraphs (f)(2)(ii) through (xi) of this section, in that order, to determine how those items of the partnership are allocated among its partners. At the conclusion of the eleven-step computation set forth in paragraphs (f)(2)(i) through (xi) of this section, the total amount of deductible business interest expense and section 163(j) excess items allocated to each partner will equal the partnership's total amount of deductible business interest expense and section 163(j) excess items.

(ii) *Relevance solely for purposes of section 163(j).* No rule set forth in paragraph (f)(2) of this section prohibits a partnership from making an allocation to a partner of any item of partnership income, gain, loss, or deduction that is otherwise permitted under section 704 and the regulations thereunder. Accordingly, any calculations in paragraphs (f)(2)(i) through (xi) of this section are solely for the purpose of determining each partner's deductible business interest expense and section 163(j) excess items, and do not otherwise affect any other provision under the Code, such as section 704(b). Additionally, floor plan financing interest expense is not allocated in accordance with paragraph (f)(2) of this section. Instead, floor plan financing interest expense of a partnership is allocated to its partners under section 704(b) and is taken into account as a nonseparately stated item of loss for purposes of section 163(j).

(2) *Steps for allocating deductible business interest expense and section 163(j) excess items*—(i) *Partnership-level calculation required by section 163(j)(4)(A).* First, a partnership must determine its section 163(j) limitation pursuant to § 1.163(j)–2(b). This calculation determines a partnership's total amounts of excess business interest income, excess taxable income, excess business interest expense (that is, the partnership's section 163(j) excess items), and deductible business interest expense under section 163(j) for a taxable year.

(ii) *Determination of each partner's relevant section 163(j) items.* Second, a partnership must determine each partner's allocable share of each section 163(j) item under section 704(b) and the regulations thereunder including any allocations under section 704(c), other than remedial items as defined in paragraph (b)(3) of this section. Only section 163(j) items that were actually taken into account in the partnership's section 163(j) calculation under paragraph (f)(2)(i) of this section are taken into account for purposes of this paragraph (f)(2)(ii). Partner basis items, allocations of investment income and expense, remedial items, and amounts determined for the partner under § 1.163(j)–8T are not taken into account for purposes of this paragraph (f)(2)(ii). For purposes of paragraphs (f)(2)(ii) through (xi) of this section, the term *allocable ATI* means a partner's distributive share of the partnership's ATI (*i.e.,* a partner's distributive share of gross income and gain items comprising ATI less such partner's distributive share of gross loss and deduction items comprising ATI), the term *allocable business interest income* means a partner's distributive share of the partnership's business interest income, and the term *allocable business interest expense* means a partner's distributive share of the partnership's business interest expense that is not floor plan financing interest expense.

(iii) *Partner-level comparison of business interest income and business interest expense.* Third, a partnership must compare each partner's allocable business interest income to such

partner's allocable business interest expense. Paragraphs (f)(2)(iii) through (v) of this section determine how a partnership must allocate its excess business interest income among its partners, as well as the amount of each partner's allocable business interest expense that is not deductible business interest expense after taking the partnership's business interest income into account. To the extent a partner's allocable business interest income exceeds its allocable business interest expense, the partner has an *allocable business interest income excess.* The aggregate of all the partners' allocable business interest income excess amounts is the *total allocable business interest income excess.* To the extent a partner's allocable business interest expense exceeds its allocable business interest income, the partner has an *allocable business interest income deficit.* The aggregate of all the partners' allocable business interest income deficit amounts is the *total allocable business interest income deficit.* These amounts are required to perform calculations in paragraphs (f)(2)(iv) and (v) of this section, which appropriately reallocate allocable business interest income excess to partners with allocable business interest income deficits in order to reconcile the partner-level calculation under paragraph (f)(2)(iii) of this section with the partnership-level result under paragraph (f)(2)(i) of this section.

(iv) *Matching partnership and aggregate partner excess business interest income.* Fourth, a partnership must determine each partner's final allocable business interest income excess. A partner's *final allocable business interest income excess* is determined by reducing, but not below zero, such partner's allocable business interest income excess (if any) by the partner's step four adjustment amount. A partner's *step four adjustment amount* is the product of the total allocable business interest income deficit and the ratio of such partner's allocable business interest income excess to the total allocable business interest income excess. The rules of this paragraph (f)(2)(iv) ensure that, following the application of paragraph (f)(2)(xi) of this section, the aggregate of all the partners' allocations of excess business interest income equals the total amount of the partnership's excess business interest income as determined in paragraph (f)(2)(i) of this section.

(v) *Remaining business interest expense determination.* Fifth, a partnership must determine each partner's remaining business interest expense. A partner's *remaining business interest expense* is calculated by reducing, but not below zero, such partner's allocable business interest income deficit (if any) by such partner's step five adjustment amount. A partner's *step five adjustment amount* is the product of the total allocable business interest income excess and the ratio of such partner's allocable business interest income deficit to the total allocable business interest income deficit. Generally, a partner's remaining business interest expense is a partner's allocable business interest income deficit adjusted to reflect a reallocation of allocable business interest income excess from other partners. Determining a partner's remaining business interest expense is necessary to perform an ATI calculation that begins in paragraph (f)(2)(vii) of this section.

(vi) *Determination of final allocable ATI.* Sixth, a partnership must determine each partner's final allocable ATI. Paragraphs (f)(2)(vi) through (x) of this section determine how a partnership must allocate its excess taxable income and excess business interest expense among its partners.

(A) *Positive allocable ATI.* To the extent a partner's income and gain items comprising its allocable ATI exceed its deduction and loss items comprising its allocable ATI, the partner has *positive allocable ATI.* The aggregate of all the partners' positive allocable ATI amounts is the *total positive allocable ATI.*

(B) *Negative allocable ATI.* To the extent a partner's deduction and loss items comprising its allocable ATI exceed its income and gain items comprising its allocable ATI, the partner has negative allocable ATI. The aggregate of all the partners' negative allocable ATI amounts is the *total negative allocable ATI.*

(C) *Final allocable ATI.* Any partner with a negative allocable ATI, or an allocable ATI of $0, has a positive allocable ATI of $0. Any partner with a positive allocable ATI of $0 has a final allocable ATI of $0. The final allocable ATI of any partner with a positive allocable ATI greater than $0 is such partner's positive allocable ATI reduced, but not below zero, by the partner's step six adjustment amount. A partner's *step six adjustment amount* is the product of the total negative allocable ATI and the ratio of such partner's positive allocable ATI to the total positive allocable ATI. The total of the partners' final allocable ATI amounts must equal the partnership's ATI amount used to compute its section 163(j) limitation pursuant to § 1.163(j)–2(b).

(vii) *Partner-level comparison of thirty percent of adjusted taxable income and remaining business interest expense.* Seventh, a partnership must compare each partner's ATI capacity to such partner's remaining business interest expense as determined under paragraph (f)(2)(v) of this section. A partner's *ATI capacity* is the amount that is thirty percent of such partner's final allocable ATI as determined under paragraph (f)(2)(vi) of this section. A partner's final allocable ATI is grossed down to thirty percent prior to being compared to its remaining business interest expense in this calculation to parallel the partnership's adjustment to its ATI under section 163(j)(1)(B). To the extent a partner's ATI capacity exceeds its remaining business interest expense, the partner has an *ATI capacity excess.* The aggregate of all the partners' ATI capacity excess amounts is the *total ATI capacity excess.* To the extent a partner's remaining business interest expense exceeds its ATI capacity, the partner has an *ATI capacity deficit.* The aggregate of all the partners' ATI capacity deficit amounts is the *total ATI capacity deficit.* These amounts (which may be subject to adjustment under paragraph (f)(2)(viii) of this section) are required to perform calculations in paragraphs (f)(2)(ix) and (x) of this section, which appropriately reallocate ATI capacity excess to partners with ATI capacity deficits in order to reconcile the partner-level calculation under paragraph (f)(2)(vii) of this section with the partnership-level result under paragraph (f)(2)(i) of this section.

(viii) *Partner priority right to ATI capacity excess determination*—(A) Eighth, the partnership must determine whether it is required to make any adjustments described in this paragraph (f)(2)(viii) and, if it is, make such adjustments. The rules of this paragraph (f)(2)(viii) are necessary to account for adjustments made to a partner's allocable ATI in paragraph (f)(2)(vi) of this section to ensure that the partners who had a negative allocable ATI do not inappropriately benefit under the rules of paragraphs (f)(2)(ix) through (xi) of this section to the detriment of the partners who had positive allocable ATI. The partnership must perform the calculations and make the necessary adjustments described under paragraphs (f)(2)(viii)(B) and (C) or paragraph (f)(2)(viii)(D) of this section if, and only if, there is—

(*1*) An excess business interest expense amount greater than $0 under paragraph (f)(2)(i) of this section;

(*2*) A total negative allocable ATI amount greater than $0 under paragraph (f)(2)(vi) of this section; and

(*3*) A total ATI capacity excess amount greater than $0 under paragraph (f)(2)(vii) of this section.

(B) A partnership must determine each partner's priority amount and usable priority amount. A partner's *priority amount* is thirty percent of the amount by which a partner's positive allocable ATI under paragraph (f)(2)(vi)(A) of this section exceeds such partner's final allocable ATI under paragraph (f)(2)(vi)(C) of this section. However, only partners with an ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section can have a priority amount greater than $0. The aggregate of all the partners' priority amounts is the *total priority amount.* A partner's *usable priority amount* is the lesser of such partner's priority amount and such partner's ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section. The aggregate of all the partners' usable priority amounts is the *total usable priority amount.* If the total ATI capacity excess amount, as determined under paragraph (f)(2)(vii) of this section, is greater than or equal to the total usable priority amount, then the partnership must perform the adjustments described in paragraph (f)(2)(viii)(C) of this section. If the total usable priority amount is greater than the total ATI capacity excess amount, as determined under paragraph (f)(2)(vii) of this section, then the partnership must perform the adjustments described in paragraph (f)(2)(viii)(D) of this section.

(C) For purposes of paragraph (f)(2)(ix) of this section, each partner's final ATI capacity excess amount is $0. For purposes of paragraph (f)(2)(x) of this section, the following terms have the following meanings for each partner:

(*1*) Each partner's *ATI capacity deficit* is such partner's ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section reduced by such partner's usable priority amount.

(*2*) The *total ATI capacity deficit* is the total ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section reduced by the total usable priority amount.

(*3*) The *total ATI capacity excess* is the total ATI capacity excess as determined under paragraph (f)(2)(vii) of this section reduced by the total usable priority amount.

(D) Any partner with a priority amount greater than $0 is a *priority partner.* Any partner that is not a priority partner is a *non-priority partner.* For purposes of paragraph (f)(2)(ix) of this section, each partner's final ATI capacity excess amount is $0. For purposes of paragraph (f)(2)(x) of this section, each non-priority partner's final ATI capacity deficit amount is such partner's ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section. For purposes of paragraph (f)(2)(x) of this section, the following terms have the following meanings for priority partners.

(*1*) Each priority partner must determine its step eight excess share. A partner's *step eight excess share* is the product of the total ATI capacity excess as determined under paragraph (f)(2)(vii) of this section and the ratio of the partner's priority amount to the total priority amount.

(*2*) To the extent a priority partner's step eight excess share exceeds its ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section, such excess amount is the priority partner's *ATI capacity excess* for purposes of paragraph (f)(2)(x) of this section. The *total ATI capacity excess* is the aggregate of the priority partners' ATI capacity excess amounts as determined under this paragraph (f)(2)(viii)(D)(*2*).

(*3*) To the extent a priority partner's ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section exceeds its step eight excess share, such excess amount is the priority partner's *ATI capacity deficit* for purposes of paragraph (f)(2)(x) of this section. The *total ATI capacity deficit* is the aggregate of the priority partners' ATI capacity deficit amounts as determined under this paragraph (f)(2)(viii)(D)(*3*).

(ix) *Matching partnership and aggregate partner excess taxable income.* Ninth, a partnership must determine each partner's final ATI capacity excess. A partner's *final ATI capacity excess* amount is determined by reducing, but not below zero, such partner's ATI capacity excess (if any) by the partner's step nine adjustment amount. A partner's *step nine adjustment amount* is the product of the total ATI capacity deficit and the ratio of such partner's ATI capacity excess to the total ATI capacity excess. The rules of this paragraph (f)(2)(ix) ensure that, following the application of paragraph (f)(2)(xi) of this section, the aggregate of all the partners' allocations of excess taxable income equals the total amount of the partnership's excess taxable income as determined in paragraph (f)(2)(i) of this section.

(x) *Matching partnership and aggregate partner excess business interest expense.* Tenth, a partnership must determine each partner's final ATI capacity deficit. A partner's *final ATI capacity deficit* amount is determined by reducing, but not below zero, such partner's ATI capacity deficit (if any) by the partner's step ten adjustment amount. A partner's *step ten adjustment amount* is the product of the total ATI capacity excess and the ratio of such partner's ATI capacity deficit to the total ATI capacity deficit. Generally, a partner's final ATI capacity deficit is a partner's ATI capacity deficit adjusted to reflect a reallocation of ATI capacity excess from other partners. The rules of this paragraph (f)(2)(x) ensure that, following the application of paragraph (f)(2)(xi) of this section, the aggregate of all the partners' allocations of excess business interest expense equals the total amount of the partnership's excess business interest expense as determined in paragraph (f)(2)(i) of this section.

(xi) *Final section 163(j) excess item and deductible business interest expense allocation.* Eleventh, a partnership must allocate section 163(j) excess items and deductible business interest expense to its partners. Excess business interest income calculated under paragraph (f)(2)(i) of this section, if any, is allocated dollar for dollar by the partnership to its partners with final allocable business interest income excess amounts. Excess business interest expense calculated under paragraph (f)(2)(i) of this section, if any, is allocated dollar for dollar to partners with final ATI capacity deficit amounts. After grossing up each partner's final ATI capacity excess amount by ten-thirds, excess taxable income calculated under paragraph (f)(2)(i) of this section, if any, is allocated dollar for dollar to partners with final ATI capacity excess amounts. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's share of excess business interest expense. See paragraphs (o)(11) through (15) of this section.

(g) *Carryforwards*—(1) *In general.* The amount of any business interest expense not allowed as a deduction to a partnership by reason of § 1.163(j)–2(b) and paragraph (f)(2) of this section for any taxable year is—

(i) Not treated as business interest expense of the partnership in the succeeding taxable year; and

(ii) Subject to paragraph (g)(2) of this section, treated as excess business interest expense which is allocated to each partner pursuant to paragraph (f)(2) of this section.

(2) *Treatment of excess business interest expense allocated to partners.* If a partner is allocated excess business interest expense from a partnership under paragraph (f)(2) of this section for any taxable year—

(i) Solely for purposes of section 163(j), such excess business interest expense is treated as business interest

expense paid or accrued by the partner in the next succeeding taxable year in which the partner is allocated excess taxable income or excess business interest income from such partnership, but only to the extent of such excess taxable income or excess business interest income; and

(ii) Any portion of such excess business interest expense remaining after the application of paragraph (g)(2)(i) of this section is excess business interest expense that is subject to the limitations of paragraph (g)(2)(i) of this section in succeeding years, unless paragraph (m)(3) of this section applies. See paragraphs (o)(1) through (10) of this section.

(3) *Excess taxable income and excess business interest income ordering rule.* In the event a partner has excess business interest expense from a prior taxable year and is allocated excess taxable income or excess business interest income from the same partnership in a succeeding taxable year, the partner must treat, for purposes of section 163(j), the excess business interest expense as business interest expense paid or accrued by the partner in an amount equal to the partner's share of the partnership's excess taxable income or excess business interest income in such succeeding taxable year. See paragraphs (o)(2) through (10) of this section.

(h) *Basis adjustments*—(1) *Section 704(d) ordering.* Deductible business interest expense and excess business interest expense are subject to section 704(d). If a partner is subject to a limitation on loss under section 704(d) and a partner is allocated losses from a partnership in a taxable year, § 1.704–1(d)(2) requires that the limitation on losses under section 704(d) be apportioned amongst these losses based on the character of each loss (each grouping of loses based on character being a ''section 704(d) loss class''). If there are multiple section 704(d) loss classes in a given year, § 1.704–1(d)(2) requires the partner to apportion the limitation on losses under section 704(d) to each section 704(d) loss class proportionately. For purposes of applying this proportionate rule, any deductible business interest expense (whether allocated to the partner in the current taxable year or suspended under section 704(d) in a prior taxable year), any excess business interest expense allocated to the partner in the current taxable year, and any excess business interest expense from a prior taxable year that was suspended under section 704(d) (''negative section 163(j) expense'') shall comprise the same section 704(d) loss class. Once the partner determines the amount of limitation on losses apportioned to this section 704(d) loss class, any deductible business interest expense is taken into account before any excess business interest expense or negative section 163(j) expense. See paragraph (o)(9) of this section.

(2) *Excess business interest expense basis adjustments.* The adjusted basis of a partner in a partnership interest is reduced, but not below zero, by the amount of excess business interest expense allocated to the partner pursuant to paragraph (f)(2) of this section. Negative section 163(j) expense is not treated as excess business interest expense in any subsequent year until such negative section 163(j) expense is no longer suspended under section 704(d). Therefore, negative section 163(j) expense does not affect, and is not affected by, any allocation of excess taxable income to the partner. Accordingly, any excess taxable income allocated to a partner from a partnership while the partner still has negative section 163(j) expense will be included in the partner's ATI. However, once the negative section 163(j) expense is no longer suspended under section 704(d), it becomes excess business interest expense, which is subject to the general rules in paragraph (g) of this section. See paragraph (o)(10) of this section.

(3) *Basis adjustments upon disposition of partnership interest*—(i) *Complete disposition of partnership interest.* If a partner disposes of all or substantially all of a partnership interest (whether by sale, exchange, or redemption), the adjusted basis of the partnership interest is increased immediately before the disposition by the amount of the excess (if any) of the amount of the basis reduction under paragraph (h)(2) of this section over the portion of any excess business interest expense allocated to the partner under paragraph (f)(2) of this section which has previously been treated under paragraph (g) of this section as business interest expense pair or accrued by the partner, regardless of whether the disposition was a result of a taxable or non-taxable transaction. Therefore, the adjusted basis of a partner in a partnership interest is not increased by any negative section 163(j) expense upon the disposition of a partnership interest. No deduction under section 163(j) is allowed to the transferor or transferee under chapter 1 of subtitle A of the Code for any excess business interest expense resulting in a basis increase under this section or any negative section 163(j) expense.

(ii) *Partial disposition of partnership interest.* If a partner disposes of less than substantially all of its interest in a partnership (whether by sale, exchange, or redemption), a partner shall not increase its basis in its partnership interest by the amount of any excess business interest expense that has not yet been treated as business interest expense paid or accrued by the partner in accordance with paragraph (g) of this section. Any such excess business interest expense shall remain excess business interest expense of the transferor partner until such time as the transferor partner is allocated an appropriate amount of excess taxable income or excess business interest income from the partnership or the partner disposes of its partnership interest in accordance with paragraph (h)(2)(i) of this section. Additionally, any negative section 163(j) expense shall remain negative section 163(j) expense of the transferor partner until such negative section 163(j) expense is no longer suspended under section 704(d).

(i) [Reserved]

(j) *Investment items.* Any item of a partnership's income, gain, deduction, or loss that is investment interest income or expense pursuant to § 1.163–8T is allocated to each partner in accordance with section 704(b) and the regulations thereunder and the effect of such allocation for purposes of section 163 is determined at the partner-level. See § 1.163(j)–4(b)(3), section 163(d), and § 1.163–8T.

(k) [Reserved]

(l) *S corporations*—(1) *In general.* In the case of any S corporation, the section 163(j) limitation is applied at the S corporation level, and any deduction allowed for business interest expense is taken into account in determining the nonseparately stated taxable income or loss of the S corporation. An S corporation determines its section 163(j) limitation in the same manner as set forth in § 1.163(j)–2(b). Allocations of excess taxable income and excess business interest income are made in accordance with the shareholders' respective pro rata interests in the S corporation pursuant to section 1366(a)(1) after determining the S corporation's section 163(j) limitation pursuant to § 1.163(j)–2(b).

(2) *Character of deductible business interest expense.* If an S corporation has deductible business interest expense, such deductible business interest expense is not subject to any additional application of section 163(j) at the shareholder-level because such deductible business interest expense is taken into account in determining the nonseparately stated taxable income or loss of the S corporation. For all other

purposes of the Code, however, deductible business interest expense retains its character as business interest expense at the shareholder-level. For example, for purposes of section 469, such deductible business interest expense retains its character as either passive or non-passive in the hands of the shareholder. Additionally, for purposes of section 469, deductible business interest expense from an S corporation remains interest derived from a trade or business in the hands of a shareholder even if the shareholder does not materially participate in the S corporation's trade or business activity. For additional rules regarding the interaction between sections 465, 469, and 163(j), see § 1.163(j)–3.

(3) *Adjusted taxable income of an S corporation.* The ATI of an S corporation generally is determined in accordance with § 1.163(j)–1(b)(1). For purposes of computing the S corporation's ATI, the taxable income of the S corporation is determined under section 1363(b) and includes—

(i) Any item described in section 1363(b)(1); and

(ii) Any item described in § 1.163(j)–1(b)(1), to the extent such item is consistent with subchapter S of the Code.

(4) *Adjusted taxable income and business interest income of S corporation shareholders*—(i) *Adjusted taxable income of S corporation shareholders.* The ATI of an S corporation shareholder is determined in accordance with § 1.163(j)–1(b)(1) without regard to such shareholder's distributive share of any items of income, gain, deduction, or loss of such S corporation, and is increased by such shareholder's distributive share of such S corporation's excess taxable income, as defined in § 1.163(j)–1(b)(15).

(ii) *Disposition of S corporation stock.* If a shareholder of an S corporation recognizes gain or loss upon the disposition of stock of the S corporation, and the corporation in which the stock is being disposed only owns non-excepted trade or business assets, the gain or loss on the disposition of the stock is included in the shareholder's ATI. For dispositions of stock of S corporations that own:

(A) Non-excepted assets and excepted assets; or

(B) Investment assets; or

(C) Both. See § 1.163(j)–10(b)(4)(ii).

(iii) *Double counting of business interest income and floor plan financing interest expense prohibited.* For purposes of calculating an S corporation shareholder's section 163(j) limitation, the shareholder does not include—

(A) Business interest income from an S corporation that is subject to section 163(j) except to the extent it is allocated excess business interest income from that S corporation pursuant to paragraph (l)(1) of this section; and

(B) The shareholder's share of the S corporation's floor plan financing interest expense because such floor plan financing interest expense has already been taken into account by the S corporation in determining its nonseparately stated taxable income or loss for purposes of section 163(j).

(5) *Carryforwards.* The amount of any business interest expense not allowed as a deduction for any taxable year by reason of the limitation contained in § 1.163(j)–2(b) is carried forward in the succeeding taxable year as a disallowed business interest expense carryforward under the rules set forth in § 1.163(j)–2(c) (whether to an S corporation or C corporation taxable year). S corporations are subject to:

(i) The same ordering rules as a C corporation that is not a member of a consolidated group; and

(ii) The limitation under section 382. See § 1.163(j)–5(b)(2) and (e).

(6) *Basis adjustments and disallowed business interest expense carryforwards.* An S corporation shareholder's adjusted basis in its S corporation stock is reduced, but not below zero, when a disallowed business interest expense carryforward becomes deductible under section 163(j).

(7) *Accumulated adjustment accounts.* The accumulated adjustment account of an S corporation is adjusted to take into account business interest expense in the year in which the S corporation treats such business interest expense as deductible under the section 163(j) limitation. See section 1368(e)(1).

(8) *Termination of qualified subchapter S subsidiary election.* If a corporation's qualified subchapter S subsidiary election terminates and any disallowed business interest expense carryforward is attributable to the activities of the qualified subchapter S subsidiary at the time of termination, such disallowed business interest expense carryforward remains with the parent S corporation and no portion of these items is allocable to the former qualified subchapter S subsidiary.

(9) *Investment items.* Any item of an S corporation's income, gain, deduction, or loss that is investment interest income or expense pursuant to § 1.163–8T is allocated to each shareholder in accordance with the shareholders' pro rata interests in the S corporation pursuant to section 1366(a)(1). See section 163(d), § 1.163–8T.

(m) *Partnerships and S corporations not subject to section 163(j)*—(1) *Partnerships and S corporations not subject to section 163(j) by reason of the small business exemption.* If a partnership or S corporation is not subject to section 163(j) by reason of § 1.163(j)–2(d) (exempt entity), the exempt entity does not calculate the section 163(j) limitation under § 1.163(j)–2 and these regulations. Because an exempt entity is not subject to section 163(j)(4), it does not take its deduction for business interest expense into account in determining its non-separately stated taxable income or loss within the meaning of section 163(j)(4)(A)(i) and retains its character as business interest expense. See § 1.163(j)–6(c). Thus, if a partner or S corporation shareholder is allocated business interest expense from an exempt entity, that allocated business interest expense will be subject to the partner's or S corporation shareholder's section 163(j) limitations. Additionally, contrary to the general rule in § 1.163(j)–6(e)(1), a partner or S corporation shareholder includes items of income, gain, loss, or deduction of such exempt entity when calculating its ATI. Finally, business interest income of such exempt entity is included in the partner's or S corporation shareholder's section 163(j) limitation regardless of the exempt entity's business interest expense amount.

(2) *Partnerships and S corporations not subject to section 163(j) by reason of an excepted trade or business.* To the extent a partnership or S corporation is not subject to section 163(j) because it has an excepted trade or business as defined in § 1.163(j)–1(b)(38)(ii) (excepted entity), the entity does not apply its section 163(j) limitation under § 1.163(j)–2 and this section with respect to the business interest expense that is allocable to such excepted trade or business. If a partner or S corporation shareholder is allocated any section 163(j) item that is allocable to the partnership's or S corporation's excepted trade or business (excepted 163(j) items), such excepted 163(j) items are excluded from the partner or shareholder's section 163(j) deduction calculation. See § 1.163(j)–10(c) (regarding the allocation of items between excepted and non-excepted trades or businesses).

(3) *Partnerships that allocated excess business interest expense prior to becoming not subject to section 163(j).* If a partnership allocates excess business interest expense to one or more of its partners, and in a succeeding taxable year becomes not subject to the requirements of section 163(j), the

excess business interest expense from the prior taxable years is treated as paid or accrued by the partner in such succeeding taxable year. See paragraphs (o)(6) and (7) of this section.

(4) *S corporations with disallowed business interest expense carryforwards prior to becoming not subject to section 163(j).* If an S corporation has a disallowed business interest expense carryforward for a taxable year, and in the succeeding taxable year becomes not subject to the requirements of section 163(j), then such disallowed business interest expense carryforward—

(i) Continues to be carried forward at the S corporation level;

(ii) Is no longer subject to the section 163(j) limitation; and

(iii) Is taken into account in determining the nonseparately stated taxable income or loss of the S corporation.

(n) [Reserved]

(o) *Examples.* The examples in this paragraph illustrate the provisions of section 163(j) as applied to partnerships and subchapter S corporations. For purposes of these examples, each partnership is subject to the provisions of section 163(j), was created or organized in the United States, and is a calendar year taxpayer. Unless stated otherwise, all partners are subject to the provisions of section 163(j), are not subject to a limitation under section 704(d) or 1366(d), have no tax items other than those listed in the example, are U.S. citizens, and are calendar year taxpayers. The phrase ''section 163(j) limit'' shall equal the maximum potential deduction allowed under section 163(j)(1). Unless stated otherwise, business interest expense means business interest expense that is not floor plan financing interest expense. With respect to partnerships, all allocations are in accordance with section 704(b) and the regulations thereunder.

(1) *Example 1*—(i) *Facts.* X and Y are equal partners in partnership PRS. In Year 1, PRS has $100 of ATI and $40 of business interest expense. PRS allocates the items comprising its $100 of ATI $50 to X and $50 to Y. PRS allocates its $40 of business interest expense $20 to X and $20 to Y. X has $100 of ATI and $20 of business interest expense from its sole proprietorship. Y has $0 of ATI and $20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 1, PRS's section 163(j) limit is 30 percent of its ATI, or $30 ($100 x 30 percent). Thus, PRS has $30 of deductible business interest expense and $10 of excess business interest expense. Such $30 of deductible business interest expense is includable in PRS's non-separately stated income or loss, and is not subject to further limitation under section 163(j) at the partners' level.

(iii) *Partner-level allocations.* Pursuant to § 1.163(j)–6(f)(2), X and Y are each allocated $15 of deductible business interest expense and $5 of excess business interest expense. At the end of Year 1, X and Y each have $5 of excess business interest expense from PRS, which is not treated as paid or accrued by the partner until such partner is allocated excess taxable income or excess business interest income from PRS in a succeeding taxable year. Pursuant to § 1.163(j)–6(e)(1), X and Y, in computing their limit under section 163(j), do not increase any of their section 163(j) items by any of PRS's section 163(j) items. X and Y each increase their outside basis in PRS by $30 ($50—$20).

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has $100 of ATI and $20 of business interest expense from its sole proprietorship. X's section 163(j) limit is $30 ($100 × 30 percent). Thus, X's $20 of business interest expense is deductible business interest expense. Y, in computing its limit under section 163(j), has $20 of business interest expense from its sole proprietorship. Y's section 163(j) limit is $0 ($0 × 30 percent). Thus, Y's $20 of business interest expense is not allowed as a deduction and is treated as business interest expense paid or accrued by Y in Year 2.

(2) *Example 2*—(i) *Facts.* The facts are the same as in *Example 1* in paragraph (o)(1)(i) of this section. In Year 2, PRS has $200 of ATI, $0 of business interest income, and $30 of business interest expense. PRS allocates the items comprising its $200 of ATI $100 to X and $100 to Y. PRS allocates its $30 of business interest expense $15 to X and $15 to Y. X has $100 of ATI and $20 of business interest expense from its sole proprietorship. Y has $0 of ATI and $20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 2, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $60 ($200 x 30 percent). Thus, PRS has $100 of excess taxable income, $30 of deductible business interest expense, and $0 of excess business interest expense. Such $30 of deductible business interest expense is includable in PRS's non-separately stated income or loss, and is not subject to further limitation under section 163(j) at the partners' level.

(iii) *Partner-level allocations.* Pursuant to § 1.163(j)–6(f)(2), X and Y are each allocated $50 of excess taxable income, $15 of deductible business interest expense, and $0 of excess business interest expense. As a result, X and Y each increase their ATI by $50. Because X and Y are each allocated $50 of excess taxable income from PRS, and excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to a partner, X and Y each treat $5 of excess business interest expense (the carryforward from Year 1) as paid or accrued in Year 2. X and Y each increase their outside basis in PRS by $85 ($100 − $15).

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has $150 of ATI ($100 from its sole proprietorship, plus $50 excess taxable income) and $25 of business interest expense ($20 from its sole proprietorship, plus $5 excess business interest expense treated as paid or accrued in Year 2). X's section 163(j) limit is $45 ($150 × 30 percent). Thus, X's $25 of business interest expense is deductible business interest expense. At the end of Year 2, X has $0 of excess business interest expense from PRS ($5 from Year 1, less $5 treated as paid or accrued in Year 2). Y, in computing its limit under section 163(j), has $50 of ATI ($0 from its sole proprietorship, plus $50 excess taxable income) and $45 of business interest expense ($20 from its sole proprietorship, plus $20 disallowed business interest expense from Year 1, plus $5 excess business interest expense treated as paid or accrued in Year 2). Y's section 163(j) limit is $15 ($50 × 30 percent). Thus, $15 of Y's business interest expense is deductible business interest expense. The $30 of Y's business interest expense not allowed as a deduction ($45 business interest expense, less $15 section 163(j) limit) is treated as business interest expense paid or accrued by Y in Year 3. At the end of Year 2, Y has $0 of excess business interest expense from PRS ($5 from Year 1, less $5 treated as paid or accrued in Year 2).

(3) *Example 3*—(i) *Facts.* The facts are the same as in *Example 1* in paragraph (o)(1)(i) of this section. In Year 2, PRS has $0 of ATI, $60 of business interest income, and $40 of business interest expense. PRS allocates its $60 of business interest income $30 to X and $30 to Y. PRS allocates its $40 of business interest expense $20 to X and $20 to Y. X has $100 of ATI and $20 of business interest expense from its sole proprietorship. Y has $0 of ATI and $20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 2, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $60 (($0 × 30 percent) + $60). Thus, PRS has $20 of excess business interest income, $0 of excess taxable income, $40 of deductible business interest expense, and $0 of excess business interest expense. Such $40 of deductible business interest expense is includable in PRS's non-separately stated income or loss, and is not subject to further limitation under section 163(j) at the partners' level.

(iii) *Partner-level allocations.* Pursuant to § 1.163(j)–6(f)(2), X and Y are each allocated $10 of excess business interest income, and $20 of deductible business interest expense. As a result, X and Y each increase their business interest income by $10. Because X and Y are each allocated $10 of excess business interest income from PRS, and excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to a partner, X and Y each treat $5 of excess business interest expense (the carryforward from Year 1) as paid or accrued in Year 2. X and Y each increase their outside basis in PRS by $10 ($30 − $20).

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has $100 of ATI (from its sole proprietorship), $10 of business interest income (from the

allocation of $10 of excess business interest income from PRS), and $25 of business interest expense ($20 from its sole proprietorship, plus $5 excess business interest expense treated as paid or accrued in Year 2). X's section 163(j) limit is $40 (($100 × 30 percent) + $10). Thus, X's $25 of business interest expense is deductible business interest expense. At the end of Year 2, X has $0 of excess business interest expense from PRS ($5 from Year 1, less $5 treated as paid or accrued in Year 2). Y, in computing its limit under section 163(j), has $0 of ATI (from its sole proprietorship), $10 of business interest income, and $45 of business interest expense ($20 from its sole proprietorship, plus $20 disallowed business interest expense from Year 1, plus $5 excess business interest expense treated as paid or accrued in Year 2). Y's section 163(j) limit is $10 (($0 × 30 percent) + $10). Thus, $10 of Y's business interest expense is deductible business interest expense. The $35 of Y's business interest expense not allowed as a deduction ($45 business interest expense, less $10 section 163(j) limit) is treated as business interest expense paid or accrued by Y in Year 3. At the end of Year 2, Y has $0 of excess business interest expense from PRS ($5 from Year 1, less $5 treated as paid or accrued in Year 2).

(4) *Example 4*—(i) *Facts.* The facts are the same as in *Example 1* in paragraph (o)(1)(i) of this section. In Year 2, PRS has $100 of ATI, $60 of business interest income, and $40 of business interest expense. PRS allocates the items comprising its $100 of ATI $50 to X and $50 to Y. PRS allocates its $60 of business interest income $30 to X and $30 to Y. PRS allocates its $40 of business interest expense $20 to X and $20 to Y. X has $100 of ATI and $20 of business interest expense from its sole proprietorship. Y has $0 of ATI and $20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 2, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $90 (($100 × 30 percent)) + $60). Thus, PRS has $20 of excess business interest income, $100 of excess taxable income, $40 of deductible business interest expense, and $0 of excess business interest expense. Such $40 of deductible business interest expense is includable in PRS's non-separately stated income or loss, and is not subject to further limitation under section 163(j) at the partners' level.

(iii) *Partner-level allocations.* Pursuant to § 1.163(j)–6(f)(2), X and Y are each allocated $10 of excess business interest income, $50 of excess taxable income, and $20 of deductible business interest expense. As a result, X and Y each increase their business interest income by $10 and ATI by $50. Because X and Y are each allocated $10 of excess business interest income and $50 of excess taxable income from PRS, and excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to a partner, X and Y each treat $5 of excess business interest expense (the carryforward from Year 1) as paid or accrued in Year 2. X and Y each increase their outside basis in PRS by $60 ($80 − $20).

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has $150 of ATI ($100 from its sole proprietorship, plus $50 excess taxable income), $10 of business interest income, and $25 of business interest expense ($20 from its sole proprietorship, plus $5 excess business interest expense treated as paid or accrued in Year 2). X's section 163(j) limit is $55 (($150 × 30 percent) + $10). Thus, $25 of X's business interest expense is deductible business interest expense. At the end of Year 2, X has $0 of excess business interest expense from PRS ($5 from Year 1, less $5 treated as paid or accrued in Year 2). Y, in computing its limit under section 163(j), has $50 of ATI ($0 from its sole proprietorship, plus $50 excess taxable income), $10 of business interest income, and $45 of business interest expense ($20 from its sole proprietorship, plus $20 disallowed business interest expense from Year 1, plus $5 excess business interest expense treated as paid or accrued in Year 2). Y's section 163(j) limit is $25 (($50 × 30 percent) + $10). Thus, $25 of Y's business interest expense is deductible business interest expense. Y's $20 of business interest expense not allowed as a deduction ($45 business interest expense, less $25 section 163(j) limit) is treated as business interest expense paid or accrued by Y in Year 3. At the end of Year 2, Y has $0 of excess business interest expense from PRS ($5 from Year 1, less $5 treated as paid or accrued in Year 2).

(5) *Example 5*—(i) *Facts.* The facts are the same as in *Example 1* in paragraph (o)(1)(i) of this section. In Year 2, PRS has $100 of ATI, $11.20 of business interest income, and $40 of business interest expense. PRS allocates the items comprising its $100 of ATI $50 to X and $50 to Y. PRS allocates its $11.20 of business interest income $5.60 to X and $5.60 to Y. PRS allocates its $40 of business interest expense $20 to X and $20 to Y. X has $100 of ATI and $20 of business interest expense from its sole proprietorship. Y has $0 of ATI and $20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 2, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $41.20 (($100 × 30 percent) + $11.20). Thus, PRS has $0 of excess business interest income, $4 of excess taxable income, and $40 of deductible business interest expense. Such $40 of deductible business interest expense is includable in PRS's non-separately stated income or loss, and is not subject to further limitation under section 163(j) at the partners' level.

(iii) *Partner-level allocations.* Pursuant to § 1.163(j)–6(f)(2), X and Y are each allocated $2 of excess taxable income, $20 of deductible business interest expense, and $0 of excess business interest expense. As a result, X and Y each increase their ATI by $2. Because X and Y are each allocated $2 of excess taxable income from PRS, and excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to a partner, X and Y each treat $2 of excess business interest expense (a portion of the carryforward from Year 1) as paid or accrued in Year 2. X and Y each increase their outside basis in PRS by $35.60 ($55.60 − $20).

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has $102 of ATI ($100 from its sole proprietorship, plus $2 excess taxable income), $0 of business interest income, and $22 of business interest expense ($20 from its sole proprietorship, plus $2 excess business interest expense treated as paid or accrued). X's section 163(j) limit is $30.60 ($102 × 30 percent). Thus, X's $22 of business interest expense is deductible business interest expense. At the end of Year 2, X has $3 of excess business interest expense from PRS ($5 from Year 1, less $2 treated as paid or accrued in Year 2). Y, in computing its limit under section 163(j), has $2 of ATI ($0 from its sole proprietorship, plus $2 excess taxable income), $0 of business interest income, and $42 of business interest expense ($20 from its sole proprietorship, plus $20 disallowed business interest expense from Year 1, plus $2 excess business interest expense treated as paid or accrued in Year 2). Y's section 163(j) limit is $0.60 ($2 × 30 percent). Thus, $0.60 of Y's business interest expense is deductible business interest expense. Y's $41.40 of business interest expense not allowed as a deduction ($42 business interest expense, less $0.60 section 163(j) limit) is treated as business interest expense paid or accrued by Y in Year 3. At the end of Year 2, Y has $3 of excess business interest expense from PRS ($5 from Year 1, less $2 treated as paid or accrued in Year 2).

(6) *Example 6*—(i) *Facts.* The facts are the same as in *Example 5* in paragraph (o)(5)(i) of this section, except in Year 2 Y becomes not subject to section 163(j) under section 163(j)(3).

(ii) *Partnership-level.* Same analysis as *Example 5* in paragraph (o)(5)(ii) of this section.

(iii) *Partner-level allocations.* Same analysis as *Example 5* in paragraph (o)(5)(iii) of this section.

(iv) *Partner-level computations.* For X, same analysis as *Example 5* in paragraph (o)(5)(iv) of this section. Y is not subject to section 163(j) under section 163(j)(3). Thus, all $42 of business interest expense ($20 from its sole proprietorship, plus $20 disallowed business interest expense from Year 1, plus $2 excess business interest expense treated as paid or accrued in Year 2) is not subject to limitation under § 1.163(j)–2(d). At the end of Year 2, Y has $3 of excess business interest expense from PRS ($5 from Year 1, less $2 treated as paid or accrued in Year 2).

(7) *Example 7*—(i) *Facts.* The facts are the same as in *Example 5* in paragraph (o)(5)(i) of this section, except in Year 2 PRS and Y become not subject to section 163(j) under section 163(j)(3).

(ii) *Partnership-level.* In Year 2, PRS becomes not subject to section 163(j)(4) by reason of section 163(j)(3). As a result, none of PRS's $30 of business interest expense is subject to limitation at the partnership level.

(iii) *Partner-level allocations.* Because section 163(j) does not apply, PRS's $30 of business interest expense is not taken into account in determining its non-separately stated taxable income or loss. Thus, PRS's

$30 of business interest expense retains its character as business interest expense for purposes of section 163(j), and is potentially subject to limitation at the partners' level. As a result, X and Y each increase their business interest expense by $15. Further, because PRS is not subject to section 163(j)(4) by reason of section 163(j)(3), the provision requiring each partner of the partnership to determine their ATI without regard to such partner's distributive share of any items of income, gain, deduction, or loss of such partnership (section 163(j)(4)(ii)(I)) is no longer applicable under § 1.163(j)–6(m)(1). As a result, X and Y each increase their ATI by $100. Further, because PRS is not subject to section 163(j)(4) by reason of section 163(j)(3), the excess business interest expense from Year 1 is treated as paid or accrued by the partners pursuant to § 1.163(j)–6(m)(3). As a result, X and Y each treat their $5 of excess business interest expense from Year 1 as paid or accrued in Year 2, and increase their business interest expense by $5.

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has $200 of ATI ($100 from its sole proprietorship, plus $100 ATI from PRS) and $40 of business interest expense ($20 from its sole proprietorship, plus $15 from PRS, plus $5 of excess business interest expense treated as paid or accrued in Year 2). X's section 163(j) limit is $60 ($200 × 30 percent). Thus, $40 of X's business interest expense is deductible business interest expense. Y is not subject to section 163(j) under section 163(j)(3). As a result, Y's business interest expense is not subject to limitation under section 163(j). Thus, all $60 of Y's business interest expense ($20 from its sole proprietorship, plus $20 disallowed from year 1, plus $15 from PRS from year 2, plus $5 of excess business interest expense treated as paid or accrued in Year 2) is not subject to limitation under section 163(j).

(8) Example 8—(i) *Facts.* In Year 1, X, Y, and Z formed partnership PRS. Upon formation, X and Y each contributed $100, and Z contributed non-excepted and non-depreciable trade or business property with a basis of $0 and fair market value of $100 (Blackacre). PRS allocates all items pro rata between its partners. Immediately after the formation of PRS, Z sold all of its interest in PRS to A for $100 (assume the interest sale is respected for U.S. federal income tax purposes). In connection with the interest transfer, PRS made a valid election under section 754. Therefore, after the interest sale, A had a $100 positive section 743(b) adjustment in Blackacre. In Year 1, PRS had $0 of ATI, $15 of business interest expense, and $0 of business interest income. Pursuant to § 1.163(j)–6(f)(2), PRS allocated each of the partners $5 of excess business interest expense. In Year 2, PRS sells Blackacre for $100 which generated $100 of ATI. The sale of Blackacre was PRS's only item of income in Year 2. In accordance with section 704(c), PRS allocates all $100 of gain resulting from the sale of Blackacre to A. Additionally, PRS has $15 of business interest expense, all of which it allocates to X. A has $50 of ATI and $20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 2, PRS's section 163(j) limit is 30 percent of its ATI, or $30 ($100 × 30 percent). Thus, PRS has $15 of deductible business interest expense and $50 of excess taxable income. Such $15 of deductible business interest expense is includable in PRS's non-separately stated income or loss, and is not subject to further limitation under section 163(j) at X's level.

(iii) *Partner-level allocations.* Pursuant to § 1.163(j)–6(f)(2), X is allocated $15 of deductible business interest expense and X's outside basis in PRS is reduced by $15. A is allocated $50 of excess taxable income and, as a result, A increases its ATI by $50. Because A is allocated $50 of excess taxable income, and excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to a partner, A treats $5 of excess business interest expense (the carryforward from Year 1) as paid or accrued in Year 2. PRS's $100 of gain allocated to A in Year 2 is fully reduced by A's $100 section 743(b) adjustment. Therefore, at the end of Year 2, there is no change to A's outside basis in PRS.

(iv) *Partner-level.* A, in computing its limit under section 163(j), has $0 of ATI ($50 from its sole proprietorship, plus $50 excess taxable income, less $100 ATI reduction as a result of A's section 743(b) adjustment under § 1.163(j)–6(e)(2)) and $25 of business interest expense ($20 from its sole proprietorship, plus $5 excess business interest expense treated as paid or accrued in Year 2). A's section 163(j) limit is $0 ($0 × 30 percent). Thus, all $25 of A's business interest expense is not allowed as a deduction and is treated as business interest expense paid or accrued by A in Year 3.

(9) *Example 9*—(i) *Facts.* X and Y are equal partners in partnership PRS. At the beginning of Year 1, X and Y each have an outside basis in PRS of $5. In Year 1, PRS has $0 of ATI, $20 of business interest income, and $40 of business interest expense. PRS allocates its $20 of business interest income $10 to X and $10 to Y. PRS allocates $40 of business interest expense $20 to X and $20 to Y. X has $100 of ATI and $20 of business interest expense from its sole proprietorship. Y has $0 of ATI and $20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 1, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $20 (($0 × 30 percent) + $20). Thus, PRS has $0 of excess business interest income, $0 of excess taxable income, $20 of deductible business interest expense, and $20 of excess business interest expense. Such $20 of deductible business interest expense is includable in non-separately stated income or loss of PRS, and not subject to further limitation under section 163(j) by the partners.

(iii) *Partner-level allocations.* Pursuant to § 1.163(j)–6(f)(2), X and Y are each allocated $10 of deductible business interest expense and $10 of excess business interest expense. After adjusting each partners respective basis for business interest income under section 705(a)(1)(A), pursuant to § 1.163(j)–6(h)(1), X and Y each take their $10 of deductible business interest expense into account when reducing their outside basis in PRS before taking the $10 of excess business interest expense into account. Following each partner's reduction in outside basis due to the $10 of deductible business interest expense, each partner has $5 of outside basis remaining in PRS. Pursuant to § 1.163(j)–6(h)(2), each partner has $5 of excess business interest expense and $5 of negative section 163(j) expense. In sum, at the end of Year 1, X and Y each have $5 of excess business interest expense from PRS which reduces each partner's outside basis to $0 (and is not treated as paid or accrued by the partners until such partner is allocated excess taxable income or excess business interest income from PRS in a succeeding taxable year), and $5 of negative section 163(j) expense (which is suspended under section 704(d) and not treated as excess business interest expense of the partners until such time as the negative section 163(j) expense is no longer subject to a limitation under section 704(d)).

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has $100 of ATI (from its sole proprietorship) and $20 of business interest expense (from its sole proprietorship). X's section 163(j) limit is $30 ($100 × 30 percent). Thus, $20 of X's business interest expense is deductible business interest expense. Y, in computing its limit under section 163(j), has $20 of business interest expense (from its sole proprietorship). Y's section 163(j) limit is $0 ($0 × 30 percent). Thus, $20 of Y's business interest expense is not allowed as a deduction in Year 1, and is treated as business interest expense paid or accrued by Y in Year 2.

(10) *Example 10*—(i) *Facts.* The facts are the same as in *Example 9* in paragraph (o)(9)(i) of this section. In Year 2, PRS has $20 of gross income that is taken into account in determining PRS's ATI (*i.e.,* properly allocable to a trade or business), $30 of gross deductions from an investment activity, and $0 of business interest expense. PRS allocates the items comprising its $20 of ATI $10 to X and $10 to Y. PRS allocates the items comprising its $30 of gross deductions $15 to X and $15 to Y. X has $100 of ATI and $20 of business interest expense from its sole proprietorship. Y has $0 of ATI and $20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 2, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $6 ($20 × 30 percent). Because PRS has no business interest expense, all $20 of its ATI is excess taxable income.

(iii) *Partner-level allocations.* Pursuant to § 1.163(j)–6(f)(2), X and Y are each allocated $10 of excess taxable income. Because X and Y are each allocated $10 of excess taxable income from PRS, X and Y each increase their ATI by $10. Pursuant to § 1.704–(1)(d)(2), each partner's limitation on losses under section 704(d) must be allocated to its distributive share of each such loss. Thus, each partner reduces its adjusted basis of $10 (attributable to the allocation of items comprising PRS's ATI in Year 2) by $7.50 of gross deductions from Year 2 ($10 × ($15 of total gross deductions from Year 2/$20 of total losses disallowed)), and $2.50 of excess

business interest expense that was carried over as negative section 163(j) expense from Year 1 ($10 × ($5 of negative section 163(j) expense treated as excess business interest expense solely for the purposes of section 704(d)/$20 of total losses disallowed)). Following the application of section 704(d), each partner has $7.50 of excess business interest expense from PRS ($5 excess business interest expense from Year 1, plus $2.50 of excess business interest expense that was formerly negative section 163(j) expense carried over from Year 1). Excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to the partner. As a result, X and Y each treat $7.50 of excess business interest expense as paid or accrued in Year 2.

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has $110 of ATI ($100 from its sole proprietorship, plus $10 excess taxable income) and $27.50 of business interest expense ($20 from its sole proprietorship, plus $7.50 excess business interest expense treated as paid or accrued in Year 2). X's section 163(j) limit is $33 ($110 × 30 percent). Thus, $27.50 of X's business interest expense is deductible business interest expense. At the end of Year 2, X has $0 of excess business interest expense from PRS ($5 from Year 1, plus $2.50 treated as excess business interest expense in Year 2, less $7.50 treated as paid or accrued in Year 2), and $2.50 of negative section 163(j) expense from PRS. Y, in computing its limit under section 163(j), has $10 of ATI ($0 from its sole proprietorship, plus $10 excess taxable income) and $47.50 of business interest expense ($20 from its sole proprietorship, plus $20 disallowed business interest expense from Year 1, plus $7.50 excess business interest expense treated as paid or accrued in Year 2). Y's section 163(j) limit is $3 ($10 × 30 percent). Thus, $3 of Y's business interest expense is deductible business interest expense. The $44.50 of Y's business interest expense not allowed as a deduction ($47.50 business interest expense, less $3 section 163(j) limit) is treated as business interest expense paid or accrued by Y in Year 3. At the end of Year 2, Y has $0 of excess business interest expense from PRS ($5 from Year 1, plus $2.50 treated as excess business interest expense in Year 2, less $7.50 treated as paid or accrued in Year 2), and $2.50 of negative section 163(j) expense from PRS.

(11) *Example 11: Facts.* A (an individual) and B (a corporation) own all of the interests in partnership PRS. In Year 1, PRS has $100 of ATI, $10 of investment interest income, $20 of business interest income (BII), $60 of business interest expense (BIE), and $10 of floor plan financing interest expense. PRS's ATI consists of $100 of gross income and $0 of gross deductions. PRS allocates its items comprising ATI $100 to A and $0 to B. PRS allocates its business interest income $10 to A and $10 to B. PRS allocates its business interest expense $30 to A and $30 to B. PRS allocates all $10 of its investment interest income and all $10 of its floor plan financing interest expense to B. A has ATI from a sole proprietorship, unrelated to PRS, in the amount of $300.

(i) First, PRS determines its limitation pursuant to § 1.163(j)–2. PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $50 (($100 × 30 percent) + $20). Thus, PRS has $0 of excess business interest income (EBII), $0 of excess taxable income, $50 of deductible business interest expense, and $10 of excess business interest expense. PRS takes its $10 of floor plan financing into account in determining its nonseparately stated taxable income or loss.

(ii) Second, PRS determines each partner's allocable share of section 163(j) items used in its own section 163(j) calculation. B's $10 of investment interest income is not included in B's allocable business interest income amount because the $10 of investment interest income was not taken into account in PRS's section 163(j) calculation. B's $10 of floor plan financing interest expense is not included in B's allocable business interest expense. The $300 of ATI from A's sole proprietorship is not included in A's allocable ATI amount because the $300 was not taken into account in PRS's section 163(j) calculation.

TABLE 1 TO PARAGRAPH (o)(11)(ii)

	A	B	Total
Allocable ATI	$100	$0	$100
Allocable BII	10	10	20
Allocable BIE	30	30	60

(iii) Third, PRS compares each partner's allocable business interest income to such partner's allocable business interest expense. Because each partner's allocable business interest expense exceeds its allocable business interest income by $20 ($30 − $10), each partner has an allocable business interest income deficit of $20. Thus, the total allocable business interest income deficit is $40 ($20 + $20). No partner has allocable business interest income excess because no partner has allocable business interest income in excess of its allocable business interest expense. Thus, the total allocable business interest income excess is $0.

TABLE 1 TO PARAGRAPH (o)(11)(iii)

	A	B	Total
Allocable BII	$10	$10	N/A
Allocable BIE	30	30	N/A
If allocable BII exceeds allocable BIE, then such amount = Allocable BII excess	0	0	$0
If allocable BIE exceeds allocable BII, then such amount = Allocable BII deficit	20	20	40

(iv) Fourth, PRS determines each partner's final allocable business interest income excess. Because no partner had any allocable business interest income excess, each partner has final allocable business interest income excess of $0.

(v) Fifth, PRS determines each partner's remaining business interest expense. PRS determines A's remaining business interest expense by reducing, but not below $0, A's allocable business interest income deficit ($20) by the product of the total allocable business interest income excess ($0) and the ratio of A's allocable business interest income deficit to the total business interest income deficit ($20/$40). Therefore, A's allocable business interest income deficit of $20 is reduced by $0 ($0 × 50 percent). As a result, A's remaining business interest expense is $20. PRS determines B's remaining business interest expense by reducing, but not below $0, B's allocable business interest income deficit ($20) by the product of the total allocable business interest income excess ($0) and the ratio of B's allocable business interest income deficit to the total business interest income deficit ($20/$40). Therefore, B's allocable business interest income deficit of $20 is reduced by $0 ($0 × 50 percent). As a result, B's remaining business interest expense is $20.

TABLE 1 TO PARAGRAPH (o)(11)(v)

	A	B	Total
Allocable BII deficit	$20	$20	$40
Less: (Total allocable BII excess) × (Allocable BII deficit/Total allocable BII deficit)	0	0	N/A
= Remaining BIE	20	20	40

(vi) Sixth, PRS determines each partner's final allocable ATI. Any partner with a negative allocable ATI, or an allocable ATI of $0, has a positive allocable ATI of $0. Therefore, B has a positive allocable ATI of $0. Because A's allocable ATI is comprised of $100 of income and gain and $0 of deduction and loss, A has positive allocable ATI of $100. Thus, the total positive allocable ATI is $100 ($100 + $0). PRS determines A's final allocable ATI by reducing, but not below $0, A's positive allocable ATI ($100) by the product of total negative allocable ATI ($0) and the ratio of A's positive allocable ATI to the total positive allocable ATI ($100/$100). Therefore, A's positive allocable ATI is reduced by $0 ($0 × 100 percent). As a result, A's final allocable ATI is $100. Because B has a positive allocable ATI of $0, B's final allocable ATI is $0.

TABLE 1 TO PARAGRAPH (o)(11)(vi)

	A	B	Total
Allocable ATI	$100	$0	$100
If deduction and loss items comprising allocable ATI exceed income and gain items comprising allocable ATI, then such excess amount = Negative allocable ATI	0	0	0
If income and gain items comprising allocable ATI equal or exceed deduction and loss items comprising allocable ATI, then such amount = Positive allocable ATI	100	0	100

TABLE 2 TO PARAGRAPH (o)(11)(vi)

	A	B	Total
Positive allocable ATI	$100	$0	$100
Less: (Total negative allocable ATI) × (Positive allocable ATI/Total positive allocable ATI)	0	0	N/A
= Final allocable ATI	100	0	100

(vii) Seventh, PRS compares each partner's ATI capacity (ATIC) amount to such partner's remaining business interest expense. A's ATIC amount is $30 ($100 × 30 percent) and B's ATIC amount is $0 ($0 × 30 percent). Because A's ATIC amount exceeds its remaining business interest expense by $10 ($30 − $20), A has an ATIC excess of $10. B does not have any ATIC excess. Thus, the total ATIC excess is $10 ($10 + $0). A does not have any ATIC deficit. Because B's remaining business interest expense exceeds its ATIC amount by $20 ($20 − $0), B has an ATIC deficit of $20. Thus, the total ATIC deficit is $20 ($0 + $20).

TABLE 1 TO PARAGRAPH (o)(11)(vii)

	A	B	Total
ATIC (Final allocable ATI × 30 percent)	$30	$0	N/A
Remaining BIE	20	20	N/A
If ATIC exceeds remaining BIE, then such excess = ATIC excess	10	0	10
If remaining BIE exceeds ATIC, then such excess = ATIC deficit	0	20	20

(viii)(A) Eighth, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section if, and only if, PRS has:

(*1*) An excess business interest expense greater than $0 under paragraph (f)(2)(i) of this section;

(*2*) A total negative allocable ATI greater than $0 under paragraph (f)(2)(vi) of this section; and

(*3*) A total ATIC excess amount greater than $0 under paragraph (f)(2)(vii) of this section.

(B) Because PRS does not meet all three requirements in paragraph (o)(11)(viii)(A) of this section, PRS does not perform the calculations or adjustments described in paragraph (f)(2)(viii) of this section. In sum, the correct amounts to be used in paragraphs (o)(11)(ix) and (x) of this section are as follows.

TABLE 1 TO PARAGRAPH (o)(11)(viii)(B)

	A	B	Total
ATIC excess	$10	$0	$10
ATIC deficit	0	20	20

(ix) Ninth, PRS determines each partner's final ATIC excess amount. Because A has an ATIC excess, PRS must determine A's final ATIC excess amount. A's final ATIC excess amount is A's ATIC excess ($10), reduced, but not below $0, by the product of the total ATIC deficit ($20) and the ratio of A's ATIC excess to the total ATIC excess ($10/$10). Therefore, A has $0 of final ATIC excess ($10 − ($20 × 100 percent)).

TABLE 1 TO PARAGRAPH (o)(11)(ix)(B)

	A	B	Total
ATIC excess	$10	$0	N/A
Less: (Total ATIC deficit) × (ATIC excess/Total ATIC excess)	20	0	N/A
= Final ATIC excess	0	0	0

(x) Tenth, PRS determines each partner's final ATIC deficit amount. Because B has an ATIC deficit, PRS must determine B's final ATIC deficit amount. B's final ATIC deficit amount is B's ATIC deficit ($20), reduced, but not below $0, by the product of the total ATIC excess ($10) and the ratio of B's ATIC deficit to the total ATIC deficit ($20/$20). Therefore, B has $10 of final ATIC deficit ($20 − ($10 × 100 percent)).

TABLE 1 TO PARAGRAPH (o)(11)(x)

	A	B	Total
ATIC deficit	$0	$20	N/A
Less: (Total ATIC excess) × (ATIC deficit/Total ATIC deficit)	0	10	N/A
= Final ATIC deficit	0	10	10

(xi) Eleventh, PRS allocates deductible business interest expense and section 163(j) excess items to the partners. Pursuant to paragraph (f)(2)(i) of this section, PRS has $10 of excess business interest expense. PRS allocates the excess business interest expense dollar for dollar to the partners with final ATIC deficits amounts. Thus, PRS allocates all $10 of its excess business interest expense to B. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's share of excess business interest expense. Therefore, A has deductible business interest expense of $30 ($30 − $0) and B has deductible business interest expense of $20 ($30 − $10).

TABLE 1 TO PARAGRAPH (o)(11)(xi)

	A	B	Total
Deductible BIE	$30	$20	$50
EBIE allocated	0	10	10
ETI allocated	0	0	0
EBII allocated	0	0	0

(12) Example 12: Facts. A, B, and C own all of the interests in partnership PRS. In Year 1, PRS has $150 of ATI, $10 of business interest income, and $40 of business interest expense. PRS's ATI consists of $200 of gross income and $50 of gross deductions. PRS allocates its items comprising ATI ($50) to A, $200 to B, and $0 to C. PRS allocates its business interest income $0 to A, $0 to B, and $10 to C. PRS allocates its business interest expense $30 to A, $10 to B, and $0 to C.

(i) First, PRS determines its limitation pursuant to § 1.163(j)–2. PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $55 (($150 × 30 percent) + $10). Thus, PRS has $0 of excess business interest income, $50 of excess taxable income, $40 of deductible business interest expense, and $0 of excess business interest expense.

(ii) Second, PRS determines each partner's allocable share of section 163(j) items used in its own section 163(j) calculation.

TABLE 1 TO PARAGRAPH (o)(12)(ii)

	A	B	C	Total
Allocable ATI	($50)	$200	$0	$150
Allocable BII	0	0	10	10
Allocable BIE	30	10	0	40

(iii) Third, PRS compares each partner's allocable business interest income to such partner's allocable business interest expense. Because A's allocable business interest expense exceeds its allocable business interest income by $30 ($30 − $0), A has an allocable business interest income deficit of $30. Because B's allocable business interest expense exceeds its allocable business interest income by $10 ($10 − $0), B has an allocable business interest income deficit of $10. C does not have any allocable business interest income deficit. Thus, the total allocable business interest income deficit is $40 ($30 + $10 + $0). A and B do not have any allocable business interest income excess. Because C's allocable business interest income exceeds its allocable business interest expense by $10 ($10 − $0), C has an allocable business interest income excess of $10. Thus, the total allocable business interest income excess is $10 ($0 + $0 + $10).

TABLE 1 TO PARAGRAPH (o)(12)(iii)

	A	B	C	Total
Allocable BII	$0	$0	$10	N/A
Allocable BIE	30	10	0	N/A
If allocable BII exceeds allocable BIE, then such amount = Allocable BII excess	0	0	10	$10
If allocable BIE exceeds allocable BII, then such amount = Allocable BII deficit	30	10	0	40

(iv) Fourth, PRS determines each partner's final allocable business interest income excess. Because A and B do not have any allocable business interest income excess, each partner has final allocable business interest income excess of $0. PRS determines C's final allocable business interest income excess by reducing, but not below $0, C's allocable business interest income excess ($10) by the product of the total allocable business interest income deficit ($40) and the ratio of C's allocable business interest income excess to the total allocable business interest income excess ($10/$10). Therefore, C's allocable business interest income excess of $10 is reduced by $10 ($40 × 100 percent). As a result, C's allocable business interest income excess is $0.

TABLE 1 TO PARAGRAPH (o)(12)(iv)

	A	B	C	Total
Allocable BII excess	$0	$0	$10	N/A
Less: (Total allocable BII deficit) × (Allocable BII excess/Total allocable BII excess)	0	0	40	N/A
= Final Allocable BII Excess	0	0	0	$10

(v) Fifth, PRS determines each partner's remaining business interest expense. PRS determines A's remaining business interest expense by reducing, but not below $0, A's allocable business interest income deficit ($30) by the product of the total allocable business interest income excess ($10) and the ratio of A's allocable business interest income deficit to the total business interest income deficit ($30/$40). Therefore, A's allocable business interest income deficit of $30 is reduced by $7.50 ($10 × 75 percent). As a result, A's remaining business interest expense is $22.50. PRS determines B's remaining business interest expense by reducing, but not below $0, B's allocable business interest income deficit ($10) by the product of the total allocable business interest income excess ($10) and the ratio of B's allocable business interest income deficit to the total business interest income deficit ($10/$40). Therefore, B's allocable business interest income deficit of $10 is reduced by $2.50 ($10 × 25 percent). As a result, B's remaining business interest expense is $7.50. Because C does not have any allocable business interest income deficit, C's remaining business interest expense is $0.

TABLE 1 TO PARAGRAPH (o)(12)(v)

	A	B	C	Total
Allocable BII deficit	$30	$10	$0	$40
Less: (Total allocable BII excess) × (Allocable BII deficit/Total allocable BII deficit)	7.50	2.50	0	N/A
= Remaining BIE	22.50	7.50	0	N/A

(vi) Sixth, PRS determines each partner's final allocable ATI. Because A's allocable ATI is comprised of $50 of items of deduction and loss and $0 of income and gain, A has negative allocable ATI of $50. A is the only partner with negative allocable ATI. Thus, the total negative allocable ATI amount is $50. Any partner with a negative allocable ATI, or an allocable ATI of $0, has a positive allocable ATI of $0. Therefore, A and C have a positive allocable ATI of $0. Because B's allocable ATI is comprised of $200 of items of income and gain and $0 of deduction and loss, B has positive allocable ATI of $200. Thus, the total positive allocable ATI is $200 ($0 + $200 + $0). PRS determines B's final allocable ATI by reducing, but not below $0, B's positive allocable ATI ($200) by the product of total negative allocable ATI ($50) and the ratio of B's positive allocable ATI to the total positive allocable ATI ($200/$200). Therefore, B's positive allocable ATI is reduced by $50 ($50 × 100 percent). As a result, B's final allocable ATI is $150.

TABLE 1 TO PARAGRAPH (o)(12)(vi)

	A	B	C	Total
Allocable ATI	($50)	$200	$0	$150
If deduction and loss items comprising allocable ATI exceed income and gain items comprising allocable ATI, then such excess amount = Negative allocable ATI	50	0	0	50
If income and gain items comprising allocable ATI equal or exceed deduction and loss items comprising allocable ATI, then such amount = Positive allocable ATI	0	200	0	200

TABLE 2 TO PARAGRAPH (o)(12)(vi)

	A	B	C	Total
Positive allocable ATI	$0	$200	$0	$200
Less: (Total negative allocable ATI) × (Positive allocable ATI/Total positive allocable ATI)	0	50	0	N/A
= Final allocable ATI	0	150	0	150

(vii) Seventh, PRS compares each partner's ATI capacity (ATIC) amount to such partner's remaining business interest expense. A's ATIC amount is $0 ($0 × 30 percent), B's ATIC amount is $45 ($150 × 30 percent), and C's ATIC amount is $0 ($0 × 30 percent). A does not have any ATIC excess. Because B's ATIC amount exceeds its remaining business interest expense by $37.50 ($45 − $7.50), B has an ATIC excess amount of $37.50. C does not have any ATIC excess. Thus, the total ATIC excess amount is $37.50 ($0 + $37.50 + $0). Because A's remaining business interest expense exceeds its ATIC amount by $22.50 ($22.50 − $0), A has an ATIC deficit of $22.50. B and C do not have any ATIC deficit. Thus, the total ATIC deficit is $22.50 ($22.50 + $0 + $0).

TABLE 1 TO PARAGRAPH (o)(12)(vii)

	A	B	C	Total
ATIC (Final allocable ATI × 30 percent)	$0	$45	$0	N/A
Remaining BIE	22.50	7.50	0	N/A
If ATIC exceeds remaining BIE, then such excess = ATIC excess	0	37.50	0	37.50
If remaining BIE exceeds ATIC, then such excess = ATIC deficit	22.50	0	0	22.50

(viii)(A) Eighth, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section if, and only if, PRS has:

(*1*) An excess business interest expense greater than $0 under paragraph (f)(2)(i) of this section;

(*2*) A total negative allocable ATI greater than $0 under paragraph (f)(2)(vi) of this section; and

(*3*) A total ATIC excess amount greater than $0 under paragraph (f)(2)(vii) of this section.

(B) Because PRS does not meet all three requirements in paragraph (o)(12)(viii)(A) of this section, PRS does not perform the calculations or adjustments described in paragraph (f)(2)(viii) of this section. In sum, the correct amounts to be used in paragraphs (o)(12)(ix) and (x) of this section are as follows.

TABLE 1 TO PARAGRAPH (o)(12)(viii)(B)

	A	B	C	Total
ATIC excess	$0	$37.50	$0	$37.50
ATIC deficit	22.50	0	0	22.50

(ix) Ninth, PRS determines each partner's final ATIC excess amount. Because B has ATIC excess, PRS must determine B's final ATIC excess amount. B's final ATIC excess amount is B's ATIC excess ($37.50), reduced, but not below $0, by the product of the total ATIC deficit ($22.50) and the ratio of B's ATIC excess to the total ATIC excess ($37.50/$37.50). Therefore, B has $15 of final ATIC excess ($37.50 − ($22.50 × 100 percent)).

TABLE 1 TO PARAGRAPH (o)(12)(ix)

	A	B	C	Total
ATIC excess	$0	$37.50	$0	N/A
Less: (Total ATIC deficit) × (ATIC excess/Total ATIC excess)	0	22.50	0	N/A
= Final ATIC excess	0	15	0	15

(x) Tenth, PRS determines each partner's final ATIC deficit amount. Because A has an ATIC deficit, PRS must determine A's final ATIC deficit amount. A's final ATIC deficit amount is A's ATIC deficit ($22.50), reduced, but not below $0, by the product of the total ATIC excess ($37.50) and the ratio of A's ATIC deficit to the total ATIC deficit ($22.50/$22.50). Therefore, A has $0 of final ATIC deficit ($22.50 − ($37.50 × 100 percent)).

TABLE 1 TO PARAGRAPH (o)(12)(x)

	A	B	C	Total
ATIC deficit	$22.50	$0	$0	N/A
Less: (Total ATIC excess) × (ATIC deficit/Total ATIC deficit)	37.50	0	0	N/A
= Final ATIC deficit	0	0	0	$0

(xi) Eleventh, PRS allocates deductible business interest expense and section 163(j) excess items to the partners. Pursuant to paragraph (f)(2)(i) of this section, PRS has $50 of excess taxable income and $40 of deductible business interest expense. After grossing up each partner's final ATIC excess amounts by ten-thirds, excess taxable income is allocated dollar for dollar to partners with final ATIC excess amounts. Thus, PRS allocates its excess taxable income (ETI) $50 to B. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's share of excess business interest expense (EBIE). Therefore, A has deductible business interest expense of $30 ($30 − $0), B has deductible business interest expense of $10 ($10 − $0), and C has deductible business interest expense of $0 ($0 − $0).

TABLE 1 TO PARAGRAPH (o)(12)(xi)

	A	B	C	Total
Deductible BIE	$30	$10	$0	$40
EBIE allocated	0	0	0	0
ETI allocated	0	50	0	50
EBII allocated	0	0	0	0

(13) *Example 13: Facts.* A, B, and C own all of the interests in partnership PRS. In Year 1, PRS has $100 of ATI, $0 of business interest income, and $50 of business interest expense. PRS's ATI consists of $200 of gross income and $100 of gross deductions. PRS allocates its items comprising ATI $100 to A, $100 to B, and ($100) to C. PRS allocates its business interest expense $0 to A, $25 to B, and $25 to C.

(i) First, PRS determines its limitation pursuant to § 1.163(j)–2. PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $30 ($100 × 30 percent). Thus, PRS has $30 of deductible business interest expense and $20 of excess business interest expense.

(ii) Second, PRS determines each partner's allocable share of section 163(j) items used in its own section 163(j) calculation.

TABLE 1 TO PARAGRAPH (o)(13)(ii)

	A	B	C	Total
Allocable ATI	$100	$100	($100)	$100
Allocable BII	0	0	0	0
Allocable BIE	0	25	25	50

(iii) Third, PRS compares each partner's allocable business interest income to such partner's allocable business interest expense. No partner has allocable business interest income. Consequently, each partner's allocable business interest income deficit is equal to such partner's allocable business interest expense. Thus, A's allocable business interest income deficit is $0, B's allocable business interest income deficit is $25, and C's allocable business interest income deficit is $25. The total allocable business interest income deficit is $50 ($0 + $25 + $25). No partner has allocable business interest income excess because no partner has allocable business interest income in excess of its allocable business interest expense. Thus, the total allocable business interest income excess is $0.

TABLE 1 TO PARAGRAPH (o)(13)(iii)

	A	B	C	Total
Allocable BII	$0	$0	$0	N/A
Allocable BIE	0	25	25	N/A
If allocable BII exceeds allocable BIE, then such amount = Allocable BII excess	0	0	0	$0
If allocable BIE exceeds allocable BII, then such amount = Allocable BII deficit	0	25	25	50

(iv) Fourth, PRS determines each partner's final allocable business interest income excess. Because no partner had any allocable business interest income excess, each partner has final allocable business interest income excess of $0.

(v) Fifth, PRS determines each partner's remaining business interest expense. Because no partner has any allocable business interest income excess, each partner's remaining business interest expense equals its allocable business interest income deficit. Thus, A's remaining business interest expense is $0, B's remaining business interest expense is $25, and C's remaining business interest expense is $25.

TABLE 1 TO PARAGRAPH (o)(13)(v)

	A	B	C	Total
Allocable BII deficit	$0	$25	$25	$50
Less: (Total allocable BII excess) × (Allocable BII deficit/Total allocable BII deficit)	0	0	0	N/A
= Remaining BIE	0	25	25	N/A

(vi) Sixth, PRS determines each partner's final allocable ATI. Because C's allocable ATI is comprised of $100 of items of deduction and loss and $0 of income and gain, C has negative allocable ATI of $100. C is the only partner with negative allocable ATI. Thus, the total negative allocable ATI amount is $100. Any partner with a negative allocable ATI, or an allocable ATI of $0, has a positive allocable ATI of $0. Therefore, C has a positive allocable ATI of $0. Because A's allocable ATI is comprised of $100 of items of income and gain and $0 of deduction and loss, A has positive allocable ATI of $100. Because B's allocable ATI is comprised of $100 of items of income and gain and $0 of deduction and loss, B has positive allocable ATI of $100. Thus, the total positive allocable ATI is $200 ($100 + $100 + $0). PRS determines A's final allocable ATI by reducing, but not below $0, A's positive allocable ATI ($100) by the product of total negative allocable ATI ($100) and the ratio of A's positive allocable ATI to the total positive allocable ATI ($100/$200). Therefore, A's positive allocable ATI is reduced by $50 ($100 × 50 percent). As a result, A's final allocable ATI is $50. PRS determines B's final allocable ATI by reducing, but not below $0, B's positive allocable ATI ($100) by the product of total negative allocable ATI ($100) and the ratio of B's positive allocable ATI to the total positive allocable ATI ($100/$200). Therefore, B's positive allocable ATI is reduced by $50 ($100 × 50 percent). As a result, B's final allocable ATI is $50. Because C has a positive allocable ATI of $0, C's final allocable ATI is $0.

TABLE 1 TO PARAGRAPH (o)(13)(vi)

	A	B	C	Total
Allocable ATI	$100	$100	($100)	$100
If deduction and loss items comprising allocable ATI exceed income and gain items comprising allocable ATI, then such excess amount = Negative allocable ATI	0	0	100	100
If income and gain items comprising allocable ATI equal or exceed deduction and loss items comprising allocable ATI, then such amount = Positive allocable ATI	100	100	0	200

TABLE 2 TO PARAGRAPH (o)(13)(vi)

	A	B	C	Total
Positive allocable ATI	$100	$100	$0	$200
Less: (Total negative allocable ATI) × (Positive allocable ATI/Total positive allocable ATI)	50	50	0	N/A
= Final allocable ATI	50	50	0	100

(vii) Seventh, PRS compares each partner's ATI capacity (ATIC) amount to such partner's remaining business interest expense. A's ATIC amount is $15 ($50 × 30 percent), B's ATIC amount is $15 ($50 × 30 percent), and C's ATIC amount is $0 ($0 × 30 percent). Because A's ATIC amount exceeds its remaining business interest expense by $15 ($15 − $0), A has an ATIC excess of $15. B and C do not have any ATIC excess. Thus, the total ATIC excess is $15 ($15 + $0 + $0). A does not have any ATIC deficit. Because B's remaining business interest expense exceeds its ATIC amount by $10 ($25 − $15), B has an ATIC deficit of $10. Because C's remaining business interest expense exceeds its ATIC amount by $25 ($25 − $0), C has an ATIC deficit of $25. Thus, the total ATIC deficit is $35 ($0 + $10 + $25).

TABLE 1 TO PARAGRAPH (o)(13)(vii)

	A	B	C	Total
ATIC (Final allocable ATI × 30 percent)	$15	$15	$0	N/A
Remaining BIE	0	25	25	N/A
If ATIC exceeds remaining BIE, then such excess = ATIC excess	15	0	0	15
If remaining BIE exceeds ATIC, then such excess = ATIC deficit	0	10	25	35

(viii)(A) Eighth, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section if, and only if, PRS has:

(*1*) An excess business interest expense greater than $0 under paragraph (f)(2)(i) of this section;

(*2*) A total negative allocable ATI greater than $0 under paragraph (f)(2)(vi) of this section; and

(*3*) A total ATIC excess greater than $0 under paragraph (f)(2)(vii) of this section. Because PRS satisfies each of these three requirements, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii)(B) and (C) or (D) of this section.

(B) PRS must determine each partner's priority amount and usable priority amount. Only partners with an ATIC deficit under paragraph (f)(2)(vii) of this section can have a priority amount greater than $0. Thus, only partners B and C can have a priority amount greater than $0. PRS determines a partner's priority amount as thirty percent of the amount by which such partner's allocable positive ATI exceeds its final allocable ATI. Therefore, A's priority amount is $0, B's priority amount is $15 (($100 − $50) × 30 percent), and C's priority amount is $0 (($0 − $0) × 30 percent). Thus, the total priority amount is $15 ($0 + $15 + $0). Next, PRS must determine each partner's usable priority amount. Each partner's usable priority amount is the lesser of such partner's priority amount or ATIC deficit. Thus, A has a usable priority amount of $0, B has a usable priority amount of $10, and C has a usable priority amount of $0. As a result, the total usable priority amount is $10 ($0 + $10 + $0). Because the total ATIC excess under paragraph (f)(2)(vii) of this section ($15) is greater than the total usable priority amount ($10), PRS must perform the adjustments described in paragraph (f)(2)(viii)(C) of this section.

TABLE 1 TO PARAGRAPH (o)(13)(viii)(B)

	A	B	C	Total
(Positive allocable ATI—Final allocable ATI)	$0	$50	$0	N/A
Multiplied by 30 percent	30 percent	30 percent	30 percent	N/A
=Priority amount	0	15	0	15

TABLE 2 TO PARAGRAPH (o)(13)(viii)(B)

	A	B	C	Total
Priority amount	$0	$15	$0	N/A
ATIC deficit	0	10	25	N/A
Lesser of priority amount or ATIC deficit = Usable priority amount	0	10	0	10

(C) For purposes of paragraph (f)(2)(ix) of this section, each partner's final ATIC excess is $0. For purposes of paragraph (f)(2)(x) of this section, the following terms shall have the following meanings. Each partner's ATIC deficit is such partner's ATIC deficit as determined pursuant to paragraph (f)(2)(vii) of this section reduced by such partner's usable priority amount. Thus, A's ATIC deficit is $0 ($0 − $0), B's ATIC deficit is $0 ($10 − $10), and C's ATIC deficit is $25 ($25 − $0). The total ATIC deficit is the total ATIC deficit determined pursuant to paragraph (f)(2)(vii) ($35) reduced by the total usable priority amount ($10). Thus, the total ATIC deficit is $25 ($35 − $10). The total ATIC excess is the total ATIC excess determined pursuant to paragraph (f)(2)(vii) of this section ($15) reduced by the total usable priority amount ($10). Thus, the total ATIC excess is $5 ($15 − $5).

TABLE 1 TO PARAGRAPH (o)(13)(viii)(C)

	A	B	C	Total
ATIC deficit	$0	$10	$25	N/A
Less: Usable priority amount	0	10	0	N/A
= ATIC deficit for purposes of paragraph (f)(2)(x) of this section	0	0	25	25

(D) In light of the fact that the total ATIC excess was greater than the total usable priority amount under paragraph (f)(2)(viii)(B) of this section, paragraph (f)(2)(viii)(D) of this section does not apply. In sum, the correct amounts to be used in paragraph (f)(2)(x) of this section are as follows.

TABLE 1 TO PARAGRAPH (o)(13)(viii)(C)

	A	B	C	Total
ATIC excess	$5	$0	$0	$5
ATIC deficit	0	0	25	25

(ix) Ninth, PRS determines each partner's final ATIC excess amount. Pursuant to paragraph (f)(2)(viii)(C) of this section, each partner's final ATIC excess amount is $0.

(x) Tenth, PRS determines each partner's final ATIC deficit amount. Because C has an ATIC deficit, PRS must determine C's final ATIC deficit amount. C's final ATIC deficit amount is C's ATIC deficit ($25), reduced, but not below $0, by the product of the total ATIC excess ($5) and the ratio of C's ATIC deficit to the total ATIC deficit ($25/$25). Therefore, C has $20 of final ATIC deficit ($25 − ($5 × 100 percent)).

TABLE 1 TO PARAGRAPH (o)(13)(x)

	A	B	C	Total
ATIC deficit	$0	$0	$25	N/A
Less: (Total ATIC excess) × (ATIC deficit/Total ATIC deficit)	0	0	5	N/A
= Final ATIC deficit	0	0	20	20

(xi) Eleventh, PRS allocates deductible business interest expense and section 163(j) excess items to the partners. Pursuant to paragraph (f)(2)(i) of this section, PRS has $20 of excess business interest expense. PRS allocates the excess business interest expense dollar for dollar to the partners with final ATIC deficits. Thus, PRS allocates its excess business interest expense $20 to C. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's share of excess business interest expense. Therefore, A has deductible business interest expense of $0 ($0 − $0), B has deductible business interest expense of $25 ($25 − $0), and C has deductible business interest expense of $5 ($25 − $20).

TABLE 1 TO PARAGRAPH (o)(13)(xi)

	A	B	C	Total
Deductible BIE	$0	$25	$5	$30
EBIE allocated	0	0	20	20
ETI allocated	0	0	0	0
EBII allocated	0	0	0	0

(14) *Example 14: Facts.* A, B, C, and D own all of the interests in partnership PRS. In Year 1, PRS has $200 of ATI, $0 of business interest income, and $140 of business interest expense. PRS's ATI consists of $600 of gross income and $400 of gross deductions. PRS allocates its items comprising ATI $100 to A, $100 to B, $400 to C, and ($400) to D. PRS allocates its business interest expense $0 to A, $40 to B, $60 to C, and $40 to D.

(i) First, PRS determines its limitation pursuant to § 1.163(j)–2. PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $60 ($200 − 30 percent). Thus, PRS has $60 of deductible business interest expense and $80 of excess business interest expense.

(ii) Second, PRS determines each partner's allocable share of section 163(j) items used in its own section 163(j) calculation.

TABLE 1 TO PARAGRAPH (o)(14)(ii)

	A	B	C	D	Total
Allocable ATI	$100	$100	$400	($400)	$200
Allocable BII	0	0	0	0	0
Allocable BIE	0	40	60	40	140

(iii) Third, PRS compares each partner's allocable business interest income to such partner's allocable business interest expense. No partner has allocable business interest income. Consequently, each partner's allocable business interest income deficit is equal to such partner's allocable business interest expense. Thus, A's allocable business interest income deficit is $0, B's allocable business interest income deficit is $40, C's allocable business interest income deficit is $60, and D's allocable business interest income deficit is $40. The total allocable business interest income deficit is $140 ($0 + $40 + $60 + $40). No partner has allocable business interest income excess because no partner has allocable business interest income in excess of its allocable business interest expense. Thus, the total allocable business interest income excess is $0.

TABLE 1 TO PARAGRAPH (o)(14)(iii)

	A	B	C	D	Total
Allocable BII	$0	$0	$0	$0	N/A
Allocable BIE	0	40	60	40	N/A
If allocable BII exceeds allocable BIE, then such amount =					
Allocable BII excess	0	0	0	0	0
If allocable BIE exceeds allocable BII, then such amount =					
Allocable BII deficit	0	40	60	40	140

(iv) Fourth, PRS determines each partner's final allocable business interest income excess. Because no partner has any allocable business interest income excess, each partner has final allocable business interest income excess of $0.

(v) Fifth, PRS determines each partner's remaining business interest expense. Because no partner has any allocable business interest income excess, each partner's remaining business interest expense equals its allocable business interest income deficit. Thus, A's remaining business interest expense is $0, B's remaining business interest expense is $40, C's remaining business interest expense is $60, and D's remaining business interest expense is $40.

TABLE 1 TO PARAGRAPH (o)(14)(v)

	A	B	C	D	Total
Allocable BII deficit	$0	$40	$60	$40	$140
Less: (Total allocable BII excess) × (Allocable BII deficit/ Total allocable BII deficit)	0	0	0	0	N/A
= Remaining BIE	0	40	60	40	N/A

(vi) Sixth, PRS determines each partner's final allocable ATI. Because D's allocable ATI is comprised of $400 of items of deduction and loss and $0 of income and gain, D has negative allocable ATI of $400. D is the only partner with negative allocable ATI. Thus, the total negative allocable ATI amount is $400. Any partner with a negative allocable ATI, or an allocable ATI of $0, has a positive allocable ATI of $0. Therefore, D has a positive allocable ATI of $0. PRS determines A's final allocable ATI by reducing, but not below $0, A's positive allocable ATI ($100) by the product of total negative allocable ATI ($400) and the ratio of A's positive allocable ATI to the total positive allocable ATI ($100/$600). Therefore, A's positive allocable ATI is reduced by $66.67 ($400 × 16.67 percent). As a result, A's final allocable ATI is $33.33. PRS determines B's final allocable ATI by reducing, but not below $0, B's positive allocable ATI ($100) by the product of total negative allocable ATI ($400) and the ratio of B's positive allocable ATI to the total positive

allocable ATI ($100/$600). Therefore, B's positive allocable ATI is reduced by $66.67 ($400 × 16.67 percent). As a result, B's final allocable ATI is $33.33. PRS determines C's final allocable ATI by reducing, but not below $0, C's positive allocable ATI ($400) by the product of total negative allocable ATI ($400) and the ratio of C's positive allocable ATI to the total positive allocable ATI ($400/$600). Therefore, C's positive allocable ATI is reduced by $266.67 ($400 × 66.67 percent). As a result, C's final allocable ATI is $133.33. Because D has a positive allocable ATI of $0, D's final allocable ATI is $0.

TABLE 1 TO PARAGRAPH (o)(14)(vi)

	A	B	C	D	Total
Allocable ATI	$100	$100	$400	($400)	$200
If deduction and loss items comprising allocable ATI exceed income and gain items comprising allocable ATI, then such excess amount = Negative allocable ATI	0	0	0	400	400
If income and gain items comprising allocable ATI equal or exceed deduction and loss items comprising allocable ATI, then such amount = Positive allocable ATI	100	100	400	0	600

TABLE 2 TO PARAGRAPH (o)(14)(vi)

	A	B	C	D	Total
Positive allocable ATI	$100	$100	$400	$0	$600
Less: (Total negative allocable ATI) x (Positive allocable ATI/Total positive allocable ATI)	66.67	66.67	266.67	0	N/A
= Final allocable ATI	33.33	33.33	133.33	0	200

(vii) Seventh, PRS compares each partner's ATI capacity (ATIC) amount to such partner's remaining business interest expense. A's ATIC amount is $10 ($33.33 × 30 percent), B's ATIC amount is $10 ($33.33 × 30 percent), C's ATIC amount is $40 ($133.33 × 30 percent), and D's ATIC amount is $0 ($0 × 30 percent). Because A's ATIC amount exceeds its remaining business interest expense by $10 ($10 − $0), A has an ATIC excess of $10. B, C, and D do not have any ATIC excess. Thus, the total ATIC excess is $10 ($10 + $0 + $0 + $0). A does not have any ATIC deficit. Because B's remaining business interest expense exceeds its ATIC amount by $30 ($40 − $10), B has an ATIC deficit of $30. Because C's remaining business interest expense exceeds its ATIC amount by $20 ($60 − $40), C has an ATIC deficit of $20. Because D's remaining business interest expense exceeds its ATIC amount by $40 ($40 − $0), D has an ATIC deficit of $40. Thus, the total ATIC deficit is $90 ($0 + $30 + $20 + $40).

TABLE 1 TO PARAGRAPH (o)(14)(vii)

	A	B	C	D	Total
ATIC (Final allocable ATI x 30 percent)	$10	$10	$40	$0	N/A
Remaining BIE	0	40	60	40	N/A
If ATIC exceeds remaining BIE, then such excess = ATIC excess	10	0	0	0	10
If remaining BIE exceeds ATIC, then such excess = ATIC deficit	0	30	20	40	90

(viii)(A) Eighth, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section if, and only if, PRS has (1) an excess business interest expense greater than $0 under paragraph (f)(2)(i) of this section, (2) a total negative allocable ATI greater than $0 under paragraph (f)(2)(vi) of this section, and (3) a total ATIC excess amount greater than $0 under paragraph (f)(2)(vii) of this section. Because PRS satisfies each of these three requirements, PRS must perform the calculations and make the necessary adjustments described under paragraphs (f)(2)(viii)(B) and (C) or paragraph (f)(2)(viii)(D) of this section.

(B) PRS must determine each partner's priority amount and usable priority amount. Only partners with an ATIC deficit under paragraph (f)(2)(vii) of this section can have a priority amount greater than $0. Thus, only partners B, C, and D can have a priority amount greater than $0. PRS determines a partner's priority amount as thirty percent of the amount by which such partner's allocable positive ATI exceeds its final allocable ATI. Therefore, B's priority amount is $20 (($100 − $33.33) × 30 percent), C's priority amount is $80 (($400 − $133.33) × 30 percent), and D's priority amount is $0 (($0 − $0) × 30 percent). Thus, the total priority amount is $100 ($0 + $20 + $80 + $0). Next, PRS must determine each partner's usable priority amount. Each partner's usable priority amount is the lesser of such partner's priority amount or ATIC deficit. Thus, A has a usable priority amount of $0, B has a usable priority amount of $20, C has a usable priority amount of $20, and D has a usable priority amount of $0. As a result, the total usable priority amount is $40 ($0 + $20 + $20 + $0). Because the total usable priority amount ($40) is greater than the total ATIC excess under paragraph (f)(2)(vii) ($10), PRS must perform the adjustments described in paragraph (f)(2)(viii)(D) of this section.

TABLE 1 TO PARAGRAPH (o)(14)(viii)(B)

	A	B	C	D	Total
(Positive allocable ATI − Final allocable ATI)	$0	$66.67	$266.67	$0	N/A
Multiplied by 30 percent	30 percent	30 percent	30 percent	30 percent	N/A

TABLE 1 TO PARAGRAPH (o)(14)(viii)(B)—Continued

	A	B	C	D	Total
= Priority amount	0	20	80	0	100

TABLE 2 TO PARAGRAPH (o)(14)(viii)(B)

	A	B	C	D	Total
Priority amount	$0	$20	$80	$0	N/A
ATIC deficit	0	30	20	40	N/A
Lesser of priority amount or ATIC deficit = Usable priority amount	0	20	20	0	40

(C) In light of the fact that the total usable priority amount is greater than the total ATIC excess under paragraph (f)(2)(viii)(B) of this section, paragraph (f)(2)(viii)(C) of this section does not apply.

(D)(*1*) Because B and C are the only partners with priority amounts greater than $0, B and C are priority partners, while A and D are non-priority partners. For purposes of paragraph (f)(2)(ix) of this section, each partner's final ATIC excess amount is $0. For purposes of paragraph (f)(2)(x) of this section, each non-priority partner's final ATIC deficit amount is such partner's ATIC deficit determined pursuant to paragraph (f)(2)(vii) of this section. Therefore, A has a final ATIC deficit of $0 and D has a final ATIC deficit of $40. Additionally, for purposes of paragraph (f)(2)(x) of this section, PRS must determine each priority partner's step eight excess share. A priority partner's step eight excess share is the product of the total ATIC excess and the ratio of the partner's priority amount to the total priority amount. Thus, B's step eight excess share is $2 ($10 × ($20/$100)) and C's step eight excess share is $8 ($10 × ($80/$100)). To the extent a priority partner's step eight excess share exceeds its ATIC deficit, the excess shall be the partner's ATIC excess for purposes of paragraph (f)(2)(x) of this section. Thus, B and C each have an ATIC excess of $0, resulting in a total ATIC excess is $0. To the extent a priority partner's ATIC deficit exceeds its step eight excess share, the excess shall be the partner's ATIC deficit for purposes of paragraph (f)(2)(x) of this section. Because B's ATIC deficit ($30) exceeds its step eight excess share ($2), B's ATIC deficit for purposes of paragraph (f)(2)(x) of this section is $28 ($30 − $2). Because C's ATIC deficit ($20) exceeds its step eight excess share ($8), C's ATIC deficit for purposes of paragraph (f)(2)(x) of this section is $12 ($20 − $8). Thus, the total ATIC deficit is $40 ($28 + $12).

TABLE 1 TO PARAGRAPH (o)(14)(viii)(D)(*1*)

	A	B	C	D	Total
Non-priority partners ATIC deficit in paragraph (f)(2)(vii) = Final ATIC deficit for purposes of paragraph (f)(2)(x) of this section	$0	N/A	N/A	$40	N/A

TABLE 2 TO PARAGRAPH (o)(14)(viii)(D)(*1*)

	A	B	C	D	Total
Priority partners step eight excess share = (Total ATIC excess) × (Priority/Total priority)	N/A	$2	$8	N/A	N/A
ATIC deficit	N/A	30	20	N/A	N/A
If step eight excess share exceeds ATIC deficit, then such excess = ATIC excess for purposes of paragraph (f)(2)(x) of this section	N/A	0	0	N/A	0
If ATIC deficit exceeds step eight excess share, then such excess = ATIC deficit for purposes of paragraph (f)(2)(x) of this section	N/A	28	12	N/A	40

(*2*) In sum, the correct amounts to be used in paragraph (f)(2)(x) of this section are as follows:

TABLE 1 TO PARAGRAPH (o)(14)(viii)(D)(*2*)

	A	B	C	D	Total
ATIC excess	$0	$0	$0	$0	$0
ATIC deficit	0	28	12	0	40
Non-priority partner final ATIC deficit	0	0	0	40	N/A

(ix) Ninth, PRS determines each partner's final ATIC excess amount. Pursuant to paragraph (f)(2)(viii)(D) of this section, each priority and non-priority partner's final ATIC excess amount is $0.

(x) Tenth, PRS determines each partner's final ATIC deficit amount. Because B has an ATIC deficit, PRS must determine B's final

ATIC deficit amount. B's final ATIC deficit amount is B's ATIC deficit ($28), reduced, but not below $0, by the product of the total ATIC excess ($0) and the ratio of B's ATIC deficit to the total ATIC deficit ($28/$40). Therefore, B has $28 of final ATIC deficit ($28 − ($0 × 70 percent)). Because C has an ATIC deficit, PRS must determine C's final ATIC deficit amount. C's final ATIC deficit amount is C's ATIC deficit ($12), reduced, but not below $0, by the product of the total ATIC excess ($0) and the ratio of C's ATIC deficit to the total ATIC deficit ($12/$40). Therefore, C has $12 of final ATIC deficit ($12 − ($0 × 30 percent)). Pursuant to paragraph (f)(2)(viii)(D) of this section, D's final ATIC deficit amount is $40.

TABLE 2 TO PARAGRAPH (o)(14)(x)

	A	B	C	D	Total
ATIC deficit	N/A	$28	$12	N/A	N/A
Less: (Total ATIC excess) × (ATIC deficit/Total ATIC deficit)	N/A	0	0	N/A	N/A
= Final ATIC deficit	0	28	12	40	80

(xi) Eleventh, PRS allocates deductible business interest expense and section 163(j) excess items to the partners. Pursuant to paragraph (f)(2)(i) of this section, PRS has $80 of excess business interest expense. PRS allocates the excess business interest expense dollar for dollar to the partners with final ATIC deficits. Thus, PRS allocates its excess business interest expense $28 to B, $12 to C, and $40 to D. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's share of excess business interest expense. Therefore, A has deductible business interest expense of $0 ($0 − $0), B has deductible business interest expense of $12 ($40 − $28), C has deductible business interest expense of $48 ($60 − $12), and D has deductible business interest expense of $0 ($40 − $40).

TABLE 1 TO PARAGRAPH (o)(14)(xi)

	A	B	C	D	Total
Deductible BIE	$0	$12	$48	$0	$60
EBIE allocated	0	28	12	40	80
ETI allocated	0	0	0	0	0
EBII allocated	0	0	0	0	0

(15) *Example 15: Facts.* A, B, C, and D own all of the interests in partnership PRS. In Year 1, PRS has $200 of ATI, $0 of business interest income, and $150 of business interest expense. PRS's ATI consists of $500 of gross income and $300 of gross deductions. PRS allocates its items comprising ATI $50 to A, $50 to B, $400 to C, and ($300) to D. PRS allocates its business interest expense $0 to A, $50 to B, $50 to C, and $50 to D.

(i) First, PRS determines its limitation pursuant to § 1.163(j)–2. PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $60 ($200 × 30 percent). Thus, PRS has $60 of deductible business interest expense, and $90 of excess business interest expense.

(ii) Second, PRS determines each partner's allocable share of section 163(j) items used in its own section 163(j) calculation.

TABLE 1 TO PARAGRAPH (o)(15)(ii)

	A	B	C	D	Total
Allocable ATI	$50	$50	$400	($300)	$200
Allocable BII	0	0	0	0	0
Allocable BIE	0	50	50	50	150

(iii) Third, PRS compares each partner's allocable business interest income to such partner's allocable business interest expense. No partner has allocable business interest income. Consequently, each partner's allocable business interest income deficit is equal to such partner's allocable business interest expense. Thus, A's allocable business interest income deficit is $0, B's allocable business interest income deficit is $50, C's allocable business interest income deficit is $50, and D's allocable business interest income deficit is $50. The total allocable business interest income deficit is $150 ($0 + $50 + $50 + $50). No partner has allocable business interest income excess because no partner has allocable business interest income in excess of its allocable business interest expense. Thus, the total allocable business interest income excess is $0.

TABLE 1 TO PARAGRAPH (o)(15)(iii)

	A	B	C	D	Total
Allocable BII	$0	$0	$0	$0	N/A
Allocable BIE	0	50	50	50	N/A
If allocable BII exceeds allocable BIE, then such amount = Allocable BII excess	0	0	0	0	0
If allocable BIE exceeds allocable BII, then such amount = Allocable BII deficit	0	50	50	50	150

(iv) Fourth, PRS determines each partner's final allocable business interest income excess. Because no partner has any allocable business interest income excess, each partner has final allocable business interest income excess of $0.

(v) Fifth, PRS determines each partner's remaining business interest expense. Because no partner has any allocable business interest income excess, each partner's remaining business interest expense equals its allocable business interest income deficit. Thus, A's remaining business interest expense is $0, B's remaining business interest expense is $50, C's remaining business interest expense is $50, and D's remaining business interest expense is $50.

TABLE 1 TO PARAGRAPH (o)(15)(v)

	A	B	C	D	Total
Allocable BII deficit	$0	$50	$50	$50	$150
Less: (Total allocable BII excess) × (Allocable BII deficit/Total allocable BII deficit)	0	0	0	0	N/A
= Remaining BIE	0	50	50	50	N/A

(vi) Sixth, PRS determines each partner's final allocable ATI. Because D's allocable ATI is comprised of $300 of items of deduction and loss and $0 of income and gain, D has negative allocable ATI of $300. D is the only partner with negative allocable ATI. Thus, the total negative allocable ATI amount is $300. Any partner with a negative allocable ATI, or an allocable ATI of $0, has a positive allocable ATI of $0. Therefore, D has a positive allocable ATI of $0. PRS determines A's final allocable ATI by reducing, but not below $0, A's positive allocable ATI ($50) by the product of total negative allocable ATI ($300) and the ratio of A's positive allocable ATI to the total positive allocable ATI ($50/$500). Therefore, A's positive allocable ATI is reduced by $30 ($300 × 10 percent). As a result, A's final allocable ATI is $20. PRS determines B's final allocable ATI by reducing, but not below $0, B's positive allocable ATI ($50) by the product of total negative allocable ATI ($300) and the ratio of B's positive allocable ATI to the total positive allocable ATI ($50/$500). Therefore, B's positive allocable ATI is reduced by $30 ($300 x 10 percent). As a result, B's final allocable ATI is $20. PRS determines C's final allocable ATI by reducing, but not below $0, C's positive allocable ATI ($400) by the product of total negative allocable ATI ($300) and the ratio of C's positive allocable ATI to the total positive allocable ATI ($400/$500). Therefore, C's positive allocable ATI is reduced by $240 ($300 × 80 percent). As a result, C's final allocable ATI is $160. Because D has a positive allocable ATI of $0, D's final allocable ATI is $0.

TABLE 1 TO PARAGRAPH (o)(15)(vi)

	A	B	C	D	Total
Allocable ATI	$50	$50	$400	($300)	$200
If deduction and loss items comprising allocable ATI exceed income and gain items comprising allocable ATI, then such excess amount = Negative allocable ATI	0	0	0	300	300
If income and gain items comprising allocable ATI equal or exceed deduction and loss items comprising allocable ATI, then such amount = Positive allocable ATI	50	50	400	0	500

TABLE 2 TO PARAGRAPH (o)(15)(vi)

	A	B	C	D	Total
Positive allocable ATI	$50	$50	$400	$0	$500
Less: (Total negative allocable ATI) × (Positive allocable ATI/Total positive allocable ATI)	30	30	240	0	N/A
= Final allocable ATI	20	20	160	0	200

(vii) Seventh, PRS compares each partner's ATI capacity (ATIC) amount to such partner's remaining business interest expense. A's ATIC amount is $6 ($20 × 30 percent), B's ATIC amount is $6 ($20 × 30 percent), C's ATIC amount is $48 ($160 × 30 percent), and D's ATIC amount is $0 ($0 × 30 percent). Because A's ATIC amount exceeds its remaining business interest expense by $6 ($6 − $0), A has an ATIC excess of $6. B, C, and D do not have any ATIC excess. Thus, the total ATIC excess amount is $6 ($6 + $0 + $0 + $0). A does not have any ATIC deficit. Because B's remaining business interest expense exceeds its ATIC amount by $44 ($50 − $6), B has an ATIC deficit of $44. Because C's remaining business interest expense exceeds its ATIC amount by $2 ($50 − $48), C has an ATIC deficit of $2. Because D's remaining business interest expense exceeds its ATIC amount by $50 ($50 − $0), D has an ATIC deficit of $50. Thus, the total ATIC deficit is $96 ($0 + $44 + $2 + $50).

TABLE 1 TO PARAGRAPH (o)(15)(vii)

	A	B	C	D	Total
ATIC (Final allocable ATI × 30 percent)	$6	$6	$48	$0	N/A
Remaining BIE	0	50	50	50	N/A
If ATIC exceeds remaining BIE, then such excess = ATIC excess	6	0	0	0	$6

TABLE 1 TO PARAGRAPH (o)(15)(vii)—Continued

	A	B	C	D	Total
If remaining BIE exceeds ATIC, then such excess = ATIC deficit	0	44	2	50	96

(viii)(A) Eighth, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section if, and only if, PRS has:

(*1*) An excess business interest expense greater than $0 under paragraph (f)(2)(i) of this section;

(*2*) A total negative allocable ATI greater than $0 under paragraph (f)(2)(vi) of this section; and

(*3*) A total ATIC excess amount greater than $0 under paragraph (f)(2)(vii) of this section. Because PRS satisfies each of these three requirements, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section.

(B) PRS must determine each partner's priority amount and usable priority amount. Only partners with an ATIC deficit under paragraph (f)(2)(vii) of this section of this section can have a priority amount greater than $0. Thus, only partners B, C, and D can have a priority amount greater than $0. PRS determines a partner's priority amount as thirty percent of the amount by which such partner's allocable positive ATI exceeds its final allocable ATI. Therefore, B's priority amount is $9 (($50 − $20) × 30 percent), C's priority amount is $72 (($400 − $160) × 30 percent), and D's priority amount is $0 (($0 − $0) × 30 percent). Thus, the total priority amount is $81 ($0 + $9 + $72 + $0). Next, PRS must determine each partner's usable priority amount. Each partner's usable priority amount is the lesser of such partner's priority amount or ATIC deficit. Thus, B has a usable priority amount of $9, C has a usable priority amount of $2, and D has a usable priority amount of $0. As a result, the total usable priority amount is $11 ($0 + $9 + $2 + $0). Because the total usable priority amount ($11) is greater than the total ATIC excess ($6) under paragraph (f)(2)(vii) of this section, PRS must perform the adjustments described in paragraph (f)(2)(viii)(D) of this section.

TABLE 1 TO PARAGRAPH (o)(15)(viii)(B)

	A	B	C	D	Total
(Positive allocable ATI − Final allocable ATI)	$0	$30	$240	$0	N/A
Multiplied by 30 percent	30 percent	30 percent	30 percent	30 percent	N/A
= Priority amount	0	9	72	0	81

TABLE 2 TO PARAGRAPH (o)(15)(viii)(B)

	A	B	C	D	Total
Priority amount	$0	$9	$72	$0	N/A
ATIC deficit	0	44	2	50	N/A
Lesser of priority amount or ATIC deficit = Usable priority amount	0	9	2	0	$11

(C) In light of the fact that the total usable priority amount is greater than the total ATIC excess under paragraph (f)(2)(viii)(B) of this section, paragraph (f)(2)(viii)(C) of this section does not apply.

(D)(*1*) Because B and C are the only partners with priority amounts greater than $0, B and C are priority partners, while A and D are non-priority partners. For purposes of paragraph (f)(2)(ix) of this section, each partner's final ATIC excess amount is $0. For purposes of paragraph (f)(2)(x) of this section, each non-priority partner's final ATIC deficit amount is such partner's ATIC deficit determined pursuant to paragraph (f)(2)(vii) of this section. Therefore, A has a final ATIC deficit of $0 and D has a final ATIC deficit of $50. Additionally, for purposes of paragraph (f)(2)(x) of this section, PRS must determine each priority partner's step eight excess share. A priority partner's step eight excess share is the product of the total ATIC excess and the ratio of the partner's priority amount to the total priority amount. Thus, B's step eight excess share is $0.67 ($6 × ($9/$81)) and C's step eight excess share is $5.33 ($6 × ($72/$81)). To the extent a priority partner's step eight excess share exceeds its ATIC deficit, the excess shall be the partner's ATIC excess for purposes of paragraph (f)(2)(x) of this section. B's step eight excess share does not exceed its ATIC deficit. Because C's step eight excess share ($5.33) exceeds its ATIC deficit ($2), C's ATIC excess for purposes of paragraph (f)(2)(x) of this section is $3.33 ($5.33 − $2). Thus, the total ATIC excess for purposes of paragraph (f)(2)(x) of this section is $3.33 ($0 + $3.33). To the extent a priority partner's ATIC deficit exceeds its step eight excess share, the excess shall be the partner's ATIC deficit for purposes of paragraph (f)(2)(x) of this section. Because B's ATIC deficit ($44) exceeds its step eight excess share ($0.67), B's ATIC deficit for purposes of paragraph (f)(2)(x) of this section is $43.33 ($44 − $0.67). C's ATIC deficit does not exceed its step eight excess share. Thus, the total ATIC deficit for purposes of paragraph (f)(2)(x) of this section is $43.33 ($43.33 + $0).

TABLE 1 TO PARAGRAPH (o)(15)(viii)(D)(*1*)

	A	B	C	D	Total
Non-priority partners ATIC deficit in paragraph (f)(2)(vii) = Final ATIC deficit for purposes of paragraph (f)(2)(x) of this section	$0	N/A	N/A	$50	N/A

TABLE 2 TO PARAGRAPH (o)(15)(viii)(D)(*1*)

	A	B	C	D	Total
Priority partners step eight excess share = (Total ATIC excess) × (Priority/Total priority)	N/A	$0.67	$5.33	N/A	N/A
ATIC deficit	N/A	44	2	N/A	N/A
If step eight excess share exceeds ATIC deficit, then such excess = ATIC excess for purposes of paragraph (f)(2)(x) of this section	N/A	0	3.33	N/A	$3.33
If ATIC deficit exceeds step eight excess share, then such excess = ATIC deficit for purposes of paragraph (f)(2)(x) of this section	N/A	43.33	0	N/A	43.33

(*2*) In sum, the correct amounts to be used in paragraph (f)(2)(x) of this section are as follows.

TABLE 1 TO PARAGRAPH (o)(15)(viii)(D)(*2*)

	A	B	C	D	Total
ATIC excess	$0	$0	$3.33	$0	$3.33
ATIC deficit	0	43.33	0	0	43.33
Non-priority partner final ATIC deficit	0	0	0	50	N/A

(ix) Ninth, PRS determines each partner's final ATIC excess amount. Pursuant to paragraph (f)(2)(viii)(D) of this section, each priority and non-priority partner's final ATIC excess amount is $0.

(x) Tenth, PRS determines each partner's final ATIC deficit amount. Because B has an ATIC deficit, PRS must determine B's final ATIC deficit amount. B's final ATIC deficit amount is B's ATIC deficit ($43.33), reduced, but not below $0, by the product of the total ATIC excess ($3.33) and the ratio of B's ATIC deficit to the total ATIC deficit ($43.33/$43.33). Therefore, B has $40 of final ATIC deficit ($43.33 − ($3.33 × 100 percent)). Pursuant to paragraph (f)(2)(viii)(D) of this section, D's final ATIC deficit amount is $40.

TABLE 1 TO PARAGRAPH (o)(15)(x)

	A	B	C	D	Total
ATIC deficit	$0	$43.33	$0	N/A	N/A
Less: (Total ATIC excess) x (ATIC deficit/Total ATIC deficit)	0	3.33	0	N/A	N/A
= Final ATIC deficit	0	40	0	$50	$90

(xi) Eleventh, PRS allocates deductible business interest expense and section 163(j) excess items to the partners. Pursuant to paragraph (f)(2)(i) of this section, PRS has $90 of excess business interest expense. PRS allocates the excess business interest expense dollar for dollar to the partners with final ATIC deficits. Thus, PRS allocates its excess business interest expense $40 to B and $50 to D. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's share of excess business interest expense. Therefore, A has deductible business interest expense of $0 ($0 − $0), B has deductible business interest expense of $10 ($50 − $40), C has deductible business interest expense of $50 ($50 − $0), and D has deductible business interest expense of $0 ($50 − $50).

TABLE 1 TO PARAGRAPH (o)(15)(xi)

	A	B	C	D	Total
Deductible BIE	$0	$10	$50	$0	$60
EBIE allocated	0	40	0	50	90
ETI allocated	0	0	0	0	0
EBII allocated	0	0	0	0	0

(16) *Example 16*—(i) *Facts.* A and B are equal shareholders in X, a subchapter S corporation. In Year 1, X has $100 of ATI and $40 of business interest expense. A has $100 of ATI and $20 of business interest expense from its sole proprietorship. B has $0 of ATI and $20 of business interest expense from its sole proprietorship.

(ii) *S corporation-level.* In Year 1, X's section 163(j) limit is 30 percent of its ATI, or $30 ($100 × 30 percent). Thus, X has $30 of deductible business interest expense and $10 of disallowed business interest expense. Such $30 of deductible business interest expense is includable in X's non-separately stated income or loss, and is not subject to further limitation under section 163(j). X carries forward the $10 of disallowed business interest expense to Year 2 as a disallowed business interest expense carryforward under § 1.163(j)–2(c). X may not currently deduct all $40 of its business interest expense in Year 1. X only reduces its accumulated adjustments account in Year 1 by the $30 of deductible business interest expense in Year 1 under § 1.163(j)–6(l)(7).

(iii) *Shareholder allocations.* A and B are each allocated $35 of nonseparately stated taxable income ($50 items of income or gain, less $15 of deductible business interest expense) from X. A and B do not reduce their basis in X by the $10 of disallowed business interest expense.

(iv) *Shareholder-level computations.* A, in computing its limit under section 163(j), has $100 of ATI and $20 of business interest expense from its sole proprietorship. A's section 163(j) limit is $30 ($100 × 30 percent). Thus, A's $20 of business interest expense is deductible business interest expense. B, in computing its limit under section 163(j), has $20 of business interest expense from its sole proprietorship. B's section 163(j) limit is $0 ($0 × 30 percent). Thus, B's $20 of business interest expense is not allowed as a deduction and is treated as business interest expense paid or accrued by B in Year 2.

(17) *Example 17*—(i) *Facts.* The facts are the same as in *Example 16* in paragraph (o)(16) of this section. In Year 2, X has $233.33 of ATI, $0 of business interest income, and $30 of business interest expense. A has $100 of ATI and $20 of business interest expense from its sole proprietorship. B has $0 of ATI and $20 of business interest expense from its sole proprietorship.

(ii) *S corporation-level.* In Year 2, X's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $70 ($233.33 × 30 percent). Because X's section 163(j) limit exceeds X's $40 of business interest expense ($30 from Year 2, plus the $10 disallowed business interest expense carryforwards from Year 1), X may deduct all $40 of business interest expense in Year 2. Such $40 of deductible business interest expense is includable in X's non-separately stated income or loss, and is not subject to further limitation under section 163(j). Pursuant to § 1.163(j)–6(l)(7), X must reduce its accumulated adjustments account by $40. Additionally, X has $100 of excess taxable income under § 1.163(j)–1(b)(15).

(iii) *Shareholder allocations.* A and B are each allocated $96.67 of nonseparately stated taxable income ($116.67 items of income or gain, less $20 of deductible business interest expense) from X. Additionally, A and B are each allocated $50 of excess taxable income under § 1.163(j)–6(l)(4). As a result, A and B each increase their ATI by $50.

(iv) *Shareholder-level computations.* A, in computing its limit under section 163(j), has $150 of ATI ($100 from its sole proprietorship, plus $50 excess taxable income) and $20 of business interest expense (from its sole proprietorship). A's section 163(j) limit is $45 ($150 × 30 percent). Thus, A's $20 of business interest expense is deductible business interest expense. B, in computing its limit under section 163(j), has $50 of ATI ($0 from its sole proprietorship, plus $50 excess taxable income) and $40 of business interest expense ($20 from its sole proprietorship, plus $20 disallowed business interest expense from its sole proprietorship in Year 1). B's section 163(j) limit is $15 ($50 × 30 percent). Thus, $15 of B's business interest expense is deductible business interest expense. The $25 of B's business interest expense not allowed as a deduction ($40 business interest expense, less $15 section 163(j) limit) is treated as business interest expense paid or accrued by B in Year 3.

(p) *Applicability date.* This section applies to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

§ 1.163(j)–7 Application of the business interest deduction limitation to foreign corporations and United States shareholders.

(a) *Overview.* This section provides rules for the application of section 163(j) to foreign corporations with shareholders that are United States persons. Paragraph (b) of this section provides rules regarding the application of section 163(j) to certain controlled foreign corporations. Paragraph (c) of this section provides rules concerning the computation of adjusted taxable income (ATI) of certain controlled foreign corporations. Paragraph (d) of this section provides rules concerning the computation of ATI of a United States shareholder of certain controlled foreign corporations (CFC). Paragraph (e) of this section provides a rule regarding the effect of section 163(j) on the earnings and profits of foreign corporations. Paragraph (f) of this section provides definitions that apply for purposes of this section. Paragraph (g) of this section provides examples illustrating the application of this section. Paragraph (h) of this section provides dates of applicability.

(b) *Application of section 163(j) to an applicable CFC and certain partnerships*—(1) *Scope.* This paragraph (b) provides rules regarding the application of section 163(j) to an applicable CFC and certain partnerships. Paragraph (b)(2) of this section describes the general application of section 163(j) to an applicable CFC and certain partnerships in which an applicable CFC is a partner. Paragraph (b)(3) of this section provides an election to use an alternative method for computing the deduction for business interest expense of a member of a CFC group. Paragraph (b)(4) of this section treats certain partnerships as members of a CFC group for purposes of this paragraph (b). Paragraph (b)(5) of this section provides the rules regarding an election to apply paragraph (b)(3) of this section.

(2) *General application of section 163(j) to an applicable CFC and a partnership with at least one partner that is an applicable CFC.* Except as otherwise provided in this paragraph (b) or in the section 163(j) regulations, section 163(j) and the section 163(j) regulations apply to determine the deductibility of an applicable CFC's business interest expense for purposes of computing its taxable income in the same manner as those provisions apply to determine the deductibility of a domestic C corporation's business interest expense for purposes of computing its taxable income. Furthermore, if an applicable CFC is a partner in a partnership, except as otherwise provided in this paragraph (b) or in the section 163(j) regulations, section 163(j) and the section 163(j) regulations apply to the partnership in the same manner as those provisions would apply if the applicable CFC were a domestic C corporation. If an applicable CFC has income that is, or is treated as, effectively connected with the conduct of a trade or business in the United States or if a partnership is engaged in a trade or business conducted in the United States, see also §§ 1.163(j)–8(d) and 1.882–5 for additional rules concerning the deduction for interest.

(3) *Alternative approach for computing the deduction for business interest expense.* If a CFC group election is properly made and in effect with respect to a specified taxable year of a CFC group member of a CFC group, then—

(i) The portion of the CFC group member's business interest expense that is subject to the general rule under § 1.163(j)–2(b) is the amount equal to the CFC group member's allocable share of the CFC group's applicable net business interest expense, or, in the case in which the CFC group member is also a member of a financial services subgroup, the allocable share of the applicable subgroup net business interest expense; and

(ii) The limitation provided in § 1.163(j)–2(b) is applied without regard to § 1.163(j)–2(b)(1) and (3).

(4) *Treatment of certain partnerships as a CFC group member*—(i) *General rule.* If one or more CFC group members of the same CFC group, in the aggregate, own more than 80 percent of the

interests in the capital or profits in a partnership, then, except as provided in paragraph (b)(4)(ii) of this section, the partnership is treated as a CFC group member. If there is a financial services subgroup with respect to the CFC group, this paragraph (b)(4) will apply only if all of the CFC group members described in the preceding sentence are financial services subgroup members or none of them are financial services subgroup members. If a partnership is treated as a CFC group member, then an interest in the partnership is treated as stock for purposes of applying this section.

(ii) *Exception for certain partnerships engaged in a United States trade or business.* Notwithstanding paragraph (b)(4)(i) of this section, a partnership is not treated as a CFC group member if the partnership is engaged in a trade or business in the United States, directly or indirectly through another passthrough entity, and one or more partners has income that is effectively connected with the conduct of a trade or business in the United States, including any income that is treated as effectively connected income under an applicable provision of the Code or regulations, and at least one of the partners is not exempt from U.S. tax by reason of a U.S. income tax treaty. Notwithstanding the preceding sentence, a partnership that, without regard to this paragraph (b)(4)(ii), would be treated as a CFC group member under paragraph (b)(4)(i) of this section, is treated as a CFC group member solely for purposes of determining if another entity is a CFC group member with respect to the CFC group.

(5) *CFC group election*—(i) *Manner of making a CFC group election.* Subject to paragraph (b)(5)(ii) of this section, a CFC group election is made by applying paragraph (b)(3) of this section for purposes of computing the amount of a CFC group member's deduction for business interest expense. Except as otherwise provided in publications, forms, instructions, or other guidance, a separate statement or form evidencing the election need not be filed.

(ii) *Consistency requirement.* An election under paragraph (b)(5)(i) of this section is not effective unless all CFC group members of the CFC group make the election. If an entity becomes a CFC group member of a CFC group for which a CFC group election is in effect, the entity must make the CFC group election.

(iii) *Duration of a CFC group election.* A CFC group election is irrevocable. If an entity ceases to be a CFC group member of a CFC group for which a CFC group election is in effect, the election terminates solely with respect to such entity. If a CFC group ceases to exist, a CFC group election terminates with respect to all CFC group members of the CFC group.

(c) *Rules concerning the computation of adjusted taxable income of an applicable CFC and certain CFC group members*—(1) *Computation of taxable income.* For purposes of computing taxable income of an applicable CFC for a taxable year, the applicable CFC's gross income and allowable deductions are determined under the principles of § 1.952–2 or the rules of section 882 for determining taxable income that is effectively connected with the conduct of a trade or business in the United States, as applicable.

(2) *Treatment of certain dividends.* For purposes of computing the ATI of an applicable CFC for a taxable year, any dividend included in gross income that is received from a related person, within the meaning of section 954(d)(3), with respect to the distributee is subtracted from taxable income.

(3) *Treatment of CFC excess taxable income*—(i) *In general.* If a CFC group election is in effect for a specified taxable year of a CFC group member and if the CFC group member (*upper-tier member*) directly owns stock in one or more other CFC group members (*lower-tier member*), then, for purposes of computing ATI of the upper-tier member for the specified taxable year, there is added to taxable income the sum of the products of the following amounts with respect to each lower-tier member—

(A) The CFC excess taxable income (if any) of the lower-tier member for the lower-tier member's specified taxable year; and

(B) The percentage (by value) of the stock of the lower-tier member that is directly owned by the upper-tier member on the last day of the lower-tier member's specified taxable year.

(ii) *Ordering rules.* For purposes of applying paragraph (c)(3)(i) of this section, if a CFC group member is an upper-tier member with respect to a CFC group member and a lower-tier member with respect to another CFC group member, paragraph (c)(3)(i) of this section is applied starting with the lowest-tier CFC group member in the chain of ownership. If an upper-tier member is a partner in a lower-tier member that is a partnership, which is an entity that does not have CFC excess taxable income but that may have excess taxable income (as defined in § 1.163(j)–1(b)(15)), see § 1.163(j)–6(f) for determining the upper-tier member's share of the lower-tier member's excess taxable income (if any).

(d) *Rules concerning the computation of adjusted taxable income of a United States shareholder*—(1) *In general*—(i) *Treatment of gross income inclusions that are properly allocable to a non-excepted trade or business.* If for a taxable year a United States shareholder with respect to one or more applicable CFCs includes amounts in gross income under section 78, 951(a), or 951A(a) that are properly allocable to a non-excepted trade or business (each amount, a *specified deemed inclusion* and such amounts, collectively *specified deemed inclusions*), then, for purposes of computing ATI of the United States shareholder, there is subtracted from taxable income an amount equal to the specified deemed inclusions, reduced by the portion of the deduction allowed under section 250(a)(1), without regard to the taxable income limitation of section 250(a)(2), by reason of the specified deemed inclusions (such a deduction, a *specified section 250 deduction*). For rules concerning inclusions under sections 78, 951(a), and 951A(a) and deductions allowable under section 250 that are not properly allocable to a non-excepted trade or business, see § 1.163(j)–1(b)(1)(ii)(F) and (b)(1)(i)(H), respectively.

(ii) *Treatment of deemed inclusions of a domestic partnership that are not allocable to any trade or business.* If a United States shareholder that is a domestic partnership includes amounts in gross income under section 951(a) or 951A(a) that are not properly allocable to trade or business of the domestic partnership, then, notwithstanding § 1.163(j)–4(b)(3), to the extent a C corporation partner, including an indirect partner in the case of tiered partnerships, takes such amounts into account as a distributive share in accordance with section 702 and § 1.702–1(a)(8)(ii), the C corporation partner may not treat such amounts as properly allocable to a trade or business of the C corporation partner.

(2) *Additional rule after application of paragraph (d)(1) of this section for a United States shareholder of a CFC group member with a CFC group election in effect*—(i) *In general.* Subject to paragraph (d)(3) of this section, if for a taxable year, a United States shareholder owns directly, or indirectly through one or more foreign pass-through entities, stock of one or more CFC group members of a CFC group for which a CFC group election is in effect for the specified taxable year of each CFC group member that ends with or within the taxable year of the United States shareholder, then, for purposes of computing ATI of the United States shareholder, in addition to the

subtraction described in paragraph (d)(1) of this section, there is added to taxable income the amount equal to the sum of the amounts of eligible CFC group ETI, as defined in paragraph (d)(2)(ii) of this section, with respect to each specified highest-tier member of the United States shareholder, but not in excess of the amount of the CFC group inclusions, as defined in paragraph (d)(2)(iii) of this section, of the United States shareholder for the taxable year. For purposes of this paragraph (d)(2)(i), members of a consolidated group are treated as a single United States shareholder.

(ii) *Eligible CFC group ETI.* The term *eligible CFC group ETI* means, with respect to a specified highest-tier member and a specified taxable year, the amount equal to the product of the following three amounts—

(A) The specified highest-tier member's CFC excess taxable income for the specified taxable year, taking into account the application of paragraph (c)(3) of this section;

(B) The specified highest-tier member's specified ETI ratio for the specified taxable year; and

(C) The percentage, by value, of the stock of the specified highest-tier member that is owned directly, or indirectly through one or more foreign passthrough entities, by the United States shareholder on the last day of the specified taxable year.

(iii) *CFC group inclusions.* The term *CFC group inclusions* means, with respect to a United States shareholder and a taxable year, the amounts of the specified deemed inclusions subtracted from taxable income under paragraph (d)(1)(i) of this section that are with respect to CFC group members, other than amounts included in gross income by reason of section 78, reduced by the portion of any specified section 250 deduction described in paragraph (d)(1)(i) of this section that is allowable by reason of such specified deemed inclusions.

(3) *Special rules if a domestic partnership is a United States shareholder of a CFC group member with a CFC group election in effect.* Paragraph (d)(2) of this section does not apply with respect to a United States shareholder described in paragraph (d)(2) of this section that is a domestic partnership (such a partnership, a *U.S. shareholder partnership*). If a U.S. shareholder partnership has a domestic C corporation partner, including an indirect partner in the case of tiered partnerships, (such a partner, a *U.S. corporate partner*), then, for purposes of computing ATI of the U.S. corporate partner, paragraph (d)(2) of this section is applied by treating the U.S. shareholder partnership, and in case of tiered partnerships, any tiered partnership that is a domestic partnership, as if it were a foreign partnership and by making the following modifications—

(i) The term ''U.S. corporate partner'' is substituted for the term ''United States shareholder'' each place it appears in paragraph (d)(2) of this section; and

(ii) If a U.S. shareholder partnership includes an amount in gross income under section 951(a) or 951(A) with respect to a CFC group member, then to the extent the amount is taken into account by a U.S. corporate partner as a distributive share in accordance with section 702 and § 1.702–1(a)(8)(ii), such amount is treated as a specified deemed inclusion of the U.S. corporate partner with respect to the CFC group member for purposes of applying paragraph (d)(2)(iii) of this section.

(4) *Inclusions under section 951A(a).* For purposes of applying paragraph (d) of this section, the portion of a United States shareholder's inclusion under section 951A(a) treated as being with respect to a CFC group member is determined under section 951A(f)(2) and § 1.951A–6(b)(2).

(e) *Effect on earnings and profits.* In the case of a foreign corporation, the disallowance and carryforward of a deduction for the corporation's business interest expense under § 1.163(j)–2 will not affect whether and when such business interest expense reduces the corporation's earnings and profits. Thus, for example, if a United States person has elected under section 1295 to treat a passive foreign investment company (as defined in section 1297) (PFIC) as a qualified electing fund, then the disallowance and carryforward of a deduction for the PFIC's business interest expense under § 1.163(j)–2 will not affect whether or when such business interest expense reduces the PFIC's earnings and profits. Similarly, the disallowance and carryforward of a deduction for an applicable CFC's business interest expense will not affect the earnings and profits limitation for subpart F income under section 952(c). See also § 1.163(j)–4(c).

(f) *Definitions.* The following definitions apply for purposes of this section.

(1) *Allocable share*—(i) *General rule.* The term *allocable share* means, with respect to a CFC group member of a CFC group and a specified taxable year, the amount equal to the product of the CFC group's applicable net business interest expense (multiplicand), if any, and a fraction, the numerator of which is equal to the amount of the CFC group member's net business interest expense, and the denominator of which is equal to the sum of the amounts of the net business interest expense of each CFC group member.

(ii) *Special rule if there is a financial services subgroup.* If there is a financial services subgroup with respect to a CFC group, then paragraph (f)(1)(i) of this section is applied with the following modifications—

(A) With respect to a CFC group member that is also a financial services subgroup member—

(*1*) The multiplicand is equal to the amount of the applicable subgroup net business interest expense; and

(*2*) The denominator of the fraction is determined by replacing the term ''CFC group member'' with the term ''financial services subgroup member.''

(B) With respect to a CFC group member this is not a financial services subgroup member—

(*1*) The multiplicand is reduced by the amount of the applicable subgroup net business interest expense; and

(*2*) The denominator of the fraction is reduced by the sum of the amounts of the net business interest expense of each financial services subgroup member.

(2) *Applicable CFC.* The term *applicable CFC* means a controlled foreign corporation described in section 957, but only if the foreign corporation has at least one United States shareholder that owns, within the meaning of section 958(a), stock of the foreign corporation.

(3) *Applicable net business interest expense.* The term *applicable net business interest expense* means, with respect to a CFC group and a majority U.S. shareholder taxable year, the excess, if any, of the sum of the amounts of the business interest expense of each CFC group member for the specified taxable year, over the sum of the amounts of the business interest income of each CFC group member for the specified taxable year.

(4) *Applicable subgroup net business interest expense.* The term *applicable subgroup net business interest expense* means, with respect to a financial services subgroup of a CFC group and a majority U.S. shareholder taxable year, the excess, if any, of the sum of the amounts of the business interest expense of each financial services subgroup member for the specified taxable year, over the sum of the amounts of the business interest income of each financial services subgroup member for the specified taxable year.

(5) *CFC excess taxable income*—(i) *In general.* The term *CFC excess taxable income* means, with respect to a CFC

group member, other than a partnership described in paragraph (b)(4)(i) of this section, and a specified taxable year, the amount which bears the same ratio to the CFC group member's ATI, as—

(A) The excess (if any) of—

(*1*) The amount determined for the CFC group member under § 1.163(j)–2(b)(2); over

(*2*) The CFC group member's allocable share of either the applicable net business interest expense or the applicable subgroup net business interest expense, as applicable; bears to

(B) The amount determined for the CFC group member under § 1.163(j)–2(b)(2).

(ii) *CFC group member is a partnership.* If a CFC group member is a partnership, see § 1.163(j)–1(b)(15) for determining the extent to which the partnership has excess taxable income. For rules concerning a partner's share of a partnership's excess taxable income, see § 1.163(j)–6(f).

(6) *CFC group*—(i) *In general.* The term *CFC group* means two or more applicable CFCs if 80 percent or more of the total value of shares of all classes of stock of each applicable CFC is owned, within the meaning of section 958(a), either by a single United States shareholder or by multiple U.S. shareholders that are related persons, within the meaning of section 267(b) or 707(b)(1), (each a *related United States shareholder* and collectively *related United States shareholders*), provided the stock of each applicable CFC is owned in the same proportion by each related United States shareholder.

(ii) *Aggregation rules.* The following rules apply for the purpose of applying paragraph (f)(6)(i) of this section—

(A) Members of a consolidated group and individuals described in section 318(a)(1)(A)(i) who file a joint tax return are treated as a single person; and

(B) If a single United States person, as defined in section 957(c), taking into account the application of paragraph (f)(6)(ii)(A) of this section, owns, directly or indirectly through one or more passthrough entities, more than 80 percent of the interests in a pass-through entity that is a United States shareholder that owns, within the meaning of section 958(a), stock in an applicable CFC, then that United States person is treated as owning the stock of the applicable CFC that is owned by the passthrough entity. For purposes of applying the 80–percent threshold described in the preceding sentence, if the pass-through entity is a partnership, then the 80–percent threshold is satisfied if the United States person owns at least 80 percent of the interests in the capital or the profits of the partnership, and if the passthrough entity is not a partnership, then the 80–percent threshold is satisfied if the United States person owns at least 80 percent of the value of all interests of the passthrough entity.

(7) *CFC group election.* The term *CFC group election* means an election to apply paragraph (b)(3) of this section.

(8) *CFC group member.* The term *CFC group member* means, with respect to a CFC group, an entity included in the CFC group. An entity that has, including through ownership of an interest in a passthrough entity, income which is effectively connected with a trade or business conducted in the United States, including any income that is treated as effectively connected income under an applicable provision of the Code or regulations, and not exempt from U.S. tax by reason of a U.S. income tax treaty is not treated as a member of a CFC group, other than solely for purposes of determining if another entity is a CFC group member with respect to the CFC group.

(9) *Financial services subgroup.* The term *financial services subgroup* means, with respect to a CFC group, a group comprised of each CFC group member of the CFC group that is an eligible controlled foreign corporation (as defined in section 954(h)(2)(A)), a qualified insurance company (as defined in section 953(e)(3)), or eligible for the dealer exception in computing foreign personal holding company income (as described in section 954(c)(2)(C)).

(10) *Financial services subgroup member.* The term *financial services subgroup member* means, with respect to a financial services subgroup of a CFC group, a CFC group member that is also a member of the financial services subgroup.

(11) *Majority U.S. shareholder taxable year.* The term *majority U.S. shareholder taxable year* means, with respect to a CFC group, one of the following taxable years, applied sequentially—

(i) If there is a single United States shareholder of the CFC group for purposes of paragraph (f)(6)(i) of this section, then the taxable year of the United States shareholder;

(ii) If paragraph (f)(11)(i) of this section does not apply and a related United States shareholder owns, within the meaning of section 958(a), more stock of the members of the CFC group, by value, than is owned, within the meaning of section 958(a), by any other related United States shareholder, then the taxable year of the first-mentioned related United States shareholder;

(iii) If paragraphs (f)(11)(i) and (ii) of this section do not apply and if one or more related United States shareholders with the same taxable year, in aggregate, own, within the meaning of section 958(a), more stock of the members of the CFC group (by value) than is, in aggregate, owned, within the meaning of section 958(a), by other related United States shareholders with the same taxable year, then the taxable year of the first-mentioned related United States shareholders; and

(iv) If paragraphs (f)(11)(i), (ii), and (iii) of this section do not apply, then the calendar year.

(12) *Net business interest expense.* The term *net business interest expense* means, with respect to a CFC group member of a CFC group and a specified taxable year, the excess, if any, of the amount of the CFC group member's business interest expense over the amount of the CFC group member's business interest income, in each case determined without regard to section 163(j) and the section 163(j) regulations.

(13) *Passthrough entity.* The term *passthrough entity* means a partnership, S corporation, or any other entity (domestic or foreign) that is not a corporation if all items of income and deduction of the entity are included in the income of its owners or beneficiaries. An *interest in a passthrough entity* means an interest in the capital or profits of the entity or stock of an S corporation, as applicable.

(14) *Specified ETI ratio*—(i) *In general.* The term *specified ETI ratio* means, with respect to a specified highest-tier member of a CFC group and a specified taxable year, the ratio computed as a fraction (expressed as a percentage), the numerator of which is the sum of the amounts described in paragraph (f)(14)(iii) of this section with respect to each CFC group member described in paragraph (f)(14)(ii) of this section, and the denominator of which is the sum of the amounts described in paragraph (f)(14)(iv) of this section with respect to each CFC group member described in paragraph (f)(14)(ii) of this section that has amounts included in the numerator. The specified ETI ratio may not exceed 100 percent. If the numerator and the denominator of the fraction are not both greater than zero, the specified ETI ratio is treated as being equal to zero.

(ii) *Includable CFC group members.* For purposes of applying paragraph (f)(14)(i) of this section, a CFC group member is described in this paragraph (f)(14)(ii) if—

(A) The CFC group member is the specified highest-tier member or a specified lower-tier member with

respect to the specified highest-tier member; and

(B) The CFC group member has CFC excess taxable income without regard to paragraph (c)(3) of this section.

(iii) *Numerator.* For purposes of applying (f)(14)(i) of this section, the amount described in this paragraph (f)(14)(iii) is, with respect to a CFC group member and a specified taxable year, the sum of the amounts included in gross income under sections 951(a) and 951A(a) of each United States shareholder with respect to the CFC group member for the taxable years of the United States shareholders in which or with which the specified taxable year of the CFC group member ends. For purposes of this paragraph (f)(14)(iii), the portion of a United States shareholder's inclusion under section 951A(a) treated as being with respect to a CFC group member is determined under section 951A(f)(2) and § 1.951A–6(b)(2).

(iv) *Denominator.* For purposes of applying (f)(14)(i) of this section, the amount described in this paragraph (f)(14)(iv) is, with respect to a CFC group member and a specified taxable year, the taxable income of the CFC group member for the specified taxable year.

(15) *Specified highest-tier member.* The term *specified highest-tier member* means, with respect to a CFC group, a CFC group member in which a United States shareholder owns directly, or indirectly through one or more foreign passthrough entities, stock of the CFC group member.

(16) *Specified lower-tier member.* The term *specified lower-tier member* means, with respect to a specified highest-tier member of a CFC group, a CFC group member in which the specified highest-tier member owns stock directly or indirectly through a chain of ownership.

(17) *Specified taxable year.* The term *specified taxable year* means, with respect to a CFC group member of a CFC group, the taxable year that ends with or within a majority U.S. shareholder year.

(18) *United States shareholder.* The term *United States shareholder* has the meaning provided in section 951(b).

(g) *Examples.* The following examples illustrate the application of this section. For each example, unless otherwise stated, the referenced business interest expense is deductible but for the application of section 163(j), no exemptions from the application of section 163(j) are available, none of the business interest expense is floor plan financing interest expense, and no foreign corporation has income that is effectively connected with a trade or business conducted in the United States or is an entity described in paragraph (f)(9) of this section (regarding entities that provide certain types of financial services).

(1) *Example 1: Computation of section 163(j) limitation of CFC group members*—(i) *Facts.* USP, a domestic C corporation, wholly owns US1 and US2, each of which is a domestic C corporation. USP, US1, and US2 are members of a consolidated group of which USP is the common parent (USP group). US1 wholly owns CFC1, a foreign corporation, and US2 wholly owns CFC2 and CFC3, each of which is a foreign corporation. The USP group has a calendar year taxable year. For U.S. tax purposes, CFC1, CFC2, and CFC3 each have a fiscal taxable year ending on November 30. CFC1 has an outstanding loan of $1,000x from a third-party (CFC1 note). CFC1 has a receivable of $500x from each of CFC2 and CFC3 (CFC2 note and CFC3 note, respectively). Interest on all debt is paid and accrued annually on November 30. During the taxable year ending November 30, 2019, CFC1 has business interest expense of $90x attributable to CFC1 note and business interest income of $100x attributable to CFC2 note and CFC3 note, and CFC2 and CFC3 each have $50x of business interest expense attributable to CFC2 note and CFC3 note, respectively. Assume that each of CFC1, CFC2, and CFC3 has ATI of $100x computed on a separate company basis for the taxable year ending November 30, 2019. The USP group has no business interest expense.

(ii) *Analysis*—(A) *Determination of CFC group.* US1 owns (within the meaning of section 958(a)) all of the stock of CFC1, and US2 owns (within the meaning of section 958(a)) all of the stock of each of CFC2 and CFC3. Under paragraph (f)(2) of this section, each of CFC1, CFC2, and CFC3 is an applicable CFC. Under paragraph (f)(6)(ii)(A) of this section, because US1 and US2 are members of a consolidated group, US1 and US2 are treated as a single person for purposes determining a CFC group under paragraph (f)(6)(i) of this section. Therefore, because 80 percent or more of the stock of each of CFC1, CFC2, and CFC3 is owned (within the meaning of section 958(a)) by a single United States shareholder, under paragraph (f)(6)(i) of this section, CFC1, CFC2, and CFC3 are members of a CFC group (USP CFC group).

(B) *CFC group election is made.* Assume a CFC group election is properly made. Under paragraph (f)(11)(i) of this section, because there is a single United States shareholder of the USP CFC group with a calendar taxable year, the majority U.S. shareholder taxable year with respect to the USP CFC group ends on December 31, 2019. Under paragraph (f)(17) of this section, the specified taxable year of each of CFC1, CFC2, and CFC3 is November 30, 2019, which is the taxable year that ends with or within the majority U.S. shareholder taxable year ending on December 31, 2019. Under paragraph (f)(3) of this section, the applicable net business interest expense of the USP CFC group is $90x. The $90x is the excess of $190x, which is the sum of the amounts of the business interest expense of each of CFC1, CFC2, and CFC3 ($90x, $50x, and $50x, respectively), over $100x, which is the sum of the amounts of the business interest income of each of CFC1, CFC2, and CFC3 ($100x, $0, and $0, respectively). Under paragraph (f)(12) of this section, CFC1 has $0 of net business interest expense ($90x business interest expense does not exceed $100x of business interest income), and CFC2 and CFC3 each have $50x of net business interest expense (each has $50x business interest expense and $0 business interest income). Because CFC2 and CFC3 each has net business interest expense, under paragraph (f)(1) of this section, each has an allocable share of the applicable net business interest expense of the USP CFC group. The allocable share of each of CFC2 and CFC3 is $45x, computed as $90x (the applicable net business interest expense) multiplied by the fraction equal to $50x/$100x (the net business interest expense of the member and the sum of the amounts of net business interest expense of all members, respectively). Under paragraph (b)(3)(i) of this section, none of CFC1's $90x of business interest expense and $45x of each of CFC2's and CFC3's $50x of business interest expense is subject to the general rule under § 1.163(j)–2(b) (and $5x of each of CFC2's and CFC3's business interest expense is not subject to limitation under § 1.163(j)–2(b)), and, under paragraph (b)(3)(ii) of this section, the general rule under § 1.163(j)–2(b), as applied to CFC2 and CFC3, is computed without regard to § 1.163(j)–2(b)(1) and (3). Thus, under § 1.163(j)–2(b), CFC2's limitation is $30x ($100x ATI computed on a separate company basis x 30 percent). The amount of CFC2's business interest expense subject to limitation under paragraph (b)(3) of this section, $45x, exceeds CFC2's limitation under § 1.163(j)–2(b), $30x. Accordingly, $35x ($5x not subject to limitation + $30x) of CFC2's business interest expense is deductible, and under § 1.163(j)–2(c), the remaining $15x of business interest expense is not deductible and will be carried forward as a disallowed business interest expense carryforward. The analysis for CFC3 is the same as for CFC2. Because the USP group has no business interest expense, the application of paragraph (d) of this section is not relevant.

(C) *CFC group election is not made.* Instead, assume a CFC group election is not made. In this case, each of CFC1, CFC2, and CFC3 must compute its interest deduction limitation under § 1.163(j)–2(b), without regard to paragraph (b)(3) of this section. CFC1's business interest expense of $90x is deductible because it has business interest income of $100x. CFC2's business interest expense limitation is $30x ($100x ATI computed on a separate company basis x 30 percent). Accordingly, $30x of CFC2's business interest expense is deductible, and under § 1.163(j)–2(c), the remaining $20x of business interest expense is disallowed business interest expense and will be carried forward as a disallowed business interest expense carryforward. The analysis for CFC3 is the same as for CFC2.

(2) *Example 2: Computation and allocation of CFC excess taxable income*—(i) *Facts.* USP, a domestic C corporation, wholly owns CFC1, a foreign corporation. CFC1 wholly owns CFC2, a foreign corporation, and CFC2

wholly owns each of CFC3 and CFC4, both of which are foreign corporations (CFC1, CFC2, CFC3, and CFC4, collectively, the USP CFC group). All entities have a calendar year for U.S. tax purposes. For Year 1, assume the following additional facts: Prior to the application of section 163(j), CFC1 has no items of income, gain, deduction, or loss; CFC2 has a taxable loss of $5x (including $5x of business interest expense); CFC3 has taxable income of $85x (including $15x of business interest expense); CFC4 has $60x of taxable income (including $40x of business interest expense); a CFC group election is in effect for the CFC group; there is no intercompany debt between any CFC group member; 50 percent of CFC3's items of income and gain are subpart F income (as defined in section 952), and 50 percent of CFC3's items of deduction and loss are properly allocable to subpart F income, and with respect to the remaining portion of CFC3's items of income, gain, deduction, and loss, no portion is taken into account in computing tested income (as defined in section 951A(c)(2)(A)) or tested loss (as defined in section 951A(c)(2)(B)) of CFC3; CFC4's items of income and gain are all tested income, and CFC4's items of deduction are all properly allocable to such income; no portion of CFC2's items of income, gain, deduction, or loss is taken into account in computing tested income or tested loss; no CFC group member has qualified business asset investment (as defined in section 951A(d)); for purposes of computing ATI, there are no subtractions or additions to taxable income described in § 1.163(j)–1(b)(1) with respect to any CFC group member of the USP CFC group other than for business interest expense; for simplicity, no foreign income taxes are paid by any CFC group member of the USP CFC group; in addition to the inclusions in gross income under sections 951(a)(1) and 951A(a) with respect to the CFC group members of the USP CFC group, USP has business interest expense of $20x.

(ii) *Analysis*—(A) *Application of section 163(j) to CFC group members of the USP CFC group; computation of USP CFC group's applicable net business interest expense.* Under paragraph (f)(3) of this section, the USP CFC group's applicable net business interest expense is $60x ($0 + $5x + $15x + $40x with respect to CFC1, CFC2, CFC3, and CFC4, respectively). Because there is no debt between the CFC group members of the USP CFC group, under paragraph (b)(3) of this section, each of the CFC group members allocable share of the $60x is equal to its separate company business interest expense. In particular, CFC1's allocable share of the USP CFC group's applicable net interest expense is zero, CFC2's allocable share is $5x, CFC3's allocable share is $15x, and CFC4's allocable share is $40x.

(B) *Application of section 163(j) to CFC4.* Under § 1.163(j)–1(b)(1), CFC4's ATI is $100x ($60x taxable income + $40x business interest expense). Under § 1.163(j)–2(b), CFC4's limitation is $30x ($100x ATI computed on a separate company basis × 30 percent). The amount of CFC4's business interest expense subject to limitation, $40x, exceeds CFC4's limitation, $30x. Accordingly, under § 1.163(j)–2(c), $10x of business interest expense is not deductible and will be carried forward as a disallowed business interest expense carryforward. Because $10x of business interest expense is not currently deductible, CFC4's tested income is $70x ($60x taxable income prior to application of section 163(j), increased by $10x of disallowed business interest expense).

(C) *Application of section 163(j) to CFC3.* Under § 1.163(j)–1(b)(1), CFC3's ATI is $100x ($85x taxable income + 15x business interest expense). Under § 1.163(j)–2(b), CFC3's limitation is $30x ($100x ATI computed on a separate company basis × 30 percent). Because the amount of CFC3's business interest expense subject to limitation, $15x, does not exceed CFC3's limitation, $30x, all of CFC3's business interest expense is currently deductible. Accordingly, CFC3's subpart F income is $42.50x ($85x taxable income x 50 percent). Furthermore, CFC3 has CFC excess taxable income of $50x ($100x × ($15x/$30x)).

(D) *Application of section 163(j) to CFC2.* Under § 1.163(j)–1(b)(1), taking into account the application of paragraph (c)(3) of this section, CFC2's ATI is $50x (($5x) taxable loss + $5x business interest expense + $50x (100 percent × $50x of CFC3's excess taxable income)). Under § 1.163(j)–2(b), CFC2's limitation is $15x ($50x ATI x 30 percent). Because the amount of CFC2's business interest expense subject to limitation, $5x, does not exceed CFC2's limitation, $15x, all of CFC2's business interest expense is currently deductible. Furthermore, CFC2 has CFC excess taxable income of $33.33x ($50x × ($10x/$15x)).

(E) *Application of section 163(j) to CFC1.* Under § 1.163(j)–1(b)(1), taking into account the application of paragraph (c)(3) of this section, CFC1's ATI is $33.33x ($0 taxable income + $33.33x (100 percent × $33.33x of CFC2's excess taxable income)). CFC1 has no business interest expense subject to limitation and therefore CFC1 has CFC excess taxable income of $33.33x.

(F) *Application of section 163(j) to USP.* Under section 951(a)(1), USP includes $42.50x in gross income with respect to CFC3. Under section 951A(a), USP includes $70x in gross income, all of which is allocable to CFC4 under section 951A(f)(2), and under section 250(a)(1)(B), USP is allowed a deduction of $35x. Thus, the amount of USP's CFC group inclusions is $77.50x ($42.50 + $70x − $35x), and USP's taxable income prior to the application of section 163(j) is $57.50x ($77.50x − $20x business interest expense). Under § 1.163(j)–1(b)(1), taking into account the application of paragraph (d)(2) of this section, USP's ATI is $16.67x. USP's ATI, $16.67x, is equal to $57.50x of taxable income + $20x of business interest expense − $77.50x of CFC group inclusions + $16.67x of eligible CFC group ETI. The eligible CFC group ETI, $16.67x, is determined as $33.33x (CFC1's excess taxable income) × 50 percent (CFC1's specified ETI ratio) × 100 percent (percentage of stock of CFC1 owned directly by USP)). Under paragraph (f)(14) of this section, the specified ETI ratio of CFC1 is 50 percent ($42.50x/$85x). The numerator of the fraction, $42.50x, is equal to the amount of USP's gross income inclusion under section 951(a) with respect to CFC3. The denominator of the fraction, $85x, is equal to the amount of the taxable income of CFC3. The numerator and the denominator of the fraction do not include amounts with respect to CFC1, CFC2, and CFC4, because none of them has CFC excess taxable income without regard to the application of paragraph (c)(3) of this section. Furthermore, USP includes no amounts in gross income under section 951(a) or 951A(a) with respect to CFC1 or CFC2. Under § 1.163(j)–2(b), USP's section 163(j) limitation is $5x ($16.67x ATI × 30 percent). The amount of USP's business interest expense, $20x, exceeds USP's section 163(j) limitation, $5x. Accordingly, under § 1.163(j)–2(c), $15x of business interest expense is not deductible and is carried forward as a disallowed business interest expense carryforward.

(h) *Applicability date.* This section applies to a taxable year of a foreign corporation ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register** and to a taxable year of a shareholder of the foreign corporation ending with or within the taxable year of the foreign corporation. However, a foreign corporation and its shareholders and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply this section to a taxable year of the foreign corporation beginning after December 31, 2017, and to a taxable year of a shareholder of the foreign corporation ending with or within the taxable year of the foreign corporation, if the foreign corporation and its shareholders and their related parties consistently apply all of the section 163(j) regulations, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

§ 1.163(j)–8 Application of the business interest deduction limitation to foreign persons with effectively connected income.

(a) *Overview.* This section provides rules concerning the application of section 163(j) to foreign persons engaged in a trade or business in the United States. Paragraph (b) of this section modifies the application of section 163(j) for specified foreign persons with effectively connected taxable income. Paragraph (c) of this section modifies the application of section 163(j) for specified foreign partners in a partnership engaged in a trade or business in the United States. Paragraph (d) of this section provides rules for certain controlled foreign corporations

with effectively connected taxable income. Paragraph (e) of this section coordinates the application of section 163(j) and § 1.882–5. Paragraph (f) of this section provides a coordination rule for determining effectively connected earnings and profits for purposes of the branch profits tax under section 884. Paragraph (g) of this section provides definitions that apply for purposes of this section. Paragraph (h) of this section provides examples that illustrate the application of this section. Paragraph (i) of this section provides dates of applicability.

(b) *Application of section 163(j) and the section 163(j) regulations to specified foreign persons with effectively connected taxable income*—(1) *In general.* If a taxpayer is a specified foreign person, then the modifications described in this paragraph (b) are made to the application of section 163(j) and the section 163(j) regulations. If a specified foreign person is also a specified foreign partner, then the modifications described in this paragraph (b) are subject to the partner-level modifications described in paragraph (c) of this section.

(2) *Modification of adjusted taxable income.* ATI for a specified foreign person for a taxable year means the specified foreign person's effectively connected taxable income for the taxable year, adjusted for the items described in § 1.163(j)–1(b)(1)(i) through (iv) that are taken into account in determining effectively connected taxable income.

(3) *Modification of business interest expense*—(i) *General rule.* Business interest expense for a specified foreign person means interest described in § 1.163(j)–1(b)(2) that is determined under § 1.882–5, in the case of a foreign corporation, or under § 1.861–9T(d)(2), in the case of a non-resident alien individual, and allocable to income which is effectively connected taxable income.

(ii) *Exclusion of certain business interest expense of a specified foreign partner.* If a foreign corporation is a specified foreign partner in a partnership engaged in a trade or business in the United States, then, for purposes of paragraph (b)(3)(i) of this section, business interest expense excludes the portion of interest expense determined under § 1.882–5 that is attributable to interest on U.S. booked liabilities of the partnership determined under § 1.882–5(d)(2)(vii).

(4) *Modification of business interest income.* The business interest income of a specified foreign person means interest described in § 1.163(j)–1(b)(3) that is effectively connected taxable income.

(5) *Modification of floor plan financing interest expense.* The floor plan financing interest expense of a specified foreign person means interest described § 1.163(j)–1(b)(17) that is allocable to income which is effectively connected taxable income.

(6) *Modification of allocation of interest expense and interest income that is properly allocable to a trade or business.* For purposes of § 1.163(j)–10(c), a specified foreign person's interest expense and interest income that is properly allocable to a trade or business is only allocated to the specified foreign person's excepted or non-excepted trades or business that have effectively connected taxable income. If the specified foreign person is also a specified foreign partner, this rule only applies to the trades or business not in the partnership.

(c) *Partner-level modifications to § 1.163(j)–6 for partnerships engaged in a U.S. trade or business*—(1) *Modification related to a partnership's excess taxable income.* If for a taxable year a specified foreign partner, other than an applicable CFC, has allocable excess taxable income with respect to a partnership, then, for purposes of computing the specified foreign partner's ATI for the taxable year, the excess, if any, of the amount of the allocable excess taxable income over the amount of the specified excess taxable income is subtracted from ATI.

(2) *Modification related to a partnership's excess business interest expense.* If for a taxable year a specified foreign partner, other than an applicable CFC, has allocable excess business interest expense with respect to a partnership, then, for purposes of determining the specified foreign partner's business interest expense for a succeeding taxable year, the amount of the allocable excess business interest expense treated as disallowed business interest expense carryforward under § 1.163(j)–6(f) is determined by taking into account only the portion of allocable excess business interest expense that is specified excess business interest expense and such excess business interest expense is limited to the portion of allocable excess taxable income for the succeeding taxable year that is specified excess taxable income.

(3) *Modification related to a partnership's excess business interest income.* If for a taxable year a specified foreign partner, other than an applicable CFC, has allocable excess business interest income (as defined in § 1.163(j)–6(b)(4)) with respect to a partnership, then, for purposes of determining the specified foreign partner's section 163(j) limitation, the amount of allocable excess business interest income that can be used by the specified foreign partner cannot exceed the amount of ECI excess business interest income.

(d) *An applicable CFC with effectively connected taxable income.* If an applicable CFC has effectively connected taxable income for a taxable year in which the applicable CFC has disallowed business interest expense, then a portion of the disallowed business interest expense is treated as being with respect to the applicable CFC's interest expense determined under § 1.882–5. That portion is equal to the amount of the applicable CFC's disallowed business interest expense multiplied by a fraction, the numerator of which is the applicable CFC's effectively connected taxable income for the taxable year, adjusted for the items described in § 1.163(j)–1(b)(1)(i) through (iv) that are taken into account in determining effectively connected taxable income, and the denominator of which is the applicable CFC's ATI for the taxable year. However, in no case will such portion exceed the amount of interest expense determined under § 1.882–5. See also § 1.163(j)–7(b)(2) (concerning the general application of section 163(j) to an applicable CFC).

(e) *Coordination of section 163(j) and § 1.882–5*—(1) *General rules*—(i) *Ordering rule.* A foreign corporation first determines its interest expense under § 1.882–5 and then determines the amount of disallowed business interest expense.

(ii) *Treatment of disallowed business interest expense carryforward.* If a foreign corporation has a disallowed business interest expense carryforward from a taxable year, then such carryforward is not taken into account for purposes of determining interest expense under § 1.882–5 in the succeeding taxable year.

(iii) *Treatment of allocable excess business interest expense.* If a foreign corporation has allocable excess business interest expense from a taxable year that is treated under § 1.163(j)–6(g)(2) as disallowed business interest expense carryforward, such interest is not taken into account for purposes of determining interest expense under § 1.882–5 in the succeeding taxable year.

(iv) *Scaling ratio.* If a foreign corporation determines its interest expense under the method described in § 1.882–5(b) through (d) and has U.S. booked liabilities in excess of U.S. connected liabilities, the foreign corporation must apply the scaling ratio

(as defined in § 1.882–5(d)(4)(ii)) pro rata to all interest expense paid or accrued by the foreign corporation consistent with § 1.882–5(d)(4)(i), including for purposes of paragraph (b)(3)(ii) of this section.

(2) *Amount of interest determined under § 1.882–5 that is disallowed business interest expense*—(i) *Foreign corporation is not a specified foreign partner.* If a foreign corporation is not a specified foreign partner for a taxable year, then the amount of the foreign corporation's interest expense determined under § 1.882–5 for which a deduction is disallowed for the taxable year is either—

(A) The amount of disallowed business interest expense computed under § 1.163(j)–2(b) with respect to business interest expense described in paragraph (b)(3)(i) of this section, in the case of a foreign corporation that is not an applicable CFC; or

(B) The amount of disallowed business interest expense determined under paragraph (d) of this section, in the case of an applicable CFC.

(ii) *Foreign corporation is a specified foreign partner.* If a foreign corporation is a specified foreign partner with respect to one or more partnerships engaged in a trade or business in the United States for a taxable year, then the portion of the foreign corporation's business interest expense determined under § 1.882–5 for which a deduction is disallowed for the taxable year is equal to the sum of the following amounts—

(A) Either—

(*1*) The amount described in paragraph (e)(2)(i)(A) of this section, in the case of a foreign corporation that is not an applicable CFC; or

(*2*) The amount described in paragraph (e)(2)(i)(B) of this section, in the case of an applicable CFC; and

(B) With respect to each partnership that has excess business interest expense for the taxable year that ends with or within the foreign corporation's taxable year, the amount of the foreign corporation's specified excess business interest expense.

(f) *Coordination with branch profits tax*—(1) *Effect on effectively connected earnings and profits.* The disallowance and carryforward of business interest expense under § 1.163(j)–2(b) and (c) will not affect when such business interest expense reduces the effectively connected earnings and profits of a foreign corporation, as defined in § 1.884–1(f).

(2) *Effect on U.S. net equity.* The disallowance and carryforward of business interest expense under § 1.163(j)–2(b) and (c) will not affect the computation of the U.S. net equity of a foreign corporation, as defined in § 1.884–1(c).

(g) *Definitions.* The following definitions apply for purposes of this section.

(1) *Applicable CFC.* The term *applicable CFC* means a foreign corporation described in section 957, but only if the foreign corporation has at least one United States shareholder that owns, within the meaning of section 958(a), stock of the foreign corporation.

(2) *ECI excess business interest income.* The term *ECI excess business interest income* means, with respect to a specified foreign partner and a partnership, the excess, if any, of the specified foreign partner's allocable business interest income (as defined in § 1.163(j)–6(f)(2)(ii)) over its allocable business interest expense (as defined in § 1.163(j)–6(f)(2)(ii)), but, for purposes of determining a specified foreign partner's allocable business interest income and allocable business interest expense, taking into account only the portion of the partnership's business interest income determined under paragraph (b)(4) of this section as if the partnership were a specified foreign person, over the business interest expense on the U.S. booked liabilities of the partnership as determined under § 1.882–5(d)(2)(vii).

(3) *Effectively connected taxable income.* The term *effectively connected taxable income* means taxable income of a person that is, or is treated as. effectively connected with the conduct of a trade business in the United States under an applicable provision of the Code or regulations or, if an income tax treaty applies, business profits attributable to a U.S. permanent establishment of a tax treaty resident eligible for benefits under an income tax treaty between the United States and the treaty country.

(4) *Specified excess business interest expense.* The term *specified excess business interest expense* means, with respect to a specified foreign partner and a partnership, the amount determined by multiplying the specified foreign partner's allocable excess business interest expense (as determined under § 1.163(j)–6(f)) by the partnership's specified ratio for the taxable year.

(5) *Specified excess taxable income.* The term *specified excess taxable income* means, with respect to a specified foreign partner and a partnership, the amount determined by multiplying the amount of the specified foreign partner's allocable excess taxable income (as determined under § 1.163(j)–6(f)) by the amount of the partnership's specified ratio for the taxable year.

(6) *Specified foreign partner.* The term *specified foreign partner* means, with respect to a partnership that is engaged in a U.S. trade or business, a partner that is a specified foreign person or an applicable CFC.

(7) *Specified foreign person.* The term *specified foreign person* means a nonresident alien individual, as defined in section 7701(b) and the regulations thereunder, or a foreign corporation other than an applicable CFC.

(8) *Specified ratio.* The term *specified ratio* means, with respect to a partnership, a fraction (expressed as a percentage), the numerator of which is the ATI for the partnership determined under paragraph (b)(2) of this section as if the partnership were a specified foreign person, and the denominator of which is the ATI for the partnership determined under § 1.163(j)–6(d).

(h) *Examples.* The following examples illustrate the application of this section. For all examples, assume that all referenced interest expense is deductible but for the application of section 163(j), the small business exemption under § 1.163(j)–2(d) is not available, no party is engaged in an excepted trade or business, and no business interest expense is floor plan financing interest expense.

(1) Example 1: Limitation on business interest deduction of a foreign corporation—(i) *Facts.* FC, a foreign corporation that is not an applicable CFC, has $100x of gross income that is effectively connected income. FC has $60x of other income which is not effectively connected income. FC has total expenses of $100x. Assume that under § 1.882–5, FC has $30x of interest expense allocable to income which is effectively connected income. Under section 882(c) and the regulations thereunder, FC has $40x of other expenses properly allocated and apportioned to income which is effectively connected taxable income. FC does not have any business interest income.

(ii) *Analysis.* FC is a specified foreign person under paragraph (g)(7) of this section. Under paragraph (e)(2) of this section, the amount of FC's interest expense determined under § 1.882–5 that is disallowed is the disallowed business interest expense computed under § 1.163(j)–2(b) with respect to interest expense described in paragraph (b)(3) of this section. Under § 1.163(j)–4(b)(1), all interest paid or accrued by FC is properly allocable to a trade or business and therefore under paragraph (b)(3) of this section, FC has business interest expense of $30x. FC has $30x of effectively connected taxable income described in paragraph (g)(3) of this section ($100x − $30x − $40x). Under paragraph (b)(2) of this section, FC has ATI of $60x, determined as $30x of effectively connected taxable income, increased by $30x of business interest expense. Accordingly, FC's section 163(j) limitation is $18x ($60x × 30

percent). Because FC's business interest expense ($30x) exceeds the section 163(j) limitation ($18x), FC may only deduct $18x of business interest expense. Under § 1.163(j)–2(c), the remaining $12x is disallowed business interest expense carryforward and under paragraph (e)(1)(ii) of this section, the $12x is not taken into account for purposes of applying § 1.882–5 in the succeeding taxable year.

(2) Example 2: Use of a disallowed business interest expense carryforward—(i) *Facts.* The facts are the same as in *Example 1* in paragraph (h)(1)(i) of this section except that FC has $300x of gross income which is all effectively connected income. Furthermore assume that FC has a disallowed business interest expense carryforward of $25x from the prior taxable year.

(ii) *Analysis.* Under paragraph (e)(1)(ii) of this section, FC's $25x of disallowed business interest expense carryforward is not taken into account for purposes of determining FC's interest under § 1.882–5. Therefore, FC has $30x of business interest expense determined under § 1.882–5. Under paragraph (g)(3) of this section, FC has effectively connected taxable income of $205x ($300x gross income − $55x interest expense ($30x + $25x) − $40x other expenses). Under paragraph (b)(2) of this section, FC has ATI of $260x, determined as $205x of effectively connected taxable income, increased by $55x of business interest expense. Accordingly, FC's section 163(j) limitation is $78x ($260x × 30 percent). Under paragraph (b)(3) of this section, FC has business interest expense of $55x ($30x + $25x disallowed interest carryforward) for the taxable year. Because FC's business interest expense ($55x) does not exceed the section 163(j) limitation ($78x), FC may deduct all $55x of business interest expense.

(3) Example 3: Foreign corporation is engaged in a U.S. trade or business and a specified foreign partner in a partnership engaged in a U.S. trade or business—(i) *Facts.* FC, a foreign corporation that is not an applicable CFC, owns a 50–percent interest in ABC, a foreign partnership that is engaged in a trade or business in the United States. ABC has two lines of businesses, Business A and Business B. Business A produces $120x of taxable income (including interest expense) and Business B produces $80x of taxable income. FC is allocated 50 percent of all items of income and expense of Business A and Business B. Business A has business interest expense of $20x on $400x of liabilities but has no business interest income. Business B does not have any business interest expense or business interest income. With respect to FC, only Business A produces effectively connected income. FC has an outside basis of $500x in the ABC partnership for purposes of § 1.882–5(b), step 1. All of the liabilities of Business A are U.S. booked liabilities for purposes of § 1.882–5(d). In addition to owning a 50–percent interest in ABC, FC conducts a separate business that is engaged in a trade or business in the United States (Business X). Business X has effectively connected taxable income of $50x, U.S. assets with an adjusted basis of $300x, U.S. booked liabilities of $160x, and interest on U.S. booked liabilities of $15x. FC computes its interest expense under the three-step method described in § 1.882–5(b) through (d) and uses the fixed ratio of 50 percent for purposes of § 1.882–5(c), step 2. Assume the interest rate on excess U.S. connected liabilities is 5 percent. For the taxable year, FC has total interest expense of 500x for purposes of § 1.882–5(a)(3).

(ii) *Analysis*—(A) *Application of section 163(j) to ABC.* Under § 1.163(j)–6(a), ABC computes a section 163(j) limitation at the partnership level. Under § 1.163(j)–6(d), ABC has ATI of $220x, determined as $200x of taxable income ($120x from Business A + $80x from Business B), increased by $20x of business interest expense of Business A. Under § 1.163(j)–2(b), ABC's section 163(j) limitation is $66x ($220x × 30 percent). Because ABC's business interest expense ($20x) does not exceed the section 163(j) limitation ($66x), ABC can deduct all of its business interest expense for the taxable year. Under § 1.163(j)–1(b)(15), ABC has excess taxable income of $153.33x ($220x × ($46x/$66x)). Under § 1.163(j)–6(f), FC is allocated 50 percent of the $153.33x of ABC's excess taxable income, or $76.67x of allocable excess taxable income, but, under paragraph (c)(1) of this section, the amount by which the allocable excess taxable income exceeds FC's specified excess taxable income (as defined in paragraph (g)(5) of this section) is a subtraction from FC's ATI. Under paragraph (g)(5) of this section, FC's specified excess taxable income is $48.79x, which is equal to the product of $76.67x and ABC's specified ratio of 63.64 percent. Under paragraph (g)(8) of this section, ABC's specified ratio of 63.64 percent is determined as $140x/$220x (where the numerator of $140x is the ATI of ABC determined under paragraph (b)(2) of this section as if ABC were a specified foreign person ($120x taxable income of Business A, increased by $20x of business interest expense), and the denominator of $220x is the ATI of ABC under § 1.163(j)–6(d)). FC's allocable excess taxable income ($76.67x) exceeds its specified excess taxable income ($48.79x) by $27.88x.

(B) *Application of § 1.882–5 to FC.* FC is a specified foreign partner under paragraph (g)(6) of this section. Under paragraph (e)(1) of this section, FC first determines its interest expense under § 1.882–5 and then determines its disallowed business interest expense. Under § 1.882–5(b), step 1, FC has U.S. assets of $800x ($500x (FC's basis in its interest in ABC) + $300x (FC's basis in Business X assets). Under § 1.882–5(c), step 2, applying the 50–percent safe harbor in § 1.882–5 for a non-banking business, FC has U.S. connected liabilities of $400x ($800x × 50 percent). Under § 1.882–5(d), step 3, FC has U.S. booked liabilities of $360x ($200x (50–percent share of Business A liabilities of ABC of $400x) + $160x (Business X liabilities) and interest on U.S. booked liabilities of $25x ($10x (50–percent share of $20x interest expense of Business A) + $15x (interest expense of Business X)). FC has excess U.S. connected liabilities of $40x ($400x − $360x) and interest on such excess liabilities of $2x ($40x x 5 percent). FC's interest expense determined under § 1.882–5 is $27x ($25x + $2x).

(C) *Application of section 163(j) to FC.* Under paragraph (e)(2)(ii) of this section, the amount of business interest expense that is disallowed for FC is equal to only the amount of interest described in paragraph (b)(3) of this section that is disallowed because there is no specified excess business interest expense with respect to ABC. Under paragraph (b)(3) of this section, FC's business interest expense (at the corporate level) is $17x, the amount determined under § 1.882–5 ($27x) less the amount of interest on U.S. booked liabilities from ABC determined under § 1.882–5(d)(2)(vii) ($10x), which was subject to the section 163(j) limitation at the ABC partnership level. Under § 1.163(j)–6(e)(1), FC's ATI is determined under § 1.163(j)–1(b)(1) without regard to FC's distributive share of any items of income, gain, deduction, or loss of ABC. Under paragraph (b)(2) of this section, taking into account the application of paragraph (c)(1) of this section, FC's ATI is $115.77x ($50x effectively connected taxable income with respect to Business X, + $17x (business interest expense under § 1.882–5 of 27x less the amount of interest on U.S. booked liabilities from ABC determined under § 1.882–5(d)(2)(vii) of $10x) + $76.65x (excess taxable income from ABC) − $27.88x (amount excess taxable income exceeds specified excess taxable income)). FC's section 163(j) limitation is $34.73x ($115.77x × 30 percent). Because FC's business interest expense ($17x) is less than FC's section 163(j) limitation ($34.73x) and all of its share of ABC's interest is deductible, FC may deduct all $27x of interest determined under § 1.882–5.

(4) *Example 4: Scaleback of interest expense under § 1.882–5*—(i) *Facts.* Assume the same facts in *Example 3* in paragraph (h)(3)(i) of this section except that Business X has U.S. booked liabilities of $300x and interest on U.S. booked liabilities of $20x.

(ii) *Analysis*—(A) *Application of section 163(j) to ABC.* The analysis is the same as *Example 3* in paragraph (h)(3)(ii)(A) of this section.

(B) *Application of § 1.882–5 to FC.* Under § 1.882–5(b), step 1, FC has U.S. assets of $800x ($500x (FC's basis in its interest in ABC) + $300x (FC's basis in Business X assets)). Under § 1.882–5(c), step 2, applying the 50–percent safe harbor in § 1.882–5 for a non-banking business, FC has U.S. connected liabilities of $400x ($800x x 50 percent). Under § 1.882–5(d), step 3, FC has U.S. booked liabilities of $500x ($200x (50–percent share of Business A liabilities of ABC of $400x) + $300x (Business X liabilities) and interest on U.S. booked liabilities of $30x ($10x (50–percent share of $20x interest expense of Business A) + $20x (interest expense of Business X)). FC has excess U.S. booked liabilities of $100x ($500x − $400x) and the interest expense on U.S. booked liabilities must be reduced by the scaling ratio as provided in § 1.882–5(d)(4). FC's interest expense determined under § 1.882–5 is $24x ($30x x (400/500 scaling ratio)).

(C) *Application of section 163(j) to FC.* Under paragraph (b)(3) of this section, FC's business interest expense is $16x, the amount determined under § 1.882–5 ($24x) less the amount of interest on U.S. booked liabilities

from ABC determined under § 1.882–5(d)(2)(vii) after applying the scaling ratio ($8x, determined as interest expense of Business A of $10x × scaling ratio of 400/500), which was subject to the section 163(j) limitation at the ABC partnership level. Under § 1.163(j)–6(e)(1), FC's ATI is determined under § 1.163(j)–1(b)(1) without regard to FC's distributive share of any items of income, gain, deduction, or loss of ABC. Under paragraph (b)(2) of this section, taking into account the application of paragraph (c)(1) of this section, FC's ATI is $114.79x ($50x effectively connected taxable income with respect to Business X + $16x (business interest expense under § 1.882–5 of 24x less the amount of interest on U.S. booked liabilities from ABC determined under § 1.882–5(d)(2)(vii), after applying the scaleback, of $8x) + $76.67x (excess taxable income from ABC) − $27.88x (amount excess taxable income exceeds specified excess taxable income)). FC's section 163(j) limitation is $34.44x ($114.79x × 30 percent). Because FC's business interest expense ($16x) is less than FC's section 163(j) limitation ($34.44x) and all of ABC's interest is deductible, FC may deduct all $24x of interest determined under § 1.882–5.

(5) Example 5: Separate currency pools method—(i) *Facts.* Assume the same facts in *Example 3* in paragraph (h)(3)(i) of this section except that FC does not conduct Business X; the value of FC's interest in ABC for purposes of § 1.882–5(e)(i), step 1, is $1,000x; and FC computes its interest expense under the separate currency pools method in § 1.882–5(e) and for purposes of applying such method, the prescribed interest rate is 5 percent.

(ii) *Analysis*—(A) *Application of section 163(j) to ABC.* The analysis is the same as in *Example 3* in paragraph (h)(1)(ii)(A) of this section.

(B) *Application of § 1.882–5 to FC.* Under § 1.882–5(e)(i), step 1, FC has U.S. assets of $1,000x (FC's basis in its partnership interest in ABC). Under § 1.882–5(e)(1)(ii), step 2, FC has U.S. connected liabilities of $500x ($1,000x x 50 percent) applying the 50 percent safe harbor for non-banking business. Under § 1.882–5(e)(1)(iii), step 3, the interest expense under § 1.882–5 is $25x ($500x × 5 percent).

(C) *Application of section 163(j) to FC.* Under paragraph (b)(3) of this section, FC's business interest expense is $15x, the amount determined under § 1.882–5 ($25x) less the amount of interest on U.S. booked liabilities from ABC determined under § 1.882–5(d)(2)(vii) of $10x, which was subject to the section 163(j) limitation at the ABC partnership level. Under § 1.163(j)–6(e)(1), FC's ATI is determined under § 1.163(j)–1(b)(1) without regard to FC's distributive share of any items of income, gain, deduction, or loss of ABC. Under paragraph (b)(2) of this section, taking into account the application of paragraph (c)(1) of this section, FC's ATI is $48.79x ($76.67x (excess taxable income from ABC) − $27.88x (amount excess taxable income exceeds specified excess taxable income)). FC's section 163(j) limitation is $14.64x ($48.79x × 30 percent). Because FC's business interest expense ($15x) exceeds the 163(j) limitation ($14.64x), FC may only deduct $14.64x of its business interest expense. Under § 1.163(j)–2(c), the remaining $0.36x is disallowed business interest expense carryforward and under paragraph (e)(1)(ii) of this section, the $0.36x is not taken into account for purposes of applying § 1.882–5 in the succeeding taxable year. Accordingly, FC may deduct 24.64x of the $25x interest determined under § 1.882–5.

(6) Example 6: Specified foreign partner with excess business interest expense—(i) *Facts—Year 1.* FC, a foreign corporation that is not an applicable CFC, owns a 50–percent interest in XYZ, a foreign partnership that is engaged in a trade or business in the United States. XYZ has two lines of businesses, Business S and Business T. Business S produces $50x of taxable income (including interest expense), and Business T produces $40x of taxable income (including interest expense). FC is allocated 50 percent of all items of income and expenses of Business S and Business T. Business S has business interest expense of $30x on $500x of liabilities but has no business interest income. Business T has business interest expense of $50x on $500x of liabilities but has no business interest income. With respect to FC, only Business S produces effectively connected income. FC has an adjusted basis of $500x in XYZ for purposes of § 1.882–5(b), step 1. All of the liabilities of Business S are U.S. booked liabilities for purposes of § 1.882–5(d). FC computes its interest expense under the three-step method described in § 1.882–5(b) through (d) and uses the fixed ratio of 50 percent for purposes of § 1.882–5(c), step 2.

(ii) *Analysis with respect to Year 1*—(A) *Application of section 163(j) to XYZ.* Under § 1.163(j)–6(a), XYZ computes a section 163(j) limitation at the partnership-level. Under § 1.163(j)–6(d), XYZ has ATI of $170x, determined as $90x of taxable income ($50x from Business S + $40x from Business T), increased by $80x of business interest expense ($30x from Business S + $50x from Business T). Under § 1.163(j)–2(b), XYZ's section 163(j) limitation is $51x ($170x x 30 percent). Because XYZ's business interest expense ($80x) exceeds the section 163(j) limitation ($51x), XYZ may only deduct $51x of business interest expense and $29x is disallowed under section 163(j). Under § 1.163(j)–6(f), FC is allocated $14.5x of excess business interest expense (50 percent × $29x). Under paragraph (c)(2) of this section, the amount of allocable business interest expense that can be used by FC is equal to the amount of specified excess business interest, and the amount of such interest that is treated as paid or accrued by FC in the succeeding taxable year is limited to the amount of FC's specified excess taxable income allocated to FC in the succeeding taxable year.

(B) *Application of § 1.882–5 to FC.* FC is a specified foreign partner under paragraph (g)(6) of this section. Under paragraph (e)(1) of this section, FC first determines its interest expense under § 1.882–5 and then determines its disallowed business interest expense. Under § 1.882–5(b), step 1, FC has U.S. assets of $500x (FC's adjusted basis in its interest in XYZ). Under § 1.882–5(c), step 2, applying the 50-percent fixed ratio in § 1.882–5 for a non-banking business, FC has U.S. connected liabilities of $250x ($500x × 50 percent). Under § 1.882–5(d), step 3, FC has U.S. booked liabilities of $250x ($500x × 50–percent share of Business S liabilities of XYZ) and interest on U.S. booked liabilities of $15x (50 percent share of $30x interest expense of Business S). Because FC has U.S. connected liabilities equal to its U.S. booked liabilities, its interest expense under § 1.882–5 is $15x (the amount of interest expense on its U.S. booked liabilities).

(C) *Application of section 163(j) to FC.* Under paragraph (e)(2)(ii) of this section, the amount of business interest expense that is disallowed for FC is equal to the sum of the amount of interest described in paragraph (b)(3) of this section that is disallowed plus the amount of FC's specified excess business interest expense. FC's business interest expense (at the corporate level) under paragraph (b)(3) of this section is $0, the amount determined under § 1.882–5 ($15x) less the amount of interest on U.S. booked liabilities from XYZ determined under § 1.882–5(d)(2)(vii) ($15x), which was subject to the section 163(j) limitation at the XYZ partnership level. Because FC (at the corporate level) has no business interest expense, there is no business interest expense subject to the section 163(j) limitation. However, because FC has excess business interest expense with respect to XYZ, a deduction for a portion of the $15x of interest on U.S. booked liabilities from XYZ determined under § 1.882–5(d)(2)(vii) will be disallowed for the taxable year. The amount of such interest that is limited is equal to the amount of the FC's specified excess business interest expense determined under paragraph (g)(4) of this section. The specified excess business interest expense is $6.82x, determined by multiplying FC's distributive share of excess business interest expense ($14.5x) by XYZ's specified ratio of 47.06 percent, determined under paragraph (g)(8) of this section. The specified ratio of 47.06 percent is determined by dividing $80x ATI determined under paragraph (b)(2) of the section as if XYZ were a specified foreign person (determined as $50x taxable income from Business S + $30x business interest expense from Business S) by $170x of XYZ ATI. FC may only deduct $8.18x ($15x − $6.82x) of business interest expense. Under § 1.163(j)–2(c), the remaining $6.82x is disallowed business interest expense carryforward and under paragraph (e)(1)(ii) of this section, the $6.82x is not taken into account for purposes of applying § 1.882–5 in the succeeding taxable year.

(iii) *Facts—Year 2.* During Year 2, Business S produces $170x of taxable income (including interest expense) and Business T produces $150x (including interest expense) of taxable income. Business S has business interest expense of $30x on $500x of liabilities but has no business interest income. Business T has business interest expense of $50x on $500x of liabilities but no business interest income. With respect to FC, only Business S produces effectively connected taxable income. FC has an adjusted basis of $600x in XYZ for purposes of § 1.882–5(b), step 1. All of the liabilities

of Business S are U.S. booked liabilities for purposes of § 1.882–5(d). FC computes its interest expense under the three-step method described in § 1.882–5(b) through (d) and uses the fixed ratio of 50 percent for purposes of § 1.882–5(c), step 2. The interest rate on excess U.S. connected liabilities is 5 percent. For the taxable year, FC has total interest expense of $1,000x for purposes of § 1.882–5(a)(3).

(iv) *Analysis with respect to Year 2*—(A) *Application of section 163(j) to XYZ.* Under § 1.163(j)–6(a), XYZ computes a section 163(j) limitation at the partnership-level. Under § 1.163(j)–6(d), XYZ has ATI of $400x, determined as $320x of taxable income ($170x from Business S + $150x from Business T), increased by $80x of business interest expense ($30x from Business S + $50x from Business T). Under § 1.163(j)–2(b), XYZ's section 163(j) limitation is $120x ($400x × 30 percent). Because XYZ's business interest expense ($80x) does not exceed the section 163(j) limitation ($120x), XYZ can deduct all of its business interest expense for the taxable year. Under § 1.163(j)–1(b)(15), XYZ has excess taxable income of $133.30x ($400x × ($40x/$120x)). Under § 1.163(j)–6(f), FC is allocated 50 percent of the $133.33x of XYZ's excess taxable income, or $66.66x of allocable excess taxable income, but, under paragraph (c)(1) of this section, the amount by which the allocable excess taxable income exceeds FC's specified excess taxable income (as defined in paragraph (g)(5) of this section) is a subtraction from FC's ATI. Under paragraph (g)(5) of this section, FC's specified excess taxable income is $33.33x, which is equal to the product of FC's allocable excess taxable income of $66.66x and XYZ's specified ratio of 50 percent. Under paragraph (g)(8) of this section, XYZ's specified ratio of 50 percent is determined as $200x/$400x (where the numerator of $200x is the ATI of XYZ determined under paragraph (b)(2) of this section as if XYZ were a specified foreign person ($170x taxable income of Business S, increased by $30x of business interest expense), and the denominator of $400x is the ATI of XYZ under § 1.163(j)–6(d)). FC's allocable excess taxable income ($66.66x) exceeds its specified excess taxable income ($33.33x) by $33.33x.

(B) *Treatment of excess business interest expense from Year 1.* In Year 1, XYZ had disallowed business interest expense of $29x and under § 1.163(j)–6(f), FC's allocable excess business interest expense was $14.50x. Under paragraph (c)(2) of this section, FC may use its allocable excess business interest expense in a succeeding taxable year only to the extent of its specified excess business interest expense, which, in this case, was determined to be $6.82x, and, with respect to Year 2, the amount of specified excess business interest expense treated as paid or accrued by FC is limited to FC's specified excess taxable income ($33.33x). Thus, FC can treat the entire $6.82x as business interest expense paid or accrued in Year 2.

(C) *Application of § 1.882–5 to FC.* Under § 1.882–5(b), step 1, FC has U.S. assets of $600x (FC's adjusted basis in its interest in XYZ). Under § 1.882–5(c), step 2, applying the 50 percent fixed ratio in § 1.882–5 for a non-banking business, FC has U.S. connected liabilities of $300x ($600x × 50 percent). Under § 1.882–5(d), step 3, FC has U.S. booked liabilities of $250x ($500x × 50-percent share of Business S liabilities of XYZ) and interest on U.S. booked liabilities of $15x (50 percent share of $30x interest expense of Business S). FC has excess U.S. connected liabilities of $50x ($300x − $250x) and interest on such excess liabilities of $2.5x ($50x × 5 percent). FC's interest expense determined under § 1.882–5 is $17.5x ($15x + $2.5x).

(D) *Application of section 163(j) to FC.* Under paragraph (e)(2)(ii) of this section, the amount of business interest expense that is disallowed for FC is equal to only the amount of interest described in paragraph (b)(3) of this section that is disallowed because there is no excess business interest expense with respect to XYZ. FC's business interest expense (at the corporate level) under paragraphs (b)(3) and (e)(1) of this section is $9.32x, determined as the sum of $2.50x (the amount determined under § 1.882–5 ($17.50x) less the amount of interest on U.S. booked liabilities from XYZ determined under § 1.882–5(d)(2)(vii) ($15x) that is excluded under paragraph (b)(3)(ii) of this section) + $6.82x (allocable business interest expense from Year 1 treated as paid or accrued in Year 2). Under § 1.163(j)–6(e)(1), FC's ATI is determined under § 1.163(j)–1(b)(1) without regard to FC's distributive share of any items of income, gain, deduction, or loss of XYZ. Under paragraph (b)(2) of this section, taking into account the application of paragraph (c)(1) of this section, FC's ATI is $33.33x, determined as $66.66x (excess taxable income from XYZ) − $33.33x (amount excess taxable income exceeds specified excess taxable income). FC's section 163(j) limitation is $10x ($33.33x x 30 percent). Because FC's business interest expense (at the corporate level) of $9.32x is less than FC's section 163(j) limitation of $10x, FC may deduct all $9.32x of business interest expense ($2.50x from Year 2 and $6.82x from Year 1). Because all of XYZ's business interest expense is deductible, FC may also deduct the $15x of business interest expense on U.S. booked liabilities of XYZ for Year 2.

(7) Example 7: Coordination of section 163(j) and branch profits tax—(i) *Facts.* FC, a foreign corporation that is not an applicable CFC, uses cash that is treated as a U.S. asset under § 1.884–1(d) in order to pay interest described in paragraph (b)(3) of this section for which a deduction for such interest is disallowed under § 1.163(j)–2(b).

(ii) *Analysis.* Assuming that FC's U.S. assets otherwise remain constant during the year, the U.S. assets of FC will have decreased by the amount of cash used to pay the interest expense, and the U.S. net equity of FC will be computed accordingly.

(i) *Applicability date.* This section applies to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply this section to a taxable year beginning after December 31, 2017, if the taxpayers and their related parties consistently apply all of the section 163(j) regulations, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

§ 1.163(j)–9 Elections for excepted trades or businesses; safe harbor for certain REITs.

(a) *Overview.* This section provides rules and procedures for making an election under section 163(j)(7)(B) to be an electing real property trade or business, as defined in § 1.163(j)–1(b)(12), and an election under section 163(j)(7)(C) to be an electing farming business, as defined in § 1.163(j)–1(b)(11).

(b) *Scope and effect of election*—(1) *In general.* An election under this section is made with respect to each eligible trade or business of the taxpayer and applies only to such trade or business for which the election is made. An election under this section applies to the taxable year in which the election is made and to all subsequent taxable years, except as otherwise provided in this section.

(2) *Irrevocability.* An election under this section is irrevocable.

(c) *Time and manner of making election*—(1) *In general.* Subject to paragraph (e) of this section, a taxpayer makes an election under this section by attaching an election statement to the taxpayer's timely filed original Federal income tax return, including extensions. A taxpayer may make elections for multiple trades or businesses on a single election statement.

(2) *Election statement contents.* The election statement should be titled ''Section 1.163(j)–9 Election'' and must contain the following information for each trade or business:

(i) The taxpayer's name;

(ii) The taxpayer's address;

(iii) The taxpayer's social security number (SSN) or employer identification number (EIN);

(iv) A description of the taxpayer's electing trade or business, including the principal business activity code; and

(v) A statement that the taxpayer is making an election under section 163(j)(7)(B) or (C), as applicable.

(3) *Consolidated group's trade or business.* For a consolidated group's trade or business, the election under this section is made by the agent for the group, as defined in § 1.1502–77, on

behalf of itself and members of the consolidated group. Only the name and taxpayer identification number (TIN) of the agent for the group, as defined in § 1.1502–77, must be provided on the election statement.

(4) *Partnership's trade or business.* An election for a partnership must be made on the partnership's return with respect to any trade or business that the partnership conducts. An election by a partnership does not apply to a trade or business conducted by a partner outside the partnership.

(d) *Termination of election*—(1) *In general.* An election under this section automatically terminates if a taxpayer ceases to engage in the electing trade or business. A taxpayer is considered to cease to engage in an electing trade or business if the taxpayer sells or transfers substantially all of the assets of the electing trade or business to an acquirer that is not a related party in a taxable asset transfer. A taxpayer is also considered to cease to engage in an electing trade or business if the taxpayer terminates its existence for Federal income tax purposes or ceases operation of the electing trade or business, except to the extent that such termination or cessation results in the sale or transfer of substantially all of the assets of the electing trade or business to an acquirer that is a related party, or in a transaction that is not a taxable asset transfer.

(2) *Taxable asset transfer defined.* For purposes of this paragraph (d), the term taxable asset transfer means a transfer in which the acquirer's basis or adjusted basis in the assets is not determined, directly or indirectly, in whole or in part, by reference to the transferor's basis in the assets.

(3) *Related party defined.* For purposes of this paragraph (d), the term *related party* means any person who bears a relationship to the taxpayer which is described section 267(b) or 707(b)(1).

(4) *Anti-abuse rule.* If, within 60 months of a sale or transfer of assets described in paragraph (d)(1) of this section, the taxpayer or a related party reacquires substantially all of the assets that were used in the taxpayer's prior electing trade or business, or substantially similar assets, and resumes conducting such prior electing trade or business, the taxpayer's previously terminated election under this section is reinstated and is effective on the date the prior electing trade or business is reacquired.

(e) *Additional guidance.* The rules and procedures regarding the time and manner of making an election under this section and the election statement contents in paragraph (c) of this section may be modified through other guidance (see §§ 601.601(d) and 601.602 of this chapter). Additional situations in which an election may terminate under paragraph (d) of this section may be provided through guidance published in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d) of this chapter).

(f) *Examples.* The examples of this paragraph (f) illustrate the application of this section. Unless otherwise indicated, assume the following: X and Y are domestic C corporations; D and E are U.S. resident individuals not subject to any foreign income tax; and the exemption for certain small businesses in § 1.163(j)–2(d) does not apply.

(1) *Example 1: Scope of election*—(i) *Facts.* During her taxable year ending December 31, 2019, D, a sole proprietor, owned and operated a dairy farm and a tree farm as separate farming businesses described in section 263A(e)(4). D filed its original Federal income tax return for the 2019 taxable year on August 1, 2020, and included with the return an election statement meeting the requirements of paragraph (c)(2) of this section. The election statement identified D's dairy farm business as an electing trade or business under this section. On March 1, 2021, D sold some but not all or substantially all of the assets from her dairy farm business to her neighbor, E, who is unrelated to D. After the sale, D continued to operate the dairy farm trade or business.

(ii) *Analysis.* D's election under this section was properly made and is effective for the 2019 taxable year and subsequent years. D's dairy farm business is an excepted trade or business because D made the election with her timely filed Federal income tax return. D's tree farm business is a non-excepted trade or business. The sale of some but not all or substantially all of the assets from D's dairy farm business has no impact on D's election under this section.

(2) *Example 2: Cessation of entire trade or business*—(i) *Facts.* X has a real property trade or business for which X made an election under this section by attaching an election statement to A's 2019 Federal income tax return. On March 1, 2020, X sold all of the assets used in its real property trade or business to Y, an unrelated party, and ceased to engage in the electing trade or business. On June 1, 2027, X started a new real property trade or business that was substantially similar to X's prior electing trade or business.

(ii) *Analysis.* X's election under this section terminated on March 1, 2020, under paragraph (d)(1) of this section. X may choose whether to make an election under this section for X's new real property trade or business that A started in 2027.

(3) *Example 3: Anti-abuse rule*—(i) *Facts.* The same facts are the same as in *Example 2* in paragraph (f)(2)(i) of this section, except that X re-started her previous real property trade or business on February 1, 2021, when X reacquired substantially all of the assets that X had sold on March 1, 2020.

(ii) *Analysis.* X's election under this section terminated on March, 1, 2020, under paragraph (d)(1) of this section. On February 1, 2021, X's election was reinstated under paragraph (d)(4) of this section. X's new real property trade or business is treated as a resumption of X's prior electing trade or business and is therefore treated as an electing real property trade or business.

(4) *Example 4: Trade or business continuing after acquisition*—(i) *Facts.* X has a farming business for which X made an election under this section by attaching an election statement to X's timely filed 2019 Federal income tax return. Y, unrelated to X, also has a farming business, but Y has not made an election under this section. On July 1, 2020, X transferred all of its assets to Y in a transaction described in section 368(a)(1)(D) (a ''D reorganization''). After the transfer, Y continues to operate the farming trade or business acquired from X.

(ii) *Analysis.* Under paragraph (d)(1) of this section, Y is subject to X's election under this section for the trade or business that uses X's assets because the sale or transfer was not in a taxable transaction. Y cannot revoke X's election, but X's election has no effect on Y's existing farming business for which Y has not made an election under this section.

(5) *Example 5: Trade or business merged after acquisition*—(i) *Facts.* The facts are the same as in *Example 4* in paragraph (f)(4)(i) of this section, except that Y uses the assets acquired from X in a trade or business that is neither a farming business (as defined in section 263A(e)(4) or § 1.263A–4(a)(4)) nor a trade or business of a specified agricultural or horticultural cooperative (as defined in section 199A(g)(4)).

(ii) *Analysis.* Y is not subject to X's election for Y's farming business because the farming trade or business ceased to exist after the acquisition.

(g) *Safe harbor for REITs*—(1) *In general.* If a REIT holds real property, as defined in § 1.856–10, interests in partnerships holding real property, as defined in § 1.856–10, or shares in other REITs holding real property, as defined in § 1.856–10, the REIT is eligible to make the election described in paragraph (b)(1) of this section to be an electing real property trade or business for purposes of sections 163(j)(7)(B) and 168(g)(1)(F) for all or part of its assets. The portion of the REIT's assets eligible for this election is determined under paragraph (g)(2) or (3) of this section.

(2) *REITs that do not significantly invest in real property financing assets.* If a REIT makes an election described in paragraph (g)(1) of this section and the value of the REIT's real property

financing assets, as defined in paragraphs (g)(5) and (6) of this section, at the close of the taxable year is 10 percent or less of the value of the REIT's total assets at the close of the taxable year, as determined under section 856(c)(4)(A), then all of the REIT's assets are treated as assets of an excepted trade or business.

(3) *REITs that significantly invest in real property financing assets.* If a REIT makes an election described in paragraph (g)(1) of this section and the value of the REIT's real property financing assets, as defined in paragraphs (g)(5) and (6) of this section, at the close of the taxable year is more than 10 percent of the value of the REIT's total assets at the close of the taxable year, as determined under section 856(c)(4)(A), then for allocation of interest expense, interest income, and other items of expense and gross income to excepted and non-excepted trades or businesses, the REIT must apply the rules set forth in § 1.163(j)–10 as modified by paragraph (g)(4) of this section.

(4) *REIT real property assets, interests in partnerships, and shares in other REITs*—(i) *Real property assets.* Assets held by a REIT described in paragraph (g)(3) of this section that meet the definition of real property under § 1.856–10 are treated as assets of an excepted trade or business.

(ii) *Partnership interests.* If a REIT described in paragraph (g)(3) of this section holds an interest in a partnership, in applying the partnership look-through rule described in § 1.163(j)–10(c)(5)(ii)(A)(*2*), the REIT treats assets of the partnership that meet the definition of real property under § 1.856–10 as assets of an excepted trade or business. This application of the definition of real property under § 1.856–10 does not affect the characterization of the partnership's assets at the partnership level or for any non-REIT partner.

(iii) *Shares in other REITs.* If a REIT (shareholder REIT) described in paragraph (g)(3) of this section holds an interest in another REIT, then for purposes of applying the allocation rules in § 1.163(j)–10, the partnership look-through rule described in § 1.163(j)–10(c)(5)(ii)(A)(*2*) applies to the assets of the other REIT (as if the other REIT were a partnership) in determining the extent to which shareholder REIT's adjusted basis in the shares of the other REIT is allocable to an excepted or non-excepted trade or business of shareholder REIT. However, no portion of the adjusted basis of shareholder REIT's shares in the other REIT is allocated to a non-excepted trade or business if all of the other REIT's assets are treated as assets of an excepted trade or business under paragraph (g)(2) of this section. If shareholder REIT does not receive from the other REIT the information necessary to determine whether and the extent that the assets of the other REIT are investments in real property financing assets, then shareholder REIT's shares in the other REIT are treated as assets of a non-excepted trade or business under § 1.163(j)–10(c).

(5) *Value of shares in other REITs.* If a REIT (shareholder REIT) holds shares in another REIT, then for purposes of applying the value tests under paragraphs (g)(2) and (3) of this section, the value of shareholder REIT's real property financing assets includes the portion of the value of shareholder REIT's shares in the other REIT that is attributable to the other REIT's investments in real property financing assets. However, no portion of the value of shareholder REIT's shares in the other REIT is included in the value of shareholder REIT's real property financing assets if all of the other REIT's assets are treated as assets of an excepted trade or business under paragraph (g)(2) of this section. If shareholder REIT does not receive from the other REIT the information necessary to determine whether and the extent that the assets of the other REIT are investments in real property financing assets, then shareholder REIT's shares in the other REIT are treated as real property financing assets for purposes of paragraphs (g)(2) and (3) of this section.

(6) *Real property financing assets.* For purposes of this paragraph (g), *real property financing assets* include interests, including participation interests, in the following: Mortgages, deeds of trust, and installment land contracts; mortgage pass-thru certificates guaranteed by Government National Mortgage Association (GNMA), Federal National Mortgage Association (FNMA), Federal Home Loan Mortgage Corporation (FHLMC), or Canada Mortgage and Housing Corporation (CMHC); REMIC regular interests; other interests in investment trusts classified as trusts under § 301.7701–4(c) of this chapter that represent undivided beneficial ownership in a pool of obligations principally secured by interests in real property and related assets that would be permitted investments if the investment trust were a REMIC; obligations secured by manufactured housing treated as single family residences under section 25(e)(10), without regard to the treatment of the obligations or the properties under state law; and debt instruments issued by publicly offered REITs.

(h) *Special anti-abuse rule for certain real property trades or businesses*—(1) *In general.* Except as provided in paragraph (h)(2) of this section, a real property trade or business does not constitute a trade or business eligible for an election described in paragraph (b)(1) of this section to be an electing real property trade or business if at least 80 percent, determined by fair market value, of the business's real property is leased, whether or not the arrangement is pursuant to a written lease or pursuant to a service contract or another agreement that is not denominated as a lease, to a trade or business under common control with the real property trade or business. For purposes of this paragraph (h), two trades or businesses are under common control if 50 percent of the direct and indirect ownership of both businesses are held by related parties within the meaning of sections 267(b) and 707(b).

(2) *Exception for certain REITs.* The special anti-abuse rule in paragraph (h)(1) does not apply to REITs that lease qualified lodging facilities, as defined in section 856(d)(9)(D), and qualified health care properties, as defined in section 856(e)(6)(D).

(i) *Applicability date.* This section applies to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

§ 1.163(j)–10 Allocation of interest expense, interest income, and other items of expense and gross income to an excepted trade or business.

(a) *Overview*—(1) *In general*—(i) *Purposes.* This section provides the exclusive rules for allocating tax items that are properly allocable to a trade or business between excepted trades or businesses and non-excepted trades or businesses for purposes of section 163(j). The amount of a taxpayer's interest expense that is properly allocable to excepted trades or

businesses is not subject to limitation under section 163(j). The amount of a taxpayer's other items of income, gain, deduction, or loss, including interest income, that is properly allocable to excepted trades or businesses is excluded from the calculation of the taxpayer's section 163(j) limitation. See section 163(j)(6) and (j)(8)(A)(i); see also § 1.163(j)–1(b)(1)(i)(H), (b)(1)(ii)(F), and (b)(3). The general method of allocation set forth in paragraph (c) of this section is based on the approach that money is fungible and that interest expense is attributable to all activities and property, regardless of any specific purpose for incurring an obligation on which interest is paid. In no event may the amount of interest expense allocated under this section exceed the amount of interest paid or accrued, or treated as paid or accrued, by the taxpayer within the taxable year.

(ii) *Application of section.* The amount of a taxpayer's tax items properly allocable to a trade or business, other than interest expense and interest income, that is properly allocable to excepted trades or businesses for purposes of section 163(j) is determined as set forth in paragraph (b) of this section. The amount of a taxpayer's interest expense and interest income that is properly allocable to excepted trades or businesses for purposes of section 163(j) generally is determined as set forth in paragraph (c) of this section, except as otherwise provided in paragraph (d) of this section. For purposes of this section, a taxpayer's activities are not treated as a trade or business if those activities do not involve the provision of services or products to a person other than the taxpayer. For example, if a taxpayer engaged in a manufacturing trade or business has in-house legal personnel that provide legal services solely to the taxpayer, the taxpayer is not treated as also engaged in the trade or business of providing legal services.

(2) *Coordination with other rules*—(i) *In general.* The rules of this section apply after a taxpayer has determined whether any interest expense or interest income paid, received, or accrued is properly allocable to a trade or business. Similarly, the rules of this section apply to other tax items after a taxpayer has determined whether those items are properly allocable to a trade or business. For instance, a taxpayer must apply § 1.163–8T to determine which items of interest expense are investment interest under section 163(d) before applying the rules in paragraph (c) of this section to allocate interest expense between excepted and non-excepted trades or businesses. After determining whether its tax items are properly allocable to a trade or business, a taxpayer that is engaged in both excepted and non-excepted trades or businesses must apply the rules of this section to determine the amount of interest expense that is business interest expense subject to limitation under section 163(j) and to determine which items are included or excluded in computing its section 163(j) limitation.

(ii) *Treatment of investment interest, investment income, and investment expenses of a partnership with a C corporation or tax-exempt corporation as a partner.* For rules governing the treatment of investment interest, investment income, and investment expenses of a partnership with a C corporation or tax-exempt corporation as a partner, see §§ 1.163(j)–4(b)(3) and 1.163(j)–6(j).

(3) *Application of allocation rules to foreign corporations and foreign partnerships.* The rules of this section apply to foreign corporations and foreign partnerships. See §§ 1.163(j)–7 and 1.163(j)–8.

(4) *Application of allocation rules to members of a consolidated group*—(i) *In general.* As provided in § 1.163(j)–4(d), the computations required by section 163(j) and the section 163(j) regulations generally are made for a consolidated group on a consolidated basis. In this regard, for purposes of applying the allocation rules of this section, all members of a consolidated group are treated as one corporation. Therefore, the rules of this section apply to the activities conducted by the group as if those activities were conducted by a single corporation. For example, the group (rather than a particular member) is treated as engaged in excepted or non-excepted trades or businesses. In the case of intercompany obligations, within the meaning of § 1.1502–13(g)(2)(ii), for purposes of allocating asset basis between excepted and non-excepted trades or businesses, the obligation of the member borrower is not considered an asset of the creditor member. Similarly, intercompany transactions, within the meaning of § 1.1502–13(b)(1)(i), are disregarded for purposes of this section, as are the resulting offsetting items, and property is not treated as used in a trade or business to the extent the use of such property in that trade or business derives from an intercompany transaction. Further, stock of a group member that is owned by another member of the same group is not treated as an asset for purposes of this section, and the transfer of any amount of member stock to a non-member is treated by the group as a transfer of the member's assets proportionate to the amount of member stock transferred. Additionally, stock of a corporation that is not a group member is treated as owned by the group.

(ii) *Application of excepted business percentage to members of a consolidated group.* After a consolidated group has determined the percentage of the group's interest expense allocable to excepted trades or businesses for the taxable year (and thus not subject to limitation under section 163(j)), this exempt percentage is applied to the interest paid or accrued by each member during the taxable year to any lender that is not a group member. Therefore, except to the extent paragraph (d) of this section (providing rules for certain qualified nonrecourse indebtedness) applies, an identical percentage of the interest paid or accrued by each member of the group to any lender that is not a group member will be treated as allocable to excepted trades or businesses, regardless of whether any particular member actually engaged in an excepted trade or business.

(iii) *Basis in assets transferred in an intercompany transaction.* For purposes of allocating interest expense and interest income under paragraph (c) of this section, the basis of property does not include any gain or loss realized with respect to the property by another member in an intercompany transaction, as defined in § 1.1502–13(b), whether or not the gain or loss is deferred.

(5) *Tax-exempt organizations.* For organizations subject to tax under section 511, section 512 and the regulations thereunder determine the rules for allocating all income and expenses among multiple trades or businesses.

(6) [Reserved]

(7) *Examples.* The following examples illustrate the principles of this paragraph (a).

(i) *Example 1: Items properly allocable to a trade or business*—(A) *Facts.* Individual T operates Business X, a non-excepted trade or business, as a sole proprietor. In Year 1, T pays or accrues $40x of interest expense and receives $100x of gross income with respect to Business X that is not eligible for a section 199A deduction. T borrows money to buy a car for personal use, and T pays or accrues $20x of interest expense with respect to the car loan. T also invests in corporate bonds, and, in Year 1, T receives $50x of interest income on those bonds.

(B) *Analysis.* Under paragraphs (a)(1) and (2) of this section, T must determine which items of income and expense, including items of interest income and interest expense, are properly allocable to a trade or business. T's $100x of gross income and T's $40x of interest expense with respect to Business X are properly allocable to a trade

or business. However, the interest expense on T's car loan is personal interest within the meaning of section 163(h)(2) rather than interest properly allocable to a trade or business. Similarly, T's interest income from corporate bonds is not properly allocable to a trade or business because it is interest from investment activity. See section 163(d)(4)(B).

(ii) *Example 2: Intercompany transaction*—(A) *Facts.* S is a member of a consolidated group of which P is the common parent. P conducts an electing real property trade or business (Business X), and S conducts a non-excepted trade or business (Business Y). P leases Building V (which P owns) to S for use in Business Y.

(B) *Analysis.* Under paragraph (a)(4)(i) of this section, a consolidated group is treated as a single corporation for purposes of applying the allocation rules of this section, and the consolidated group (rather than a particular member of the group) is treated as engaged in excepted and non-excepted trades or businesses. Thus, intercompany transactions are disregarded for purposes of this section. As a result, the lease of Building V by P to S is disregarded. Moreover, because Building V is used in Business Y, basis in this asset is allocated to Business Y rather than Business X for purposes of these allocation rules, regardless of which member (P or S) owns the building.

(b) *Allocation of tax items other than interest expense and interest income*—(1) *In general.* For purposes of calculating ATI, tax items other than interest expense and interest income are allocated to a particular trade or business in the manner described in this paragraph (b). It is not necessary to allocate items under this paragraph (b) for purposes of calculating ATI if all of the taxpayer's items subject to allocation under this paragraph (b) are allocable to excepted trades or businesses, or if all of those items are allocable to non-excepted trades or businesses.

(2) *Gross income other than dividends and interest income.* A taxpayer's gross income other than dividends and interest income is allocated to the trade or business that generated the gross income.

(3) *Dividends*—(i) *Look-through rule.* If a taxpayer receives a dividend, within the meaning of section 316, that is not investment income, within the meaning of section 163(d), and if the taxpayer looks through to the assets of the payor corporation under paragraph (c)(5)(ii) of this section for the taxable year, then, solely for purposes of allocating amounts received as a dividend during the taxable year to excepted or non-excepted trades or businesses under this paragraph (b), the dividend income is treated as allocable to excepted or non-excepted trades or businesses based upon the relative amounts of the payor corporation's adjusted basis in the assets used in its trades or businesses, determined pursuant to paragraph (c) of this section. If at least 90 percent of the payor corporation's adjusted basis in its assets during the taxable year, determined pursuant to paragraph (c) of this section, is allocable to either excepted trades or businesses or to non-excepted trades or businesses, all of the taxpayer's dividend income from the payor corporation for the taxable year is treated as allocable to either excepted or non-excepted trades or businesses, respectively.

(ii) *Inapplicability of the look-through rule.* If a taxpayer receives a dividend that is not investment income, within the meaning of section 163(d), and if the taxpayer does not look through to the assets of the payor corporation under paragraph (c)(5)(ii) of this section for the taxable year, then the taxpayer must treat the dividend as allocable to a non-excepted trade or business.

(4) *Gain or loss from the disposition of non-consolidated C corporation stock, partnership interests, or S corporation stock*—(i) *Non-consolidated C corporations.* If a taxpayer recognizes gain or loss upon the disposition of stock in a non-consolidated C corporation that is not property held for investment, within the meaning of section 163(d)(5), and if the taxpayer looks through to the assets of the C corporation under paragraph (c)(5)(ii) of this section for the taxable year, then the taxpayer must allocate gain or loss from the disposition of stock to excepted or non-excepted trades or businesses based upon the relative amounts of the corporation's adjusted basis in the assets used in its trades or businesses, determined pursuant to paragraph (c) of this section. However, if a taxpayer recognizes gain or loss upon the disposition of stock in a non-consolidated C corporation that is not property held for investment, within the meaning of section 163(d)(5), and if the taxpayer does not look through to the assets of the C corporation under paragraph (c)(5)(ii) of this section for the taxable year, then the taxpayer must treat the gain or loss from the disposition of stock as allocable to a non-excepted trade or business. For rules governing the transfer of stock of a member of a consolidated group, see paragraph (a)(4)(i) of this section.

(ii) *Partnerships and S corporations.* (A) If a taxpayer recognizes gain or loss upon the disposition of interests in a partnership or stock in an S corporation that owns:

(*1*) Non-excepted assets and excepted assets;

(*2*) Investment assets; or

(*3*) Both;

(B) The taxpayer determines a proportionate share of the amount properly allocable to a non-excepted trade or business in accordance with the allocation rules set forth in paragraph (c)(5)(ii)(A) or (c)(5)(ii)(B)(3) of this section, as appropriate, and includes such proportionate share of gain or loss in the taxpayer's ATI. This rule also applies to tiered passthrough entities, as defined in § 1.163(j)–7(f)(13), by looking through each passthrough entity tier (for example, an S corporation that is the partner of the highest-tier partnership would look through each lower-tier partnership), subject to paragraph (c)(5)(ii)(D) of this section. With respect to a partner that is a C corporation or tax-exempt corporation, a partnership's investment assets are taken into account and treated as non-excepted trade or business assets.

(5) *Expenses, losses, and other deductions*—(i) *Expenses, losses, and other deductions that are definitely related to a trade or business.* Expenses (other than interest expense), losses, and other deductions (collectively, *deductions* for purposes of this paragraph (b)(5)) that are definitely related to a trade or business are allocable to the trade or business to which they relate. A deduction is considered definitely related to a trade or business if the item giving rise to the deduction is incurred as a result of, or incident to, an activity of the trade or business or in connection with property used in the trade or business (see § 1.861–8(b)(2)). If a deduction is definitely related to one or more excepted trades or businesses and one or more non-excepted trades or businesses, the deduction is apportioned between the excepted and non-excepted trades or businesses based upon the relative amounts of the taxpayer's adjusted basis in the assets used in those trades or businesses, as determined under paragraph (c) of this section.

(ii) *Other deductions.* Deductions that are not described in paragraph (b)(5)(i) of this section are ratably apportioned to all gross income.

(6) *Treatment of certain investment items of a partnership with a C corporation partner.* Any investment income or investment expenses that a partnership receives, pays, or accrues and that is treated as properly allocable to a trade or business of a C corporation partner under § 1.163(j)–4(b)(3)(i) is treated as properly allocable to a non-excepted trade or business of the C corporation partner.

(7) *Example: Allocation of income and expense.* The following example illustrates the principles of this paragraph (b):

(i) *Facts.* T conducts an electing real property trade or business (Business Y), which is an excepted trade or business. T also operates a lumber yard (Business Z), which is a non-excepted trade or business. In Year 1, T receives $100x of gross rental income from real property leasing activities. T also pays or accrues $60x of expenses in connection with its real property leasing activities and $20x of legal services performed on behalf of both Business Y and Business Z. T receives $60x of gross income from lumber yard customers and pays or accrues $50x of expenses related to the lumber yard business. For purposes of expense allocations under paragraphs (b) and (c) of this section, T has $240x of adjusted basis in its Business Y assets and $80x of adjusted basis in its Business Z assets.

(ii) *Analysis.* Under paragraph (b)(2) of this section, for Year 1, $100x of rental income is allocated to Business Y, and $60x of income from lumber yard customers is allocated to Business Z. Under paragraph (b)(5)(i) of this section, $60x of expenses paid or accrued in connection with real property leasing activities are allocated to Business Y, and $50x of expenses related to the lumber yard are allocated to Business Z. The $20x of remaining expenses for legal services performed on behalf of both Business Y and Business Z are allocated according to the relative amounts of T's basis in the assets used in each business. The total amount of T's basis in the assets used in Businesses Y and Z is $320x, of which 75 percent ($240x/$320x) is used in Business Y and 25 percent ($80x/$320x) is used in Business Z. Accordingly, $15x of the expenses for legal services are allocated to Business Y and $5x are allocated to Business Z.

(c) *Allocating interest expense and interest income that is properly allocable to a trade or business*—(1) *General rule*—(i) *In general.* Except as otherwise provided in this section, the amount of a taxpayer's interest expense and interest income that is properly allocable to a trade or business is allocated to the taxpayer's excepted or non-excepted trades or businesses for purposes of section 163(j) based upon the relative amounts of the taxpayer's adjusted basis in the assets, as determined under paragraph (c)(5) of this section, used in its excepted or non-excepted trades or businesses. The taxpayer must determine the adjusted basis in its assets as of the close of each determination date, as defined in paragraph (c)(6) of this section, in the taxable year and average those amounts to determine the relative amounts of asset basis for its excepted and non-excepted trades or businesses for that year. It is not necessary to allocate interest expense or interest income under this paragraph (c) for purposes of determining a taxpayer's business interest expense and business interest income if all of the taxpayer's interest income and expense is allocable to excepted trades or businesses (in which case the taxpayer is not subject to the section 163(j) limitation) or if all of the taxpayer's interest income and expense is allocable to non-excepted trades or businesses.

(ii) *De minimis exception.* If 90 percent or more of the taxpayer's basis in its assets for the taxable year is allocable to either excepted or non-excepted trades or businesses pursuant to this paragraph (c), then all of the taxpayer's interest expense and interest income for that year that is properly allocable to a trade or business is treated as allocable to either excepted or non-excepted trades or businesses, respectively.

(2) *Example.* The following example illustrates the principles of paragraph (c)(1) of this section: T is a calendar-year C corporation engaged in an electing real property trade or business, the business of selling wine, and the business of selling hand-carved wooden furniture. In Year 1, T has $100x of interest expense that is deductible except for the potential application of section 163(j). Based upon determinations made on the determination dates of March 31, June 30, September 30, and December 31, T's average adjusted basis in the assets used in the electing real property trade or business (an excepted trade or business) in Year 1 is $800x, and T's total average adjusted basis in the assets used in the other two businesses in Year 1 is $200x. Thus, $80x (($800x/($800x + $200x)) × $100x) of T's interest expense for Year 1 is allocable to T's electing real property trade or business and is not business interest expense subject to limitation under section 163(j). The remaining $20x of T's interest expense is business interest expense for Year 1 that is subject to limitation under section 163(j).

(3) *Asset used in more than one trade or business*—(i) *General rule.* If an asset is used in more than one trade or business during a determination period, as defined in paragraph (c)(6) of this section, the taxpayer's adjusted basis in the asset is allocated to each trade or business using the permissible methodology under this paragraph (c)(3) that most reasonably reflects the use of the asset in each trade or business during that determination period. An allocation methodology most reasonably reflects the use of the asset in each trade or business if it most properly reflects the proportionate benefit derived from the use of the asset in each trade or business. If none of the permissible methodologies set forth in paragraph (c)(3)(ii) of this section reasonably reflects the use of the asset in each trade or business, the taxpayer's basis in the asset is not taken into account for purposes of this paragraph (c).

(ii) *Permissible methodologies for allocating asset basis between or among two or more trades or businesses.* Subject to the special rules in paragraphs (c)(3)(iii) and (c)(5) of this section, a taxpayer's basis in an asset used in two or more trades or businesses during a determination period may be allocated to those trades or businesses based upon—

(A) The relative amounts of gross income that an asset generates, has generated, or may reasonably be expected to generate, within the meaning of § 1.861–9T(g)(3), with respect to the trades or businesses;

(B) If the asset is land or an inherently permanent structure, the relative amounts of physical space used by the trades or businesses; or

(C) If the trades or businesses generate the same unit of output, the relative amounts of output of those trades or businesses (for example, if an asset is used in two trades or businesses, one of which is an excepted regulated utility trade or business, and the other of which is a non-excepted regulated utility trade or business, the taxpayer may allocate basis in the asset based upon the relative amounts of kilowatt-hours generated by each trade or business).

(iii) *Special rules*—(A) *Consistent allocation methodologies*—(*1*) *In general.* Except as otherwise provided in paragraph (c)(3)(iii)(A)(*2*) of this section, a taxpayer may not vary its allocation methodology from one determination period to the next within a taxable year or from one taxable year to the next.

(*2*) *Consent to change allocation methodology.* If a taxpayer determines that a different allocation methodology properly reflects the proportionate benefit derived from the use of assets in its trades or businesses, the taxpayer may change its method of allocation under paragraphs (c)(3)(i) and (ii) of this section with the consent of the Commissioner. To obtain consent, a taxpayer must submit a request for a letter ruling under the applicable administrative procedures, and consent only will be granted in extraordinary circumstances.

(B) *De minimis exceptions*—(*1*) *De minimis amount of gross income from trades or businesses.* If at least 90 percent of gross income that an asset generates, has generated, or may reasonably be expected to generate, within the meaning of § 1.861–9T(g)(3), during a determination period is with respect to either excepted trades or

businesses or non-excepted trades or businesses, the taxpayer's entire basis in the asset for the determination period must be allocated to either excepted or non-excepted trades or businesses, respectively.

(*2*) *De minimis amount of asset basis allocable to a trade or business.* If 90 percent or more of the taxpayer's basis in an asset would be allocated to either excepted trades or businesses or non-excepted trades or businesses during a determination period pursuant to this paragraph (c)(3), the taxpayer's entire basis in the asset for the determination period must be allocated to either excepted or non-excepted trades or businesses, respectively.

(C) *Allocations of excepted regulated utility trades or businesses*—(*1*) *In general.* Except as provided in the de minimis rule in paragraph (c)(3)(iii)(C)(*3*) of this section, if a taxpayer is engaged in the trade or business of the furnishing or sale of items described in § 1.163(j)–1(b)(13)(i)(A), the taxpayer is engaged in an excepted regulated utility trade or business only to the extent the rates for the items furnished and sold are described in § 1.163(j)–1(b)(13)(i)(B). Thus, for example, electricity sold at market rates rather than on a cost of service and rate of return basis must be treated as electricity sold by a non-excepted regulated utility trade or business. The taxpayer must allocate under this paragraph (c) the basis of assets used in the utility trade or business between its excepted and non-excepted trades or businesses.

(*2*) *Permissible method for allocating asset basis for utility trades or businesses.* In the case of a utility trade or business described in paragraph (c)(3)(iii)(C)(*1*) of this section, and except as provided in the de minimis rule in paragraph (c)(3)(iii)(C)(*3*) of this section, the method described in paragraph (c)(3)(ii)(C) of this section is the only permissible method for allocating the taxpayer's basis in assets used in the trade or business between the taxpayer's excepted and non-excepted trades or businesses of selling or furnishing the items described in § 1.163(j)–1(b)(13)(i)(A).

(*3*) *De minimis rule for excepted utility trades or businesses.* If a taxpayer is engaged in a utility trade or business described in paragraph (c)(3)(iii)(C)(*1*) of this section, and if more than 90 percent of the items described in § 1.163(j)–1(b)(13)(i)(A) are furnished or sold at rates determined in the manner described in § 1.163(j)–1(b)(13)(i)(B), the taxpayer's entire trade or business is an excepted regulated utility trade or business, and paragraph (c)(3)(iii)(C)(*2*) of this section does not apply.

(*4*) *Example.* The following example illustrates the principles of this paragraph (c)(3)(iii)(C):

(*i*) *Facts.* X, a C corporation, is engaged in the trade or business of generating electrical energy. During each determination period in the taxable year, 80 percent of the kilowatts generated in the electricity generation trade or business is sold at rates established by a public utility commission on a rate of return basis. The remaining 20 percent of the kilowatts is sold on the wholesale markets at rates not established on a rate of return basis or by the governing or ratemaking body of an electric cooperative. None of the assets used in X's utility generation trade or business are used in any other trade or business.

(*ii*) *Analysis.* For purposes of section 163(j), under paragraph (c)(3)(iii)(C)(*1*) of this section, 80 percent of X's electricity generation business is an excepted regulated utility trade or business, and the remaining 20 percent of X's business is a non-excepted utility trade or business. Under paragraph (c)(3)(iii)(C)(*2*) of this section, X must allocate 80 percent of the basis of the assets used in its utility business to excepted trades or business and the remaining 20 percent of the basis in its assets to non-excepted trades or businesses.

(4) *Disallowed business interest expense carryforwards; floor plan financing interest expense.* Disallowed business interest expense carryforwards (which were treated as allocable to a non-excepted trade or business in a prior taxable year) are not re-allocated between non-excepted and excepted trades or businesses in a succeeding taxable year. Instead, the carryforwards continue to be treated as allocable to a non-excepted trade or business. Floor plan financing interest expense also is not subject to allocation between excepted and non-excepted trades or businesses (see § 1.163(j)–1(b)(17)) and is always treated as allocable to non-excepted trades or businesses.

(5) *Additional rules relating to basis*—(i) *Calculation of adjusted basis*—(A) *Non-depreciable property other than land.* Except as otherwise provided in paragraph (c)(5)(i)(E) of this section, for purposes of this section, the adjusted basis of an asset other than land with respect to which no deduction is allowable under section 167, section 168 of the Internal Revenue Code of 1954 (former section 168), or section 197, as applicable, is the adjusted basis of the asset for determining gain or loss from the sale or other disposition of that asset as provided in § 1.1011–1. Self-created intangible assets are not taken into account for purposes of this paragraph (c).

(B) *Depreciable property other than inherently permanent structures.* For purposes of this section, the adjusted basis of any tangible asset with respect to which a deduction is allowable under section 167, other than inherently permanent structures, is determined by using the alternative depreciation system under section 168(g) before any application of the additional first-year depreciation deduction (for example, under section 168(k) or (m)), and the adjusted basis of any tangible asset with respect to which a deduction is allowable under former section 168, other than inherently permanent structures, is determined by using the taxpayer's method of computing depreciation for the asset under former section 168. The depreciation deduction with respect to the property described in this paragraph (c)(5)(i)(B) is allocated ratably to each day during the period in the taxable year to which the depreciation relates.

(C) *Special rule for land and inherently permanent structures.* Except as otherwise provided in paragraph (c)(5)(i)(E) of this section, for purposes of this section, the adjusted basis of any asset that is land, including nondepreciable improvements to land, or an inherently permanent structure is its unadjusted basis.

(D) *Depreciable or amortizable intangible property and depreciable income forecast method property.* For purposes of this section, the adjusted basis of any intangible asset with respect to which a deduction is allowable under section 167 or 197, as applicable, is determined in accordance with section 167 or 197, as applicable, and the adjusted basis of any asset described in section 167(g)(6) for which the deduction allowable under section 167 is determined by the taxpayer under section 167(g), is determined in accordance with section 167(g). The depreciation or amortization deduction with respect to the property described in this paragraph (c)(5)(i)(D) is allocated ratably to each day during the period in the taxable year to which the depreciation or amortization relates.

(E) *Assets not yet used in a trade or business.* Assets that have been acquired or that are under development but that are not yet used in a trade or business are not taken into account for purposes of this paragraph (c). For example, construction works in progress (such as buildings, airplanes, or ships) are not taken into account for purposes of this paragraph (c). Similarly, land acquired by a taxpayer for construction of a building by the taxpayer to be used in a trade or business is not taken into account for purposes of this paragraph (c) until the building is placed in service. This rule does not apply to

interests in a partnership or stock in a corporation.

(F) *Trusts established to fund specific liabilities.* Trusts required by law to fund specific liabilities (for example, pension trusts and plant decommissioning trusts) are not taken into account for purposes of this paragraph (c).

(G) *Inherently permanent structure.* For purposes of this section, the term *inherently permanent structure* has the meaning provided in § 1.856–10(d)(2).

(ii) *Partnership interests; stock in non-consolidated domestic corporations*—(A) *Partnership interests*—(*1*) *Calculation of asset basis.* For purposes of this section, a partner's interest in a partnership is treated as an asset of the partner. For these purposes, the partner's adjusted basis in a partnership interest is reduced, but not below zero, by the partner's share of partnership liabilities, as determined under section 752, and is further reduced as provided in paragraph (c)(5)(ii)(A)(*2*)(*iii*) of this section.

(*2*) *Allocation of asset basis*—(*i*) *In general.* For purposes of determining the extent to which a partner's adjusted basis in its partnership interest is allocable to an excepted or non-excepted trade or business, the partner may look through to such partner's share of the partnership's basis in the partnership's assets, taking into account any adjustments under sections 734(b) and 743(b), and adjusted to the extent required under paragraph (d)(4) of this section, except as otherwise provided in paragraph (c)(5)(ii)(D) of this section. For purposes of the preceding sentence, such partner's share of partnership assets is determined using a reasonable method taking into account special allocations under section 704(b). Notwithstanding paragraph (c)(7) of this section, if a partner's direct and indirect interest in a partnership is greater than or equal to 80 percent of the partnership's capital or profits, the partner must apply the rules in this paragraph (c)(5)(ii)(A) to look through to the partnership's basis in the partnership's assets.

(*ii*) *De minimis rule.* If, after applying paragraph (c)(5)(ii)(A)(*2*)(*iii*) of this section, at least 90 percent of a partner's share of a partnership's basis in its assets (including adjustments under sections 734(b) and 743(b)) is allocable to either excepted trades or businesses or non-excepted trades or businesses, without regard to assets not properly allocable to a trade or business, the partner's entire basis in its partnership interest is treated as allocable to either excepted or non-excepted trades or businesses, respectively. For purposes of the preceding sentence, such partner's share of partnership assets is determined using a reasonable method taking into account special allocations under section 704(b).

(*iii*) *Partnership assets not properly allocable to a trade or business.* For purposes of applying paragraphs (c)(5)(ii)(A)(*2*)(*i*) and (*ii*) of this section with respect to a partner that is a C corporation or tax-exempt corporation, such partner's share of a partnership's assets that are not properly allocable to a trade or business is treated as properly allocable to an excepted or non-excepted trade or business with respect to such partner in the same manner that such assets would be treated if held directly by such partner. With respect to a partner other than a C corporation or tax-exempt corporation, a partnership's assets that are not properly allocable to a trade or business are treated as neither excepted nor non-excepted trade or business assets, and such partner's adjusted basis in its partnership interest is reduced by that partner's share of the partnership's asset basis with respect to those assets. For purposes of this paragraph (c)(5)(ii)(A)(*2*)(*iii*), such partner's share of a partnership's assets is determined under a reasonable method taking into account special allocations under section 704(b).

(*iv*) *Inapplicability of partnership look-through rule.* If a partner, other than a C corporation or a tax-exempt corporation, chooses not to look through to the partnership's basis in the partnership's assets under paragraph (c)(5)(ii)(A)(*2*)(*i*) of this section or is precluded by paragraph (c)(5)(ii)(D) of this section from applying such partnership look-through rule, the partner generally will treat its basis in the partnership interest as either an asset held for investment or a non-excepted trade or business asset as determined under section 163(d). If a partner that is a C corporation or a tax-exempt corporation chooses not to look through to the partnership's basis in the partnership's assets under paragraph (c)(5)(ii)(A)(*2*)(*i*) of this section or is precluded by paragraph (c)(5)(ii)(D) of this section from applying such partnership look-through rule, the taxpayer must treat its entire basis in the partnership interest as allocable to a non-excepted trade or business.

(B) *Stock in non-consolidated domestic corporations*—(*1*) *In general.* For purposes of this section, if a taxpayer owns stock in a domestic C corporation that is not a member of the taxpayer's consolidated group, or if the taxpayer owns stock in an S corporation, the stock is treated as an asset of the taxpayer.

(*2*) *Domestic non-consolidated C corporations*—(*i*) *Allocation of asset basis.* If a shareholder satisfies the minimum ownership threshold in paragraph (c)(7) of this section, then, for purposes of determining the extent to which the shareholder's basis in its stock in the domestic non-consolidated C corporation is allocable to an excepted or non-excepted trade or business, the shareholder must look through to the corporation's basis in the corporation's assets, adjusted to the extent required under paragraph (d)(4) of this section, except as otherwise provided in paragraph (c)(5)(ii)(D) of this section.

(*ii*) *De minimis rule.* If at least 90 percent of the domestic non-consolidated C corporation's basis in the corporation's assets is allocable to either excepted trades or businesses or non-excepted trades or businesses, the shareholder's entire interest in the corporation's stock is treated as allocable to either excepted or non-excepted trades or businesses, respectively.

(*iii*) *Inapplicability of corporate look-through rule.* If a shareholder other than a C corporation or a tax-exempt corporation does not satisfy the minimum ownership threshold in paragraph (c)(7) of this section or is precluded by paragraph (c)(5)(ii)(D) of this section from applying the corporation look-through rule of paragraph (c)(5)(ii)(B)(*2*)(*i*) of this section, the shareholder generally will treat its entire basis in the corporation's stock as an asset held for investment. If a shareholder that is a C corporation or a tax-exempt corporation does not satisfy the minimum ownership threshold in paragraph (c)(7) of this section or is precluded by paragraph (c)(5)(ii)(D) of this section from applying the corporation look-through rule of paragraph (c)(5)(ii)(B)(*2*)(*i*) of this section, the shareholder must treat its entire basis in the corporation's stock as allocable to a non-excepted trade or business.

(*3*) *S corporations*—(*i*) *Calculation of asset basis.* For purposes of this section, a shareholder's share of stock in an S corporation is treated as an asset of the shareholder. Additionally, for these purposes, the shareholder's adjusted basis in a share of S corporation stock is adjusted to take into account the modifications in paragraph (c)(5)(i)(A) of this section with respect to the assets of the S corporation (for example, a shareholder's adjusted basis in its S corporation stock is increased by the shareholder's share of depreciation with respect to an inherently permanent structure owned by the S corporation).

(*ii*) *Allocation of asset basis.* For purposes of determining the extent to which a shareholder's basis in its stock of an S corporation is allocable to an excepted or non-excepted trade or business, the shareholder may look through to such shareholder's share of the S corporation's basis in the S corporation's assets, allocated on a pro rata basis, adjusted to the extent required under paragraph (d)(4) of this section, except as otherwise provided in paragraph (c)(5)(ii)(D) of this section. Notwithstanding paragraph (c)(7) of this section, if a shareholder's direct and indirect interest in an S corporation is greater than or equal to 80 percent of the S corporation's stock by vote and value, the shareholder must apply the rules in this paragraph (c)(5)(ii)(B)(*3*) to look through to the S corporation's basis in the S corporation's assets.

(*iii*) *De minimis rule.* If at least 90 percent of a shareholder's share of an S corporation's basis in its assets is allocable to either excepted trades or businesses or non-excepted trades or businesses, the shareholder's entire basis in its S corporation stock is treated as allocable to either excepted or non-excepted trades or businesses, respectively.

(*iv*) *Inapplicability of S corporation look-through rule.* If a shareholder chooses not to look through to the S corporation's basis in the S corporation's assets under paragraph (c)(5)(ii)(B)(*3*)(*ii*) of this section or is precluded by paragraph (c)(5)(ii)(D) of this section from applying such S corporation look-through rule, the shareholder generally will treat its basis in the S corporation stock as either an asset held for investment or a non-excepted trade or business asset as determined under section 163(d).

(C) *Stock in CFCs.* The rules applicable to domestic non-consolidated C corporations in paragraph (c)(5)(ii)(B) of this section also apply to CFCs.

(D) *Inapplicability of look-through rule to partnerships or non-consolidated corporations to which the small business exemption applies.* A taxpayer may not apply the look-through rules in paragraphs (b)(3) and (c)(5)(ii)(A), (B), and (C) of this section to a partnership, S corporation, or non-consolidated corporation that is eligible for the small business exemption under section 163(j)(3) and § 1.163(j)–2(d)(1).

(E) *Tiered entities.* If a taxpayer applies the look-through rules of this paragraph (c)(5)(ii), the taxpayer must do so for all lower-tier entities with respect to which the taxpayer satisfies, directly or indirectly, the minimum ownership threshold in paragraph (c)(7) of this section, subject to the limitation in paragraph (c)(5)(ii)(D) of this section, beginning with the lowest-tier entity.

(iii) *Cash and cash equivalents and customer receivables.* Except as otherwise provided in paragraph (d)(2) of this section, a taxpayer's basis in its cash and cash equivalents and customer receivables is not taken into account for purposes of this paragraph (c). This rule also applies to a lower-tier entity if a taxpayer looks through to the assets of that entity under paragraph (c)(5)(ii) of this section. For purposes of this paragraph (c)(5)(iii), the term *cash and cash equivalents* includes cash, foreign currency, commercial paper, any interest in an investment company registered under the Investment Company Act of 1940 (1940 Act) and regulated as a money market fund under 17 CFR 270.2a–7 (Rule 2a–7 under the 1940 Act), any obligation of a government, and any derivative that is substantially secured by an obligation of a government, or any similar asset. For purposes of this paragraph (c)(5)(iii), a *derivative* is a derivative described in section 59A(h)(4)(A), without regard to section 59A(h)(4)(C). For purposes of this paragraph (c)(5)(iii), the term *government* means the United States or any agency or instrumentality of the United States; a State or any political subdivision thereof, including the District of Columbia and any possession or territory of the United States, within the meaning of section 103 and § 1.103–1; or any foreign government, any political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one of the foregoing within the meaning of § 1.1471–6(b).

(iv) *Deemed asset sale.* Solely for purposes of determining the amount of basis allocable to excepted and non-excepted trades or businesses under this section, an election under section 336, 338, or 754, as applicable, is deemed to have been made for any acquisition of corporate stock or partnership interests with respect to which the taxpayer demonstrates to the satisfaction of the Commissioner, in the information statement required by paragraph (c)(6)(iii)(B) of this section, that the taxpayer was eligible to make an election but was actually or effectively precluded from doing so by a regulatory agency with respect to an excepted regulated utility trade or business. Any additional basis taken into account under this rule is reduced ratably over a 15-year period beginning with the month of the acquisition and is not subject to the anti-abuse rule in paragraph (c)(8) of this section.

(v) *Other adjustments.* The Commissioner may make appropriate adjustments to prevent a taxpayer from intentionally and artificially increasing its basis in assets attributable to an excepted trade or business.

(6) *Determination dates; determination periods; reporting requirements*—(i) *Definitions.* For purposes of this section, the term *determination date* means the last day of each quarter of the taxpayer's taxable year (and the last day of the taxpayer's taxable year, if the taxpayer has a short taxable year), and the term *determination period* means the period beginning the day after one determination date and ending on the next determination date.

(ii) *Application of look-through rules.* If a taxpayer that applies the look-through rules of paragraph (c)(5)(ii) of this section has a different taxable year than the partnership or non-consolidated corporation to which the taxpayer is applying those rules, then, for purposes of this paragraph (c)(6), the taxpayer must use the most recent quarterly figures from the partnership or non-consolidated corporation. For example, assume that PS1 is a partnership with a May 31 taxable year, and that C (a calendar-year C corporation) is a partner whose ownership interest satisfies the ownership threshold in paragraph (c)(7) of this section. PS1's determination dates are February 28, May 31, August 31, and November 30. In turn, C's determination dates are March 31, June 30, September 30, and December 31. If C looks through to PS1's basis in its assets under paragraph (c)(5)(ii) of this section, then, for purposes of determining the amount of C's asset basis that is attributable to its excepted and non-excepted businesses on March 31, C must use PS1's asset basis calculations for February 28.

(iii) *Reporting requirements*—(A) *Books and records.* A taxpayer must maintain books of account and other records and data as necessary to substantiate the taxpayer's use of an asset in an excepted trade or business and to substantiate the adjustments to asset basis for purposes of applying paragraph (c) of this section. One indication demonstrating that a particular asset is used in a particular trade or business is if the taxpayer maintains separate books and records for all of its excepted and non-excepted trades or businesses, and can show the asset in the books and records of a particular excepted or non-excepted trade or business. For rules governing record retention, see § 1.6001–1.

(B) *Information statement.* Except as otherwise provided in publications, forms, instructions, or other guidance,

each taxpayer that is making an allocation under this paragraph (c) must prepare a statement containing the information described in this paragraph (c)(6)(iii) and must attach the statement to its timely filed Federal income tax return for the taxable year. The statement, which must be titled ''Section 163(j) Asset Basis Calculations,'' must include the following information:

(*1*) The taxpayer's adjusted basis in the assets used in its excepted and non-excepted businesses, determined on a quarterly basis as set forth in this section, including detailed information for the different groups of assets identified in paragraphs (c)(5)(i), (c)(5)(ii), and (d) of this section;

(*2*) The determination dates on which asset basis was measured during the taxable year;

(*3*) The names and taxpayer identification numbers (TINs) of all entities for which basis information is being provided, including partnerships and corporations if the taxpayer that owns an interest in a partnership or corporation looks through to the partnership's or corporation's basis in the partnership's or corporation's assets under paragraph (c)(5)(ii) of this section. If the taxpayer is a member of a consolidated group, the name and TIN of the agent for the group, as defined in § 1.1502–77, must be provided, but the taxpayer need not provide the names and TINs of all other consolidated group members;

(*4*) Asset basis information for corporations or partnerships if the taxpayer looks through to the corporation's or partnership's basis in the corporation's or partnership's assets under paragraph (c)(5)(ii) of this section; and

(*5*) A summary of the method or methods used to determine asset basis in property used in both excepted and non-excepted businesses, as well as information regarding any deemed sale under paragraph (c)(5)(iv) of this section.

(iv) *Failure to file statement.* If a taxpayer fails to file the statement described in paragraph (c)(6)(iii) of this section or files a statement that does not comply with the requirements of paragraph (c)(6)(iii) of this section, the Commissioner may treat the taxpayer as if all of its interest expense is properly allocable to a non-excepted trade or business, unless the taxpayer shows that there was reasonable cause for failing to comply with, and the taxpayer acted in good faith with respect to, the requirements of paragraph (c)(6)(iii) of this section, taking into account all pertinent facts and circumstances.

(7) *Ownership threshold for look-through rules*—(i) *Corporations*—(A) *Asset basis.* A shareholder must look through to the assets of a non-consolidated domestic C corporation or a CFC under paragraph (c)(5)(ii) of this section for purposes of allocating the shareholder's basis in its stock in the corporation between excepted and non-excepted trades or businesses if the shareholder's direct and indirect interest in the corporation satisfies the ownership requirements of section 1504(a)(2). A shareholder may look through to the assets of an S corporation under paragraph (c)(5)(ii) of this section for purposes of allocating the shareholder's basis in its stock in the S corporation between excepted and non-excepted trades or businesses regardless of the shareholder's direct and indirect interest in the S corporation.

(B) *Dividends.* A shareholder must look through to the activities of a non-consolidated domestic C corporation or a CFC under paragraph (b)(3) of this section if the shareholder's direct and indirect interest in the corporation satisfies the ownership requirements of section 1504(a)(2). A shareholder may look through to the activities of an S corporation under paragraph (b)(3) of this section regardless of the shareholder's direct and indirect interest in the S corporation.

(ii) *Partnerships.* A partner may look through to the assets of a partnership under paragraph (c)(5)(ii) of this section for purposes of allocating the partner's basis in its partnership interest between excepted and non-excepted trades or businesses regardless of the partner's direct and indirect interest in the partnership.

(iii) *Inapplicability of look-through rule.* For circumstances in which a taxpayer that satisfies the ownership threshold in this paragraph (c)(7) may not apply the look-through rules in paragraphs (b)(3) and (c)(5)(ii) of this section, see paragraph (c)(5)(ii)(D) of this section.

(8) *Anti-abuse rule.* If a principal purpose for the acquisition, disposition, or change in use of an asset was to artificially shift the amount of basis allocable to excepted or non-excepted trades or businesses on a determination date, the additional basis or change in use will not be taken into account for purposes of this section. For example, if an asset is used in a non-excepted trade or business for most of the taxable year, and if the taxpayer begins using the asset in an excepted trade or business towards the end of the year with a principal purpose of shifting the amount of basis in the asset that is allocable to the excepted trade or business, the change in use is disregarded for purposes of this section. A purpose may be a principal purpose even though it is outweighed by other purposes (taken together or separately). In determining whether a taxpayer has a principal purpose described in this paragraph (c)(8), factors to be considered include, for example, the following: the business purpose for the acquisition, disposition, or change in use; the length of time the asset was used in a trade or business; whether the asset was acquired from a related person; and whether the taxpayer's aggregate basis in its assets increased or decreased temporarily on or around a determination date. A principal purpose is presumed to be present in any case in which the acquisition, disposition, or change in use lacks a substantial business purpose and increases the taxpayer's basis in assets used in its excepted trades or businesses by more than 10 percent during the taxable year.

(d) *Direct allocations*—(1) *In general.* For purposes of this section, a taxpayer with qualified nonrecourse indebtedness, within the meaning of § 1.861–10T(b), must directly allocate interest expense from the indebtedness to the taxpayer's assets in the manner and to the extent provided in § 1.861–10T(b).

(2) *Financial services entities.* For purposes of this section, a taxpayer that is engaged in the trade or business of banking, within the meaning of section 581, insurance, financing, or a similar business that derives active financing income as described in § 1.904–4(e)(2) (an active financing business) must directly allocate interest expense and interest income from that business to the taxpayer's assets used in that business. The special rule for cash and cash equivalents in paragraph (c)(5)(iii) of this section does not apply to an entity that qualifies as a financial services entity as described in § 1.904–4(e)(3).

(3) *Assets used in more than one trade or business.* If an asset is used in more than one trade or business, the taxpayer must apply the rules in paragraph (c)(3) of this section to determine the extent to which interest that is directly allocated under this paragraph (d) is allocable to excepted or non-excepted trades or businesses.

(4) *Adjustments to basis of assets to account for direct allocations.* In determining the amount of a taxpayer's basis in the assets used in its excepted and non-excepted trades or businesses for purposes of paragraph (c) of this section, adjustments must be made to reflect direct allocations under this paragraph (d). These adjustments

consist of reductions in the amount of the taxpayer's basis in its assets for purposes of paragraph (c) of this section to reflect assets to which interest expense is directly allocated under this paragraph (d). These adjustments must be made before the taxpayer averages the adjusted basis in its assets as determined on each determination date during the taxable year.

(5) *Example: Direct allocation of interest expense*—(i) *Facts.* T conducts an electing real property trade or business (Business X) and operates a retail store that is a non-excepted trade or business (Business Y). In Year 1, T issues Note A to a third party in exchange for $1,000x for the purpose of acquiring Building B. Note A is qualified nonrecourse indebtedness (within the meaning of § 1.861–10T(b)) secured by Building B. T then uses those funds to acquire Building B for $1,200x, and T uses Building B in Business X. During Year 1, T pays $500x of interest, of which $100x is interest payments on Note A. For Year 1, T's basis in its assets used in Business X (as determined under paragraph (c) of this section) is $3,600x (excluding cash and cash equivalents), and T's basis in its assets used in Business Y (as determined under paragraph (c) of this section) is $800x (excluding cash and cash equivalents). Each of Business X and Business Y also has $100x of cash and cash equivalents.

(ii) *Analysis.* Because Note A is qualified nonrecourse indebtedness that is secured by Building B, in allocating interest expense between Businesses X and Y, T first must directly allocate the $100x of interest expense it paid with respect to Note A to Business X in accordance with paragraph (d)(1) of this section. Thereafter, T must allocate the remaining $400x of interest expense between Businesses X and Y under paragraph (c) of this section. After excluding T's $1,200× cost basis in Building B (see paragraph (d)(4) of this section), and without regard to T's $200x of cash and cash equivalents (see paragraph (c)(5)(iv) of this section), T's basis in assets used in Businesses X and Y is $2,400x and $800x (75 percent and 25 percent), respectively. Thus, $300x of the remaining $400x of interest expense would be allocated to Business X, and $100x would be allocated to Business Y.

(e) *Examples.* The examples in this paragraph (e) illustrate the principles of this section. For purposes of these examples, assume that no taxpayer is eligible for the small business exemption under section 163(j)(3) and § 1.163(j)–2(d), no taxpayer has floor plan financing interest expense, and no taxpayer has qualified nonrecourse indebtedness within the meaning of § 1.861–10T(b).

(1) *Example 1: Interest allocation within a consolidated group*—(i) *Facts.* S is a member of a consolidated group of which P is the common parent. P conducts an electing real property trade or business (Business X), and S conducts a non-excepted trade or business (Business Y). In Year 1, P pays or accrues (without regard to section 163(j)) $35x of interest expense and receives $10x of interest income, and S pays or accrues (without regard to section 163(j)) $115x of interest expense and receives $5x of interest income (for a total of $150x of interest expense and $15x of interest income). For purposes of this example, assume that, pursuant to paragraph (c) of this section, $30x of the P group's interest expense and $3x of the P group's interest income is allocable to Business X, and the remaining $120x of interest expense and $12x of interest income is allocable to Business Y.

(ii) *Analysis.* Under paragraph (a)(4) of this section, 20 percent of the P group's Year 1 interest expense ($30x/$150x) and interest income ($3x/$15x) is allocable to an excepted trade or business. Thus, $7x ($35x × 20 percent) of P's interest expense and $2x ($10x × 20 percent) of P's interest income is allocable to an excepted trade or business. The remaining $28x of P's interest expense is business interest expense subject to limitation under section 163(j), and the remaining $8x of P's interest income is business interest income that increases the group's section 163(j) limitation. In turn, $23x ($115x × 20 percent) of S's interest expense and $1x ($5x × 20 percent) of S's interest income is allocable to an excepted trade or business. The remaining $92x of S's interest expense is business interest expense subject to limitation under section 163(j), and the remaining $4x of S's interest income is business interest income that increases the group's section 163(j) limitation.

(2) *Example 2: Interest allocation within a consolidated group with assets used in more than one trade or business*—(i) *Facts.* S is a member of a consolidated group of which P is the common parent. P conducts an electing real property trade or business (Business X), and S conducts a non-excepted trade or business (Business Y). In Year 1, P pays or accrues (without regard to section 163(j)) $50x of interest expense, and S pays or accrues $100x of interest expense (without regard to section 163(j)). P leases 40 percent of space in Building V (which P owns) to S for use in Business Y, and P leases the remaining 60 percent of space in Building V to third parties. For purposes of allocating interest expense under paragraph (c) of this section, the P group's basis in its assets (excluding Building V) used in Businesses X and Y is $180x and $620x, respectively. The P group's basis in Building V for purposes of allocating interest expense under paragraph (c) of this section is $200x.

(ii) *Analysis.* Under paragraph (c)(3)(ii) of this section, the P group's basis in Building V ($200x) is allocated to excepted and non-excepted trades or businesses in accordance with the use of space by Business Y (40 percent) and Business X (the remainder, or 60 percent). Accordingly, $120x of the basis in Building V is allocated to excepted trades or businesses (60 percent × $200x), and $80x is allocated to non-excepted trades or businesses (40 percent × $200x). After allocating the basis in Building V, the P group's total basis in the assets used in excepted and non-excepted trades or businesses is $300x and $700x, respectively. Under paragraphs (a)(4) and (c) of this section, 30 percent ($300x/$1000x) of the P group's Year 1 interest expense is properly allocable to an excepted trade or business. Thus, $15x ($50x × 30 percent) of P's interest expense is properly allocable to an excepted trade or business, and the remaining $35x of P's interest expense is business interest expense subject to limitation under section 163(j). In turn, $30x ($100x × 30 percent) of S's interest expense is properly allocable to an excepted trade or business, and the remaining $70x of S's interest expense is business interest expense subject to limitation under section 163(j).

(3) *Example 3: Application of look-through rules*—(i) *Facts.* (A) A and B are unrelated individual taxpayers. A owns 100 percent of the stock of Corp 1, a calendar-year domestic C corporation. The basis of A's stock in Corp 1 is $500x. Corp 1 owns 10 percent of the interests in PS1 (a domestic partnership), and B owns the remaining 90 percent. Corp 1's basis in its PS1 interests is $25x, and B's basis in its PS1 interests is $225x. PS1 owns 100 percent of the stock of Corp 2, a calendar-year domestic C corporation. PS1 has a basis of $1000x in its Corp 2 stock.

(B) In 2020, Corp 1 was engaged solely in a non-excepted trade or business. That same year, PS1's only activity was holding Corp 2 stock. In turn, Corp 2 was engaged in both an electing farming business and a non-excepted trade or business. Under the allocation rules in paragraph (c) of this section, 50 percent of Corp 2's asset basis in 2020 was allocable to the electing farming business. The remaining 50 percent was allocable to the non-excepted trade or business.

(C) Individuals A and B each paid or accrued (without regard to section 163(j)) $150x of interest expense allocable to a trade or business under § 1.163–8T (along with personal interest and investment interest). A's trade or business was an excepted trade or business, and B's trade or business was a non-excepted trade or business. A's basis in the assets used in its trade or business was $100x, and B's basis in the assets used in its trade or business was $112.5x.

(ii) *Analysis.* (A) As provided in paragraph (c)(5)(ii)(E) of this section, if a taxpayer applies the look-through rules of paragraph (c)(5)(ii) of this section, the taxpayer must begin with the lowest-tier entity to which it is eligible to apply the look-through rules. A directly owns 100 percent of the stock of Corp 1; thus, A satisfies the 80 percent minimum ownership threshold with respect to Corp 1. A also owns 10 percent of the interests in PS1. There is no minimum ownership threshold for partnerships; thus, A may apply the look-through rules to PS1. However, A does not directly or indirectly own at least 80 percent of the stock of Corp 2; thus, A may not look through its indirect interest in Corp 2. In turn, B directly owns 90 percent of the interests in PS1, and B indirectly owns at least 80 percent of the stock of Corp 2. Thus, B may apply the look-through rules to both PS1 and Corp 2.

(B) From A's perspective, PS1 is not engaged in a trade or business for purposes of section 163(j); instead, PS1 is merely holding its Corp 2 stock as an investment. Under paragraph (c)(5)(ii)(A)(*2*) of this

section, if a partnership is not engaged in a trade or business, then its C corporation partner must treat its entire basis in the partnership interest as allocable to a non-excepted trade or business. Thus, for purposes of A's application of the look-through rules, Corp 1's entire basis in its PS1 interest ($25x) is allocable to a non-excepted trade or business. Corp 1's basis in its other assets also is allocable to a non-excepted trade or business (the only trade or business in which Corp 1 is engaged). Thus, under paragraph (c) of this section, A's $500x basis in its Corp 1 stock is allocable entirely to a non-excepted trade or business. A's $100x basis in its other business assets is allocable to an excepted trade or business. Thus, 5/6 (or $125x) of A's $150x of interest expense is properly allocable to a non-excepted trade or business and is business interest expense subject to limitation under section 163(j), and the remaining $25x of A's $150x of interest expense is allocable to an excepted trade or business and is not subject to limitation under section 163(j).

(C) From B's perspective, PS1 must look through its stock in Corp 2 to determine the extent to which PS1's basis in the stock is allocable to an excepted or non-excepted trade or business. Half of Corp 2's basis in its assets is allocable to an excepted trade or business, and the other half is allocable to a non-excepted trade or business. Thus, from B's perspective, $500x of PS1's basis in its Corp 2 stock (PS1's only asset) is allocable to an excepted trade or business, and the other half is allocable to a non-excepted trade or business. B's basis in its PS1 interests is $225x. Applying the look-through rules to B's PS1 interests, $112.5x of B's basis in its PS1 interests is allocable to an excepted trade or business, and $112.5x of B's basis in its PS1 interests is allocable to a non-excepted trade or business. Since B's basis in the assets used in its non-excepted trade or business also was $112.5x, two-thirds of B's interest expense ($100x) is properly allocable to a non-excepted trade or business and is business interest expense subject to limitation under section 163(j), and one-third of B's interest expense ($50x) is allocable to an excepted trade or business and is not subject to limitation under section 163(j).

(4) *Example 4: Excepted and non-excepted trades or businesses in a consolidated group*—(i) *Facts.* P is the common parent of a consolidated group of which A and B are the only other members. A conducts an electing real property trade or business (Business X), and B conducts a non-excepted trade or business (Business Y). In Year 1, A pays or accrues (without regard to section 163(j)) $50x of interest expense and earns $70x of gross income in the conduct of Business X, and B pays or accrues (without regard to section 163(j)) $100x of interest expense and earns $150x of gross income in the conduct of Business Y. B owns Building V, which it uses in Business Y. For purposes of allocating the P group's Year 1 business interest expense between excepted and non-excepted trades or businesses under paragraph (c) of this section, the P group's basis in its assets (other than Building V) used in Businesses X and Y is $180x and $620x, respectively, and the P group's basis in Building V is $200x. At the end of Year 1, B sells Building V to a third party and realizes a gain of $60x in addition to the $150x of gross income B earned that year from the conduct of Business Y.

(ii) *Analysis.* (A) Under paragraphs (a)(4) and (c) of this section, the P group's basis in its assets used in its trades or businesses is allocated between the P group's excepted trade or business (Business X) and its non-excepted trade or business (Business Y) as though these trades or businesses were conducted by a single corporation. Under paragraph (c) of this section, the P group's basis in its assets used in Businesses X and Y is $180x and $820x, respectively. Accordingly, 18 percent ($180x/$1,000x) of the P group's total interest expense ($150x) is properly allocable to an excepted trade or business ($27x), and the remaining 82 percent of the P group's total interest expense is business interest expense properly allocable to a non-excepted trade or business ($123x).

(B) To determine the P group's section 163(j) limitation, paragraph (a) of this section requires that certain items of income and deduction be allocated to the excepted and non-excepted trades or businesses of the P group as though these trades or businesses were conducted by a single corporation. In Year 1, the P group's excepted trade or business (Business X) has gross income of $70x, and the P group's non-excepted trade or business (Business Y) has gross income of $150x. Because Building V was used exclusively in Business Y, the $60x of gain from the sale of Building V in Year 1 is attributed to Business Y under paragraph (b)(2) of this section. The P group's section 163(j) limitation is $63x (30 percent × $210x), which allows the P group to deduct $63x of its $123x of business interest expense allocated to the P group's non-excepted trades or businesses. The group's $27x of interest expense that is allocable to excepted trades or businesses may be deducted without limitation under section 163(j).

(iii) *Intercompany transaction.* The facts are the same as in *Example 4* in paragraph (e)(4)(i) of this section, except that A owns Building V and leases it to B in Year 1 for $20x for use in Business Y, and A sells Building V to a third party for a $60 gain at the end of Year 1. Under paragraphs (a)(4) and (c) of this section, all members of the P group are treated as a single corporation. As a result, the P group's basis in its assets used in its trades or businesses is allocated between the P group's excepted trade or business (Business X) and its non-excepted trade or business (Business Y) as though these trades or businesses were conducted by a single corporation. A lease between two divisions of a single corporation would produce no rental income or expense. Thus, the $20x of rent paid by B to A does not affect the P group's ATI. Moreover, under paragraph (c) of this section, Building V is an asset used in the P group's non-excepted trade or business (Business Y). Accordingly, although A owns Building V, the basis in Building V is added to the P group's basis in assets used in Business Y for purposes of allocating interest expense under paragraph (c) of this section. In the same vein, when A sells Building V to a third party at a gain of $60x, the gain is included in the P group's ATI because Building V was used in a non-excepted trade or business of the P group (Business Y) prior to its sale.

(5) *Example 5: Captive activities*—(i) *Facts.* S and T are members of a consolidated group of which P is the common parent. P conducts an electing real property trade or business (Business X), S conducts a non-excepted trade or business (Business Y), and T provides transportation services to Businesses X and Y but does not have any customers outside of the P group. For Year 1, T provides transportation services using a single bus with a basis of $120x.

(ii) *Analysis.* Under paragraph (a)(4) of this section, activities conducted by a consolidated group are treated as though those activities were conducted by a single corporation. Because the activities of T are limited to providing intercompany transportation services, T does not conduct a trade or business for purposes of section 163(j). Under paragraph (c)(3) of this section, business interest expense is allocated to excepted and non-excepted trades or businesses based on the relative basis of the assets used in those businesses. The basis in T's only asset, a bus, is therefore allocated between Business X and Business Y according to the use of T's bus by these businesses. Business X uses one-third of T's services, and Business Y uses two-thirds of T's services. Thus, $40x of the basis of T's bus is allocated to Business X, and $80x of the basis of T's bus is allocated to Business Y.

(f) *Applicability date.* This section applies to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

§ 1.163(j)–11 Transition rules.

(a) *Application of section 163(j) limitation if a corporation joins a consolidated group with a taxable year beginning before January 1, 2018*—(1) *In general.* If a corporation (S) joins a consolidated group whose taxable year began before January 1, 2018, and if S is subject to the section 163(j) limitation at the time of its change in status, then section 163(j) will apply to S's short taxable year that ends on the day of S's change in status, but section 163(j) will

not apply to S's short taxable year that begins the next day (when S is a member of the acquiring consolidated group). Any business interest expense paid or accrued (without regard to section 163(j)) by S in its short taxable year ending on the day of S's change in status for which a deduction is disallowed under section 163(j) will be carried forward to the acquiring group's first taxable year beginning after December 31, 2017. Those disallowed business interest expense carryforwards may be subject to limitation under other provisions of these regulations (see, for example, § 1.163(j)–5(c), (d), (e), and (f)).

(2) *Example.* Acquiring Group is a consolidated group with a fiscal year end of November 30; Target is a stand-alone calendar-year C corporation. On May 31, 2018, Acquiring Group acquires Target in a transaction that is not an ownership change for purposes of section 382. Acquiring Group is not subject to the section 163(j) limitation during its taxable year beginning December 1, 2017. As a result of the acquisition, Target has a short taxable year beginning January 1, 2018 and ending May 31, 2018. Target is subject to the section 163(j) limitation during this short taxable year. However, Target (as a member of Acquiring Group) is not subject to the section 163(j) limitation during Acquiring Group's taxable year ending November 30, 2018. Any disallowed business interest expense carryforwards from Target's taxable year ending May 31, 2018, will not be available for use in Acquiring Group's taxable year ending November 30, 2018. However, that disallowed business interest expense is carried forward to Acquiring Group's taxable year beginning December 1, 2018, and can be deducted by the group, subject to the separate return limitation year (SRLY) limitation. See § 1.163(j)–5(d).

(b) *Treatment of disallowed disqualified interest*—(1) *In general.* Disallowed disqualified interest is carried forward to the taxpayer's first taxable year beginning after December 31, 2017, and is subject to disallowance as a disallowed business interest expense carryforward under section 163(j) and § 1.163(j)–2, except to the extent the interest is properly allocable to an excepted trade or business under § 1.163(j)–10. See § 1.163(j)–10(a)(6).

(2) *Earnings and profits.* A taxpayer may not reduce its earnings and profits in a taxable year beginning after December 31, 2017, to reflect any disallowed disqualified interest carryforwards to the extent the payment or accrual of the disallowed disqualified interest reduced the earnings and profits of the taxpayer in a prior taxable year.

(3) *Disallowed disqualified interest of members of an affiliated group*—(i) *Scope.* This paragraph (b)(3)(i) applies to corporations that were treated as a single taxpayer under old section 163(j)(6)(C) and that had disallowed disqualified interest.

(ii) *Allocation of disallowed disqualified interest to members of the affiliated group*—(A) *In general.* Each member of the affiliated group is allocated its allocable share of the affiliated group's disallowed disqualified interest as provided in paragraph (b)(3)(ii)(B) of this section.

(B) *Definitions.* The following definitions apply for purposes of paragraph (b)(3)(ii) of this section.

(*1*) *Allocable share of the affiliated group's disallowed disqualified interest.* The term *allocable share of the affiliated group's disallowed disqualified interest* means, with respect to any member of an affiliated group for the member's last taxable year beginning before January 1, 2018, the product of the total amount of the disallowed disqualified interest of all members of the affiliated group under old section 163(j)(6)(C) and the member's disallowed disqualified interest ratio.

(*2*) *Disallowed disqualified interest ratio.* The term *disallowed disqualified interest ratio* means, with respect to any member of an affiliated group for the member's last taxable year beginning before January 1, 2018, the ratio of the exempt related person interest expense of the member for the last taxable year beginning before January 1, 2018, to the sum of the amounts of exempt related person interest expense for all members of the affiliated group.

(*3*) *Exempt related person interest expense.* The term *exempt related person interest expense* means interest expense that is, or is treated as, paid or accrued by a domestic C corporation, or by a foreign corporation with income, gain, or loss that is effectively connected, or treated as effectively connected, with the conduct of a trade or business in the United States, to—

(*i*) Any person related to the taxpayer, within the meaning of sections 267(b) or 707(b)(1), applying the constructive ownership and attribution rules of section 267(c), if no U.S. tax is imposed with respect to the interest under subtitle A of the Internal Revenue Code, determined without regard to net operating losses or net operating loss carryovers, and taking into account any applicable treaty obligation of the United States. For this purpose, interest that is subject to a reduced rate of tax under any treaty obligation of the United States applicable to the recipient is treated as in part subject to the statutory tax rate under sections 871 or 881 and in part not subject to tax, based on the proportion that the rate of tax under the treaty bears to the statutory tax rate. Thus, for purposes of section 163(j), if the statutory tax rate is 30 percent, and pursuant to a treaty U.S. tax is instead limited to a rate of 10 percent, two-thirds of the interest is considered interest not subject to U.S. tax under subtitle A of the Internal Revenue Code;

(*ii*) A person that is not related to the taxpayer, within the meaning of sections 267(b) or 707(b)(1), applying the constructive ownership and attribution rules of section 267(c), with respect to indebtedness on which there is a disqualified guarantee, within the meaning of paragraph (6)(D) of old section 163(j), of such indebtedness, and no gross basis U.S. tax is imposed with respect to the interest. For purposes of this paragraph (b)(3)(ii)(B)(*3*)(*ii*), a *gross basis U.S. tax* means any tax imposed by this subtitle A of the Internal Revenue Code that is determined by reference to the gross amount of any item of income without any reduction for any deduction allowed by subtitle A of the Internal Revenue Code. Interest that is subject to a gross basis U.S. tax that is eligible for a reduced rate of tax under any treaty obligation of the United States applicable to the recipient is treated as, in part, subject to the statutory tax rate under sections 871 or 881 and, in part, not subject to a gross basis U.S. tax, based on the proportion that the rate of tax under the treaty bears to the statutory tax rate. Thus, for purposes of section 163(j), if the statutory tax rate is 30 percent, and pursuant to a treaty U.S. tax is instead limited to a rate of 10 percent, two-thirds of the interest is considered interest not subject to a gross basis U.S. tax under subtitle A of the Internal Revenue Code; or

(*iii*) A REIT, directly or indirectly, to the extent that the domestic C corporation, or a foreign corporation with income, gain, or loss that is effectively connected, or treated as effectively connected, with the conduct of a trade or business in the United States, is a taxable REIT subsidiary, as defined in section 856(l), with respect to the REIT.

(iii) *Treatment of carryforwards.* The amount of disallowed disqualified interest allocated to a taxpayer pursuant to paragraph (b)(3)(ii) of this section is treated in the same manner as described in paragraph (b)(1) of this section.

(4) *Application of section 382*—(i) *Ownership change occurring before the date the Treasury decision adopting these regulations as final regulations is*

published in the **Federal Register**—(A) *Pre-change loss.* For purposes of section 382(d)(3), unless the rules of § 1.382–2(a)(7) apply, disallowed disqualified interest is not a pre-change loss under § 1.382–2(a) subject to a section 382 limitation with regard to an ownership change on a change date occurring before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. But see section 382(h)(6)(B) (regarding built-in deduction items).

(B) *Loss corporation.* For purposes of section 382(k)(1), unless the rules of § 1.382–2(a)(7) apply, disallowed disqualified interest is not a carryforward of disallowed interest described in section 381(c)(20) with regard to an ownership change on a change date occurring before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. But see section 382(h)(6) (regarding built-in deductions).

(ii) *Ownership change occurring on or after the date the Treasury decision adopting these regulations as final regulations is published in the* **Federal Register**—(A) *Pre-change loss.* For rules governing the treatment of disallowed disqualified interest as a pre-change loss for purposes of section 382 with regard to an ownership change on a change date occurring on or after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, see §§ 1.382–2(a)(2) and 1.382–6(c)(3).

(B) *Loss corporation.* For rules governing when disallowed disqualified interest causes a corporation to be a loss corporation with regard to an ownership change occurring on or after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, see § 1.382–2(a)(1)(i)(A).

(iii) *Definitions.* For purposes of this paragraph (b)(4), the terms *ownership change* and *change date* have the meanings provided in section 382 and the regulations thereunder.

(5) [Reserved]

(6) *Treatment of excess limitation from taxable years beginning before January 1, 2018.* No amount of excess limitation under old section 163(j)(2)(B) may be carried forward to taxable years beginning after December 31, 2017.

(7) *Example: Members of an affiliated group*—(i) *Facts.* A, B, and C are calendar-year domestic C corporations that are members of an affiliated group (within the meaning of section 1504(a)) that was treated as a single taxpayer under old section 163(j)(6)(C) and the proposed regulations thereunder (see formerly proposed § 1.163(j)–5). For the taxable year ending December 31, 2017, the separately determined amounts of exempt related person interest expense of A, B, and C were $0, $600x, and $150x, respectively (for a total of $750x). The affiliated group has $200x of disallowed disqualified interest in that year.

(ii) *Analysis.* The affiliated group's disallowed disqualified interest expense for the 2017 taxable year ($200x) is allocated among A, B, and C based on the ratio of each member's exempt related person interest expense to the group's exempt related person interest expense. Because A has no exempt related person interest expense, no disallowed disqualified interest is allocated to A. Disallowed disqualified interest of $160x is allocated to B (($600x/$750x) × $200x), and disallowed disqualified interest of $40x is allocated to C (($150x/$750x) × $200x). Thus, B and C have $160x and $40x, respectively, of disallowed disqualified interest that is carried forward to the first taxable year beginning after December 31, 2017. No excess limitation that was allocated to A, B, or C under old section 163(j) will carry forward to the first taxable year beginning after December 31, 2017.

(iii) *Carryforward of disallowed disqualified interest to 2018 taxable year.* The facts are the same as in the *Example* in paragraph (b)(7)(i) of this section, except that, for the taxable year ending December 31, 2018, A, B, and C are members of a consolidated group that has a section 163(j) limitation of $140x, current-year business interest expense (as defined in § 1.163(j)–5(a)(2)(i)) of $80x, and no excepted trade or business. Under paragraph (b)(1) of this section, disallowed disqualified interest is carried to the taxpayer's first taxable year beginning after December 31, 2017, and is subject to disallowance under section 163(j) and § 1.163(j)–2. Under § 1.163(j)–5(b)(3)(ii)(D)(*1*), a consolidated group that has section 163(j) limitation remaining for the current year after deducting all current-year business interest expense deducts each member's disallowed disqualified interest carryforwards from prior taxable years, starting with the earliest taxable year, on a pro rata basis (subject to certain limitations). In accordance with paragraph (b)(1) of this section, the rule in § 1.163(j)–5(b)(3)(ii)(D)(*1*) applies to disallowed disqualified interest carried forward to the taxpayer's first taxable year beginning after December 31, 2017. Accordingly, after deducting $80x of current-year business interest expense in 2018, the group may deduct $60x of its $200x disallowed disqualified interest carryforwards. Under paragraph (b)(3) of this section, B has $160x of disallowed disqualified interest carryforwards, and C has $40x of disallowed disqualified interest carryforwards. Thus, $48x (($160x/$200x) × $60x) of B's disallowed disqualified interest carryforwards, and $12x (($40x/$200x) × $60x) of C's disallowed disqualified interest carryforwards, are deducted by the consolidated group in the 2018 taxable year.

(c) *Applicability date.* This section applies to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

■ **Par. 4.** Section 1.263A–9 is amended by revising the first and third sentences of paragraph (g)(1)(i) to read as follows:

§ 1.263A–9 The avoided cost method.

* * * * *

(g) * * *

(1) * * *

(i) Interest must be capitalized under section 263A(f) before the application of section 163(d) (regarding the investment interest limitation), section 163(j) (regarding the limitation on business interest expense), section 266 (regarding the election to capitalize carrying charges), section 469 (regarding the limitation on passive losses), and section 861 (regarding the allocation of interest to United States sources). * * * However, in applying section 263A(f) with respect to the excess expenditure amount, the taxpayer must capitalize all interest that is neither investment interest under section 163(d), business interest expense under section 163(j), nor passive interest under section 469 before capitalizing any interest that is either investment interest, business interest expense, or passive interest. * * *

* * * * *

■ **Par. 5.** Section 1.381(c)(20)–1 is added to read as follows:

§ 1.381(c)(20)–1 Carryforward of disallowed business interest.

(a) *Carryover requirement.* Section 381(c)(20) provides that the acquiring corporation in a transaction described in section 381(a) will succeed to and take into account the carryover of disallowed business interest described in section 163(j)(2) to taxable years ending after the date of distribution or transfer.

(b) *Carryover of disallowed business interest described in section 163(j)(2).* For purposes of section 381(c)(20) and this section, the term *carryover of disallowed business interest described in section 163(j)(2)* means the disallowed business interest expense carryforward (within the meaning of § 1.163(j)–1(b)(9)), including any disallowed disqualified interest (within the meaning of § 1.163(j)–1(b)(10)), and including the distributor or transferor corporation's disallowed business interest expense from the taxable year that ends on the date of distribution or transfer. For the application of section 382 to disallowed business interest expense described in section 163(j)(2), see the regulations under section 382, including but not limited to § 1.382–2.

(c) *Limitation on use of disallowed business interest expense carryforwards in the acquiring corporation's first taxable year ending after the date of distribution or transfer*—(1) *In general.* In determining the extent to which the acquiring corporation may use disallowed business interest expense carryforwards in its first taxable year ending after the date of distribution or transfer, the principles of §§ 1.381(c)(1)–1 and 1.381(c)(1)–2 apply with appropriate adjustments, including but not limited to the adjustments described in paragraphs (c)(2) and (3) of this section.

(2) *One date of distribution or transfer within the acquiring corporation's taxable year.* If the acquiring corporation succeeds to the disallowed business interest expense carryforwards of one or more distributor or transferor corporations on a single date of distribution or transfer within one taxable year of the acquiring corporation, then, for the acquiring corporation's first taxable year ending after the date of distribution or transfer, that part of the acquiring corporation's business interest expense deduction (if any) that is attributable to the disallowed business interest expense carryforwards of the distributor or transferor corporation is limited under this paragraph (c) to an amount equal to the post-acquisition portion of the acquiring corporation's section 163(j) limitation, as defined in paragraph (c)(4) of this section.

(3) *Two or more dates of distribution or transfer in the taxable year.* If the acquiring corporation succeeds to the disallowed business interest expense carryforwards of two or more distributor or transferor corporations on two or more dates of distribution or transfer within one taxable year of the acquiring corporation, the limitation to be applied under this paragraph (c) is determined by applying the principles of § 1.381(c)(1)–2(b) to the post-acquisition portion of the acquiring corporation's section 163(j) limitation, as defined in paragraph (c)(4) of this section.

(4) *Definition.* For purposes of this paragraph (c), the term *post-acquisition portion of the acquiring corporation's section 163(j) limitation* means the amount that bears the same ratio to the acquiring corporation's section 163(j) limitation (within the meaning of § 1.163(j)–1(b)(31)) (or, if the acquiring corporation is a member of a consolidated group, the consolidated group's section 163(j) limitation) for the first taxable year ending after the date of distribution or transfer (taking into account items to which the acquiring corporation succeeds under section 381, other than disallowed business interest expense carryforwards) as the number of days in that year after the date of distribution or transfer bears to the total number of days in that year.

(5) *Examples.* For purposes of this paragraph (c)(5), unless otherwise stated, X, Y, and Z are taxable domestic C corporations that were incorporated on January 1, 2018 and that file their tax returns on a calendar-year basis; none of X, Y, or Z is a member of a consolidated group; the small business exemption in § 1.163(j)–2(d) does not apply; interest expense is deductible except to the extent of the potential application of section 163(j); and the facts set forth the only corporate activity. The principles of this paragraph (c) are illustrated by the following examples.

(i) *Example 1: Transfer before last day of acquiring corporation's taxable year*—(A) *Facts.* On October 31, 2019, X transferred all of its assets to Y in a statutory merger to which section 361 applies. For the 2018 taxable year, X had $400x of disallowed business interest expense, and Y had $0 of disallowed business interest expense. For the taxable year ending October 31, 2019, X had an additional $350x of disallowed business interest expense (X did not deduct any of its 2018 carryforwards in its 2019 taxable year). For the taxable year ending December 31, 2019, Y had business interest expense of $100x, business interest income of $200x, and adjusted taxable income (ATI) of $1,000x. Y's section 163(j) limitation for the 2019 taxable year was $500x ($200x + (30 percent × $1,000x) = $500x).

(B) *Analysis.* Pursuant to § 1.163(j)–5(b)(2), Y deducts its $100x of current-year business interest expense (as defined in § 1.163(j)–5(a)(2)(i)) before any disallowed business interest expense carryforwards (including X's carryforwards) from a prior taxable year are deducted. The aggregate disallowed business interest expense of X carried forward under section 381(c)(20) to Y's taxable year ending December 31, 2019, is $750x. However, pursuant to paragraph (c)(2) of this section, for Y's first taxable year ending after the date of distribution or transfer, the maximum amount of X's disallowed business interest expense carryforwards that Y can deduct is equal to the post-acquisition portion of Y's section 163(j) limitation. Pursuant to paragraph (c)(4) of this section, the post-acquisition portion of Y's section 163(j) limitation means Y's section 163(j) limitation times the ratio of the number of days in the taxable year after the date of distribution or transfer to the total number of days in that year. Therefore, only $84x of the aggregate amount ($500x × (61/365) = $84x) may be deducted by Y in that year, and the remaining $666x ($750x − $84x = $666x) is carried forward to the succeeding taxable year.

(C) *Transfer on last day of acquiring corporation's taxable year.* The facts are the same as in *Example 1* in paragraph (c)(5)(i)(A) of this section, except that X's transfer of its assets to Y occurred on December 31, 2019. For the taxable year ending December 31, 2019, X had an additional $350x of disallowed business interest expense (X did not deduct any of its 2018 carryforwards in its 2019 taxable year). For the taxable year ending December 31, 2020, Y had business interest expense of $100x, business interest income of $200x, and ATI of $1,000x. Y's section 163(j) limitation for the 2020 taxable year was $500x ($200x + (30 percent × $1,000x) = $500x). The aggregate disallowed business interest expense of X carried under section 381(c)(20) to Y's taxable year ending December 31, 2020, is $750x. Paragraph (c)(2) of this section does not limit the amount of X's disallowed business interest expense carryforwards that may be deducted by Y in the 2020 taxable year. Since the amount of Y's section 163(j) limit for the 2020 taxable year was $500x, Y may deduct the full amount ($100x) of its own business interest expense for the 2020 taxable year, along with $400x of X's disallowed business interest expense carryforwards.

(ii) *Example 2: Multiple transferors on same date*—(A) *Facts.* On October 31, 2019, X and Y transferred all of their assets to Z in statutory mergers to which section 361 applies. For the 2018 taxable year, X had $300x of disallowed business interest expense, Y had $200x, and Z had $0. For the taxable year ending October 31, 2019, each of X and Y had an additional $125x of disallowed business interest expense (neither X nor Y deducted any of its 2018 carryforwards in 2019). For the taxable year ending December 31, 2019, Z had business interest expense of $100x, business interest income of $200x, and ATI of $1,000x. Z's section 163(j) limitation for the 2019 taxable year was $500x ($200x + (30 percent × $1,000x) = $500x).

(B) *Analysis.* The aggregate disallowed business interest expense of X and Y carried under section 381(c)(20) to Z's taxable year ending December 31, 2019, is $750x. However, pursuant to paragraph (c)(2) of this section, only $84x of the aggregate amount ($500x × (61/365) = $84x) may be deducted by Z in that year. Moreover, under paragraph (b)(2) of this section, this amount only may be deducted by Z in that year after Z has deducted its $100 of current-year business interest expense (as defined in § 1.163(j)–5(a)(2)(i)).

(d) *Applicability date.* This section applies to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of this section, the section 163(j) regulations (within the meaning of § 1.163(j)–1(b)(32)), and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

■ **PAR. 6.** Section 1.382–1 is amended by:

■ 1. Adding entries for § 1.382–2(a)(7) and (8);

■ 2. Revising the entry for § 1.382–2(b)(3);

■ 3. Adding entries for § 1.382–6(b)(4), (b)(4)(i), and (b)(4)(ii);

■ 4. Revising the entry for § 1.382–6(h); and

■ 5. Adding entries for § 1.382–6(h)(1) and (2).

The additions and revisions read as follows:

§ 1.382–1 Table of contents.

* * * * *

§ 1.382–2 General rules for ownership change.

(a) * * *

(7) Section 382 disallowed business interest carryforward.

(8) Testing period.

(b) * * *

(3) Rules provided in paragraphs (a)(1)(i)(A), (a)(1)(ii), (iv), and (v), (a)(2)(iv) through (vi), (a)(3)(i), and (a)(4) through (8) of this section.

* * * * *

§ 1.382–6 Allocation of income and loss to periods before and after the change date for purposes of section 382.

* * * * *

(b) * * *

(4) Allocation of business interest expense.

(i) In general.

(ii) Example.

* * * * *

(h) Applicability date.

(1) In general.

(2) Paragraphs (b)(1) and (4) of this section.

* * * * *

■ **Par. 7.** Section 1.382–2 is amended by:

■ 1. Revising paragraph (a)(1)(i)(A);

■ 2. Removing ", or" and adding "; or" in its place at the end of paragraph (a)(1)(i)(B);

■ 3. Revising paragraphs (a)(1)(ii) introductory text and (a)(1)(ii)(A);

■ 4. Removing ", and" and adding "; and" in its place at the end of paragraph (a)(1)(ii)(B);

■ 5. Removing the last sentence in paragraphs (a)(1)(iv) and (v);

■ 6. Removing the commas and adding semicolons in their place at the end of paragraphs (a)(2)(i) and (iii);

■ 7. Removing the period and adding a semicolon in its place at the end of paragraph (a)(2)(ii);

■ 8. Removing ", and" and adding a semicolon in its place at the end of paragraph (a)(2)(iv);

■ 9. Removing "1.383–1T(c)(3)." and adding "§ 1.383–1T(c)(3); and" in its place in paragraph (a)(2)(v);

■ 10. Adding paragraph (a)(2)(vi);

■ 11. Removing the last sentence in paragraphs (a)(3)(i), (a)(4)(i), and (a)(5) and (6);

■ 12. Adding paragraphs (a)(7) and (8); and

■ 13. Revising paragraph (b)(3).

The revisions and additions read as follows:

§ 1.382–2 General rules for ownership change.

(a) * * *

(1) * * *

(i) * * *

(A) Is entitled to use a net operating loss carryforward, a capital loss carryover, a carryover of excess foreign taxes under section 904(c), a carryforward of a general business credit under section 39, a carryover of a minimum tax credit under section 53, or a section 382 disallowed business interest carryforward described in paragraph (a)(7) of this section;

* * * * *

(ii) *Distributor or transferor loss corporation in a transaction under section 381.* Notwithstanding that a loss corporation ceases to exist under state law, if its disallowed business interest expense carryforwards, net operating loss carryforwards, excess foreign taxes, or other items described in section 381(c) are succeeded to and taken into account by an acquiring corporation in a transaction described in section 381(a), such loss corporation shall be treated as continuing in existence until—

(A) Any pre-change losses (excluding pre-change credits described in § 1.383–1(c)(3)), determined as if the date of such transaction were the change date, are fully utilized or expire under section 163(j), 172, or 1212;

* * * * *

(2) * * *

(vi) Any section 382 disallowed business interest carryforward.

* * * * *

(7) *Section 382 disallowed business interest carryforward.* The term *section 382 disallowed business interest carryforward* includes the following items:

(i) The loss corporation's disallowed business interest expense carryforwards, as defined in § 1.163(j)–1(b)(9), including disallowed disqualified interest, within the meaning of § 1.163(j)–1(b)(10), as of the ownership change.

(ii) The carryforward of the loss corporation's disallowed business interest expense (within the meaning of § 1.163(j)–1(b)(8)) paid or accrued (without regard to section 163(j)) in the pre-change period (within the meaning of § 1.382–6(g)(2)) in the year of the testing date, determined by allocating an equal portion of the disallowed business interest expense paid or accrued (without regard to section 163(j)) in the year of the testing date to each day in that year, regardless of whether the loss corporation has made a closing-of-the-books election under § 1.382–6(b)(2).

(8) *Testing period.* Notwithstanding the temporal limitations provided in § 1.382–2T(d)(3)(i), the testing period for a loss corporation can begin as early as the first day of the first taxable year from which there is a section 382 disallowed business interest carryforward to the first taxable year ending after the testing date.

(b) * * *

(3) *Rules provided in paragraphs (a)(1)(i)(A), (a)(1)(ii), (iv), and (v), (a)(2)(iv) through (vi), (a)(3)(i), and (a)(4) through (8) of this section.* The rules provided in paragraphs (a)(1)(i)(A), (a)(1)(ii), (iv), and (v), (a)(2)(iv) through (vi), (a)(3)(i), and (a)(4) through (8) of this section apply to testing dates occurring on or after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. For

loss corporations that have testing dates occurring before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, see § 1.382–2 as contained in 26 CFR part 1, revised April 1, 2018. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to testing dates occurring during a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of this section, the section 163(j) regulations (within the meaning of § 1.163(j)–1(b)(32)), §§ 1.382–5, 1.382–6, and 1.383–1, and if applicable, §§ 1.263A–9, 1.381(c)(20–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–2, 1.382–5, 1.382–6, and 1.383–1), and 1.1504–4 to taxable years beginning after December 31, 2017.

■ **Par. 8.** Section 1.382–5 is amended by revising the first and second sentences of paragraph (d)(1) and by adding three sentences to the end of paragraph (f) to read as follows:

§ 1.382–5 Section 382 limitation.

* * * * *

(d) * * *

(1) * * * If a loss corporation has two (or more) ownership changes, any losses or section 382 disallowed business interest carryforwards (within the meaning of § 1.382–2(a)(7)) attributable to the period preceding the earlier ownership change are treated as pre-change losses with respect to both ownership changes. Thus, the later ownership change may result in a lesser (but never in a greater) section 382 limitation with respect to such pre-change losses. * * *

* * * * * *

(f) * * * Paragraph (d)(1) of this section applies with respect to an ownership change occurring on or after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. For loss corporations that have undergone an ownership change before or after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, see § 1.382–5 as contained in 26 CFR part 1, revised April 1, 2018. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to testing dates occurring during a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of this section, the section 163(j) regulations (within the meaning of § 1.163(j)–1(b)(32)), §§ 1.382–2, 1.382–6, and 1.383–1, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–2, 1.382–5, 1.382–6, and 1.383–1), and 1.1504–4 to taxable years beginning after December 31, 2017.

■ **Par. 9.** Section 1.382–6 is amended by:

■ 1. Removing ''Subject to paragraphs (b)(3)(ii) and (d)'' in the first sentence of paragraph (b)(1) and adding ''Subject to paragraphs (b)(3)(ii), (b)(4), and (d)'' in its place;

■ 2. Adding paragraph (b)(4); and

■ 3. Revising paragraph (h).

The addition and revision read as follows:

§ 1.382–6 Allocation of income and loss to periods before and after the change date for purposes of section 382.

* * * * *

(b) * * *

(4) *Allocation of business interest expense*—(i) *In general.* Regardless of whether a loss corporation has made a closing-of-the-books election pursuant to paragraph (b) of this section, for purposes of calculating the taxable income of a loss corporation attributable to the pre-change period, the amount of the loss corporation's deduction for current-year business interest expense, within the meaning of § 1.163(j)–5(a)(2)(i), is calculated based on a single tax year and is allocated between the pre-change period and the post-change period by ratably allocating an equal portion to each day in the year.

(ii) *Example*—(A) *Facts.* X is a calendar-year C corporation that is not a member of a consolidated group. On May 26, 2019, X is acquired by Z (an unrelated third-party) in a transaction that qualifies as an ownership change under section 382(g). For calendar year 2019, X has paid or accrued $100x of current-year business interest expense (within the meaning of § 1.163(j)–5(a)(2)(i)) and has an $81x section 163(j) limitation (within the meaning of § 1.163(j)–1(b)(31)).

(B) *Analysis.* Pursuant to paragraph (b)(4)(i) of this section, regardless of whether X has made a closing-of-the-books election pursuant to paragraph (b) of this section, X's business interest expense deduction is ratably allocated between the pre-change and post-change periods. For calendar year 2019, X may deduct $81x of business interest expense (see § 1.163(j)–2(b)), of which $32.4x ($81x × (146 days/365 days) = $32.4x) is allocable to the pre-change period. The remaining $19x of interest that was paid or accrued in calendar year 2019 is disallowed business interest expense, of which $7.6x ($19x × (146 days/365 days) = $7.6x) is allocable to the pre-change period. The $7.6x of disallowed business interest expense is treated as a section 382 disallowed business interest carryforward (see § 1.382–2(a)(7)), and thus is a pre-change loss within the meaning of § 1.382–2(a)(2).

* * * * *

(h) *Applicability date*—(1) *In general.* This section applies to ownership changes occurring on or after June 22, 1994.

(2) *Paragraphs (b)(1) and (4) of this section.* Paragraphs (b)(1) and (4) of this section apply with respect to an ownership change occurring during a taxable year ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. For ownership changes occurring during a taxable year ending before the date the Treasury decision adopting these regulations is published in the **Federal Register**, see § 1.382–6 as contained in 26 CFR part 1, revised April 1, 2018. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to testing dates occurring during a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of this section, and the section 163(j) regulations (within the meaning of § 1.163(j)–1(b)(32)) and § 1.383–1, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to taxable years beginning after December 31, 2017.

■ **Par. 10.** Section 1.383–0 is amended by revising paragraph (a) to read as follows:

§ 1.383–0 Effective date.

(a) The regulations under section 383 (other than the regulations described in paragraph (b) of this section) reflect the amendments made to sections 382 and 383 by the Tax Reform Act of 1986 and the amendments made to section 382 by the Tax Cuts and Jobs Act of 2017. See § 1.383–1(j) for effective date rules.

* * * * *

■ **Par. 11.** Section 1.383–1 is amended by:

■ 1. In paragraph (a):

■ a. Adding entries for paragraphs (d)(1)(i) and (ii);
■ b. Revising the entries for paragraphs (e)(3) and (j);
■ c. Adding entries for paragraphs (j)(1) and (2); and
■ d. Removing the entry for paragraph (k).
■ 2. Removing ''(iv)'' and adding ''(v)'' in its place in paragraph (c)(6)(i)(B).
■ 3. Revising paragraphs (c)(6)(ii) and (d)(1).
■ 4. Removing the commas and adding semicolons in their place at ends of paragraphs (d)(2)(i) through (vi).
■ 5. Revising paragraph (d)(2)(iii).
■ 6. Redesignating paragraphs (d)(2)(iv) through (vii) as paragraphs (d)(2)(v) through (viii), respectively.
■ 7. Adding a new paragraph (d)(2)(iv).
■ 8. Revising newly redesignated paragraph (d)(2)(v) and paragraph (d)(3)(ii).
■ 9. Removing ''(iv)'' and adding ''(v)'' in its place in paragraph (e)(1).
■ 10. In paragraph (e)(2):
■ a. Removing ''sections 11(b)(2) and (15)'' and adding ''section 15'' in its place in the fourth sentence; and
■ b. Removing the last two sentences.
■ 11. Removing and reserving paragraph (e)(3).
■ 12. In paragraph (f):
■ a. Removing *Example 4;*
■ b. Designating *Examples 1* through *3* as paragraphs (f)(1) through (3), respectively; and
■ c. Revising newly designated paragraphs (f)(2) and (3).
■ 13. In the last sentence of paragraph (g), removing ''(*e.g.,* 0.34 for taxable years beginning in 1989)''.
■ 14. In paragraph (j):
■ a. Revising the paragraph heading;
■ b. Designating the text of paragraph (j) as paragraph (j)(1) and adding a heading to newly designated paragraph (j)(1); and
■ c. Adding paragraph (j)(2).
■ 15. Removing paragraph (k).

The revisions and additions read as follows:

§ 1.383–1 Special limitations on certain capital losses and excess credits.

(a) * * *

* * * * *

(d) * * *

(1) * * *

(i) In general.

(ii) Ordering rule for losses or credits from same taxable year.

* * * * *

(e) * * *

(3) [Reserved]

* * * * *

(j) Applicability date.

(1) In general.

(2) Interaction with section 163(j).

* * * * *

(c) * * *

(6) * * *

(ii) *Example.* L, a new loss corporation, is a calendar-year taxpayer. L has an ownership change on December 31, 2019. For 2020, L has taxable income (prior to the use of any pre-change losses) of $100,000. In addition, L has a section 382 limitation of $25,000, a pre-change net operating loss carryover of $12,000, a pre-change general business credit carryforward under section 39 of $50,000, and no items described in § 1.383–1(d)(2)(i) through (iv). L's section 383 credit limitation for 2020 is the excess of its regular tax liability computed after allowing a $12,000 net operating loss deduction (taxable income of $88,000; regular tax liability of $18,480), over its regular tax liability computed after allowing an additional deduction in the amount of L's section 382 limitation remaining after the application of paragraphs (d)(2)(i) through (v) of this section, or $13,000 (taxable income of $75,000; regular tax liability of $15,750). L's section 383 credit limitation is therefore $2,730 ($18,480 minus $15,750).

(d) * * *

(1) *In general*—(i) *In general.* The amount of taxable income of a new loss corporation for any post-change year that may be offset by pre-change losses shall not exceed the amount of the section 382 limitation for the post-change year. The amount of the regular tax liability of a new loss corporation for any post-change year that may be offset by pre-change credits shall not exceed the amount of the section 383 credit limitation for the post-change year.

(ii) *Ordering rule for losses or credits from same taxable year.* A loss corporation's taxable income is offset first by losses subject to a section 382 limitation, to the extent the section 382 limitation for that taxable year has not yet been absorbed, before being offset by losses of the same type from the same taxable year that are not subject to a section 382 limitation. For example, assume that Corporation X has an ownership change in Year 1 and carries over disallowed business interest expense within the meaning of § 1.163(j)–1(b)(8), some of which constitutes a section 382 disallowed business interest carryforward, from Year 1 to Year 2. To the extent of its section 163(j) limitation, within the meaning of § 1.163(j)–1(b)(31), and its remaining section 382 limitation, Corporation X offsets its Year 2 income with the section 382 disallowed business interest carryforward before using any of the disallowed business interest expense that is not a section 382 disallowed business interest carryforward. Similar principles apply to the use of tax credits.

(2) * * *

(iii) Pre-change losses that are described in § 1.382–2(a)(2)(iii), other than losses that are pre-change capital losses, that are recognized and are subject to the section 382 limitation in such post-change year;

(iv)(A) With respect to an ownership change date occurring prior to the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, but during the taxable year which includes the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, the pre-change loss described in section 382(d)(3);

(B) With respect to an ownership change date occurring on or after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, section 382 disallowed business interest carryforwards (within the meaning of § 1.382–2(a)(7));

(v) Pre-change losses not described in paragraphs (d)(2)(i) through (iv) of this section;

* * * * *

(3) * * *

(ii) *Example.* L, a calendar-year taxpayer, has an ownership change on December 31, 2019. For 2020, L has taxable income of $300,000 and a regular tax liability of $63,000. L has no pre-change losses, but it has a business credit carryforward from 2018 of $25,000. L has a section 382 limitation for 2020 of $50,000. L's section 383 credit limitation is $10,500, an amount equal to the excess of L's regular tax liability ($63,000) over its regular tax liability calculated by allowing an additional deduction of $50,000 ($52,500). Pursuant to the limitation contained in section 38(c), however, L is entitled to use only $9,500 (($63,000 − $25,000) × 25 percent) of its business credit carryforward in 2020. The unabsorbed portion of L's section 382 limitation (computed pursuant to paragraph (e) of this section) is carried forward under section 382(b)(2). The unused portion of L's business credit carryforward, $1,000, is carried forward to the extent provided in section 39.

* * * * *

(f) * * *

(2) *Example 2*—(i) *Facts.* L, a calendar-year taxpayer, has an ownership change on December 31, 2019. For 2020, L has $750,000

of ordinary taxable income (before the application of carryovers) and a section 382 limitation of $1,500,000. L's only carryovers are from pre-2019 taxable years and consist of a $500,000 net operating loss (NOL) carryover, and a $200,000 foreign tax credit carryover (all of which may be used under the section 904 limitation). The NOL carryover is a pre-change loss, and the foreign tax credit carryover is a pre-change credit. L has no other pre-change losses or credits that can be used in 2020.

(ii) *Analysis.* The following computation illustrates the application of this section for 2020:

1. Taxable income before carryovers	$750,000
2. Pre-change NOL carryover	500,000
3. Section 382 limitation	1,500,000
4. Amount of pre-change NOL carryover that can be used (least of line 1, 2, or 3)	500,000
5. Taxable income (line 1 minus line 4)	250,000
6. Section 382 limitation remaining (line 3 minus line 4)	1,000,000
7. Pre-change credit carryover	200,000
8. Regular tax liability (line 5 × section 11 rates)	52,500
9. Modified tax liability (line 5 minus line 6 (but not less than zero) × section 11 rates)	0
10. Section 383 credit limitation (line 8 minus line 9)	52,500
11. Amount of pre-change credits that can be used in 2020 (lesser of line 7 or line 10)	52,500
12. Amount of pre-change credits to be carried over to 2021 under section 904(c) (line 7 minus line 11)	147,500
13. Section 383 credit reduction amount: $52,500/0.21	250,000
14. Section 382 limitation to be carried to 2021 under section 382(b)(2) (line 6 minus line 13)	750,000

(3) *Example 3*—(i) *Facts.* L, a calendar-year taxpayer, has an ownership change on December 31, 2019. L has $80,000 of ordinary taxable income (before the application of carryovers) and a section 382 limitation of $25,000 for 2020, a post-change year. L's only carryover is from a pre-2019 taxable year and is a general business credit carryforward under section 39 in the amount of $10,000 (no portion of which is attributable to the investment tax credit under section 46). The general business credit carryforward is a pre-change credit. L has no other credits which can be used in 2020.

(ii) *Analysis.* The following computation illustrates the application of this section:

1. Taxable income before carryovers	$80,000
2. Section 382 limitation	25,000
3. Pre-change credit carryover	10,000
4. Regular tax liability (line 1 × section 11 rates)	16,800
5. Modified tax liability ((line 1 minus line 2) × section 11 rates)	11,550
6. Section 383 credit limitation (line 4 minus line 5)	5,250
7. Amount of pre-change credits that can be used (lesser of line 3 or line 6)	5,250
8. Amount of pre-change credits to be carried over to 2021 under sections 39 and 382(l)(2) (line 3 minus line 7)	4,750
9. Regular tax payable (line 4 minus line 7)	11,550
10. Section 383 credit reduction amount: $5,250/0.21	25,000
11. Section 382 limitation to be carried to 2021 under section 382(b)(2) (line 2 minus line 10)	0

* * * * *

(j) Applicability date—(1) *In general.*

* * *

(2) *Interaction with section 163(j).* Paragraphs (c)(6)(i)(B) and (c)(6)(ii), (d)(1), (d)(2)(iii) through (viii), (d)(3)(ii), (e)(1) through (3), (f), and (g) of this section apply with respect to ownership changes occurring during a taxable year ending after the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. For loss corporations that have undergone an ownership change during a taxable year ending before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, see § 1.383–1 as contained in 26 CFR part 1, revised April 1, 2018. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to an ownership change occurring during a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply either the rules of this section, except paragraph (d)(2)(iv)(B) of this section, the section 163(j) regulations, within the meaning of § 1.163(j)–1(b)(32), and § 1.382–6, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4; or the rules of this section (except paragraph (d)(2)(iv)(A) of this section), the section 163(j) regulations, within the meaning of § 1.163(j)–1(b)(32), and §§ 1.382–2, 1.382–5, 1.382–6, and 1.383–1, and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–2, 1.382–5, 1.382–6, and 1.383–1), and 1.1504–4, to those ownership changes.

■ **Par. 12.** Section 1.446–3 is amended by revising paragraphs (g)(4) and (j)(2) to read as follows:

§ 1.446–3 Notional principal contracts.

* * * * *

(g) * * *

(4) *Swaps with significant nonperiodic payments.* For swaps with significant nonperiodic payments, see § 1.163(j)–1(b)(20)(ii).

* * * * *

(j) * * *

(2) The rules provided in paragraph (g)(4) of this section apply to notional principal contracts entered into on or after the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**. Taxpayers may apply the rules provided in paragraph (g)(4) of this section to notional principal contracts entered into before the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

■ **Par. 13.** Section 1.469–9 is amended by revising paragraph (b)(2) to read as follows:

§ 1.469–9 Rules for certain rental real estate activities.

* * * * *

(b) * * *

(2) *Real property trade or business.* The following terms have the following meanings in determining whether a trade or business is a real property trade or business for purposes of section 469(c)(7)(C) and this section.

(i) *Real property*—(A) *In general.* The term *real property* includes land, buildings, and other inherently permanent structures that are permanently affixed to land. Any interest in real property, including fee ownership, co-ownership, a leasehold, an option, or a similar interest is real property under this section. Tenant improvements to land, buildings, or other structures that are inherently permanent or otherwise classified as real property within the meaning of this section are real property for purposes of section 469(c)(7)(C). However, property produced for sale that is not real property in the hands of the producing taxpayer or a related person, but that may be incorporated into real property by an unrelated person, is not treated as real property of the producing taxpayer for purposes of section 469(c)(7)(C) and this section (for example, bricks, nails, paint, and windowpanes).

(B) *Land.* The term *land* includes water and air space superjacent to land and natural products and deposits that are unsevered from the land. Natural products and deposits, such as plants, crops, trees, water, ores, and minerals, cease to be real property when they are harvested, severed, extracted, or removed from the land. Accordingly, any trade or business that involves the cultivation and harvesting of plants, crops, or trees, or severing, extracting, or removing natural products or deposits from land is not a real property trade or business for purposes of section 469(c)(7)(C) and this section. The storage or maintenance of severed or extracted natural products or deposits, such as plants, crops, trees, water, ores, and minerals, in or upon real property does not cause the stored property to be recharacterized as real property, and any trade or business relating to or involving such storage or maintenance of severed or extracted natural products or deposits is not a real property trade or business, even though such storage or maintenance otherwise may occur upon or within real property.

(C) *Inherently permanent structure.* The term *inherently permanent structure* means any permanently affixed building or other permanently affixed structure. If the affixation is reasonably expected to last indefinitely, based on all the facts and circumstances, the affixation is considered permanent. However, an asset that serves an active function, such as an item of machinery or equipment (for example, HVAC system, elevator or escalator), is not a building or other inherently permanent structure, and therefore is not real property for purposes of section 469(c)(7)(C) and this section, even if such item of machinery or equipment is permanently affixed to or becomes incorporated within a building or other inherently permanent structure. Accordingly, a trade or business that involves the manufacture, installation, operation, maintenance, or repair of any asset that serves an active function will not be a real property trade or business, or a unit or component of another real property trade or business, for purposes of section 469(c)(7)(C) and this section.

(D) *Building*—(*1*) *In general.* A *building* encloses a space within its walls and is generally covered by a roof or other external upper covering that protects the walls and inner space from the elements.

(*2*) *Types of buildings.* Buildings include the following assets if permanently affixed to land: Houses; townhouses; apartments; condominiums; hotels; motels; stadiums; arenas; shopping malls; factory and office buildings; warehouses; barns; enclosed garages; enclosed transportation stations and terminals; and stores.

(E) *Other inherently permanent structures*—(*1*) *In general.* Other inherently permanent structures include the following assets if permanently affixed to land: Parking facilities; bridges; tunnels; roadbeds; railroad tracks; pipelines; storage structures such as silos and oil and gas storage tanks; and stationary wharves and docks.

(*2*) *Facts and circumstances determination.* The determination of whether an asset is an inherently permanent structure is based on all the facts and circumstances. In particular, the following factors must be taken into account:

(*i*) The manner in which the asset is affixed to land and whether such manner of affixation allows the asset to be easily removed from the land;

(*ii*) Whether the asset is designed to be removed or to remain in place indefinitely on the land;

(*iii*) The damage that removal of the asset would cause to the asset itself or to the land to which it is affixed;

(*iv*) Any circumstances that suggest the expected period of affixation is not indefinite (for example, a lease that requires or permits removal of the asset from the land upon the expiration of the lease); and

(*v*) The time and expense required to move the asset from the land.

(ii) *Other definitions*—(A) through (G) [Reserved]

(H) *Real property operation.* The term *real property operation* means handling, by a direct or indirect owner of the real property, the day-to-day operations of a trade or business, within the meaning of paragraph (b)(1) of this section, relating to the maintenance and occupancy of the real property that affect the availability and functionality of that real property used, or held out for use, by customers where payments received from customers are principally for the customers' use of the real property. The principal purpose of such business operations must be the provision of the use of the real property, or physical space accorded by or within the real property, to one or more customers, and not the provision of other significant or extraordinary personal services, within the meaning of § 1.469–1T(e)(3)(iv) and (v), to customers in conjunction with the customers' incidental use of the real property or physical space. If the real property or physical space is provided to a customer to be used to carry on the customer's trade or business, the principal purpose of the business operations must be to provide the customer with exclusive use of the real property or physical space in furtherance of the customer's trade or business, and not to provide other significant or extraordinary personal services to the customer in addition to or in conjunction with the use of the real property or physical space, regardless of whether the customer pays for the services separately. However, other incidental personal services may be provided to the customer in conjunction with the use of real property or physical space, as long as such services are insubstantial in relation to the customer's use of the real property or physical space and the receipt of such services is not a significant factor in the customer's decision to use the real property or physical space.

(I) *Real property management.* The term *real property management* means handling, by a professional manager, the day-to-day operations of a trade or business, within the meaning of paragraph (b)(1) of this section, relating to the maintenance and occupancy of real property that affect the availability and functionality of that property used, or held out for use, by customers where payments received from customers are principally for the customers' use of the real property. The principal purpose of such business operations must be the provision of the use of the real property, or physical space accorded by or within the real property, to one or more customers, and not the provision of other significant or extraordinary personal services, within the meaning of § 1.469–1T(e)(3)(iv) and (v), to customers in conjunction with the customers' incidental use of the real property or physical space. If the real property or physical space is provided to a customer to be used to carry on the customer's trade or business, the principal purpose of the business operations must be to provide the customer with exclusive use of the real property or physical space in furtherance of the customer's trade or business, and not to provide other significant or extraordinary personal services to the customer in addition to or in conjunction with the use of the real property or physical space, regardless of whether the customer pays for the services separately. However, other incidental personal services may be provided to the customer in conjunction with the use of real property or physical space, as long as such services are insubstantial in relation to the customer's use of the real property or physical space and the

receipt of such services is not a significant factor in the customer's decision to use the real property or physical space. A professional manager is a person responsible, on a full-time basis, for the overall management and oversight of the real property or properties and who is not a direct or indirect owner of the real property or properties.

(J) *and (K)* [Reserved]

(iii) *Examples.* The following examples illustrate the operation of this paragraph (b)(2):

(A) *Example 1.* A owns farmland and uses the land in A's farming business to grow and harvest crops of various kinds. As part of this farming business, A utilizes a greenhouse that is an inherently permanent structure to grow certain crops during the winter months. Under the rules of this section, any trade or business that involves the cultivation and harvesting of plants, crops, or trees is not a real property trade or business for purposes of section 469(c)(7)(C) and this section, even though the cultivation and harvesting of crops occurs upon or within real property. Accordingly, under these facts, A is not engaged in a real property trade or business for purposes of section 469(c)(7)(C) and this section.

(B) *Example 2.* B is a retired farmer and owns farmland that B rents exclusively to C to operate a farm. The arrangement between B and C is a trade or business (within the meaning of paragraph (b)(1) of this section) where payments by C are principally for C's use of B's real property. B also provides certain farm equipment for C's use. However, C is solely responsible for the maintenance and repair of the farm equipment along with any costs associated with operating the equipment. B also occasionally provides oral advice to C regarding various aspects of the farm operation, based on B's prior experience as a farmer. Other than the provision of this occasional advice, B does not provide any significant or extraordinary personal services to C in connection with the rental of the farmland to C. Under these facts, B is engaged in a real property trade or business (which does not include the use or deemed rental of any farm equipment) for purposes of section 469(c)(7)(C) and this section, and B's oral advice is an incidental personal service that B provides in conjunction with C's use of the real property. Nevertheless, under these facts, C is not engaged in a real property trade or business for purposes of section 469(c)(7)(C) and this section because C is engaged in the business of farming.

(C) *Example 3.* D owns a building in which D operates a restaurant and bar. Even though D provides customers with use of the physical space inside the building, D is not engaged in a trade or business where payments by customers are principally for the use of real property or physical space. Instead, the payments by D's customers are principally for the receipt of significant or extraordinary personal services (within the meaning of § 1.469–1T(e)(3)(iv) and (v)), mainly food and beverage preparation and presentation services, and the use of the physical space by customers is incidental to the receipt of these personal services. Under the rules of this section, any trade or business that involves the provision of significant or extraordinary personal services to customers in conjunction with the customers' incidental use of real property or physical space is not a real property trade or business, even though the business operations occur upon or within real property. Accordingly, under these facts, D is not engaged in a real property trade or business for purposes of section 469(c)(7)(C) and this section.

(D) *Example 4.* E owns a majority interest in an S corporation, X, that is engaged in the trade or business of manufacturing industrial cooling systems for installation in commercial buildings and for other uses. E also owns a majority interest in an S corporation, Y, that purchases the industrial cooling systems from X and that installs, maintains, and repairs those systems in both existing commercial buildings and commercial buildings under construction. Under the rules of this section, any trade or business that involves the manufacture, installation, operation, maintenance, or repair of any machinery or equipment that serves an active function will not be a real property trade or business (or a unit or component of another real property trade or business) for purposes of section 469(c)(7)(C) and this section, even though the machinery or equipment will be permanently affixed to real property once it is installed. In this case, the industrial cooling systems are machinery or equipment that serves an active function. Accordingly, under these facts, E, X and Y will not be treated as engaged in one or more real property trades or businesses for purposes of section 469(c)(7)(C) and this section.

(E) *Example 5.* (*1*) F owns an interest in P, a limited partnership. P owns and operates a luxury hotel. In addition to providing rooms and suites for use by customers, the hotel offers many additional amenities such as in-room food and beverage service, maid and linen service, parking valet service, concierge service, front desk and bellhop service, dry cleaning and laundry service, and in-room barber and hairdresser service. P contracted with M to provide maid and janitorial services to P's hotel. M is an S corporation principally engaged in the trade or business of providing maid and janitorial services to various types of businesses, including hotels. G is a professional manager employed by M who handles the day-to-day business operations relating to M's provision of maid and janitorial services to M's various customers, including P.

(*2*) Even though the personal services that P provides to the customers of its hotel are significant personal services within the meaning of § 1.469–1T(e)(3)(iv), the principal purpose of P's hotel business operations is the provision of use of the hotel's rooms and suites to customers, and not the provision of the significant personal services to P's customers in conjunction with the customers' incidental use of those rooms or suites. The provision of these significant personal services by P to P's customers is incidental to the customers' use of the hotel's real property. Accordingly, under these facts, F and P are treated as engaged in a real property trade or business for purposes of section 469(c)(7)(C) and this section.

(*3*) With respect to the maid and janitorial services provided by M, M's operations affect the availability and functionality of real property used, or held out for use, by customers in a trade or business where payments by customers are principally for the use of real property (in this case, P's hotel). However, M does not operate or manage real property. Instead, M is engaged in a trade or business of providing maid and janitorial services to customers, such as P, that are engaged in real property trades or businesses. Thus, M's business operations are merely ancillary to real property trades or businesses. Therefore, M is not engaged in real property operations or management as defined in this section. Accordingly, under these facts, M is not engaged in a real property trade or business within the meaning of section 469(c)(7)(C) and this section.

(*4*) With respect to the day-to-day business operations that G handles as a professional manager of M, the business operations that G manages is not the provision of use of P's hotel rooms and suites to customers. G does not operate or manage real property. Instead, G manages the provision of maid and janitorial services to customers, including P's hotel. Therefore, G is not engaged in real property management as defined in this section. Accordingly, under these facts, G is not engaged in a real property trade or business within the meaning of section 469(c)(7)(C) and this section.

* * * * *

■ **Par. 14.** Section 1.469–11 is amended by:

■ 1. Removing the period at the end of paragraph (a)(1) and adding a semicolon in its place;

■ 2. Revising paragraph (a)(3);

■ 3. Redesignating paragraphs (a)(4) and (5) as paragraphs (a)(5) and (6), respectively; and

■ 4. Adding a new paragraph (a)(4).

The revision and addition read as follows:

§ 1.469–11 Effective date and transition rules.

(a) * * *

(3) The rules contained in § 1.469–9, other than paragraph (a)(4) of this section, apply for taxable years beginning on or after January 1, 1995, and to elections made under § 1.469–9(g) with returns filed on or after January 1, 1995, and the rules contained in § 1.469–11(a)(4) apply for taxable years beginning on or after the date of the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**;

(4) The rules contained in § 1.469–9(b)(2) apply to taxable years beginning after December 31, 2018. Paragraph (b) of this section applies to loss corporations that have undergone an

ownership change during a taxable year ending after the date of the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may rely on the rules of this section if applied consistently by the taxpayers and their related parties, until the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**;

* * * * *

■ **Par. 15.** Section 1.860C–2 is amended by revising paragraph (b)(2) to read as follows:

§ 1.860C–2 Determination of REMIC taxable income or net loss.

* * * * *

(b) * * *

(2) *Deduction allowable under section 163*—(i) A REMIC is allowed a deduction, determined without regard to section 163(d), for any interest expense accrued during the taxable year.

(ii) For taxable years beginning after December 31, 2017, a REMIC is allowed a deduction, determined without regard to section 163(j), for any interest expense accrued during the taxable year.

* * * * *

■ **Par. 16.** Section 1.882–5 is amended by adding a sentence to the end of paragraph (a)(5) to read as follows:

§ 1.882–5 Determination of interest deduction.

(a) * * *

(5) * * * For rules regarding the coordination of this section and section 163(j), see § 1.163(j)–8(e).

* * * * *

■ **Par. 17.** Section 1.1502–13 is amended by—

■ 1. In paragraph (a)(6)(ii)—

■ a. Under the heading ''Matching rule. (§ 1.1502–13(c)(7)(ii))'':

■ i. Designating *Examples 1* through *17* as entries (A) through (Q).

■ ii. Adding entries (R) and (S).

■ b. Under the heading ''Anti-avoidance rules. (§ 1.1502–13(h)(2))'':

■ i. Designating *Examples 1* through *5* as entries (i) through (v).

■ ii. Adding an entry (vi).

■ 2. In paragraph (c)(7)(ii):

■ a. Designating *Examples 1* through *17* as paragraphs (c)(7)(ii)(A) through (Q), respectively.

■ b. In newly designated paragraphs (c)(7)(ii)(A) through (Q):

■ i. Redesignating paragraphs (c)(7)(ii)(A)(a) through (i) as paragraphs (c)(7)(ii)(A)(*1*) through (*9*).

■ ii. Redesignating paragraphs (c)(7)(ii)(B)(a) and (b) as paragraphs (c)(7)(ii)(B)(*1*) and (*2*).

■ iii. Redesignating paragraphs (c)(7)(ii)(C)(a) through (d) as paragraphs (c)(7)(ii)(C)(*1*) through (*4*).

■ iv. Redesignating paragraphs (c)(7)(ii)(D)(a) through (e) as paragraphs (c)(7)(ii)(D)(*1*) through (*5*).

■ v. Redesignating paragraphs (c)(7)(ii)(E)(a) through (f) as paragraphs (c)(7)(ii)(E)(*1*) through (*6*).

■ vi. Redesignating paragraphs (c)(7)(ii)(F)(a) through (d) as paragraphs (c)(7)(ii)(F)(*1*) through (*4*).

■ v. Redesignating paragraphs (c)(7)(ii)(G)(a) through (d) as paragraphs (c)(7)(ii)(G)(*1*) through (*4*).

■ vi. Redesignating paragraphs (c)(7)(ii)(I)(a) through (e) as paragraphs (c)(7)(ii)(I)(*1*) through (*5*).

■ vii. Redesignating paragraphs (c)(7)(ii)(J)(a) through (d) as paragraphs (c)(7)(ii)(J)(*1*) through (*4*).

■ viii. Redesignating paragraphs (c)(7)(ii)(K)(a) through (d) as paragraphs (c)(7)(ii)(K)(*1*) through (*4*).

■ ix. Redesignating paragraphs (c)(7)(ii)(L)(a) and (b) as paragraphs (c)(7)(ii)(L)(*1*) and (*2*).

■ x. Redesignating paragraphs (c)(7)(ii)(N)(a) through (c) as paragraphs (c)(7)(ii)(N)(*1*) through (*3*).

■ xi. Redesignating paragraphs (c)(7)(ii)(O)(a) through (d) as paragraphs (c)(7)(ii)(O)(*1*) through (*4*).

■ xii. Redesignating paragraphs (c)(7)(ii)(P)(a) and (b) as paragraphs (c)(7)(ii)(P)(*1*) and (*2*).

■ xiii. Redesignating paragraphs (c)(7)(ii)(Q)(a) through (c) as paragraphs (c)(7)(Q)(*1*) through (*3*).

c. In the table below, for each newly redesignated paragraph listed in the ''Paragraph'' column, remove the text indicated in the ''Remove'' column and add in its place the text indicated in the ''Add'' column:

Paragraph	Remove	Add
(c)(7)(ii)(A)(*5*)	paragraph (a) of this *Example 1*	*Example 1* in paragraph (c)(7)(ii)(A)(*1*) of this section.
(c)(7)(ii)(A)(*5*)	paragraphs (c) and (d) of this *Example 1*.	*Example 1* in paragraphs (c)(7)(ii)(A)(*3*) and (*4*) of this section.
(c)(7)(ii)(A)(*6*)	paragraph (a) of this *Example 1*	*Example 1* in paragraph (c)(7)(ii)(A)(*1*) of this section.
(c)(7)(ii)(A)(*7*)	paragraph (a) of this *Example 1*	*Example 1* in paragraph (c)(7)(ii)(A)(*1*) of this section.
(c)(7)(ii)(A)(*8*)	paragraph (a) of this *Example 1*	*Example 1* in paragraph (c)(7)(ii)(A)(*1*) of this section.
(c)(7)(ii)(A)(*9*)	paragraph (a) of this *Example 1*	*Example 1* in paragraph (c)(7)(ii)(A)(*1*) of this section.
(c)(7)(ii)(C)(*3*)	paragraph (a) of this *Example 3*	*Example 3* in paragraph (c)(7)(ii)(C)(*1*) of this section.
(c)(7)(ii)(C)(*4*)	paragraph (c) of this *Example 3*	*Example 3* in paragraph (c)(7)(ii)(C)(*3*) of this section.
(c)(7)(ii)(C)(*4*)	paragraph (b) of this *Example 3*	*Example 3* in paragraph (c)(7)(ii)(C)(*2*) of this section.
(c)(7)(ii)(D)(*5*)	paragraph (a) of this *Example 4*	*Example 4* in paragraph (c)(7)(ii)(D)(*1*) of this section.
(c)(7)(ii)(D)(*5*)	paragraphs (c) and (d) of this *Example 4*.	*Example 4* in paragraphs (c)(7)(ii)(D)(*3*) and (*4*) of this section.
(c)(7)(ii)(E)(*3*)	paragraph (a) of this *Example 5*	*Example 5* in paragraph (c)(7)(ii)(E)(*1*) of this section.
(c)(7)(ii)(E)(*4*)	paragraph (a) of this *Example 5*	*Example 5* in paragraph (c)(7)(ii)(E)(*1*) of this section.
(c)(7)(ii)(E)(*5*)	paragraph (a) of this *Example 5*	*Example 5* in paragraph (c)(7)(ii)(E)(*1*) of this section.
(c)(7)(ii)(E)(*6*)	paragraph (a) of this *Example 5*	*Example 5* in paragraph (c)(7)(ii)(E)(*1*) of this section.
(c)(7)(ii)(F)(*3*)	paragraph (a) of this *Example 6*	*Example 6* in paragraph (c)(7)(ii)(F)(*1*) of this section.
(c)(7)(ii)(F)(*4*)	paragraph (a) of this *Example 6*	*Example 6* in paragraph (c)(7)(ii)(F)(*1*) of this section.
(c)(7)(ii)(G)(*4*)	paragraph (a) of this *Example 7*	*Example 7* in paragraph (c)(7)(ii)(G)(*1*) of this section.
(c)(7)(ii)(G)(*4*)	paragraph (c) of this *Example 7*	*Example 7* in paragraph (c)(7)(ii)(G)(*3*) of this section.
(c)(7)(ii)(I)(*3*)	paragraph (a) of this *Example 9*	*Example 9* in paragraph (c)(7)(ii)(I)(*1*) of this section.
(c)(7)(ii)(I)(*4*)	paragraph (a) of this *Example 9*	*Example 9* in paragraph (c)(7)(ii)(I)(*1*) of this section.
(c)(7)(ii)(I)(*5*)	paragraph (d) of this *Example 9*	*Example 9* in paragraph (c)(7)(ii)(I)(*4*) of this section.
(c)(7)(ii)(J)(*3*)	paragraph (a) of this *Example 10*	*Example 10* in paragraph (c)(7)(ii)(J)(*1*) of this section.
(c)(7)(ii)(J)(*4*)	paragraph (a) of this *Example 10*	*Example 10* in paragraph (c)(7)(ii)(J)(*1*) of this section.
(c)(7)(ii)(K)(*4*)	paragraph (a) of this *Example 11*	*Example 11* in paragraph (c)(7)(ii)(K)(*1*) of this section.
(c)(7)(ii)(N)(*2*)	paragraph (a) of this *Example 14*	*Example 14* in paragraph (c)(7)(ii)(N)(*1*) of this section.
(c)(7)(ii)(O)(*4*)	paragraph (a) of this *Example 15*	*Example 15* in paragraph (c)(7)(ii)(O)(*1*) of this section.
(c)(7)(ii)(Q)(*1*)	*Example 16*	*Example 16* in paragraph (c)(7)(ii)(P) of this section.

Paragraph	Remove	Add
(c)(7)(ii)(Q)(2)	paragraph (f)(7), *Example 2* of this section.	*Example 2* in paragraph (f)(7) of this section.
(c)(7)(iii)(A)	Paragraphs (c)(6)(ii)(C), (c)(6)(ii)(D), and (c)(7)(ii), Examples 16 and 17 of this section.	Paragraphs (c)(6)(ii)(C) and (D) of this section, *Example 16* in paragraph (c)(7)(ii)(P) of this section, and *Example 17* in paragraph (c)(7)(ii)(Q) of this section.

■ d. Adding paragraphs (c)(7)(ii)(R) and (S).
■ 3. In paragraph (h)(2):
■ a. Designating *Examples 1* through *5* as paragraphs (h)(2)(i) through (v), respectively.
■ b. In newly designated paragraphs (h)(2)(i) through (v):
■ i. Redesignating paragraphs (h)(2)(i)(a) and (b) as paragraphs (h)(2)(i)(A) and (B).
■ ii. Redesignating paragraphs (h)(2)(ii)(a) and (b) as paragraphs (h)(2)(ii)(A) and (B).
■ iii. Redesignating paragraphs (h)(2)(iii)(a) and (b) as paragraphs (h)(2)(iii)(A) and (B).
■ iv. Redesignating paragraphs (h)(2)(iv)(a) and (b) as paragraphs (h)(2)(iv)(A) and (B).
■ v. Redesiganting paragraphs (h)(2)(v)(a) and (b) as paragraphs (h)(2)(iv)(A) and (B).
■ c. Adding paragraph (h)(2)(vi).
The additions read as follows:

§ 1.1502–13 Intercompany transactions.

(a) * * *
(6) * * *
(ii) * * *
Matching rule. (§ 1.1502–13(c)(7)(ii))
* * * * *
(R) Example 18. Transfer of partnership interests in an intercompany sale.
(S) Example 19. Intercompany transfer of partnership interests in a non-recognition transaction.
* * * * *
Anti-avoidance rules. (§ 1.1502–13(h)(2))
* * * * *
(vi) Example 6. Section 163 interest limitation.
* * * * *
(c) * * *
(7) * * *
(ii) * * *

(R) *Example 18: Transfer of partnership interests in an intercompany sale*—(*1*) *Facts.* P wholly owns S and B, both of which are members of the consolidated group of which P is the common parent. S and A (an unrelated third party) are equal partners in PS1, which was formed in Year 1. At the end of Year 1, the fair market value of PS1 is $200x, and S's adjusted basis in its partnership interest is $100x. During Year 2, PS1 borrows money, pays $100x of business interest expense, and repays the debt. PS1's section 163(j) limitation is $0; thus, the $100x of Year 2 business interest expense is disallowed as a deduction to PS1, is characterized as excess business interest expense, and is allocated proportionally to PS1's partners. S reduces its basis in its PS1 interest under § 1.163(j)–6(h) to reflect the $50x of excess business interest expense allocated to S, but the reduction is not treated as a noncapital, nondeductible expense (see § 1.163(j)–4(d)(4)(ii)). On the last day of Year 2, S sells its PS1 partnership interest to B for $50x. S has not used any of the excess business interest expense allocated from PS1; thus, immediately before the sale, S's basis in its PS1 interest is increased by $50x (to $100x) under § 1.163(j)–6(h). This basis increase is not treated as tax-exempt income (see § 1.163(j)–4(d)(4)(ii)). During Year 3, PS1 earns $50x of income, all of which is reported to the partners as excess taxable income, and $25x of which is allocated to B. B's basis in its PS1 interest is increased accordingly. Additionally, during Year 3, B earns $25x of business interest income and has no business interest expense other than its allocation of business interest expense from PS1. At the close of business on the last day of Year 4, B sells its PS1 partnership interest to Z (an unrelated third party) for $85x. At the time of the sale, B's basis in its PS1 interest is $75x.

(*2*) *Definitions.* Under paragraph (b)(1) of this section, S's sale of its PS1 interest to B in Year 2 is an intercompany transaction, with S as the selling member and B as the buying member. S's $50x capital loss on the sale is an intercompany item within the meaning of paragraph (b)(2)(i) of this section. B's $25 of ordinary income in Year 3 and its $10x gain on the sale of the PS1 interest to Z in Year 4 are both corresponding items within the meaning of paragraph (b)(3)(i) of this section.

(*3*) *Timing and attributes.* S takes its $50x loss into account to reflect the difference in each consolidated return year between B's corresponding items taken into account for the year and the recomputed corresponding item for the year. If S and B were divisions of a single corporation and the intercompany sale were a transfer between divisions, the single entity would have had zero income inclusion in Year 3, as the $25x of excess taxable income attributable to the single entity's interest in PS1 would have allowed the single entity to use $25x of the excess business interest expense allocation from PS1 in Year 2. However, on a separate entity basis, B's corresponding item for Year 3 is $25x of ordinary income (the excess taxable income from PS1). As a result, under § 1.1502–13(c)(ii), S takes into account $25x of its loss in Year 3, the difference between the recomputed corresponding item and B's corresponding item in Year 3 ($0—$25x = −$25x). Under paragraphs (c)(1)(i) and (c)(4)(i)(A) of this section, the $25x is redetermined to be ordinary. The remaining $25x of S's loss continues to be deferred. The recomputed corresponding item in Year 4 is a $15x capital loss ($85x of sales proceeds minus $100x basis (the original $100x basis, minus a $50 reduction in basis under § 1.163(j)–6(h), plus a $25x increase for its allocable share of PS1's income, plus a $25x increase under § 1.163(j)–6(h)). B's corresponding item is a $10x capital gain ($85x sales proceeds minus $75x basis). Accordingly, the remaining $25x of S's $50x Year 2 capital loss is taken into account in Year 4.

(S) *Example 19: Intercompany transfer of partnership interests in a non-recognition transaction*—(*1*) *Facts.* P wholly owns B, which is a member of the consolidated group of which P is the common parent. P and A (an unrelated third party) are equal partners in PS1, which was formed in Year 1. At the end of Year 1, the fair market value of PS1 is $200x, and P's adjusted basis in its partnership interest is $100x. At the beginning of Year 2, PS1 borrows money and purchases inventory. During Year 2, PS1 pays $100x of business interest expense, sells inventory for $100x (net of cost of goods sold), and repays the debt in full. PS1's section 163(j) limitation for Year 2 is $30x (30 percent × $100x). Thus, $70x of PS1's Year 2 business interest expense is disallowed as a deduction to PS1, is characterized as excess business interest, and is allocated proportionally to PS1's partners. P reduces its basis in its PS1 interest under § 1.163(j)–6(h) to reflect the $35x of excess business interest allocated to P. P's basis in its PS1 interest also is increased to reflect the $35x of income allocated to P, leaving P with a basis in its PS1 interest of $100x at the end of Year 2. On the first day of Year 3, P contributes its PS1 partnership interest to B in exchange for B stock in a non-recognition exchange under section 351. At the time, P had not used any of the excess business interest expense allocated from PS1. During Year 4, B sells its PS1 partnership interest to Z (an unrelated third party) for $200x.

(*2*) *Analysis.* P's transfer of its interest in PS1 to B is an intercompany transaction. The transfer also is a disposition for purposes of § 1.163(j)–6(h). Therefore, immediately before the transfer, P increases its $100x basis in its PS1 interest by $35x (the amount of P's unused excess business interest expense). Under section 362, B receives a carryover basis of $135x in the PS1 interest. P has no intercompany item, but B's $65x of capital gain from its sale of the PS1 interest to Z is a corresponding item because the PS1 interest was acquired in an intercompany

transaction. B takes the $65x of capital gain into account in Year 4.

* * * * *

(h) * * *

(2) * * *

(vi) *Example 6: Section163(j) interest limitation*—(A) *Facts.* S1 and S2 are members of a consolidated group of which P is the common parent. S1 is engaged in an excepted trade or business, and S2 is engaged in a non-excepted trade or business. If S1 were to lend funds directly to S2 in an intercompany transaction, under § 1.163(j)–10(a)(4)(i), the intercompany obligation of S2 would not be considered an asset of S1 for purposes of § 1.163(j)–10 (concerning allocations of interest and other taxable items between excepted and non-excepted trades or businesses for purposes of section 163(j)). With a principal purpose of avoiding treatment of a lending transaction between S1 and S2 as an intercompany transaction (and increasing the P group's basis in its assets allocable to excepted trades or businesses), S1 lends funds to X (an unrelated third party). X then on-lends funds to S2 on substantially similar terms.

(B) *Analysis.* A principal purpose of the steps undertaken was to avoid treatment of a lending transaction between S1 and S2 as an intercompany transaction. Therefore, under paragraph (h)(1) of this section, appropriate adjustments are made, and the X obligation in the hands of S1 is not treated as an asset of S1 for purposes of § 1.163(j)–10, to the extent of the loan from X to S2.

* * * * *

■ **Par. 18.** Section 1.1502–21 is amended by revising paragraph (d) to read as follows:

§ 1.1502–21 Net operating losses.

* * * * *

(d) *Cross-reference.* For rules governing the application of a SRLY limitation to business interest expense for which a deduction is disallowed under section 163(j), see § 1.163(j)–5(d) and (f).

* * * * *

■ Par. 19. Section 1.1502–36 is amended by:

■ 1. Revising the second sentence of paragraph (f)(2);

■ 2. Revising the paragraph (h) heading;

■ 3. Designating the text of paragraph (h) as paragraph (h)(1) and adding a heading to newly designated paragraph (h)(1); and

■ 4. Adding paragraph (h)(2).

The revisions and addition read as follows:

§ 1.1502–36 Unified loss rule.

* * * * *

(f) * * *

(2) * * * Such provisions include, for example, sections 163(j), 267(f), and 469, and § 1.1502–13. * * *

* * * * *

(h) *Applicability date*—(1) *In general.* * * *

(2) *Definition in paragraph (f)(2) of this section.* Paragraph (f)(2) of this section applies to taxable years ending after the date of the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. For taxable years ending before the date of the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, see § 1.1502–36 as contained in 26 CFR part 1, revised April 1, 2018. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of this section, the section 163(j) regulations (within the meaning of § 1.163(j)–1(b)(32)), and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–79, 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6 and 1.383–1), and 1.1504–4 to those taxable years.

■ **Par. 20.** Section 1.1502–79 is amended by adding paragraph (f) to read as follows:

§ 1.1502–79 Separate return years.

* * * * *

(f) *Disallowed business interest expense carryforwards.* For the treatment of disallowed business interest expense carryforwards (within the meaning of § 1.163(j)–1) of a member arising in a separate return limitation year, see § 1.163(j)–5(d) and (f).

■ **Par. 21.** Section 1.1502–90 is amended by revising the entry for § 1.1502–98 and adding an entry for § 1.1502–99(d) to read as follows:

§ 1.1502–90 Table of contents.

* * * * *

§ 1.1502–98 Coordination with sections 383 and 163(j).

§ 1.1502–99 Effective dates.

* * * * *

(d) Application to section 163(j).

■ **Par. 22.** Section 1.1502–91 is amended by revising paragraph (e)(2) to read as follows:

§ 1.1502–91 Application of section 382 with respect to a consolidated group.

* * * * *

(e) * * *

(2) *Example*—(i) *Facts.* The L group has a consolidated net operating loss arising in Year 1 that is carried over to Year 2. The L loss group has an ownership change at the beginning of Year 2.

(ii) *Analysis.* The net operating loss carryover of the L loss group from Year 1 is a pre-change consolidated attribute because the L group was entitled to use the loss in Year 2 and therefore the loss was described in paragraph (c)(1)(i) of this section. Under paragraph (a)(2)(i) of this section, the amount of consolidated taxable income of the L group for Year 2 that may be offset by this loss carryover may not exceed the consolidated section 382 limitation of the L group for that year. See § 1.1502–93 for rules relating to the computation of the consolidated section 382 limitation.

(iii) *Business interest expense.* The facts are the same as in the *Example* in paragraph (e)(2)(i) of this section, except that, rather than a consolidated net operating loss, a member of the L group pays or accrues a business interest expense in Year 1 for which a deduction is disallowed in that year under section 163(j) and § 1.163(j)–2(b). The disallowed business interest expense is carried over to Year 2 under section 163(j)(2) and § 1.163(j)–2(c). Thus, the disallowed business interest expense carryforward is a pre-change loss. Under section 163(j), the L loss group is entitled to deduct the carryforward in Year 2; however, the amount of consolidated taxable income of the L group for Year 2 that may be offset by this carryforward may not exceed the consolidated section 382 limitation of the L group for that year. See § 1.1502–98(b) (providing that §§ 1.1502–91 through 1.1502–96 apply section 382 to business interest expense, with appropriate adjustments).

* * * * *

■ **Par. 23.** Section 1.1502–95 is amended in paragraph (b)(4) by:

■ 1. Designating *Examples 1* and *2* as paragraphs (b)(4)(i) and (ii), respectively;

■ 2. In newly designated paragraph (b)(4)(i), redesignating paragraphs (b)(4)(i)(i) and (ii) as paragraphs (b)(4)(i)(A) and (B), respectively;

■ 3. In newly designated paragraph (b)(4)(ii), redesignating paragraphs (b)(4)(ii)(i) and (ii) as paragraphs (b)(4)(ii)(A) and (B), respectively; and

■ 4. Adding two sentences at the end of newly redesignated paragraph (b)(4)(ii)(B).

The additions read follows:

§ 1.1502–95 Rules on ceasing to be a member of a consolidated group (or loss subgroup).

* * * * *

(b) * * *

(4) * * *

(ii) * * *

(B) * * * The analysis would be similar if the L loss group had an ownership change under § 1.1502–92 in Year 2 with respect to disallowed business interest expense paid or accrued by L2 in Year 1 and carried forward under section 163(j)(2) to Year 2 and Year 3. See § 1.1502–98(b) (providing that §§ 1.1502–91 through 1.1502–96 apply section 382 to

business interest expense, with appropriate adjustments).

* * * * *

■ **Par. 24.** Section 1.1502–98 is amended by:

■ 1. Revising the section heading;

■ 2. Designating the undesignated text as paragraph (a) and adding a heading for newly designated paragraph (a); and

■ 3. Adding paragraph (b).

The revision and additions read as follows:

§ 1.1502–98 Coordination with sections 383 and 163(j).

(a) *Coordination with section 383.* * * *

(b) *Application to section 163(j)*—(1) *In general.* The regulations under sections 163(j), 382, and 383 contain rules governing the application of section 382 to interest expense governed by section 163(j) and the regulations thereunder. See, for example, §§ 1.163(j)–11(b), 1.382–2, 1.382–6, and 1.383–1. The rules contained in §§ 1.1502–91 through 1.1502–96 apply these rules to members of a consolidated group, or corporations that join or leave a consolidated group, with appropriate adjustments. For example, for purposes of §§ 1.1502–91 through 1.1502–96, the term *loss group* includes a consolidated group in which any member is entitled to use a disallowed business interest expense carryforward, within the meaning of § 1.163(j)–1(b)(9), that did not arise, and is not treated as arising, in a SRLY with regard to that group. Additionally, a reference to net operating loss carryovers in §§ 1.1502–91 through 1.1502–96 generally includes a reference to disallowed business interest expense carryforwards. References to a loss or losses in §§ 1.1502–91 through 1.1502–96 include references to disallowed business interest expense carryforwards or section 382 disallowed business interest carryforwards, within the meaning of § 1.382–2(a)(7), as appropriate.

(2) *Appropriate adjustments.* For purposes of applying the rules in §§ 1.1502–91 through 1.1502–96 to current-year business interest expense (within the meaning of § 1.163(j)–5(a)(2)(i)), disallowed business interest expense carryforwards, and section 382 disallowed business interest carryforwards, appropriate adjustments are required.

■ **Par. 25.** Section 1.1502–99 is amended by adding paragraph (d) to read as follows:

§ 1.1502–99 Effective/applicability dates.

* * * * *

(d) *Application to section 163(j)*—(1) *Sections 1.382–2 and 1.382–5.* To the extent the rules of §§ 1.1502–91 through 1.1502–99 effectuate the rules of §§ 1.382–2 and 1.382–5, the provisions apply with respect to ownership changes occurring on or after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. For loss corporations that have ownership changes occurring before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, see §§ 1.1502–91 through 1.1502–99 as contained in 26 CFR part 1, revised April 1, 2018. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of §§ 1.1502–91 through 1.1502–99 to the extent they apply the rules of §§ 1.382–2 and 1.382–5, to ownership changes occurring during a taxable year beginning after December 31, 2017, as well as consistently applying the rules of the §§ 1.1502–91 through 1.1502–99 to the extent they effectuate the rules of §§ 1.382–2, 1.382–5, 1.382–6, and 1.383–1, the section 163(j) regulations (within the meaning of § 1.163(j)–1(b)(32)), and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, and 1.1504–4 to taxable years beginning after December 31, 2017.

(2) *Sections 1.382–6 and 1.383–1.* To the extent the rules of §§ 1.1502–91 through 1.1502–98 effectuate the rules of §§ 1.382–6 and 1.383–1, the provisions apply with respect to ownership changes occurring during a taxable year ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. For the application of these rules to an ownership change with respect to an ownership change occurring during a taxable year ending before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, see §§ 1.1502–91 through 1.1502–99 as contained in 26 CFR part 1, revised April 1, 2018. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of §§ 1.1502–91 through 1.1502–99 (to the extent that those rules effectuate the rules of §§ 1.382–6 and 1.383–1), to ownership changes occurring during a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations (within the meaning of § 1.163(j)–1(b)(32)), and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, and 1.1504–4 to taxable years beginning after December 31, 2017.

■ **Par. 26.** Section 1.1504–4 is amended by:

■ 1. Removing ''163(j), 864(e),'' from paragraph the first sentence of paragraph (a)(2) and adding ''864(e)'' in its place; and

■ 2. Adding two sentences at the end of paragraph (i).

The addition reads as follows:

§ 1.1504–4 Treatment of warrants, options, convertible obligations, and other similar interests.

* * * * *

(i) * * * Paragraph (a)(2) of this section applies with respect to taxable years ending after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of this section, the section 163(j) regulations (within the meaning of § 1.163(j)–1(b)(32)), and if applicable, §§ 1.263A–9, 1.381(c)(20)–1, 1.382–6, 1.383–1, 1.469–9, 1.882–5, 1.1502–13, 1.1502–21, 1.1502–36, 1.1502–79, and 1.1502–91 through 1.1502–99 (to the extent they effectuate the rules of §§ 1.382–6, and 1.383–1), to those taxable years.

Dated: October 4, 2018.

Douglas W. O'Donnell,

Acting Deputy Commissioner for Services and Enforcement.

[FR Doc. 2018–26257 Filed 12–20–18; 4:15 pm]

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Part III

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1 and 301

Rules Regarding Certain Hybrid Arrangements; Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–104352–18]

RIN 1545–BO53

Rules Regarding Certain Hybrid Arrangements

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations implementing sections 245A(e) and 267A of the Internal Revenue Code (''Code'') regarding hybrid dividends and certain amounts paid or accrued in hybrid transactions or with hybrid entities. Sections 245A(e) and 267A were added to the Code by the Tax Cuts and Jobs Act, Public Law 115–97 (2017) (the ''Act''), which was enacted on December 22, 2017. This document also contains proposed regulations under sections 1503(d) and 7701 to prevent the same deduction from being claimed under the tax laws of both the United States and a foreign country. Further, this document contains proposed regulations under sections 6038, 6038A, and 6038C to facilitate administration of certain rules in the proposed regulations. The proposed regulations affect taxpayers that would otherwise claim a deduction related to such amounts and certain shareholders of foreign corporations that pay or receive hybrid dividends.

DATES: Written or electronic comments and requests for a public hearing must be received by February 26, 2019.

ADDRESSES: Send submissions to: Internal Revenue Service, CC:PA:LPD:PR (REG–104352–18), Room 5203, Post Office Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (indicate REG–104352–18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–104352–18).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, contact Tracy Villecco at (202) 317–3800; concerning submissions of comments or requests for a public hearing, Regina L. Johnson at (202) 317–6901 (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Background

I. In General

This document contains proposed amendments to 26 CFR parts 1 and 301 under sections 245A(e), 267A, 1503(d), 6038, 6038A, 6038C, and 7701 (the ''proposed regulations''). Added to the Code by sections 14101(a) and 14222(a) of the Act, section 245A(e) denies the dividends received deduction under section 245A with respect to hybrid dividends, and section 267A denies certain interest or royalty deductions involving hybrid transactions or hybrid entities. The proposed regulations only include rules under section 245A(e); rules addressing other aspects of section 245A, including the general eligibility requirements for the dividends received deduction under section 245A(a), will be addressed in a separate notice of proposed rulemaking. Section 14101(f) of the Act provides that section 245A, including section 245A(e), applies to distributions made after December 31, 2017. Section 14222(c) of the Act provides that section 267A applies to taxable years beginning after December 31, 2017. Other provisions of the Code, such as sections 894(c) and 1503(d), also address certain hybrid arrangements.

II. Purpose of Anti-Hybrid Rules

A cross-border transaction may be treated differently for U.S. and foreign tax purposes because of differences in the tax law of each country. In general, the U.S. tax treatment of a transaction does not take into account foreign tax law. However, in specific cases, foreign tax law is taken into account—for example, in the context of withholdable payments to hybrid entities for which treaty benefits are claimed under section 894(c) and for dual consolidated losses subject to section 1503(d)—in order to address policy concerns resulting from the different treatment of the same transaction or arrangement under U.S. and foreign tax law.

In response to international concerns regarding hybrid arrangements used to achieve double non-taxation, Action 2 of the OECD's Base Erosion and Profit Shifting (''BEPS'') project, and two final reports thereunder, address hybrid and branch mismatch arrangements. *See* OECD/G20, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2: 2015 Final Report* (October 2015) (the ''Hybrid Mismatch Report''); OECD/G20, *Neutralising the Effects of Branch Mismatch Arrangements, Action 2: Inclusive Framework on BEPS* (July 2017) (the ''Branch Mismatch Report''). The Hybrid Mismatch Report sets forth recommendations to neutralize the tax effects of hybrid arrangements that exploit differences in the tax treatment of an entity or instrument under the laws of two or more countries (such arrangements, ''hybrid mismatches''). The Branch Mismatch Report sets forth recommendations to neutralize the tax effects of certain arrangements involving branches that result in mismatches similar to hybrid mismatches (such arrangements, ''branch mismatches''). Given the similarity between hybrid mismatches and branch mismatches, the Branch Mismatch Report recommends that a jurisdiction adopting rules to address hybrid mismatches adopt, at the same time, rules to address branch mismatches. *See* Branch Mismatch Report, at p. 11, Executive Summary. Otherwise, taxpayers might ''shift[] from hybrid mismatch to branch mismatch arrangements in order to secure the same tax advantages.'' *Id.*

The Act's legislative history explains that section 267A is intended to be ''consistent with many of the approaches to the same or similar problems [regarding hybrid arrangements] taken in the Code, the OECD base erosion and profit shifting project (''BEPS''), bilateral income tax treaties, and provisions or rules of other countries.'' *See* Senate Committee on Finance, Explanation of the Bill, at 384 (November 22, 2017). The types of hybrid arrangements of concern are arrangements that ''exploit differences in the tax treatment of a transaction or entity under the laws of two or more tax jurisdictions to achieve double non-taxation, including long-term deferral.'' *Id.* Hybrid arrangements targeted by these provisions are those that rely on a hybrid element to produce such outcomes.

These concerns also arise in the context of section 245A as a result of the enactment of a participation exemption system for taxing foreign income. Under this system, section 245A(e) generally prevents double non-taxation by disallowing the 100 percent dividends received deduction for dividends received from a controlled foreign corporation (''CFC''), or by mandating subpart F inclusions for dividends received from a CFC by another CFC, if there is a corresponding deduction or other tax benefit in the foreign country.

Explanation of Provisions

I. Section 245A(e)—Hybrid Dividends

A. Overview

The proposed regulations under section 245A(e) address certain dividends involving hybrid arrangements. The proposed regulations

neutralize the double non-taxation effects of these dividends by either denying the section 245A(a) dividends received deduction with respect to the dividend or requiring an inclusion under section 951(a) with respect to the dividend, depending on whether the dividend is received by a domestic corporation or a CFC.

The proposed regulations provide that if a domestic corporation that is a United States shareholder within the meaning of section 951(b) (''U.S. shareholder'') of a CFC receives a ''hybrid dividend'' from the CFC, then the U.S. shareholder is not allowed the section 245A(a) deduction for the hybrid dividend, and the rules of section 245A(d) (denial of foreign tax credits and deductions) apply. *See* proposed § 1.245A(e)–1(b). In general, a dividend is a hybrid dividend if it satisfies two conditions: (i) But for section 245A(e), the section 245A(a) deduction would be allowed, and (ii) the dividend is one for which the CFC (or a related person) is or was allowed a deduction or other tax benefit under a ''relevant foreign tax law'' (such a deduction or other tax benefit, a ''hybrid deduction''). *See* proposed § 1.245A(e)–1(b) and (d). The proposed regulations take into account certain deductions or other tax benefits allowed to a person related to a CFC (such as a shareholder) because, for example, certain tax benefits allowed to a shareholder of a CFC are economically equivalent to the CFC having been allowed a deduction.

B. Relevant Foreign Tax Law

The proposed regulations define a relevant foreign tax law as, with respect to a CFC, any regime of any foreign country or possession of the United States that imposes an income, war profits, or excess profits tax with respect to income of the CFC, other than a foreign anti-deferral regime under which an owner of the CFC is liable to tax. *See* proposed § 1.245A(e)–1(f). Thus, for example, a relevant foreign tax law includes the tax law of a foreign country of which the CFC is a tax resident, as well as the tax law applicable to a foreign branch of the CFC.

C. Deduction or Other Tax Benefit

1. In General

Under the proposed regulations, only deductions or other tax benefits that are ''allowed'' under the relevant foreign tax law may constitute a hybrid deduction. *See* proposed § 1.245A(e)–1(d). Thus, for example, if the relevant foreign tax law contains hybrid mismatch rules under which a CFC is denied a deduction for an amount of interest paid with respect to a hybrid instrument to prevent a deduction/no-inclusion (''D/NI'') outcome, then the payment of the interest does not give rise to a hybrid deduction, because the deduction is not ''allowed.'' This prevents double-taxation that could arise if a hybrid dividend were subject to both section 245A(e) and a hybrid mismatch rule under a relevant foreign tax law.

For a deduction or other tax benefit to be a hybrid deduction, it must relate to or result from an amount paid, accrued, or distributed with respect to an instrument of the CFC that is treated as stock for U.S. tax purposes. That is, there must be a connection between the deduction or other tax benefit under the relevant foreign tax law and the instrument that is stock for U.S. tax purposes. Thus, a hybrid deduction includes an interest deduction under a relevant foreign tax law with respect to a hybrid instrument (stock for U.S. tax purposes, indebtedness for foreign tax purposes). It also includes dividends paid deductions and other deductions allowed on equity under a relevant foreign tax law, such as notional interest deductions (''NIDs''), which raise similar concerns as traditional hybrid instruments. However, it does not, for example, include an exemption provided to a CFC under its tax law for certain types of income (such as income attributable to a foreign branch), because there is not a connection between the tax benefit and the instrument that is stock for U.S. tax purposes.

The proposed regulations provide that deductions or other tax benefits allowed pursuant to certain integration or imputation systems do not constitute hybrid deductions. *See* proposed § 1.245A(e)–1(d)(2)(i)(B). However, a system that has the effect of exempting earnings that fund a distribution from foreign tax at both the CFC and shareholder level gives rise to a hybrid deduction. *See id.; see also* proposed § 1.245A(e)–1(g)(2), *Example 2.*

2. Effect of Foreign Currency Gain or Loss

The payment of an amount by a CFC may, under a provision of foreign tax law comparable to section 988, give rise to gain or loss to the CFC that is attributable to foreign currency. The proposed regulations provide that such foreign currency gain or loss recognized with respect to such deduction or other tax benefit is taken into account for purposes of determining hybrid deductions. *See* proposed § 1.245A(e)–1(d)(6); *see also* section II.K.1 of this Explanation of Provisions (requesting comments on foreign currency rules).

D. Tiered Hybrid Dividends

Proposed § 1.245A(e)–1(c) sets forth rules related to hybrid dividends of tiered corporations (''tiered hybrid dividends''), as provided under section 245A(e)(2). A tiered hybrid dividend means an amount received by a CFC from another CFC to the extent that the amount would be a hybrid dividend under proposed § 1.245A(e)–1(b) if the receiving CFC were a domestic corporation. Accordingly, the amount must be treated as a dividend under U.S. tax law to be treated as a tiered hybrid dividend; the treatment of the amount under the tax law in which the receiving CFC is a tax resident (or under any other foreign tax law) is irrelevant for this purpose.

If a CFC receives a tiered hybrid dividend from another CFC, and a domestic corporation is a U.S. shareholder of both CFCs, then (i) the tiered hybrid dividend is treated as subpart F income of the receiving CFC, (ii) the U.S. shareholder must include in gross income its pro rata share of the subpart F income, and (iii) the rules of section 245A(d) apply to the amount included in the U.S. shareholder's gross income. *See* proposed § 1.245A(e)–1(c)(1). This treatment applies notwithstanding any other provision of the Code. Thus, for example, exceptions to subpart F income such as those provided under section 954(c)(3) (''same country'' exception for income received from related persons) and section 954(c)(6) (look-through rule for related CFCs) do not apply. As additional examples, the gross amount of subpart F income cannot be reduced by deductions taken into account under section 954(b)(5) and § 1.954–1(c), and is not subject to the current earnings and profits limitation under section 952(c).

E. Interaction With Section 959

Distributions of previously taxed earnings and profits (''PTEP'') attributable to amounts that have been taken into account by a U.S. shareholder under section 951(a) are, in general, excluded from the gross income of the U.S. shareholder when distributed under section 959(a), and under section 959(d) are not treated as a dividend (other than to reduce earnings and profits). As a result, distributions from a CFC to its U.S. shareholder out of PTEP are not eligible for the dividends received deduction under section 245A(a), and section 245A(e) does not apply. Similarly, distributions of PTEP from a CFC to an upper-tier CFC are excluded from the gross income of the upper-tier CFC under section 959(b), but

only for the limited purpose of applying section 951(a). In addition, such amounts continue to be treated as dividends because section 959(d) does not apply to such amounts. Accordingly, distributions out of PTEP could qualify as tiered hybrid dividends that would result in an income inclusion to a U.S. shareholder. To prevent this result, the proposed regulations provide that a tiered hybrid dividend does not include amounts described in section 959(b). *See* proposed § 1.245A(e)–1(c)(2).

F. Interaction With Section 964(e)

Under section 964(e)(1), gain recognized by a CFC on the sale or exchange of stock in another foreign corporation may be treated as a dividend. In certain cases, section 964(e)(4): (i) Treats the dividend as subpart F income of the selling CFC; (ii) requires a U.S. shareholder of the CFC to include in its gross income its pro rata share of the subpart F income; and (iii) allows the U.S. shareholder the section 245A(a) deduction for its inclusion in gross income. As is the case with the treatment of tiered hybrid dividends, the treatment of dividends under section 964(e)(4) applies notwithstanding any other provision of the Code.

The proposed regulations coordinate the tiered hybrid dividend rules and the rules of section 964(e) by providing that, to the extent a dividend arising under section 964(e)(1) is a tiered hybrid dividend, the tiered hybrid dividend rules, rather than the rules of section 964(e)(4), apply. Thus, in such a case, a U.S. shareholder that includes an amount in its gross income under the tiered hybrid dividend rule is not allowed the section 245A(a) deduction, or foreign tax credits or deductions, for the amount. *See* proposed § 1.245A(e)–1(c)(1) and (4).

G. Hybrid Deduction Accounts

1. In General

In some cases, the actual payment by a CFC of an amount that is treated as a dividend for U.S. tax purposes will result in a corresponding hybrid deduction. In many cases, however, the dividend and the hybrid deduction may not arise pursuant to the same payment and may be recognized in different taxable years. This may occur in the case of a hybrid instrument for which under a relevant foreign tax law the CFC is allowed deductions for accrued (but not yet paid) interest. In such a case, to the extent that an actual payment has not yet been made on the instrument, there generally would not be a dividend for U.S. tax purposes for which the section 245A(a) deduction could be disallowed under section 245A(e). Nevertheless, because the earnings and profits of the CFC would not be reduced by the accrued interest deduction, the earnings and profits may give rise to a dividend when subsequently distributed to the U.S. shareholder. This same result could occur in other cases, such as when a relevant foreign tax law allows deductions on equity, such as NIDs.

The disallowance of the section 245A(a) deduction under section 245A(e) should not be limited to cases in which the dividend and the hybrid deduction arise pursuant to the same payment (or in the same taxable year for U.S. tax purposes and for purposes of the relevant foreign tax law). Interpreting the provision in such a manner would result in disparate treatment for hybrid arrangements that produce the same D/NI outcome. Accordingly, the proposed regulations define a hybrid dividend (or tiered hybrid dividend) based, in part, on the extent of the balance of the ''hybrid deduction accounts'' of the domestic corporation (or CFC) receiving the dividend. *See* proposed § 1.245A(e)–1(b) and (d). This ensures that dividends are subject to section 245A(e) regardless of whether the same payment gives rise to the dividend and the hybrid deduction.

A hybrid deduction account must be maintained with respect to each share of stock of a CFC held by a person that, given its ownership of the CFC and the share, could be subject to section 245A upon a dividend paid by the CFC on the share. *See* proposed § 1.245A(e)–1(d) and (f). The account, which is maintained in the functional currency of the CFC, reflects the amount of hybrid deductions of the CFC (allowed in taxable years beginning after December 31, 2017) that have been allocated to the share. A dividend paid by a CFC to a shareholder that has a hybrid deduction account with respect to the CFC is generally treated as a hybrid dividend or tiered hybrid dividend to the extent of the shareholder's balance in all of its hybrid deduction accounts with respect to the CFC, even if the dividend is paid on a share that has not had any hybrid deductions allocated to it. Absent such an approach, the purposes of section 245A(e) might be avoided by, for example, structuring dividend payments such that they are generally made on shares of stock to which a hybrid deduction has not been allocated (rather than on shares of stock to which a hybrid deduction has been allocated, such as a share that is a hybrid instrument).

Once an amount in a hybrid deduction account gives rise to a hybrid dividend or a tiered hybrid dividend, the account is correspondingly reduced. *See* proposed § 1.245A(e)–1(d). The Treasury Department and the IRS request comments on whether hybrid deductions attributable to amounts included in income under section 951(a) or section 951A should not increase the hybrid deduction account, or, alternatively, the hybrid deduction account should be reduced by distributions of PTEP, and on whether the effect of any deemed paid foreign tax credits associated with such inclusions or distributions should be considered.

2. Transfers of Stock

Because hybrid deduction accounts are with respect to stock of a CFC, the proposed regulations include rules that take into account transfers of the stock. *See* proposed § 1.245A(e)–1(d)(4)(ii)(A). These rules, which are similar to the ''successor'' PTEP rules under section 959 (*see* § 1.959–1(d)), ensure that section 245A(e) properly applies to dividends that give rise to a D/NI outcome in cases where the shareholder that receives the dividend is not the same shareholder that held the stock when the hybrid deduction was incurred. These rules only apply when the stock is transferred among persons that are required to keep hybrid deduction accounts. Thus, if the stock is transferred to a person that is not required to keep a hybrid deduction account—such as an individual or a foreign corporation that is not a CFC—the account terminates (subject to the anti-avoidance rule, discussed in section I.H of this Explanation of Provisions). Finally, the proposed regulations include rules that take into account certain non-recognition exchanges of the stock, such as exchanges in connection with asset reorganizations, recapitalizations, and liquidations, as well as transfers and exchanges that occur mid-way through a CFC's taxable year. *See* proposed § 1.245A(e)–1(d)(4)(ii)(B) and (d)(5). The Treasury Department and the IRS request comments on these rules.

3. Dividends From Lower-Tier CFCs

The proposed regulations provide a special rule to address earnings and profits of a lower-tier CFC that are included in a domestic corporation's income as a dividend by virtue of section 1248(c)(2). In these cases, the proposed regulations treat the domestic corporation as having certain hybrid deduction accounts with respect to the lower-tier CFC that are held and

maintained by other CFCs. *See* proposed § 1.245A(e)–1(b)(3). This ensures that, to the extent the earnings and profits of the lower-tier CFC give rise to the dividend, hybrid deduction accounts with respect to the lower-tier CFC are taken into account for purposes of the determinations under section 245A(e), even though the accounts are held indirectly by the domestic corporation. A similar rule applies with respect to gains on stock sales treated as dividends under section 964(e)(1). *See* proposed § 1.245A(e)–1(c)(3).

H. Anti-Avoidance Rule

The proposed regulations include an anti-avoidance rule. This rule provides that appropriate adjustments are made, including adjustments that would disregard a transaction or arrangement, if a transaction or arrangement is engaged in with a principal purpose of avoiding the purposes of proposed § 1.245A(e)–1.

II. Section 267A—Related Party Amounts Involving Hybrid Transactions and Hybrid Entities

A. Overview

As indicated in the Senate Finance Committee's Explanation of the Bill, hybrid arrangements may exploit differences under U.S. and foreign tax law between the tax characterization of an entity as transparent or opaque or differences in the treatment of financial instruments or other transactions. The proposed regulations under section 267A address certain payments or accruals of interest or royalties for U.S. tax purposes (the amount of such interest or royalty, a ''specified payment'') that involve hybrid arrangements, or similar arrangements involving branches, that produce D/NI (deduction/no inclusion) outcomes or indirect D/NI outcomes. *See also* section II.J.1 of this Explanation of Provisions (discussing certain amounts that are treated as specified payments). The proposed regulations neutralize the double non-taxation effects of the arrangements by denying a deduction for the specified payment to the extent of the D/NI outcome.

B. Scope

1. Disallowed Deductions

The proposed regulations generally disallow a deduction for a specified payment if and only if the payment is (i) a ''disqualified hybrid amount,'' meaning that it produces a D/NI outcome as a result of a hybrid or branch arrangement; (ii) a ''disqualified imported mismatch amount,'' meaning that it produces an indirect D/NI outcome as a result of the effects of an offshore hybrid or branch arrangement being imported into the U.S. tax system; or (iii) made pursuant to a transaction a principal purpose of which is to avoid the purposes of the regulations under section 267A and it produces a D/NI outcome. *See* proposed § 1.267A–1(b). Thus, the proposed regulations do not address D/NI outcomes that are not the result of hybridity. *See also* section II.E of this Explanation of Provisions (discussing the link between hybridity and a D/NI outcome). In addition, the proposed regulations do not address double-deduction outcomes. Section 267A is intended to address D/NI outcomes; transactions that produce double-deduction outcomes are addressed through other provisions (or doctrines), such as the dual consolidated loss rules under section 1503(d). *See also* section IV.A.1 of this Explanation of Provisions (discussing the dual consolidated loss rules).

2. Parties Subject to Section 267A

The application of section 267A by its terms is not limited to any particular category of persons. The proposed regulations, however, narrow the scope of section 267A so that it applies only to deductions of ''specified parties.'' Deductions of persons other than specified parties are not subject to disallowance under section 267A because the deductions of such other persons generally do not have significant U.S. tax consequences.

A specified party means any of (i) a tax resident of the United States, (ii) a CFC for which there is one or more United States shareholders that own (within the meaning of section 958(a)) at least ten percent of the stock of the CFC, and (iii) a U.S. taxable branch (which includes a U.S. permanent establishment of a tax treaty resident). *See* proposed § 1.267A–5(a). The term generally includes a CFC because, for example, a specified payment made by a CFC to the foreign parent of the CFC's U.S. shareholder, or a specified payment by the CFC to an unrelated party pursuant to a structured arrangement, may indirectly reduce income subject to U.S. tax. Specified payments made by a CFC to other related CFCs or to U.S. shareholders of the CFC, however, typically will not be subject to section 267A because of the rules in proposed § 1.267A–3(b) that exempt certain payments included in income of a U.S. tax resident or taken into account under the subpart F or global intangible low-tax income (''GILTI'') rules. *See also* section II.F of this Explanation of Provisions (discussing the relatedness or structured arrangement limitation); section II.H of this Explanation of Provisions (discussing exceptions for amounts included or includible in income). Similarly, the term includes a U.S. taxable branch because a payment made by the home office may be allocable to and thus reduce income subject to U.S. tax under sections 871(b) or 882. *See also* section II.K.2 of this Explanation of Provisions (discussing amounts considered paid or accrued by a U.S. taxable branch for section 267A purposes).

The term specified party does not include a partnership because a partnership generally is not liable to tax and therefore is not the person allowed a deduction. However, a partner of a partnership may be a specified party. For example, in the case of a payment made by a partnership a partner of which is a domestic corporation, the domestic corporation is a specified party and its allocable share of the deduction for the payment is subject to disallowance under section 267A.

C. Amount of a D/NI Outcome

1. In General

Proposed § 1.267A–3(a) provides rules for determining the ''no-inclusion'' aspect of a D/NI outcome—that is, the amount of a specified payment that is or is not included in income under foreign tax law. The proposed regulations provide that only ''tax residents'' or ''taxable branches'' are considered to include an amount in income. Parties other than tax residents or taxable branches, for example, an entity that is fiscally transparent for purposes of the relevant tax laws, do not include an amount in income because such parties are not liable to tax.

In general, a tax resident or taxable branch includes a specified payment in income for this purpose to the extent that, under its tax law, it includes the payment in its income or tax base at the full marginal rate imposed on ordinary income, and the payment is not reduced or offset by certain items (such as an exemption or credit) particular to that type of payment. *See* proposed § 1.267A–3(a)(1).

Whether a tax resident or taxable branch includes a specified payment in income is determined without regard to any defensive or secondary rule in hybrid mismatch rules (which generally requires the payee to include certain amounts in income, if the payer is not denied a deduction for the amount), if any, under the tax resident's or taxable branch's tax law. Otherwise, in cases in which such tax law contains a secondary response, the analysis of whether the specified payment is

included in income could become circular: For example, whether the United States denies a deduction under section 267A may depend on whether the payee includes the specified payment in income, and whether the payee includes it in income (under a secondary response) may depend on whether the United States denies the deduction.

A specified payment may be considered included in income even though offset by a generally applicable deduction or other tax attribute, such as a deduction for depreciation or a net operating loss. For this purpose, a deduction may be treated as being generally applicable even if closely related to the specified payment (for example, if the deduction and payment are in connection with a back-to-back financing arrangement).

If a specified payment is taxed at a preferential rate, or if there is a partial reduction or offset particular to the type of payment, a portion of the payment is considered included in income. The portion included in income is the amount that, taking into account the preferential rate or reduction or offset, is subject to tax at the full marginal rate applicable to ordinary income. *See* proposed § 1.267A–3(a)(1); *see also* proposed § 1.267A–6(c), *Example 2* and *Example 7.*

2. Timing Differences

Some specified payments may never be included in income. For example, a specified payment treated as a dividend under a tax resident's tax laws may be permanently excluded from its income under a participation exemption. Permanent exclusions are always treated as giving rise to a no-inclusion. *See* proposed § 1.267A–3(a)(1).

Other specified payments, however, may be included in income but on a deferred basis. Some of these timing differences result from different methods of accounting between U.S. tax law and foreign tax law. For example, and subject to certain limitations such as those under sections 163(e)(3) and 267(a) (generally applicable to payments involving related parties, but not to payments involving structured arrangements), a specified payment may be deductible for U.S. tax purposes when accrued and later included in a foreign tax resident's income when actually paid. *See also* section II.K.3 of this Explanation of Provisions (discussing the coordination of section 267A with rules such as sections 163(e)(3) and 267(a)). Timing differences may also occur in cases in which all or a portion of a specified payment that is treated as interest for U.S. tax purposes is treated as a return of principal for purposes of the foreign tax law.

In some cases, timing differences reverse after a short period of time and therefore do not provide a meaningful deferral benefit. The Treasury Department and the IRS have determined that routine, short-term deferral does not give rise to the policy concerns that section 267A is intended to address. In addition, subjecting such short-term deferral to section 267A could give rise to administrability issues for both taxpayers and the IRS, because it may be challenging to determine whether the taxable period in which a specified payment is included in income matches the taxable period in which the payment is deductible.

Other timing differences, though, may provide a significant and long-term deferral benefit. Moreover, taxpayers may structure transactions that exploit these differences to achieve long-term deferral benefits. Timing differences that result in long-term deferral have an economic effect similar to a permanent exclusion and therefore give rise to policy concerns that section 267A is intended to address. *See* Senate Explanation, at 384 (expressing concern with hybrid arrangements that ''achieve double non-taxation, including long-term deferral.''). Accordingly, proposed § 1.267A–3(a)(1) provides that short-term deferral, meaning inclusion during a taxable year that ends no more than 36 months after the end of the specified party's taxable year, does not give rise to a D/NI outcome; inclusions outside of the 36-month timeframe, however, are treated as giving rise to a D/NI outcome.

D. Hybrid and Branch Arrangements Giving Rise to Disqualified Hybrid Amounts

1. Hybrid Transactions

Proposed § 1.267A–2(a) addresses hybrid financial instruments and similar arrangements (collectively, ''hybrid transactions'') that result in a D/NI outcome. For example, in the case of an instrument that is treated as indebtedness for purposes of the payer's tax law and stock for purposes of the payee's tax law, a payment on the instrument may constitute deductible interest expense of the payer and excludible dividend income of the payee (for instance, under a participation exemption).

In general, the proposed regulations provide that a specified payment is made pursuant to a hybrid transaction if there is a mismatch in the character of the instrument or arrangement such that the payment is not treated as interest or a royalty, as applicable, under the tax law of a ''specified recipient.'' Examples of such a specified payment include a payment that is treated as interest for U.S. tax purposes but, for purposes of a specified recipient's tax law, is treated as a distribution on equity or a return of principal. When a specified payment is made pursuant to a hybrid transaction, it generally is a disqualified hybrid amount to the extent that the specified recipient does not include the payment in income.

The proposed regulations broadly define specified recipient as (i) any tax resident that under its tax law derives the specified payment, and (ii) any taxable branch to which under its tax law the specified payment is attributable. *See* proposed § 1.267A–5(a)(19). In other words, a specified recipient is any party that may be subject to tax on the specified payment under its tax law. There may be more than one specified recipient of a specified payment. For example, in the case of a specified payment to an entity that is fiscally transparent for purposes of the tax law of its tax resident owners, each of the owners is a specified recipient of a share of the payment. In addition, if the entity is a tax resident of the country in which it is established or managed and controlled, then the entity is also a specified recipient. Moreover, in the case of a specified payment attributable to a taxable branch, both the taxable branch and the home office are specified recipients.

The proposed regulations deem a specified payment as made pursuant to a hybrid transaction if there is a long-term mismatch between when the specified party is allowed a deduction for the payment under U.S. tax law and when a specified recipient includes the payment in income under its tax law. This rule applies, for example, when a specified payment is made pursuant to an instrument viewed as indebtedness under both U.S. and foreign tax law and, due to a mismatch in tax accounting treatment between the U.S. and foreign tax law, results in long-term deferral. In these cases, this rule treats the long-term deferral as giving rise to a hybrid transaction; the rules in proposed § 1.267A–3(a)(1) (discussed in section II.C.2 of this Explanation of Provisions) treat the long-term deferral as creating a D/NI outcome.

Lastly, proposed § 1.267A–2(a)(3) provides special rules to address securities lending transactions, sale-repurchase transactions, and similar transactions. In these cases, a specified payment (that is, interest consistent with the substance of the transaction) might not be regarded under a foreign

tax law. As a result, there might not be a specified recipient of the specified payment under such foreign tax law, absent a special rule. To address this scenario, the proposed regulations provide that the determination of the identity of a specified recipient under the foreign tax law is made with respect to an amount connected to the specified payment and regarded under the foreign tax law—for example, a dividend consistent with the form of the transaction. The Treasury Department and the IRS request comments on whether similar rules should be extended to other specific transactions.

2. Disregarded Payments

Proposed § 1.267A–2(b) addresses disregarded payments. Disregarded payments generally give rise to a D/NI outcome because they are regarded under the payer's tax law and are therefore available to offset income not taxable to the payee, but are disregarded under the payee's tax law and therefore are not included in income.

In general, the proposed regulations define a disregarded payment as a specified payment that, under a foreign tax law, is not regarded because, for example, it is a disregarded transaction involving a single taxpayer or between consolidated group members. For example, a disregarded payment includes a specified payment made by a domestic corporation to its foreign owner if, under the foreign tax law, the domestic corporation is a disregarded entity and therefore the payment is not regarded. It also includes a specified payment between related foreign corporations that are members of the same foreign consolidated group (or can otherwise share income or loss) if, under the foreign tax law, payments between group members are not regarded, or give rise to a deduction or similar offset to the payer member that is available to offset the corresponding income of the recipient member.

In general, a disregarded payment is a disqualified hybrid amount only to the extent it exceeds dual inclusion income. For example, if a domestic corporation that for foreign tax purposes is a disregarded entity of its foreign owner makes a disregarded payment to its foreign owner, the payment is a disqualified hybrid amount only to the extent it exceeds the net of the items of gross income and deductible expense taken into account in determining the domestic corporation's income for U.S. tax purposes and the foreign owner's income for foreign tax purposes. This prevents the excess of the disregarded payment over dual inclusion income from offsetting non-dual inclusion income. Such an offset could otherwise occur, for example, through the U.S. consolidation regime, or a sale, merger, or similar transaction.

A disregarded payment could also be viewed as being made pursuant to a hybrid transaction because the payment of interest or royalty would not be viewed as interest or royalty under the foreign tax law (since the payment is disregarded). The proposed regulations address disregarded payments separately from hybrid transactions, however, because disregarded payments are more likely to offset dual inclusion income and therefore are treated as disqualified hybrid amounts only to the extent they offset non-dual inclusion income.

3. Deemed Branch Payments

Proposed § 1.267A–2(c) addresses deemed branch payments. These payments result in a D/NI outcome when, under an income tax treaty, a deductible payment is deemed to be made by a permanent establishment to its home office and offsets income not taxable to the home office, but the payment is not taken into account under the home office's tax law.

In general, the proposed regulations define a deemed branch payment as interest or royalty considered paid by a U.S. permanent establishment to its home office under an income tax treaty between the United States and the home office country. *See* proposed § 1.267A–2(c)(2). Thus, for example, a deemed branch payment includes an amount allowed as a deduction in computing the business profits of a U.S. permanent establishment with respect to the use of intellectual property developed by the home office. *See,* for example, the U.S. Treasury Department Technical Explanation to the income tax convention between the United States and Belgium, signed November 27, 2006 (''[T]he OECD Transfer Pricing Guidelines apply, by analogy, in determining the profits attributable to a permanent establishment.'').

When a specified payment is a deemed branch payment, it is a disqualified hybrid amount if the home office's tax law provides an exclusion or exemption for income attributable to the branch. In these cases, a deduction for the deemed branch payment would offset non-dual inclusion income and therefore give rise to a D/NI outcome. If the home office's tax law does not have an exclusion or exemption for income attributable to the branch, then, because U.S. permanent establishments cannot consolidate or otherwise share losses with U.S. taxpayers, there would generally not be an opportunity for a deduction for the deemed branch payment to offset non-dual inclusion income.

4. Reverse Hybrids

Proposed § 1.267A–2(d) addresses payments to reverse hybrids. In general, and as discussed below, a reverse hybrid is an entity that is fiscally transparent for purposes of the tax law of the country in which it is established but not for purposes of the tax law of its owner. Thus, payments to a reverse hybrid may result in a D/NI outcome because the reverse hybrid is not a tax resident of the country in which it is established, and the owner does not derive the payment under its tax law. Because this D/NI outcome may occur regardless of whether the establishment country is a foreign country or the United States, the proposed regulations provide that both foreign and domestic entities may be reverse hybrids. A domestic entity that is a reverse hybrid for this purpose therefore differs from a ''domestic reverse hybrid entity'' under § 1.894–1(d)(2)(i), which is defined as ''a domestic entity that is treated as not fiscally transparent for U.S. tax purposes and as fiscally transparent under the laws of an interest holder's jurisdiction[.]''

For an entity to be a reverse hybrid under the proposed regulations, two requirements must be satisfied. These requirements generally implement the definition of hybrid entity in section 267A(d)(2), with certain modifications. First, the entity must be fiscally transparent under the tax law of the country in which it is established, whether or not it is a tax resident of another country. For this purpose, the determination of whether an entity is fiscally transparent with respect to an item of income is made using the principles of § 1.894–1(d)(3)(ii) (but without regard to whether there is an income tax treaty in effect between the entity's jurisdiction and the United States).

Second, the entity must not be fiscally transparent under the tax law of an ''investor.'' An investor means a tax resident or taxable branch that directly or indirectly owns an interest in the entity. For this purpose, the determination of whether an investor's tax law treats the entity as fiscally transparent with respect to an item of income is made under the principles of § 1.894–1(d)(3)(iii) (but without regard to whether there is an income tax treaty in effect between the investor's jurisdiction and the United States). If an investor views the entity as not fiscally transparent, the investor generally will not be currently taxed under its tax law

on payments to the entity. Thus, the non-fiscally-transparent status of the entity is determined on an investor-by-investor basis, based on the tax law of each investor. In addition, a tax resident or a taxable branch may be an investor of a reverse hybrid even if the tax resident or taxable branch indirectly owns the reverse hybrid through one or more intermediary entities that, under the tax law of the tax resident or taxable branch, are not fiscally transparent. In such a case, however, the investor's no-inclusion would not be a result of the payment being made to the reverse hybrid and therefore would not be a disqualified hybrid amount. *See also* section II.E of this Explanation of Provisions (explaining that the D/NI outcome must be a result of hybridity); proposed § 1.267A–6(c), *Example 5* (analyzing whether a D/NI outcome with respect to an upper-tier investor is a result of the specified payment being made to the reverse hybrid).

When a specified payment is made to a reverse hybrid, it is generally a disqualified hybrid amount to the extent that an investor does not include the payment in income. For this purpose, whether an investor includes the specified payment in income is determined without regard to a subsequent distribution by the reverse hybrid. Although a subsequent distribution may be included in the investor's income, the distribution may not occur for an extended period and, when it does occur, it may be difficult to determine whether the distribution is funded from an amount comprising the specified payment.

In addition, if an investor takes a specified payment into account under an anti-deferral regime, then the investor is considered to include the payment in income to the extent provided under the general rules of proposed § 1.267A–3(a). *See* proposed § 1.267A–6(c), *Example 5.* Thus, for example, if the investor's inclusion under the anti-deferral regime is subject to tax at a preferential rate, the investor is considered to include only a portion of the specified payment in income.

5. Branch Mismatch Payments

Proposed § 1.267A–2(e) addresses branch mismatch payments. These payments give rise to a D/NI outcome due to differences between the home office's tax law and the branch's tax law regarding the allocation of items of income or the treatment of the branch. This could occur, for example, if the home office's tax law views a payment as attributable to the branch and exempts the branch's income, but the branch's tax law does not tax the payment.

Under the proposed regulations, a specified payment is a branch mismatch payment when two requirements are satisfied. First, under a home office's tax law, the specified payment is treated as attributable to a branch of the home office. Second, under the tax law of the branch country, either (i) the home office does not have a taxable presence in the country, or (ii) the specified payment is treated as attributable to the home office and not the branch. When a specified payment is a branch mismatch payment, it is generally a disqualified hybrid amount to the extent that the home office does not include the payment in income.

E. Link Between Hybridity and D/NI Outcome

Under section 267A(a), a deduction for a payment is generally disallowed if (i) the payment involves a hybrid arrangement, and (ii) a D/NI outcome occurs. In certain cases, although both of these conditions are satisfied, the D/NI outcome is not a result of the hybridity. For example, in the hybrid transaction context, the D/NI outcome may be a result of the specified recipient's tax law containing a pure territorial system (and thus exempting from taxation all foreign source income) or not having a corporate income tax, or a result of the specified recipient's status as a tax-exempt entity under its tax law.

The proposed regulations provide that a D/NI outcome gives rise to a disqualified hybrid amount only to the extent that the D/NI outcome is a result of hybridity. *See,* for example, proposed § 1.267A–2(a)(1)(ii); *see also* Senate Explanation, at 384 (''[T]he Committee believes that hybrid arrangements exploit differences in the tax treatment of a transaction or entity under the laws of two or more jurisdictions *to achieve* double non-taxation . . .'') (emphasis added).

To determine whether a D/NI outcome is a result of hybridity, the proposed regulations generally apply a test based on facts that are counter to the hybridity at issue. For example, in the hybrid transaction context, a specified recipient's no-inclusion is a result of the specified payment being made pursuant to the hybrid transaction to the extent that the no-inclusion would not occur were the payment to be treated as interest or a royalty for purposes of the specified recipient's tax law.

This test also addresses cases in which, for example, a specified payment is made to a fiscally transparent entity (such as a partnership) and owners of the entity that are specified recipients of the payment each derive only a portion of the payment under its tax law. The test ensures that, with respect to each specified recipient, only the no-inclusion that occurs for the portion of the specified payment that it derives may give rise to a disqualified hybrid amount. In addition, as a result of the relatedness or structured arrangement limitation discussed in section II.F of this Explanation of Provisions, the no-inclusion with respect to the specified recipient is taken into account under the proposed regulations only if the specified recipient is related to the specified party or is a party to a structured arrangement pursuant to which the specified payment is made.

F. Relatedness or Structured Arrangement Limitation

In determining whether a specified payment is made pursuant to a hybrid or branch mismatch arrangement, the proposed regulations generally only consider the tax laws of tax residents or taxable branches that are related to the specified party. *See* proposed § 1.267A–2(f). For example, in general, only the tax law of a specified recipient that is related to the specified party is taken into account for purposes of determining whether the specified payment is made pursuant to a hybrid transaction. Because a deemed branch payment by its terms involves a related home office, the relatedness limitation in proposed § 1.267A–2(f) does not apply to proposed § 1.267A–2(c).

The proposed regulations provide that related status is determined under the rules of section 954(d)(3) (involving ownership of more than 50 percent of interests) but without regard to downward attribution. *See* proposed § 1.267A–5(a)(14). In addition, to ensure that a tax resident may be considered related to a specified party even though the tax resident is a disregarded entity for U.S. tax purposes, the proposed regulations provide that such a tax resident is treated as a corporation for purposes of the relatedness test. A similar rule applies with respect to a taxable branch.

However, the Treasury Department and the IRS are aware that some hybrid arrangements involving unrelated parties are designed to give rise to a D/NI outcome and therefore present the policy concerns underlying section 267A. Furthermore, it is likely that in such cases the specified party will have, or can reasonably obtain, the information necessary to comply with section 267A. Accordingly, the proposed regulations generally provide

that the tax law of an unrelated tax resident or taxable branch is taken into account for purposes of section 267A if the tax resident or taxable branch is a party to a structured arrangement. *See* proposed § 1.267A–2(f). The proposed regulations set forth a test for when a transaction is a structured arrangement. *See* proposed § 1.267A–5(a)(20). In addition, the proposed regulations impute an entity's participation in a structured arrangement to its investors. *See id.* Thus, for example, in the case of a specified payment to a partnership that is a party to a structured arrangement pursuant to which the payment is made, a tax resident that is a partner of the partnership is also a party to the structured arrangement, even though the tax resident may not have actual knowledge of the structured arrangement.

G. Effect of Inclusion in Another Jurisdiction

The proposed regulations provide that a specified payment is a disqualified hybrid amount if a D/NI outcome occurs as a result of hybridity in any foreign jurisdiction, even if the payment is included in income in another foreign jurisdiction. *See* proposed § 1.267A–6(c), *Example 1.* Absent such a rule, an inclusion of a specified payment in income in a jurisdiction with a (generally applicable) low rate might discharge the application of section 267A even though a D/NI outcome occurs in another jurisdiction as a result of hybridity.

For example, assume FX, a tax resident of Country X, owns US1, a domestic corporation, and FZ, a tax resident of Country Z that is fiscally transparent for Country X tax purposes. Also, assume that Country Z has a single, low-tax rate applicable to all income. Further, assume that FX holds an instrument issued by US1, a $100x payment with respect to which is treated as interest for U.S. tax purposes and an excludible dividend for Country X tax purposes. In an attempt to avoid US1's deduction for the $100x payment being denied under the hybrid transaction rule, FX contributes the instrument to FZ, and, upon US1's $100x payment, US1 asserts that, although a $100x no-inclusion occurs with respect to FX as a result of the payment being made pursuant to the hybrid transaction, the payment is not a disqualified hybrid amount because FZ fully includes the payment in income (albeit at a low-tax rate). The proposed regulations treat the payment as a disqualified hybrid amount.

This rule only applies for inclusions under the laws of foreign jurisdictions. See proposed § 1.267A–3(b), and section II.H of this Explanation of Provisions, for exceptions that apply when the payment is included or includible in a U.S. tax resident's or U.S. taxable branch's income.

The Treasury Department and IRS request comments on whether an exception should apply if the specified payment is included in income in any foreign jurisdiction, taking into account accommodation transactions involving low-tax entities.

H. Exceptions for Certain Amounts Included or Includible in a U.S. Tax Resident's or U.S. Taxable Branch's Income

Proposed § 1.267A–3(b) provides rules that reduce disqualified hybrid amounts to the extent the amounts are included or includible in a U.S. tax resident's or U.S. taxable branch's income. In general, these rules ensure that a specified payment is not a disqualified hybrid amount to the extent included in the income of a tax resident of the United States or a U.S. taxable branch, or taken into account by a U.S. shareholder under the subpart F or GILTI rules.

Source-based withholding tax imposed by the United States (or any other country) on disqualified hybrid amounts does not neutralize the D/NI outcome and therefore does not reduce or otherwise affect disqualified hybrid amounts. Withholding tax policies are unrelated to the policies underlying hybrid arrangements—for example, withholding tax can be imposed on non-hybrid payments—and, accordingly, withholding tax is not a substitute for a specified payment being included in income by a tax resident or taxable branch. *See also* section II.L of this Explanation of Provisions (interaction with withholding taxes and income tax treaties). Furthermore, other jurisdictions applying the defensive or secondary rule to a payment (which generally requires the payee to include the payment in income, if the payer is not denied a deduction for the payment under the primary rule) may not treat withholding taxes as satisfying the primary rule and may therefore require the payee to include the payment in income if a deduction for the payment is not disallowed (regardless of whether withholding tax has been imposed).

Thus, the proposed regulations do not treat amounts subject to U.S. withholding taxes as reducing disqualified hybrid amounts. Nevertheless, the Treasury Department and the IRS request comments on the interaction of the proposed regulations with withholding taxes and whether, and the extent to which, there should be special rules under section 267A when withholding taxes are imposed in connection with a specified payment, taking into account how such a rule could be coordinated with the hybrid mismatch rules of other jurisdictions.

I. Disqualified Imported Mismatch Amounts

Proposed § 1.267A–4 sets forth a rule to address ''imported'' hybrid and branch arrangements. This rule is generally intended to prevent the effects of an ''offshore'' hybrid arrangement (for example, a hybrid arrangement between two foreign corporations completely outside the U.S. taxing jurisdiction) from being shifted, or ''imported,'' into the U.S. taxing jurisdiction through the use of a non-hybrid arrangement.

Accordingly, the proposed regulations disallow deductions for specified payments that are ''disqualified imported mismatch amounts.'' In general, a disqualified imported mismatch amount is a specified payment: (i) That is non-hybrid in nature, such as interest paid on an instrument that is treated as indebtedness for both U.S. and foreign tax purposes, and (ii) for which the income attributable to the payment is directly or indirectly offset by a hybrid deduction of a foreign tax resident or taxable branch. The rule addresses ''indirect'' offsets in order to take into account, for example, structures involving intermediaries where the foreign tax resident that receives the specified payment is different from the foreign tax resident that incurs the hybrid deduction. *See* proposed § 1.267A–6(c), *Example 8, Example 9,* and *Example 10.*

In general, a hybrid deduction for purposes of the imported mismatch rule is an amount for which a foreign tax resident or taxable branch is allowed an interest or royalty deduction under its tax law, to the extent the deduction would be disallowed if such tax law were to contain rules substantially similar to the section 267A proposed regulations. For this purpose, it is not relevant whether the amount is recognized as interest or a royalty under U.S. law, or whether the amount would be allowed as a deduction under U.S. law. Thus, for example, a deduction with respect to equity (such as a notional interest deduction) constitutes a hybrid deduction even though such a deduction would not be recognized (or allowed) under U.S. tax law. As another example, a royalty deduction under foreign tax law may constitute a hybrid deduction even though for U.S. tax purposes the royalty is viewed as made

from a disregarded entity to its owner and therefore is not regarded.

The requirement that the deduction would be disallowed if the foreign tax law were to contain rules substantially similar to those under section 267A is intended to limit the application of the imported mismatch rule to cases in which, had the foreign-to-foreign hybrid arrangement instead involved a specified party, section 267A would have applied to disallow the deduction. In other words, this requirement prevents the imported mismatch rule from applying to arrangements outside the general scope of section 267A, even if the arrangements are hybrid in nature and result in a D/NI (or similar) outcome. For example, in the case of a deductible payment of a foreign tax resident to a tax resident of a foreign country that does not impose an income tax, the deduction would generally not be a hybrid deduction—even though it may be made pursuant to a hybrid instrument—because the D/NI outcome would not be a result of hybridity. *See* section II.E of this Explanation of Provisions (requiring a link between hybridity and the D/NI outcome, for a specified payment to be a disqualified hybrid amount).

Further, the proposed regulations include ''ordering'' and ''funding'' rules to determine the extent that a hybrid deduction directly or indirectly offsets income attributable to a specified payment. In addition, the proposed regulations provide that certain payments made by non-specified parties the tax laws of which contain hybrid mismatch rules are taken into account when applying the ordering and funding rules. Together, these provisions are intended to coordinate proposed § 1.267A–4 with foreign imported mismatch rules, in order to prevent the same hybrid deduction from resulting in deductions for non-hybrid payments being disallowed under imported mismatch rules in more than one jurisdiction.

J. Definitions of Interest and Royalty

1. Interest

There are no generally applicable regulations or statutory provisions addressing when financial instruments are treated as debt for U.S. tax purposes or when a payment is interest. As a general matter, however, the factors that distinguish debt from equity are described in Notice 94–47, 1994–1 C.B. 357, and interest is defined as compensation for the use or forbearance of money. *Deputy* v. *Dupont,* 308 U.S. 488 (1940).

Using these principles, the proposed regulations define interest broadly to include interest associated with conventional debt instruments, other amounts treated as interest under the Code, as well as transactions that are indebtedness in substance although not in form. *See* proposed § 1.267A–5(a)(12).

In addition, in order to address certain structured transactions, the proposed regulations apply equally to ''structured payments.'' Proposed § 1.267A–5(b)(5) defines structured payments to include a number of items such as an expense or loss predominately incurred in consideration of the time value of money in a transaction or series of integrated or related transactions in which a taxpayer secures the use of funds for a period of time. This approach is consistent with the rules treating such payments similarly to interest under §§ 1.861–9T and 1.954–2.

The definitions of interest and structured payments also provide for adjustments to the amount of interest expense or structured payments, as applicable, to reflect the impact of derivatives that affect the economic yield or cost of funds of a transaction involving interest or structured payments. The definitions of interest and structured payments contained in the proposed regulations apply only for purposes of section 267A. However, solely for purposes of certain other provisions, similar definitions apply. For example, the definition of interest and structured payments under the proposed regulations is similar in scope to the definition of items treated similarly to interest under § 1.861–9T for purposes of allocating and apportioning deductions under section 861 and similar to the items treated as interest expense for purposes of section 163(j) in proposed regulations under section 163(j).

The Treasury Department and the IRS considered three options with respect to the definition of interest for purposes of section 267A. The first option considered was to not provide a definition of interest, and thus rely on general tax principles and case law to define interest for purposes of section 267A. While adopting this option might reduce complexity for some taxpayers, not providing an explicit definition of interest would create its own uncertainty as neither taxpayers nor the IRS might have a clear sense of what types of payments are treated as interest expense subject to disallowance under section 267A. Such uncertainty could increase burdens to the IRS and taxpayers by increasing the number of disputes about whether particular payments are interest for section 267A purposes. Moreover, this option could be distortive as it would provide an incentive to taxpayers to engage in transactions generating deductions economically similar to interest while asserting that such deductions are not described by existing principles defining interest expense. If successful, such strategies could allow taxpayers to avoid the application of section 267A through transactions that are similar to transactions involving interest.

The second option considered would have been to adopt a definition of interest but limit the scope of the definition to cover only amounts associated with conventional debt instruments and amounts that are generally treated as interest for all purposes under the Code or regulations prior to the passage of the Act. This would be equivalent to only adopting the rule that is proposed in § 1.267A–5(a)(12)(i) without also addressing structured payments, which are described in proposed § 1.267A–5(b)(5). While this would clarify what would be deemed interest for purposes of section 267A, the Treasury Department and the IRS have determined that this approach would potentially distort future financing transactions. Some taxpayers would choose to use financial instruments and transactions that provide a similar economic result of using a conventional debt instrument, but would avoid the label of interest expense under such a definition, potentially enabling these taxpayers to avoid the application of section 267A. As a result, under this second approach, there would still be an incentive for taxpayers to engage in the type of avoidance transactions discussed in the first alternative.

The final option considered and the one ultimately adopted in the proposed regulations is to provide a complete definition of interest that addresses all transactions that are commonly understood to produce interest expense, as well as structured payments that may have been entered into to avoid the application of section 267A. The proposed regulations also reduce taxpayer burden by adopting definitions of interest that have already been developed and administered in §§ 1.861–9T and 1.954–2 and that have been proposed for purposes of section 163(j). The definition of interest provided in the proposed regulations applies only for purposes of section 267A and not for other purposes of the Code, such as section 904(d)(3).

The Treasury Department and the IRS welcome comments on the definition of

interest for purposes of section 267A contained in the proposed regulations.

2. Royalty

Section 267A does not define the term royalty and there is no universal definition of royalty under the Code. The Treasury Department and the IRS considered providing no definition for royalties. However, similar to the discussion in Section II.J.1 of this Explanation of Provisions with respect to the definition of interest, not providing a definition for royalties and relying instead on general tax principles could create uncertainty as neither taxpayers nor the IRS might have a clear sense of what types of payments are treated as royalties subject to disallowance under section 267A. Such uncertainty could increase burdens to the IRS and taxpayers with respect to disputes about whether particular payments are royalties for section 267A purposes.

Instead, the Treasury Department and the IRS have determined that providing a definition of royalties would increase certainty, and therefore the proposed regulations define the term royalty for purposes of section 267A to include amounts paid or accrued as consideration for the use of, or the right to use, certain intellectual property and certain information concerning industrial, commercial or scientific experience. *See* proposed § 1.267A–5(a)(16). The term does not include amounts paid or accrued for after-sales services, for services rendered by a seller to the purchaser under a warranty, for pure technical assistance, or for an opinion given by an engineer, lawyer or accountant. The definition of royalty provided in the proposed regulations applies only for purposes of section 267A and not for other purposes of the Code, such as section 904(d)(3).

The definition of royalty is generally based on the definition used in tax treaties and, in particular, the definition incorporated into Article 12 of the 2006 U.S. Model Income Tax Treaty. This definition is also generally consistent with the language of section 861(a)(4). In addition, similar to the approach in the technical explanation to Article 12 of the 2006 U.S. Model Income Tax Treaty, the proposed regulations provide certain circumstances where payments are not treated as paid or accrued in consideration for the use of information concerning industrial, commercial or scientific experience. By using definitions that have already been developed and administered in other contexts, the proposed regulations provide an approach that reduces taxpayer burdens and uncertainty. The Treasury Department and the IRS welcome comments on the definition of royalty for purposes of section 267A contained in the proposed regulations.

K. Miscellaneous Issues

1. Effect of Foreign Currency Gain or Loss

The proposed regulations provide that foreign currency gain or loss recognized under section 988 is not separately taken into account under section 267A. *See* proposed § 1.267A–5(b)(2). Rather, foreign currency gain or loss recognized with respect to a specified payment is taken into account under section 267A only to the extent that the specified payment is in respect of accrued interest or an accrued royalty for which a deduction is disallowed under section 267A. Thus, for example, a section 988 loss recognized with respect to a specified payment of interest is not separately taken into account under section 267A (even though under the tax law of the tax resident to which the specified payment is made the tax resident does not include in income an amount corresponding to the section 988 loss, as the specified payment is made in the tax resident's functional currency).

The Treasury Department and the IRS recognize that additional rules addressing the effect of different foreign currencies may be necessary. For example, a hybrid deduction for purposes of the imported mismatch rule may be denominated in a different currency than a specified payment, in which case a translation rule may be necessary to determine the amount of the specified payment that is subject to the imported mismatch rule. The Treasury Department and the IRS request comments on foreign currency rules, including any rules regarding the translation of amounts between currencies, for purposes of the proposed regulations under sections 245A and 267A.

2. Payments by U.S. Taxable Branches

Certain expenses incurred by a nonresident alien or foreign corporation are allowed as deductions under sections 873(a) and 882(c) in determining that person's effectively connected income. To the extent the deductions arise from transactions involving certain hybrid or branch arrangements, the deductions should be disallowed under section 267A, as discussed in section II.B of this Explanation of Provisions. The proposed regulations do so by (i) treating a U.S. taxable branch (which includes a permanent establishment of a foreign person) as a specified party, and (ii) providing rules regarding interest or royalties considered paid or accrued by a U.S. taxable branch, solely for purposes of section 267A (and thus not for other purposes, such as chapter 3 of the Code). *See* proposed § 1.267A–5(b)(3). The effect of this approach is that interest or royalties considered paid or accrued by a U.S. taxable branch are specified payments that are subject to the rules of proposed §§ 1.267A–1 through 1.267A–4. *See also* proposed § 1.267A–6(c), *Example 4.*

In general, a U.S. taxable branch is considered to pay or accrue any interest or royalties allocated or apportioned to effectively connected income of the U.S. taxable branch. *See* proposed § 1.267A–5(b)(3)(i). However, if a U.S. taxable branch constitutes a U.S. permanent establishment of a treaty resident, then the U.S. permanent establishment is considered to pay or accrue the interest or royalties deductible in computing its business profits. Although interest paid by a U.S. taxable branch may be subject to withholding tax as determined under section 884(f)(1)(A) and § 1.884–4, those rules are not relevant for purposes of section 267A.

The proposed regulations also provide rules to identify the manner in which a specified payment of a U.S. taxable branch is considered made. *See* proposed § 1.267A–5(b)(3)(ii). Absent such rules, it might be difficult to determine whether the specified payment is made pursuant to a hybrid or branch arrangement (for example, made pursuant to a hybrid transaction or to a reverse hybrid). However, these rules regarding the manner in which a specified payment is made do not apply to interest or royalties deemed paid by a U.S. permanent establishment in connection with inter-branch transactions that are permitted to be taken into account under certain U.S. tax treaties—such payments, by definition, constitute deemed branch payments (subject to disallowance under proposed § 1.267A–2(c)) and are therefore made pursuant to a branch arrangement.

3. Coordination With Other Provisions

Proposed § 1.267A–5(b)(1) coordinates the application of section 267A with other provisions of the Code and regulations that affect the deductibility of interest and royalties. This rule provides that, in general, section 267A applies after the application of other provisions of the Code and regulations. For example, a specified payment is subject to section 267A for the taxable year for which a deduction for the payment would

otherwise be allowed. Thus, if a deduction for an accrued amount is deferred under section 267(a) (in certain cases, deferring a deduction for an amount accrued to a related foreign person until paid), then the deduction is tested for disallowance under section 267A for the taxable year in which the amount is paid. Absent such a rule, an accrued amount for which a deduction is deferred under section 267(a) could constitute a disqualified hybrid amount even though the amount will be included in the specified recipient's income when actually paid. This coordination rule also provides that section 267A applies to interest or royalties after taking into account provisions that could otherwise recharacterize such amounts, such as § 1.894–1(d)(2).

4. E&P Reduction

Proposed § 1.267A–5(b)(4) provides that the disallowance of a deduction under section 267A does not affect whether or when the amount paid or accrued that gave rise to the deduction reduces earnings and profits of a corporation. Thus, a corporation's earnings and profits may be reduced as a result of a specified payment for which a deduction is disallowed under section 267A. This is consistent with the approach in the context of other disallowance rules. *See* § 1.312–7(b)(1) (''A loss . . . may be recognized though not allowed as a deduction (by reason, for example, of the operation of sections 267 and 1211 . . .) but the mere fact that it is not allowed does not prevent a decrease in earnings and profits by the amount of such disallowed loss.''); *Luckman* v. *Comm'r,* 418 F.2d 381, 383–84 (7th Cir. 1969) (''[T]rue expenses incurred by the corporation reduce earnings and profits despite their nondeductibility from current income for tax purposes.'').

5. De Minimis Exception

The proposed regulations provide a de minimis exception to make the rules more administrable. *See* proposed § 1.267A–1(c). As a result of this exception, a specified party is excepted from the application of section 267A for any taxable year for which the sum of its interest and royalty deductions (plus interest and royalty deductions of any related specified parties) is below $50,000. This rule applies based on any interest or royalty deductions, regardless of whether the deductions would be disallowed under section 267A. In addition, for purposes of this rule, specified parties that are related are treated as a single specified party.

The Treasury Department and the IRS welcome comments on the de minimis exception and whether another threshold would be more appropriate to implement the purposes of section 267A.

L. Interaction With Withholding Taxes and Income Tax Treaties

The determination of whether a deduction for a specified payment is disallowed under section 267A is made without regard to whether the payment is subject to withholding under section 1441 or 1442 or is eligible for a reduced rate of tax under an income tax treaty. Since the U.S. tax characterization of the payment prevails in determining the treaty rate for interest or royalties, regardless of whether the payment is made pursuant to a hybrid transaction, the proposed regulations will generally result in the disallowance of a deduction but treaty benefits may still be claimed, as long as the recipient is the beneficial owner of the payment and otherwise eligible for treaty benefits. On the other hand, if interest or royalties are paid to a fiscally transparent entity that is a reverse hybrid, as defined in proposed § 1.267A–2(d), the payment generally will not be deductible under the proposed regulations if the investor does not derive the payment, and will not be eligible for treaty benefits if the interest holder under § 1.894–1(d) does not derive the payment. The proposed regulations will only apply, however, if the investor is related to the specified party, whereas the reduced rate under the treaty may be denied without regard to whether the interest holder is related to the payer of the interest or royalties.

Certain U.S. income tax treaties also address indirectly the branch mismatch rules under proposed § 1.267A–2(e). Special rules, generally in the limitation on benefits articles of income tax treaties, increase the tax treaty rate for interest and royalties to 15 percent (even if otherwise not taxable under the relevant treaty article) if the amount paid to a permanent establishment of the treaty resident is subject to minimal tax, and the foreign corporation that derives and beneficially owns the payment is a resident of a treaty country that excludes or otherwise exempts from gross income the profits attributable to the permanent establishment to which the payment was made.

III. Information Reporting Under Sections 6038, 6038A, and 6038C

Under section 6038(a)(1), U.S. persons that control foreign business entities must file certain information returns with respect to those entities, which includes information listed in section 6038(a)(1)(A) through (a)(1)(E), as well as information that ''the Secretary determines to be appropriate to carry out the provisions of this title.'' Section 6038A similarly requires 25-percent foreign-owned domestic corporations (reporting corporations) to file certain information returns with respect to those corporations, including information related to transactions between the reporting corporation and each foreign person which is a related party to the reporting corporation. Section 6038C imposes the same reporting requirements on certain foreign corporations engaged in a U.S. trade or business (also, a reporting corporation).

The proposed regulations provide that a specified payment for which a deduction is disallowed under section 267A, as well as hybrid dividends and tiered hybrid dividends under section 245A, must be reported on the appropriate information reporting form in accordance with sections 6038 and 6038A. *See* proposed §§ 1.6038–2(f)(13) and (14), 1.6038–3(g)(3), and 1.6038A–2(b)(5)(iii).

IV. Sections 1503(d) and 7701—Application to Domestic Reverse Hybrids

A. Overview

1. Dual Consolidated Loss Rules

Congress enacted section 1503(d) to prevent the ''double dipping'' of losses. *See* S. Rep. 313, 99th Cong., 2d Sess., at 419–20 (1986). The Senate Report explains that ''losses that a corporation uses to offset foreign tax on income that the United States does not subject to tax should not also be used to reduce any other corporation's U.S. tax.'' *Id.* Section 1503(d) and the regulations thereunder generally provide that, subject to certain exceptions, a dual consolidated loss of a corporation cannot reduce the taxable income of a domestic affiliate (a ''domestic use''). *See* §§ 1.1503(d)–2 and 1.1503–4(b). Section 1.1503(d)–1(b)(5) defines a dual consolidated loss as a net operating loss of a dual resident corporation or the net loss attributable to a separate unit (generally defined as either a foreign branch or an interest in a hybrid entity). *See* § 1.1503(d)–1(b)(4).

The general prohibition against the domestic use of a dual consolidated loss does not apply if, pursuant to a ''domestic use election,'' the taxpayer certifies that there has not been and will not be a ''foreign use'' of the dual consolidated loss during a certification period. *See* § 1.1503(d)–6(d). If a foreign use or other triggering event occurs during the certification period, the dual consolidated loss is recaptured. A

foreign use occurs when any portion of the dual consolidated loss is made available to offset the income of a foreign corporation or the direct or indirect owner of a hybrid entity (generally non-dual inclusion income). *See* § 1.1503(d)–3(a)(1). Other triggering events include certain transfers of the stock or assets of a dual resident corporation, or the interests in or assets of a separate unit. *See* § 1.1503(d)–6(e).

The regulations include a ''mirror legislation'' rule that, in general, prevents a domestic use election when a foreign jurisdiction has enacted legislation similar to section 1503(d) that denies any opportunity for a foreign use of the dual consolidated loss. *See* § 1.1503(d)–3(e). As a result, the existence of mirror legislation may prevent the dual consolidated loss from being put to a domestic use (due to the domestic use limitation) or to a foreign use (due to the foreign ''mirror legislation'') such that the loss becomes ''stranded.'' In such a case, the regulations contemplate that the taxpayer may enter into an agreement with the United States and the foreign country (for example, through the competent authorities) pursuant to which the losses are used in only one country. *See* § 1.1503(d)–6(b).

2. Entity Classification Rules

Sections 301.7701–1 through 301.7701–3 classify a business entity with two or more members as either a corporation or a partnership, and a business entity with a single owner as either a corporation or a disregarded entity. Certain domestic business entities, such as limited liability companies, are classified by default as partnerships (if they have more than one member) or as disregarded entities (if they have only one owner) but are eligible to elect for federal tax purposes to be classified as corporations. *See* § 301.7701–3(b)(1).

B. Domestic Reverse Hybrids

The Treasury Department and the IRS are aware that structures involving domestic reverse hybrids have been used to obtain double-deduction outcomes because they were not subject to limitation under current section 1503(d) regulations. A domestic reverse hybrid generally refers to a domestic business entity that elects under § 301.7701–3(c) to be treated as a corporation for U.S. tax purposes, but is treated as fiscally transparent under the tax law of its investors. In these structures, a foreign parent corporation typically owns the majority of the interests in the domestic reverse hybrid. Domestic reverse hybrid structures can lead to double-deduction outcomes because, for example, deductions incurred by the domestic reverse hybrid can be used (i) under U.S. tax law to offset income that is not subject to tax in the foreign parent's country, such as income of domestic corporations with which the domestic reverse hybrid files a U.S. consolidated return, and (ii) under the foreign parent's tax law to offset income not subject to U.S. tax, such as income of the foreign parent other than the income (if any) of the domestic reverse hybrid. Taxpayers take the position that these structures are not subject to the current section 1503(d) regulations because the domestic reverse hybrid is neither a dual resident corporation (because it is not subject to tax on a residence basis or on its worldwide income in the foreign parent country) nor a separate unit of a domestic corporation.

A comment on regulations under section 1503(d) that were proposed in 2005 asserted that this result is inconsistent with the policies underlying section 1503(d), which was adopted, in part, to ensure that domestic corporations were not put at a competitive disadvantage as compared to foreign corporations through the use of certain inbound acquisition structures. *See* TD 9315. The comment suggested that the scope of the final regulations be broadened to treat such entities as separate units, the losses of which are subject to the restrictions of section 1503(d). *Id.*

In response to this comment, the preamble to the 2007 final dual consolidated loss regulations stated that the Treasury Department and the IRS acknowledged that this type of structure results in a double dip similar to that which Congress intended to prevent through the adoption of section 1503(d). The final regulations did not address these structures, however, because the Treasury Department and the IRS determined at that time that a domestic reverse hybrid was neither a dual resident corporation nor a separate unit and, therefore, was not subject to section 1503(d). *See* TD 9315. The preamble noted, however, that the Treasury Department and the IRS would continue to study these and similar structures.

The Treasury Department and the IRS have determined that these structures are inconsistent with the principles of section 1503(d) and, as a result, raise significant policy concerns. Accordingly, the proposed regulations include rules under sections 1503(d) and 7701 to prevent the use of these structures to obtain a double-deduction outcome. The proposed regulations require, as a condition to a domestic entity electing to be treated as a corporation under § 301.7701–3(c), that the domestic entity consent to be treated as a dual resident corporation for purposes of section 1503(d) (such an entity, a ''domestic consenting corporation'') for taxable years in which two requirements are satisfied. *See* proposed § 301.7701–3(c)(3). The requirements are intended to restrict the application of section 1503(d) to cases in which it is likely that losses of the domestic consenting corporation could result in a double-deduction outcome.

The requirements are satisfied if (i) a ''specified foreign tax resident'' (generally, a body corporate that is a tax resident of a foreign country) under its tax law derives or incurs items of income, gain, deduction, or loss of the domestic consenting corporation, and (ii) the specified foreign tax resident is related to the domestic consenting corporation (as determined under section 267(b) or 707(b)). *See* proposed § 1.1503(d)–1(c). For example, the requirements are satisfied if a specified foreign tax resident directly owns all the interests in the domestic consenting corporation and the domestic consenting corporation is fiscally transparent under the specified foreign tax resident's tax law. In addition, an item of the domestic consenting corporation for a particular taxable year is considered derived or incurred by the specified tax resident during that year even if, under the specified foreign tax resident's tax law, the item is recognized in, and derived or incurred by the specified foreign tax resident in, a different taxable year.

Further, if a domestic entity filed an election to be treated as a corporation before December 20, 2018 such that the entity was not required to consent to be treated as a dual resident corporation, then the entity is deemed to consent to being treated as a dual resident corporation as of its first taxable year beginning on or after the end of a 12-month transition period. This deemed consent can be avoided if the entity elects, effective before its first taxable year beginning on or after the end of the transition period, to be treated as a partnership or disregarded entity such that it ceases to be a corporation for U.S. tax purposes. For purposes of such an election, the 60 month limitation under § 301.7701–3(c)(1)(iv) is waived.

Finally, the proposed regulations provide that the mirror legislation rule does not apply to dual consolidated losses of a domestic consenting corporation. *See* proposed § 1.1503(d)–3(e)(3). This exception is intended to minimize cases in which dual

consolidated losses could be ''stranded'' when, for example, the foreign parent jurisdiction has adopted rules similar to the recommendations in Chapter 6 of the Hybrid Mismatch Report. The exception does not apply to dual consolidated losses attributable to separate units because, in such cases, the United States is the parent jurisdiction and the dual consolidated loss rules should neutralize the double-deduction outcome.

V. Triggering Event Exception for Compulsory Transfers

As noted in section IV.A.1 of this Explanation of Provisions, certain triggering events require a dual consolidated loss that is subject to a domestic use election to be recaptured and included in income. The dual consolidated loss regulations also include various exceptions to these triggering events, including an exception for compulsory transfers involving foreign governments. *See* § 1.1503(d)–6(f)(5).

A comment on the 2007 final dual consolidated loss regulations stated that the policies underlying the triggering event exception for compulsory transfers involving foreign governments apply equally to compulsory transfers involving the United States government. Accordingly, the comment requested guidance under § 1.1503(d)–3(c)(9) to provide that the exception is not limited to foreign governments. The comment suggested, as an example, that the exception should apply to a divestiture of a hybrid entity engaged in proprietary trading pursuant to the ''Volcker Rule'' contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 (2010).

The Treasury Department and the IRS agree with this comment and, accordingly, the proposed regulations modify the compulsory transfer triggering event exception such that it will also apply with respect to the United States government.

VI. Disregarded Payments Made to Domestic Corporations

As discussed in sections II.D.2 and 3 of this Explanation of Provisions, the proposed regulations under section 267A address D/NI outcomes resulting from actual and deemed payments of interest and royalties that are regarded for U.S. tax purposes but disregarded for foreign tax purposes. The proposed regulations under section 267A do not, however, address similar structures involving payments to domestic corporations that are regarded for foreign tax purposes but disregarded for U.S. tax purposes.

For example, USP, a domestic corporation that is the parent of a consolidated group, borrows from a bank to fund the acquisition of the stock of FT, a foreign corporation that is tax resident of Country X. USP contributes the loan proceeds to USS, a newly formed domestic corporation that is a member of the USP consolidated group, in exchange for all the stock of USS. USS then forms FDE, a disregarded entity that is tax resident of Country X, USS lends the loan proceeds to FDE, and FDE uses the proceeds to acquire the stock of FT. For U.S. tax purposes, USP claims a deduction for interest paid on the bank loan, and USS does not recognize interest income on interest payments made to it from FDE because the payments are disregarded. For Country X tax purposes, the interest paid from FDE to USS is regarded and gives rise to a loss that can be surrendered (or otherwise used, such as through a consolidation regime) to offset the operating income of FT.

Under the current section 1503(d) regulations, the loan from USS to FDE does not result in a dual consolidated loss attributable to USS's interest in FDE because interest paid on the loan is not regarded for U.S. tax purposes; only items that are regarded for U.S. tax purposes are taken into account for purposes of determining a dual consolidated loss. *See* § 1.1503(d)–5(c)(1)(ii). In addition, the regarded interest expense of USP is not attributed to USS's interest in FDE because only regarded items of USS, the domestic owner of FDE, are taken into account for purposes of determining a dual consolidated loss. *Id.* The result would generally be the same, however, even if USS, rather than USP, were the borrower on the bank loan. *See* § 1.1503(d)–7(c), *Example 23*.

The Treasury Department and the IRS have determined that these transactions raise significant policy concerns that are similar to those relating to the D/NI outcomes addressed by sections 245A(e) and 267A, and the double-deduction outcomes addressed by section 1503(d). The Treasury Department and the IRS are studying these transactions and request comments.

VII. Applicability Dates

Under section 7805(b)(2), and consistent with the applicability date of section 245A, proposed § 1.245A(e)–1 applies to distributions made after December 31, 2017. Under section 7805(b)(2), proposed §§ 1.267A–1 through 1.267A–6 generally apply to specified payments made in taxable years beginning after December 31, 2017. This applicability date is consistent with the applicability date of section 267A. The Treasury Department and the IRS therefore expect to finalize such provisions by June 22, 2019. *See* section 7805(b)(2). However if such provisions are finalized after June 22, 2019, then the Treasury Department and the IRS expect that such provisions will apply only to taxable years ending on or after December 20, 2018. *See* section 7805(b)(1)(B).

As provided in proposed § 1.267A–7(b), certain rules, such as the disregarded payment and deemed branch payment rules as well as the imported mismatch rule, apply to specified payments made in taxable years beginning on or after December 20, 2018. *See* section 7805(b)(1)(B).

Proposed §§ 1.6038–2, 1.6038–3, and 1.6038A–2, which require certain reporting regarding deductions disallowed under section 267A, as well as hybrid dividends and tiered hybrid dividends under section 245A, apply with respect to information for annual accounting periods or tax years, as applicable, beginning on or after December 20, 2018. *See* section 7805(b)(1)(B).

Proposed §§ 1.1503(d)–1 and –3, treating domestic consenting corporations as dual resident corporations, apply to taxable years ending on or after December 20, 2018. *See* section 7805(b)(1)(B).

Proposed § 1.1503(d)–6, amending the compulsory transfer triggering event exception, applies to transfers that occur on or after December 20, 2018, but taxpayers may apply the rules to earlier transfers. *See* section 7805(b)(1)(B).

Proposed § 301.7701–3(a) and (c)(3) apply to a domestic eligible entity that on or after December 20, 2018 files an election to be classified as an association (regardless of whether the election is effective before December 20, 2018). These provisions also apply to certain domestic eligible entities the interests in which are transferred or issued on or after December 20, 2018. *See* section 7805(b)(1)(B).

Special Analyses

I. Regulatory Planning and Review

Executive Orders 13771, 13563, and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs,

harmonizing rules, and promoting flexibility. The preliminary E.O. 13771 designation for this proposed rulemaking is regulatory.

The proposed regulations have been designated by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations (''MOA''). OIRA has determined that the proposed rulemaking is economically significant and subject to review under E.O. 12866 and section 1(c) of the Memorandum of Agreement. Accordingly, the proposed regulations have been reviewed by the Office of Management and Budget.

A. Background

Hybrid arrangements include both ''hybrid entities'' and ''hybrid instruments.'' A hybrid entity is generally an entity which is treated as a flow-through or disregarded entity for U.S. tax purposes but as a corporation for foreign tax purposes or vice versa. Hybrid instruments are financial instruments that share characteristics of both debt and equity and are treated as debt for U.S. tax purposes and equity in the foreign jurisdiction or vice versa.

Before the Act, U.S. subsidiaries of foreign-based multinational enterprises could employ cross-border hybrid arrangements as legal tax-avoidance techniques by exploiting differences in tax treatment across jurisdictions. These arrangements allowed taxpayers to claim tax deductions in the United States without a corresponding inclusion in another jurisdiction.

The United States has a check-the-box regulatory provision, under which some taxpayers can choose whether they are treated as corporations, where they may face a separate entity level tax, or as partnerships, where there is no such separate entity tax (but rather only owner-level tax), under the U.S. tax code. This choice allows taxpayers the ability to become hybrid entities that are viewed as corporations in one jurisdiction, but not in another. For example, a foreign parent could own a domestic subsidiary limited liability partnership (LLP) that, under the check-the-box rules, elects to be treated as a corporation under U.S. tax law. However, this subsidiary could be viewed as a partnership under foreign tax law. The result is that the domestic subsidiary could be entitled to a deduction for U.S. tax purposes for making interest payments to the foreign parent, but the foreign country would see a payment between a partnership and a partner, and therefore would not tax the interest income. That is, the corporate structure would enable the business entity to avoid paying U.S. tax on the interest by allowing a deduction attributable to an intra-group loan, despite the interest income never being included under foreign tax law.

In addition, there are hybrid instruments, which share characteristics of both debt and equity. Because of these shared characteristics, countries may be inconsistent in their treatment of such instruments. One example is perpetual debt, which many countries treat as debt, but the United States treats as equity. If a foreign affiliate of a U.S.-based multinational issued perpetual debt to a U.S. holder, the interest payments would be tax deductible in a foreign jurisdiction that treats the instrument as debt, while the payments are treated as dividends in the United States and potentially eligible for a dividends received deduction (DRD).

The Act adds section 245A(e) to the Code to address issues of hybridity by introducing a hybrid dividends provision, which disallows the DRD for any dividend received by a U.S. shareholder from a controlled foreign corporation if the dividend is a hybrid dividend. The statute defines a hybrid dividend as an amount received from a controlled foreign corporation for which a deduction would be allowed under section 245A(a) and for which the controlled foreign corporation received a deduction or other tax benefit in a foreign country. Hybrid dividends between controlled foreign corporations with a common U.S. shareholder are treated as subpart F income.

The Act also adds section 267A of the Code to deny a deduction for any disqualified related party amount paid or accrued as a result of a hybrid transaction or by, or to, a hybrid entity. The statute defines a disqualified related party amount as any interest or royalty paid or accrued to a related party where there is no corresponding inclusion to the related party in the other tax jurisdiction or the related party is allowed a deduction with respect to such amount in the other tax jurisdiction. The statute's definition of a hybrid transaction is any transaction where there is a mismatch in tax treatment between the U.S. and the other foreign jurisdiction. Similarly, a hybrid entity is any entity which is treated as fiscally transparent for U.S. tax purposes but not for purposes of the foreign tax jurisdiction, or vice versa.

B. Overview

The hybrids provisions in the Act and the proposed regulations are anti-abuse measures. Taxpayers have been taking aggressive tax positions to take advantage of tax treatment mismatches between jurisdictions in order to achieve favorable tax outcomes at the detriment of tax revenues (see OECD/G20 Hybrid Mismatch Report, October 2015 and OECD/G20 Branch Mismatch Report, July 2017). The statute and the proposed regulations serve to conform the U.S. tax system to recently agreed-upon international tax principles (see OECD/G20 Hybrids Mismatch Report, October 2015 and OECD/G20 Branch Mismatch Report, July 2017), consistent with statutory intent, while protecting U.S. interests and the U.S. tax base. International tax coordination is particularly advantageous in the context of hybrids as it has the potential to greatly curb opportunities for hybrid arrangements, while avoiding double taxation. The anticipated effect of the statute and proposed regulations is a reduction in tax revenue loss due to hybrid arrangements, at the cost of an increase in compliance burden for a limited number of sophisticated taxpayers, as explained below.

C. Need for the Proposed Regulations

Because the Act introduced new sections to the Code to address hybrid entities and hybrid instruments, a large number of the relevant terms and necessary calculations that taxpayers are currently required to apply under the statute can benefit from greater specificity. Taxpayers will lack clarity on which types of arrangements are subject to the statute without the additional interpretive guidance and clarifications contained in the proposed regulations. This lack of clarity could lead to a shifting of corporate income overseas through hybrid arrangements, further eroding U.S. tax revenues. Without accompanying rules to cover branches, structured arrangements, imported mismatches, and similar structures, the statute would be extremely easy to avoid, a pathway that is contrary to Congressional intent. It could also lead to otherwise similar taxpayers interpreting the statute differently, distorting the equity of tax treatment for otherwise similarly situated taxpayers. Finally, the lack of clarity could cause some taxpayers unnecessary compliance burden if they misinterpret the statute.

D. Economic Analysis

1. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of the proposed regulations relative to a no-action baseline reflecting anticipated tax-related behavior and other economic behavior in the absence of the proposed regulations.

The baseline includes the Act, which effectively cut the top statutory corporate income tax rate from 35 to 21 percent. This change lowered the value of using hybrid arrangements for multinational corporations, because the value of such arrangements is proportional to the tax they allow the corporation to avoid. As such, some firms with an incentive to set up hybrid arrangements prior to the Act would no longer find it profitable to maintain these arrangements. The Act also modified section 163(j), and regulations interpreting this provision are expected to be finalized soon, which together further limit the deductibility of interest payments. These statutory and regulatory changes further curb the incentive to set up and maintain hybrid arrangements for multinational corporations, since interest payments are a primary vehicle through which hybrid arrangements generated deductions prior to the Act. Further, prior to the Act, the Treasury Department and the IRS issued a series of regulations that reduced or eliminated the incentive for multinational corporations to invert, or change their tax residence to avoid U.S. taxes (including setting up some hybrid arrangements). As a result, under the baseline, the value of hybrid arrangements reflects the existing regulatory framework and the Act and its associated soon-to-be-finalized regulations, all of which strongly affect the value of hybrid arrangements as a tax avoidance technique.

2. Anticipated Costs and Benefits

i. Economic Effects

The Treasury Department has determined that the discretionary non-revenue impacts of the proposed hybrid regulations will reduce U.S. Gross Domestic Product (GDP) by less than $100 million per year ($2018).

To evaluate this effect, the Treasury Department considered the share of interest deductions that would be disallowed by the proposed regulations. Using Treasury Department models applied to confidential 2016 tax data, the Treasury Department calculated the average effective tax rate for potentially affected taxpayers under a range of levels of interest payment deductibility, including the level of deductibility under the Act without the proposed regulations. The difference between the estimated effective tax rate under the Act and without the discretionary elements of the proposed regulations and the range of estimated effective tax rates that include the proposed regulations provides a range of estimates of the net increase in the effective tax rate due to the discretion exercised in the proposed regulations. The Treasury Department next applied an elasticity of taxable income to the range of estimated increases in the effective tax rate to estimate the reduction in taxable income for each of the affected taxpayers in the sample. The Treasury Department then examined a range of estimates of the relationship between the change in taxable income and the real change in economic activity. Finally, the Treasury Department extrapolated the results through 2027.

The Treasury Department concludes from this evaluation that the discretionary aspects of the proposed rules will reduce GDP annually by less than $100 million ($2018). The projected effects reflect the proposed regulations alone and do not include non-revenue economic effects stemming from the Act in the absence of the proposed regulations. More specifically, the analysis did not estimate the impacts of the statutory requirement that hybrid dividends shall be treated as subpart F income of the receiving controlled foreign corporations for purposes of section 951(a)(1)(A) for the taxable year and shall not be permitted a foreign tax credit. *See* section 245A(e).

The Treasury Department solicits comments on the methodology used to evaluate the non-revenue economic effects of the proposed regulations and anticipates that further analysis will be provided at the final rule stage.

ii. Anticipated Costs and Benefits of Specific Provisions

a. Section 245A(e)

Section 245A(e) applies in certain cases in which a CFC pays a hybrid dividend, which is a dividend paid by the CFC for which the CFC received a deduction or other tax benefit under foreign tax law (a hybrid deduction). The proposed regulations provide rules for identifying and tracking such hybrid deductions. These rules set forth common standards for identifying hybrid deductions and therefore clarify what is deemed a hybrid dividend by the statute and ensure equitable tax treatment of otherwise similar taxpayers.

The proposed regulations also address timing differences to ensure that there is parity between economically similar transactions. Absent such rules, similar transactions may be treated differently due to timing differences. For example, if a CFC paid out a dividend in a given taxable year for which it received a deduction or other tax benefit in a prior taxable year, the taxpayer might claim the dividend is not a hybrid dividend, since the taxable year in which the dividend is paid for U.S. tax purposes and the year in which the tax benefit is received do not overlap. Absent rules, such as the proposed regulations, the purpose of section 245A(e) might be avoided and economically similar transactions might be treated differently.

Finally, these rules excuse certain taxpayers from having to track hybrid deductions (namely taxpayers without a sufficient connection to a section 245A(a) dividends received deduction). The utility of requiring these taxpayers to track hybrid deductions would be outweighed by the burdens of doing so. The proposed regulations reduce the compliance burden on taxpayers that are not directly dealing with hybrid dividends.

b. Section 267A

Section 267A disallows a deduction for interest or royalties paid or accrued in certain transactions involving a hybrid arrangement. Congress intended this provision to address cases in which the taxpayer is provided a deduction under U.S. tax law, but the payee does not have a corresponding income inclusion under foreign tax law, dubbed a ''deduction/no-inclusion outcome'' (D/NI outcome). See Senate Explanation, at 384. This affects taxpayers that attempt to use hybrid arrangements to strip income out of the United States taxing jurisdiction.

The proposed regulations disallow a deduction under section 267A only to the extent that the D/NI outcome is a result of a hybrid arrangement. Note that under the statute but without the proposed regulations, a deduction would be disallowed simply if a D/NI outcome occurs and a hybrid arrangement exists (see section II.E of the Explanation of Provisions). For example, a royalty payment made to a hybrid entity in the U.K. qualifying for a low tax rate under the U.K. patent box regime could be denied a deduction in the U.S. under the statute. However, the low U.K. rate is a result of the lower tax rate on patent box income and not a result of any hybrid arrangement. In this example, there is no link between hybridity and the D/NI outcome, since it is the U.K. patent box regime that

yields the D/NI outcome and the low U.K. patent box rate is available to taxpayers regardless of whether they are organized as hybrid entities or not. The proposed regulations limit the application of section 267A to cases where the D/NI outcome occurs as a result of hybrid arrangements and not due to a generally applicable feature of the jurisdiction's tax system.

The proposed regulations also provide several exceptions to section 267A in order to refine the scope of the provision and minimize burdens on taxpayers. First, the proposed regulations generally exclude from section 267A payments that are included in a U.S. tax resident's or U.S. taxable branch's income or are taken into account for purposes of the subpart F or global intangible low-taxed income (GILTI) provisions. While the exception for income taken into account for purposes of subpart F is in the statute, the proposed regulations expand the exception to cover GILTI. This avoids potential double taxation on that income. In addition, as a refinement compared with the statute, the extent to which a payment is taken into account under subpart F is determined without regard to allocable deductions or qualified deficits. The proposed regulations also provide a de minimis rule that excepts small taxpayers from section 267A, minimizing the burden on small taxpayers.

Finally, the proposed regulations address a comprehensive set of transactions that give rise to D/NI outcomes. The statute, as written, does not apply to certain hybrid arrangements, including branch arrangements and certain reverse hybrids, as described above (see section II.D of the Explanation of Provisions). The exclusion of these arrangements could have large economic and fiscal consequences due to taxpayers shifting tax planning towards these arrangements to avoid the new anti-abuse statute. The proposed regulations close off this potential avenue for additional tax avoidance by applying the rules of section 267A to branch mismatches, reverse hybrids, certain transactions with unrelated parties that are structured to achieve D/NI outcomes, certain structured transactions involving amounts similar to interest, and imported mismatches.

3. Alternatives Considered

i. Addressing conduit arrangements/ imported mismatches

Section 267A(e)(1) provides regulatory authority to apply the rules of section 267A to conduit arrangements and thus to disallow a deduction in cases in which income attributable to a payment is directly or indirectly offset by an offshore hybrid deduction. The Treasury Department and the IRS considered four options with regards to conduit arrangement rules.

The first option was to not implement any conduit rules, and thus rely on existing and established judicial doctrines (such as conduit principles and substance-over-form principles) to police these transactions. A second option considered was to address conduit arrangement concerns through a broad anti-abuse rule. On the one hand, both of these approaches might reduce complexity by eliminating the need for detailed regulatory rules addressing conduit arrangements. On the other hand, such approaches could create uncertainty (as neither taxpayers nor the IRS might have a clear sense of what types of transactions might be challenged under the judicial doctrines or anti-abuse rule) and could increase burdens to the IRS (as challenging under judicial doctrines or anti-abuse rules are generally difficult and resource intensive). Significantly, such approaches could result in double non-taxation (if judicial doctrines or anti-abuse rules were to not be successfully asserted) or double-taxation (if judicial doctrines or anti-abuse rules were to not take into account the application of foreign tax law, such as a foreign imported mismatch rule).

A third option considered was to implement rules modeled off existing U.S. anti-conduit rules under § 1.881–3. On the positive side, such an approach would rely on an established and existing framework that taxpayers are already familiar with and thus there would be a lesser need to create and apply a new framework or set of rules. On the negative side, existing anti-conduit rules are limited in certain respects as they apply only to certain financing arrangements, which exclude certain stock, and they address only withholding tax policies, which pose separate concerns from section 267A policies (D/NI policies). Furthermore, taxpayers have implemented structures that attempt to avoid the application of the existing anti-conduit rules. Detrimental to tax equity, such an approach could also lead to double-taxation, as the existing anti-conduit rules do not take into account the application of foreign tax law, such as a foreign imported mismatch rule.

The final option considered was to implement rules that are generally consistent with the BEPS imported mismatch rule. The first advantage of such an approach is that it provides certainty about when a deduction will or will not be disallowed under the rule. The second advantage of this approach is that it neutralizes the risk of double non-taxation, while also neutralizing the risk of double taxation. This is because this option is modeled off the BEPS approach, which is being implemented by other countries, and also contains explicit rules to coordinate with foreign tax law. Coordinating with the global tax community reduces opportunities for economic distortions. Although such an approach involves greater complexity than the alternatives, the Treasury Department and IRS expect the benefits of this approach's comprehensiveness, administrability, and conduciveness to taxpayer certainty, to be substantially greater than the complexity burden in comparison with the available alternative approaches. Thus, this is the approach adopted in the proposed regulations.

ii. De Minimis Rules

The proposed regulations provide a de minimis exception that exempts taxpayers from the application of section 267A for any taxable year for which the sum of the taxpayer's interest and royalty deductions (plus interest and royalty deductions of any related specified parties) is below $50,000. The exception's $50,000 threshold looks to a taxpayer's amount of interest or royalty deductions without regard to whether the deductions involve hybrid arrangements and therefore, absent the de minimis exception, would be disallowed under section 267A.

The Treasury Department and the IRS considered not providing a de minimis exception because hybrid arrangements are highly likely to be tax-motivated structures undertaken only by mostly sophisticated investors. However, it is possible that, in limited cases, small taxpayers could be subject to these rules, for example, as a result of timing differences or a lack of familiarity with foreign law. Furthermore, section 267A is intended to stop base erosion and tax avoidance, and in the case of small taxpayers, it is expected that the revenue gains from applying these rules would be minimal since few small taxpayers are expected to engage in hybrid arrangements.

The Treasury Department and IRS also considered a de minimis exception based on a dollar threshold with respect to the amount of interest or royalties involving hybrid arrangements. However, such an approach would require a taxpayer to first apply the rules of section 267A to identify its interest or royalty deductions involving hybrid arrangements in order to

determine whether the de minimis threshold is satisfied and thus whether it is subject to section 267A for the taxable year. This would therefore not significantly reduce burdens on taxpayers with respect to applying the rules of section 267A.

Therefore, the proposed regulations adopt a rule that looks to the overall amount of interest and royalty payments, whether or not such payments involve hybrid arrangements. This has the effect of exempting, in an efficient manner, small taxpayers that are unlikely to engage in hybrid arrangements, and therefore such taxpayers do not need to consider the application of these rules.

iii. Deemed Branch Payments and Branch Mismatch Payments

The proposed regulations expand the application of section 267A to certain transactions involving branches. This was necessary in order to ensure that taxpayers could not avoid section 267A by engaging in transactions that were economically similar to the hybrid arrangements that are covered by the statute. For example, assume that a related party payment is made to a foreign entity in Country X that is owned by a parent company in Country Y. Further assume that there is a mismatch between how Country X views the entity (fiscally transparent) versus how Country Y views it (not fiscally transparent). In general, section 267A's hybrid entity rules prevent a D/NI outcome in this case. However, assume instead that the parent company forms a branch in Country X instead of a foreign entity, and Country Y (the parent company's jurisdiction) exempts all branch income under its territorial system. On the other hand, due to a mismatch in laws governing whether a branch exists, Country X does not view the branch as existing and therefore does not tax payments made to the branch. Absent regulations, taxpayers could easily avoid section 267A through use of branch structures, which are economically similar to the foreign entity structure in the first example.

In the absence of the proposed regulations, taxpayers may have found it valuable to engage in transactions that are economically similar to hybrid arrangements but that avoided the application of 267A. Such transactions would have resulted in a loss in U.S. tax revenue without any accompanying efficiency gain. Furthermore, to the extent that these transactions were structured specifically to avoid the application of section 267A and were not available to all taxpayers, they would generally have led to an efficiency loss in addition to the loss in U.S. tax revenue.

iv. Exceptions for Income Included in U.S. Tax and GILTI Inclusions

Section 267A(b)(1) provides that deductions for interest and royalties that are paid to a CFC and included under section 951(a) in income (as subpart F income) by a United States shareholder of such CFC are not subject to disallowance under section 267A. The statute does not state whether section 267A applies to a payment that is included directly in the U.S. tax base (for example, because the payment is made directly to a U.S. taxpayer or a U.S. taxable branch), or a payment made to a CFC that is taken into account under GILTI (as opposed to being included as subpart F income) by such CFC's United States shareholders. However, the grant of regulatory authority in section 267A(e) includes a specific mention of exceptions in ''cases which the Secretary determines do not present a risk of eroding the Federal tax base.'' *See* section 267A(e)(7)(B).

The Treasury Department and the IRS considered providing no additional exception for payments included in the U.S. tax base (either directly or under GILTI), therefore the only exception available would be the exception provided in the statute for payments included in the U.S tax base by subpart F inclusions. This approach was rejected in the case of a payment to a U.S. taxpayer since it would result in double taxation by the United States, as the United States would both deny a deduction for a payment as well as fully include such payment in income for U.S. tax purposes. Similarly, in the case of hybrid payments made by one CFC to another CFC with the same United States shareholders, a payment would be included in tested income of the recipient CFC and therefore taken into account under GILTI. If section 267A were to apply to also disallow the deduction by the payor CFC, this could also lead to the same amount being subject to section 951A twice because the payor CFC's tested income would increase as a result of the denial of deduction, and the payee would have additional tested income for the same payment.

Payments that are included directly in the U.S. tax base or that are included in GILTI do not give rise to a D/NI outcome and, therefore, it is consistent with the policy of section 267A and the grant of authority in section 267A(e) to exempt them from disallowance under section 267A. Therefore, the proposed regulations provide that such payments are not subject to disallowance under section 267A.

v. Link Between Hybridity and D/NI

As discussed in section II.E of the Explanation of Provisions and section I.D.2.ii of this Special Analyses, the proposed regulations limit disallowance to cases in which the no-inclusion portion of the D/NI outcome is a result of hybridity as opposed to a different feature of foreign tax law, such as a general preference for royalty income.

Under the language of the statute, no link between hybridity and the no-inclusion outcome appears to be required. The Treasury Department and the IRS considered following this approach, which would have resulted in a deduction being disallowed even though if the transaction had been a non-hybrid transaction, the same no-inclusion outcome would have resulted. However, the Treasury Department and the IRS rejected this option because it would lead to inconsistent and arbitrary results. In particular, such an approach would incentivize taxpayers to restructure to eliminate hybridity in order to avoid the application of section 267A in cases where hybridity does not cause a D/NI outcome. Such restructuring would eliminate the hybridity without actually eliminating the D/NI outcome since the hybridity did not cause the D/NI outcome. Interpreting section 267A in a manner that incentivizes taxpayers to engage in restructurings of this type would generally impose costs on taxpayers to retain deductions where hybridity is irrelevant to a D/NI outcome, without furthering the statutory purpose of section 267A to neutralize hybrid arrangements.

Furthermore, the policy of section 267A is not to address all situations that give rise to no-inclusion outcomes, but to only address a subset of such situations where they arise due to hybrid arrangements. When base erosion or double non-taxation arises due to other features of the international tax system (such as the existence of low-tax jurisdictions or preferential regimes for certain types of income), there are other types of rules that are better suited to address these concerns (for example, through statutory impositions of withholding taxes, revisions to tax treaties, or new statutory provisions such as the base erosion and anti-abuse tax under section 59A). Moreover, the legislative history to section 267A makes clear that the policy of the provision is to eliminate the tax-motivated hybrid structures that lead to D/NI outcomes, and was not a general provision for eliminating all cases of D/

NI outcomes. *See* Senate Explanation, at 384 (''[T]he Committee believes that hybrid arrangements exploit differences in the tax treatment of a transaction or entity under the laws of two or more jurisdictions *to achieve* double non-taxation . . .'') (emphasis added). In addition, to the extent that regulations limit disallowance to those cases in which the no-inclusion portion of the D/NI outcome is a result of hybridity, the scope of section 267A is limited and the burden on taxpayers is reduced without impacting the core policy underlying section 267A. Therefore, the proposed regulations provide that a deduction is disallowed under section 267A only to the extent that the no-inclusion portion of the D/NI outcome is a result of hybridity.

vi. Timing Differences Under Section 245A

In some cases, there may be a timing difference between when a CFC pays an amount constituting a dividend for U.S. tax purposes and when the CFC receives a deduction for the amount in a foreign jurisdiction. Timing differences may raise issues about whether a deduction is a hybrid deduction and thus whether a dividend is considered a hybrid dividend. The Treasury Department and the IRS considered three options with respect to this timing issue.

The first option considered was to not address timing differences, and thus not treat such transactions as giving rise to hybrid dividends. Not addressing the timing differences would raise policy concerns, since failure to treat the deduction as giving rise to a hybrid dividend would result in the section 245A(a) DRD applying to the dividend, allowing the amount to permanently escape both foreign tax (through the deduction) and U.S. tax (through the DRD).

The second option considered was to not address the timing difference directly under section 245A(e), but instead address it under another Code section or regime. For example, one method that would be consistent with the BEPS Report would be to mandate an income inclusion to the U.S. parent corporation at the time the deduction is permitted under foreign law. This would rely on a novel approach that deems an inclusion at a particular point in time despite the fact that the income has otherwise not been recognized for U.S. tax purposes.

The final option was to address the timing difference by providing rules requiring the establishment of hybrid deduction accounts. These hybrid deduction accounts will be maintained across years so that deductions that accrue in one year will be matched up with income arising in a different year, thus addressing the timing differences issue. This approach appropriately addresses the timing differences under section 245A of the Code. The Treasury Department and IRS expect the benefits of this option's comprehensiveness and clarity to be substantially greater than the tax administration and compliance costs it imposes, relative to the alternative options. This is the approach adopted by the proposed regulations.

vii. Timing Differences Under Section 267A

A similar timing issue arises under section 267A. Here, there is a timing difference between when the deduction is otherwise permitted under U.S. tax law and when the payment is included in the payee's income under foreign tax law. The legislative history to section 267A indicates that in certain cases such timing differences can lead to ''long term deferral'' and that such long-term deferral should be treated as giving rise to a D/NI outcome. In the context of section 267A, the Treasury Department and the IRS considered three options with respect to this timing issue.

The first option considered was to not address timing differences, because they will eventually reverse over time. Although such an approach would result in a relatively simple rule, it would raise significant policy concerns because, as indicated in the legislative history, long-term deferral can be equivalent to a permanent exclusion.

The second option considered was to address all timing differences, because even a timing difference that reverses within a short period of time provides a tax benefit during the short term. Although such an approach might be conceptually pure, it would raise significant practical and administrative difficulties. It could also lead to some double-tax, absent complicated rules to calibrate the disallowed amount to the amount of tax benefit arising from the timing mismatch.

The final option considered was to address only certain timing differences—namely, long-term timing differences, such as timing differences that do not reverse within a 3 taxable year period. The Treasury Department and IRS expect that the net benefits of this option's comprehensiveness, clarity, and tax administrability and compliance burden are substantially higher than those of the available alternatives. Thus, this option is adopted in the proposed regulations.

4. Anticipated Impacts on Administrative and Compliance Costs

The Treasury Department and the IRS estimate that there are approximately 10,000 taxpayers in the current population of taxpayers affected by the proposed regulations or about 0.5% of all corporate filers. This is the best estimate of the number of sophisticated taxpayers with capabilities to structure a hybrid arrangement. However, the Treasury Department and the IRS anticipate that fewer taxpayers would engage in hybrid arrangements going forward as the statute and the proposed regulations would make such arrangements less beneficial to taxpayers. As such, the taxpayer counts provided in section II of this Special Analyses are an upper bound of the number of affected taxpayers by the proposed regulations.

It is important to note that the population of taxpayers affected by section 267A and the proposed regulations under section 267A will seldom include U.S.-based companies as these companies are taxed under the new GILTI regime as well as subpart F. Instead, section 267A and the proposed regulations apply predominantly to foreign-headquartered companies that employ hybrid arrangements to strip income out of the U.S., undermining the collection of U.S. tax revenue. In addition, although section 245A(e) applies primarily to U.S.-based companies, the amounts of dividends affected are limited because a large portion of distributions will be treated as previously taxed earnings and profits due to the operation of both the GILTI regime and the transition tax under section 965, and such distributions are not subject to section 245A(e).

II. Paperwork Reduction Act

The collections of information in the proposed regulations are in proposed §§ 1.6038–2(f)(13) and (14), 1.6038–3(g)(3), and 1.6038A–2(b)(5)(iii).

The collection of information in proposed § 1.6038–2(f)(13) and (14) is mandatory for every U.S. person that controls a foreign corporation that has a deduction disallowed under section 267A, or that pays or receives a hybrid dividend or tiered hybrid dividend under section 245A, respectively, during an annual accounting period and files Form 5471 for that period (OMB control number 1545–0123, formerly, OMB control number 1545–0704). The collection of information in proposed § 1.6038–2(f)(13) is satisfied by providing information about the disallowance of the deduction for any interest or royalty under section 267A

for the corporation's accounting period as Form 5471 and its instructions may prescribe, and the collection of information in proposed § 1.6038–2(f)(14) is satisfied by providing information about hybrid dividends or tiered hybrid dividends under section 245A(e) for the corporation's accounting period as Form 5471 and its instructions may prescribe. For purposes of the PRA, the reporting burden associated with proposed § 1.6038–2(f)(13) and (14) will be reflected in the IRS Form 14029, Paperwork Reduction Act Submission, associated with Form 5471. As provided below, the estimated number of respondents for the reporting burden associated with proposed § 1.6038–2(f)(13) and (14) is 1,000 and 2,000, respectively.

The collection of information in proposed § 1.6038–3(g)(3) is mandatory for every U.S. person that controls a foreign partnership that paid or accrued any interest or royalty for which a deduction is disallowed under section 267A during the partnership tax year and files Form 8865 for that period (OMB control number 1545–1668). The collection of information in proposed § 1.6038–3(g)(3) is satisfied by providing information about the disallowance of the deduction for any interest or royalty under section 267A for the partnership's tax year as Form 8865 and its instructions may prescribe. For purposes of the PRA, the reporting burden associated with proposed § 1.6038–3(g)(3) will be reflected in the IRS Form 14029, Paperwork Reduction Act submission, associated with Form 8865. As provided below, the estimated number of respondents for the reporting burden associated with proposed § 1.6038–3(g)(3) is less than 1,000.

The collection of information in proposed § 1.6038A–2(b)(5)(iii) is mandatory for every reporting corporation that has a deduction disallowed under section 267A and files Form 5472 (OMB control number 1545–0123, formerly, OMB control number 1545–0805) for the tax year. The collection of information in proposed § 1.6038A–2(b)(5)(iii) is satisfied by providing information about the disallowance of the reporting corporation's deduction for any interest or royalty under section 267A for the tax year as Form 5472 and its instructions may prescribe. For purposes of the PRA, the reporting burden associated with proposed § 1.6038A–2(b)(5)(iii) will be reflected in the IRS Form 14029, Paperwork Reduction Act submission, associated with Form 5472. As provided below, the estimated number of respondents for the reporting burden associated with proposed § 1.6038A–2(b)(5)(iii) is 7,000.

The revised tax forms are as follows:

	New	Revision of existing form	Number of respondents (estimated, rounded to nearest 1,000)
Schedule G (Form 5471)	.....	✓	1,000
Schedule I (Form 5471)	.....	✓	2,000
Form 5472	.....	✓	7,000
Form 8865	.....	✓	<1,000

The current status of the Paperwork Reduction Act submissions related to the tax forms that will be revised as a result of the information collections in the proposed regulations is provided in the accompanying table. As described above, the reporting burdens associated with the information collections in proposed §§ 1.6038–2(f)(13) and (14) and 1.6038A–2(b)(5)(iii) are included in the aggregated burden estimates for OMB control number 1545–0123, which represents a total estimated burden time for all forms and schedules for corporations of 3.157 billion hours and total estimated monetized costs of $58.148 billion ($2017). The overall burden estimates provided in 1545–0123 are aggregate amounts that relate to the entire package of forms associated with the OMB control number and will in the future include but not isolate the estimated burden of the tax forms that will be revised as a result of the information collections in the proposed regulations. These numbers are therefore unrelated to the future calculations needed to assess the burden imposed by the proposed regulations. They are further identical to numbers provided for the proposed regulations relating to foreign tax credits (83 FR 63200). The Treasury Department and IRS urge readers to recognize that these numbers are duplicates and to guard against overcounting the burden that international tax provisions imposed prior to the Act. No burden estimates specific to the proposed regulations are currently available. The Treasury Department has not identified any burden estimates, including those for new information collections, related to the requirements under the proposed regulations. Those estimates would capture both changes made by the Act and those that arise out of discretionary authority exercised in the proposed regulations. The Treasury Department and the IRS request comments on all aspects of information collection burdens related to the proposed regulations. In addition, when available, drafts of IRS forms are posted for comment at *https://apps.irs.gov/app/picklist/list/draftTaxForms.htm.*

Form	Type of filer	OMB No.	Status
Form 5471	All other Filers (mainly trusts and estates) (Legacy system).	1545–0121	Approved by OMB through 10/30/2020.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201704-1545-023.*		
	Business (NEW Model)	1545–0123	Published in the **Federal Register** Notice (FRN) on 10/8/18. Public Comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd.*		

Form	Type of filer	OMB No.	Status
	Individual (NEW Model)	1545–0074	Limited Scope submission (1040 only) on 10/11/18 at OIRA for review. Full ICR submission (all forms) scheduled in 3/2019. 60 Day FRN not published yet for full collection.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201808-1545-031.*		
Form 5472	Business (NEW Model)	1545–0123	Published in the FRN on 10/8/18. Public Comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd.*		
	Individual (NEW Model)	1545–0074	Limited Scope submission (1040 only) on 10/11/18 at OIRA for review. Full ICR submission for all forms in 3/2019. 60 Day FRN not published yet for full collection.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201808-1545-031.*		
Form 8865	All other Filers (mainly trusts and estates) (Legacy system).	1545–1668	Published in the FRN on 10/1/18. Public Comment period closed on 11/30/18. ICR in process by Treasury as of 10/17/18.
	Link: *https://www.federalregister.gov/documents/2018/10/01/2018-21288/proposed-collection-comment-request-for-regulation-project.*		
	Business (NEW Model)	1545–0123	Published in the FRN on 10/8/18. Public Comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd.*		
	Individual (NEW Model)	1545–0074	Limited Scope submission (1040 only) on 10/11/18 at OIRA for review. Full ICR submission for all forms in 3/2019. 60 Day FRN not published yet for full collection.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201808-1545-031.*		

III. Regulatory Flexibility Act

It is hereby certified that this notice of proposed rulemaking will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6).

The small entities that are subject to proposed §§ 1.6038–2(f)(13), 1.6038–3(g)(3), and 1.6038A–2(b)(5)(iii) are small entities that are controlling U.S. shareholders of a CFC that is disallowed a deduction under section 267A, small entities that are controlling fifty-percent partners of a foreign partnership that makes a payment for which a deduction is disallowed under section 267A, and small entities that are 25 percent foreign-owned domestic corporations and disallowed a deduction under section 267A, respectively. In addition, the small entities that are subject to proposed § 1.6038–2(f)(14) are controlling U.S. shareholders of a CFC that pays or received a hybrid dividend or a tiered hybrid dividend.

A controlling U.S. shareholder of a CFC is a U.S. person that owns more than 50 percent of the CFC's stock. A controlling fifty-percent partner is a U.S. person that owns more than a fifty-percent interest in the foreign partnership. A 25 percent foreign-owned domestic corporation is a domestic corporation at least 25 percent of the stock of which is owned by a foreign person.

The Treasury Department and the IRS do not have data readily available to assess the number of small entities potentially affected by proposed §§ 1.6038–2(f)(13) or (14), 1.6038–3(g)(3), or 1.6038A–2(b)(5)(iii). However, entities potentially affected by these sections are generally not small businesses, because the resources and investment necessary for an entity to be a controlling U.S. shareholder, a controlling fifty-percent partner, or a 25 percent foreign-owned domestic corporation are generally significant. Moreover, the de minimis exception under section 267A excepts many small entities from the application of section 267A for any taxable year for which the sum of its interest and royalty deductions (plus interest and royalty deductions of certain related persons) is below $50,000. Therefore, the Treasury Department and the IRS do not believe that a substantial number of domestic small business entities will be subject to proposed §§ 1.6038–2(f)(13) or (14), 1.6038–3(g)(3), or 1.6038A–2(b)(5)(iii). Accordingly, the Treasury Department and the IRS do not believe that proposed §§ 1.6038–2(f)(13) or (14), 1.6038–3(g)(3), or 1.6038A–2(b)(5)(iii) will have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act is not required.

The Treasury Department and the IRS do not believe that the proposed regulations have a significant economic impact on domestic small business entities. Based on published information from 2012 from form 5472, interest and royalty amounts paid to related foreign entities by foreign-owned

U.S. corporations over total receipts is 1.6 percent (*https://www.irs.gov/statistics/soi-tax-stats-transactions-of-foreign-owned-domestic-corporations#_2, Classified by Industry 2012*). This is substantially less than the 3 to 5 percent threshold for significant economic impact. The calculated percentage is likely to be an upper bound of the related party payments affected by the proposed hybrid regulations. In particular, this is the ratio of the potential income affected and not the tax revenues, which would be less than half this amount. While 1.6 percent is only for foreign-owned domestic corporations with total receipts of $500 million or more, these are entities that are more likely to have related party payments and so the percentage would be higher. Moreover, hybrid arrangements are only a subset of these related party payments; therefore this percentage is higher than what it would be if only considering hybrid arrangements.

Notwithstanding this certification, Treasury and IRS invite comments about the impact this proposal may have on small entities.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before the proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of the proposed regulations are Shane M. McCarrick and Tracy M. Villecco of the Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in the development of the proposed regulations.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are proposed to be amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding sectional authorities for §§ 1.245A(e)–1 and 1.267A–1 through 1.267A–7 in numerical order and revising the entry for § 1.6038A–2 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.245A(e)–1 also issued under 26 U.S.C. 245A(g).

* * * * *

Sections 1.267A–1 through 1.267A–7 also issued under 26 U.S.C. 267A(e).

* * * * *

Section 1.6038A–2 also issued under 26 U.S.C. 6038A and 6038C.

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■ **Par. 2.** Section 1.245A(e)–1 is added to read as follows:

§ 1.245A(e)–1 Special rules for hybrid dividends.

(a) *Overview.* This section provides rules for hybrid dividends. Paragraph (b) of this section disallows the deduction under section 245A(a) for a hybrid dividend received by a United States shareholder from a CFC. Paragraph (c) of this section provides a rule for hybrid dividends of tiered corporations. Paragraph (d) of this section sets forth rules regarding a hybrid deduction account. Paragraph (e) of this section provides an anti-avoidance rule. Paragraph (f) of this section provides definitions. Paragraph (g) of this section illustrates the application of the rules of this section through examples. Paragraph (h) of this section provides the applicability date.

(b) *Hybrid dividends received by United States shareholders*—(1) *In general.* If a United States shareholder receives a hybrid dividend, then—

(i) The United States shareholder is not allowed a deduction under section 245A(a) for the hybrid dividend; and

(ii) The rules of section 245A(d) (disallowance of foreign tax credits and deductions) apply to the hybrid dividend.

(2) *Definition of hybrid dividend.* The term *hybrid dividend* means an amount received by a United States shareholder from a CFC for which but for section 245A(e) and this section the United States shareholder would be allowed a deduction under section 245A(a), to the extent of the sum of the United States shareholder's hybrid deduction accounts (as described in paragraph (d) of this section) with respect to each share of stock of the CFC, determined at the close of the CFC's taxable year (or in accordance with paragraph (d)(5) of this section, as applicable). No other amount received by a United States shareholder from a CFC is a hybrid dividend for purposes of section 245A.

(3) *Special rule for certain dividends attributable to earnings of lower-tier foreign corporations.* This paragraph (b)(3) applies if a domestic corporation sells or exchanges stock of a foreign corporation and, pursuant to section 1248, the gain recognized on the sale or exchange is included in gross income as a dividend. In such a case, for purposes of this section—

(i) To the extent that earnings and profits of a lower-tier CFC gave rise to the dividend under section 1248(c)(2), those earnings and profits are treated as distributed as a dividend by the lower-tier CFC directly to the domestic corporation under the principles of § 1.1248–1(d); and

(ii) To the extent the domestic corporation indirectly owns (within the meaning of section 958(a)(2)) shares of stock of the lower-tier CFC, the hybrid deduction accounts with respect to those shares are treated as hybrid deduction accounts of the domestic corporation. Thus, for example, if a domestic corporation sells or exchanges all the stock of an upper-tier CFC and under this paragraph (b)(3) there is considered to be a dividend paid directly by the lower-tier CFC to the domestic corporation, then the dividend is generally a hybrid dividend to the extent of the sum of the upper-tier CFC's hybrid deduction accounts with respect to stock of the lower-tier CFC.

(4) *Ordering rule.* Amounts received by a United States shareholder from a CFC are subject to the rules of section 245A(e) and this section based on the order in which they are received. Thus, for example, if on different days during a CFC's taxable year a United States shareholder receives dividends from the CFC, then the rules of section 245A(e) and this section apply first to the dividend received on the earliest date (based on the sum of the United States shareholder's hybrid deduction accounts with respect to each share of stock of the CFC), and then to the

dividend received on the next earliest date (based on the remaining sum).

(c) *Hybrid dividends of tiered corporations*—(1) *In general.* If a CFC (the *receiving CFC*) receives a tiered hybrid dividend from another CFC, and a domestic corporation is a United States shareholder with respect to both CFCs, then, notwithstanding any other provision of the Code—

(i) The tiered hybrid dividend is treated for purposes of section 951(a)(1)(A) as subpart F income of the receiving CFC for the taxable year of the CFC in which the tiered hybrid dividend is received;

(ii) The United States shareholder must include in gross income an amount equal to its pro rata share (determined in the same manner as under section 951(a)(2)) of the subpart F income described in paragraph (c)(1)(i) of this section; and

(iii) The rules of section 245A(d) (disallowance of foreign tax credit, including for taxes that would have been deemed paid under section 960(a) or (b), and deductions) apply to the amount included under paragraph (c)(1)(ii) of this section in the United States shareholder's gross income.

(2) *Definition of tiered hybrid dividend.* The term *tiered hybrid dividend* means an amount received by a receiving CFC from another CFC to the extent that the amount would be a hybrid dividend under paragraph (b)(2) of this section if, for purposes of section 245A and the regulations under section 245A as contained in 26 CFR part 1 (except for section 245A(e)(2) and this paragraph (c)), the receiving CFC were a domestic corporation. A tiered hybrid dividend does not include an amount described in section 959(b). No other amount received by a receiving CFC from another CFC is a tiered hybrid dividend for purposes of section 245A.

(3) *Special rule for certain dividends attributable to earnings of lower-tier foreign corporations.* This paragraph (c)(3) applies if a CFC sells or exchanges stock of a foreign corporation and pursuant to section 964(e)(1) the gain recognized on the sale or exchange is included in gross income as a dividend. In such a case, rules similar to the rules of paragraph (b)(3) of this section apply.

(4) *Interaction with rules under section 964(e).* To the extent a dividend described in section 964(e)(1) (gain on certain stock sales by CFCs treated as dividends) is a tiered hybrid dividend, the rules of section 964(e)(4) do not apply and, therefore, the United States shareholder is not allowed a deduction under section 245A(a) for the amount included in gross income under paragraph (c)(1)(ii) of this section.

(d) *Hybrid deduction accounts*—(1) *In general.* A specified owner of a share of CFC stock must maintain a hybrid deduction account with respect to the share. The hybrid deduction account with respect to the share must reflect the amount of hybrid deductions of the CFC allocated to the share (as determined under paragraphs (d)(2) and (3) of this section), and must be maintained in accordance with the rules of paragraphs (d)(4) through (6) of this section.

(2) *Hybrid deductions*—(i) *In general.* The term *hybrid deduction* of a CFC means a deduction or other tax benefit (such as an exemption, exclusion, or credit, to the extent equivalent to a deduction) for which the requirements of paragraphs (d)(2)(i)(A) and (B) of this section are both satisfied.

(A) The deduction or other tax benefit is allowed to the CFC (or a person related to the CFC) under a relevant foreign tax law.

(B) The deduction or other tax benefit relates to or results from an amount paid, accrued, or distributed with respect to an instrument issued by the CFC and treated as stock for U.S. tax purposes. Examples of such a deduction or other tax benefit include an interest deduction, a dividends paid deduction, and a deduction with respect to equity (such as a notional interest deduction). *See* paragraph (g)(1) of this section. However, a deduction or other tax benefit relating to or resulting from a distribution by the CFC with respect to an instrument treated as stock for purposes of the relevant foreign tax law is considered a hybrid deduction only to the extent it has the effect of causing the earnings that funded the distribution to not be included in income (determined under the principles of § 1.267A–3(a)) or otherwise subject to tax under the CFC's tax law. Thus, for example, a refund to a shareholder of a CFC (including through a credit), upon a distribution by the CFC to the shareholder, of taxes paid by the CFC on the earnings that funded the distribution results in a hybrid deduction of the CFC, but only to the extent that the shareholder, if a tax resident of the CFC's country, does not include the distribution in income under the CFC's tax law or, if not a tax resident of the CFC's country, is not subject to withholding tax (as defined in section 901(k)(1)(B)) on the distribution under the CFC's tax law. *See* paragraph (g)(2) of this section.

(ii) *Application limited to items allowed in taxable years beginning after December 31, 2017.* A deduction or other tax benefit allowed to a CFC (or a person related to the CFC) under a relevant foreign tax law is taken into account for purposes of this section only if it was allowed with respect to a taxable year under the relevant foreign tax law beginning after December 31, 2017.

(3) *Allocating hybrid deductions to shares.* A hybrid deduction is allocated to a share of stock of a CFC to the extent that the hybrid deduction (or amount equivalent to a deduction) relates to an amount paid, accrued, or distributed by the CFC with respect to the share. However, in the case of a hybrid deduction that is a deduction with respect to equity (such as a notional interest deduction), the deduction is allocated to a share of stock of a CFC based on the product of—

(i) The amount of the deduction allowed for all of the equity of the CFC; and

(ii) A fraction, the numerator of which is the value of the share and the denominator of which is the value of all of the stock of the CFC.

(4) *Maintenance of hybrid deduction accounts*—(i) *In general.* A specified owner's hybrid deduction account with respect to a share of stock of a CFC is, as of the close of the taxable year of the CFC, adjusted pursuant to the following rules.

(A) First, the account is increased by the amount of hybrid deductions of the CFC allocable to the share for the taxable year.

(B) Second, the account is decreased by the amount of hybrid deductions in the account that gave rise to a hybrid dividend or tiered hybrid dividend during the taxable year. If a specified owner has more than one hybrid deduction account with respect to its stock of the CFC, then a pro rata amount in each hybrid deduction account is considered to have given rise to the hybrid dividend or tiered hybrid dividend, based on the amounts in the accounts before applying this paragraph (d)(4)(i)(B).

(ii) *Acquisition of account*—(A) *In general.* The following rules apply when a person (the *acquirer*) acquires a share of stock of a CFC from another person (the *transferor*).

(*1*) In the case of an acquirer that is a specified owner of the share immediately after the acquisition, the transferor's hybrid deduction account, if any, with respect to the share becomes the hybrid deduction account of the acquirer.

(*2*) In the case of an acquirer that is not a specified owner of the share immediately after the acquisition, the transferor's hybrid deduction account, if any, is eliminated and accordingly is not thereafter taken into account by any person.

(B) *Additional rules.* The following rules apply in addition to the rules of paragraph (d)(4)(ii)(A) of this section.

(*1*) *Certain section 354 or 356 exchanges.* The following rules apply when a shareholder of a CFC (the CFC, the *target CFC*; the shareholder, the *exchanging shareholder*) exchanges stock of the target CFC for stock of another CFC (the *acquiring CFC*) pursuant to an exchange described in section 354 or 356 that occurs in connection with a transaction described in section 381(a)(2) in which the target CFC is the transferor corporation.

(*i*) In the case of an exchanging shareholder that is a specified owner of one or more shares of stock of the acquiring CFC immediately after the exchange, the exchanging shareholder's hybrid deduction accounts with respect to the shares of stock of the target CFC that it exchanges are attributed to the shares of stock of the acquiring CFC that it receives in the exchange.

(*ii*) In the case of an exchanging shareholder that is not a specified owner of one or more shares of stock of the acquiring CFC immediately after the exchange, the exchanging shareholder's hybrid deduction accounts with respect to its shares of stock of the target CFC are eliminated and accordingly are not thereafter taken into account by any person.

(*2*) *Section 332 liquidations.* If a CFC is a distributor corporation in a transaction described in section 381(a)(1) (the *distributing CFC*) in which a controlled foreign corporation is the acquiring corporation (the *distributee CFC*), then each hybrid account with respect to a share of stock of the distributee CFC is increased pro rata by the sum of the hybrid accounts with respect to shares of stock of the distributing CFC.

(*3*) *Recapitalizations.* If a shareholder of a CFC exchanges stock of the CFC pursuant to a reorganization described in section 368(a)(1)(E) or a transaction to which section 1036 applies, then the shareholder's hybrid deduction accounts with respect to the stock of the CFC that it exchanges are attributed to the shares of stock of the CFC that it receives in the exchange.

(5) *Determinations and adjustments made on transfer date in certain cases.* This paragraph (d)(5) applies if on a date other than the date that is the last day of the CFC's taxable year a United States shareholder of the CFC or an upper-tier CFC with respect to the CFC directly or indirectly transfers a share of stock of the CFC, and, during the taxable year, but on or before the transfer date, the United States shareholder or upper-tier CFC receives an amount from the CFC that is subject to the rules of section 245A(e) and this section. In such a case, as to the United States shareholder or upper-tier CFC and the United States shareholder's or upper-tier CFC's hybrid deduction accounts with respect to each share of stock of the CFC (regardless of whether such share is transferred), the determinations and adjustments under this section that would otherwise be made at the close of the CFC's taxable year are made at the close of the date of the transfer. Thus, for example, if a United States shareholder of a CFC exchanges stock of the CFC in an exchange described in § 1.367(b)–4(b)(1)(i) and is required to include in income as a deemed dividend the section 1248 amount attributable to the stock exchanged, the sum of the United States shareholder's hybrid deduction accounts with respect to each share of stock of the CFC is determined, and the accounts are adjusted, as of the close of the date of the exchange. For this purpose, the principles of § 1.1502–76(b)(2)(ii) apply to determine amounts in hybrid deduction accounts at the close of the date of the transfer.

(6) *Effects of CFC functional currency*—(i) *Maintenance of the hybrid deduction account.* A hybrid deduction account with respect to a share of CFC stock must be maintained in the functional currency (within the meaning of section 985) of the CFC. Thus, for example, the amount of a hybrid deduction and the adjustments described in paragraphs (d)(4)(i)(A) and (B) of this section are determined based on the functional currency of the CFC. In addition, for purposes of this section, the amount of a deduction or other tax benefit allowed to a CFC (or a person related to the CFC) is determined taking into account foreign currency gain or loss recognized with respect to such deduction or other tax benefit under a provision of foreign tax law comparable to section 988 (treatment of certain foreign currency transactions).

(ii) *Determination of amount of hybrid dividend.* This paragraph (d)(6)(ii) applies if a CFC's functional currency is other than the functional currency of a United States shareholder or upper-tier CFC that receives an amount from the CFC that is subject to the rules of section 245A(e) and this section. In such a case, the sum of the United States shareholder's or upper-tier CFC's hybrid deduction accounts with respect to each share of stock of the CFC is, for purposes of determining the extent that a dividend is a hybrid dividend or tiered hybrid dividend, translated into the functional currency of the United States shareholder or upper-tier CFC based on the spot rate (within the meaning of § 1.988–1(d)) as of the date of the dividend.

(e) *Anti-avoidance rule.* Appropriate adjustments are made pursuant to this section, including adjustments that would disregard the transaction or arrangement, if a transaction or arrangement is undertaken with a principal purpose of avoiding the purposes of this section. For example, if a specified owner of a share of CFC stock transfers the share to another person, and a principal purpose of the transfer is to shift the hybrid deduction account with respect to the share to the other person or to cause the hybrid deduction account to be eliminated, then for purposes of this section the shifting or elimination of the hybrid deduction account is disregarded as to the transferor. As another example, if a transaction or arrangement is undertaken to affirmatively fail to satisfy the holding period requirement under section 246(c)(5) with a principal purpose of avoiding the tiered hybrid dividend rules described in paragraph (c) of this section, the transaction or arrangement is disregarded for purposes of this section.

(f) *Definitions.* The following definitions apply for purposes of this section.

(1) The term *controlled foreign corporation* (or *CFC*) has the meaning provided in section 957.

(2) The term *person* has the meaning provided in section 7701(a)(1).

(3) The term *related* has the meaning provided in this paragraph (f)(3). A person is related to a CFC if the person is a related person within the meaning of section 954(d)(3).

(4) The term *relevant foreign tax law* means, with respect to a CFC, any regime of any foreign country or possession of the United States that imposes an income, war profits, or excess profits tax with respect to income of the CFC, other than a foreign anti-deferral regime under which a person that owns an interest in the CFC is liable to tax. Thus, the term includes any regime of a foreign country or possession of the United States that imposes income, war profits, or excess profits tax under which—

(i) The CFC is liable to tax as a resident;

(ii) The CFC has a branch that gives rise to a taxable presence in the foreign country or possession of the United States; or

(iii) A person related to the CFC is liable to tax as a resident, provided that under such person's tax law the person is allowed a deduction for amounts paid or accrued by the CFC (because, for

example, the CFC is fiscally transparent under the person's tax law).

(5) The term *specified owner* means, with respect to a share of stock of a CFC, a person for which the requirements of paragraphs (f)(5)(i) and (ii) of this section are satisfied.

(i) The person is a domestic corporation that is a United States shareholder of the CFC, or is an upper-tier CFC that would be a United States shareholder of the CFC were the upper-tier CFC a domestic corporation.

(ii) The person owns the share directly or indirectly through a partnership, trust, or estate. Thus, for example, if a domestic corporation directly owns all the shares of stock of an upper-tier CFC and the upper-tier CFC directly owns all the shares of stock of another CFC, the domestic corporation is the specified owner with respect to each share of stock of the upper-tier CFC and the upper-tier CFC is the specified owner with respect to each share of stock of the other CFC.

(6) The term *United States shareholder* has the meaning provided in section 951(b).

(g) *Examples.* This paragraph (g) provides examples that illustrate the application of this section. For purposes of the examples in this paragraph (g), unless otherwise indicated, the following facts are presumed. US1 is a domestic corporation. FX and FZ are CFCs formed at the beginning of year 1. FX is a tax resident of Country X and FZ is a tax resident of Country Z. US1 is a United States shareholder with respect to FX and FZ. No distributed amounts are attributable to amounts which are, or have been, included in the gross income of a United States shareholder under section 951(a). All instruments are treated as stock for U.S. tax purposes.

(1) Example 1. Hybrid dividend resulting from hybrid instrument—(i) *Facts.* US1 holds both shares of stock of FX, which have an equal value. One share is treated as indebtedness for Country X tax purposes (''Share A''), and the other is treated as equity for Country X tax purposes (''Share B''). During year 1, under Country X tax law, FX accrues $80x of interest to US1 with respect to Share A and is allowed a deduction for the amount (the ''Hybrid Instrument Deduction''). During year 2, FX distributes $30x to US1 with respect to each of Share A and Share B. For U.S. tax purposes, each of the $30x distributions is treated as a dividend for which, but for section 245A(e) and this section, US1 would be allowed a deduction under section 245A(a). For Country X tax purposes, the $30x distribution with respect to Share A represents a payment of interest for which a deduction was already allowed (and thus FX is not allowed an additional deduction for the amount), and the $30x distribution with respect to Share B is treated as a dividend (for which no deduction is allowed).

(ii) *Analysis.* The entire $30x of each dividend received by US1 from FX during year 2 is a hybrid dividend, because the sum of US1's hybrid deduction accounts with respect to each of its shares of FX stock at the end of year 2 ($80x) is at least equal to the amount of the dividends ($60x). *See* paragraph (b)(2) of this section. This is the case for the $30x dividend with respect to Share B even though there are no hybrid deductions allocated to Share B. *See id.* As a result, US1 is not allowed a deduction under section 245A(a) for the entire $60x of hybrid dividends and the rules of section 245A(d) (disallowance of foreign tax credits and deductions) apply. *See* paragraph (b)(1) of this section. Paragraphs (g)(1)(ii)(A) through (D) of this section describe the determinations under this section.

(A) At the end of year 1, US1's hybrid deduction accounts with respect to Share A and Share B are $80x and $0, respectively, calculated as follows.

(*1*) The $80x Hybrid Instrument Deduction allowed to FX under Country X tax law (a relevant foreign tax law) is a hybrid deduction of FX, because the deduction is allowed to FX and relates to or results from an amount accrued with respect to an instrument issued by FX and treated as stock for U.S. tax purposes. *See* paragraph (d)(2)(i) of this section. Thus, FX's hybrid deductions for year 1 are $80x.

(*2*) The entire $80x Hybrid Instrument Deduction is allocated to Share A, because the deduction was accrued with respect to Share A. *See* paragraph (d)(3) of this section. As there are no additional hybrid deductions of FX for year 1, there are no additional hybrid deductions to allocate to either Share A or Share B. Thus, there are no hybrid deductions allocated to Share B.

(*3*) At the end of year 1, US1's hybrid deduction account with respect to Share A is increased by $80x (the amount of hybrid deductions allocated to Share A). *See* paragraph (d)(4)(i)(A) of this section. Because FX did not pay any dividends with respect to either Share A or Share B during year 1 (and therefore did not pay any hybrid dividends or tiered hybrid dividends), no further adjustments are made. *See* paragraph (d)(4)(i)(B) of this section. Therefore, at the end of year 1, US1's hybrid deduction accounts with respect to Share A and Share B are $80x and $0, respectively.

(B) At the end of year 2, and before the adjustments described in paragraph (d)(4)(i)(B) of this section, US1's hybrid deduction accounts with respect to Share A and Share B remain $80x and $0, respectively. This is because there are no hybrid deductions of FX for year 2. *See* paragraph (d)(4)(i)(A) of this section.

(C) Because at the end of year 2 (and before the adjustments described in paragraph (d)(4)(i)(B) of this section) the sum of US1's hybrid deduction accounts with respect to Share A and Share B ($80x, calculated as $80x plus $0) is at least equal to the aggregate $60x of year 2 dividends, the entire $60x dividend is a hybrid dividend. *See* paragraph (b)(2) of this section.

(D) At the end of year 2, US1's hybrid deduction account with respect to Share A is decreased by $60x, the amount of the hybrid deductions in the account that gave rise to a hybrid dividend or tiered hybrid dividend during year 2. *See* paragraph (d)(4)(i)(B) of this section. Because there are no hybrid deductions in the hybrid deduction account with respect to Share B, no adjustments with respect to that account are made under paragraph (d)(4)(i)(B) of this section. Therefore, at the end of year 2 and taking into account the adjustments under paragraph (d)(4)(i)(B) of this section, US1's hybrid deduction account with respect to Share A is $20x ($80x less $60x) and with respect to Share B is $0.

(iii) *Alternative facts—notional interest deductions.* The facts are the same as in paragraph (g)(1)(i) of this section, except that for each of year 1 and year 2 FX is allowed $10x of notional interest deductions with respect to its equity, Share B, under Country X tax law (the ''NIDs''). In addition, during year 2, FX distributes $47.5x (rather than $30x) to US1 with respect to each of Share A and Share B. For U.S. tax purposes, each of the $47.5x distributions is treated as a dividend for which, but for section 245A(e) and this section, US1 would be allowed a deduction under section 245A(a). For Country X tax purposes, the $47.5x distribution with respect to Share A represents a payment of interest for which a deduction was already allowed (and thus FX is not allowed an additional deduction for the amount), and the $47.5x distribution with respect to Share B is treated as a dividend (for which no deduction is allowed). The entire $47.5x of each dividend received by US1 from FX during year 2 is a hybrid dividend, because the sum of US1's hybrid deduction accounts with respect to each of its shares of FX stock at the end of year 2 ($80x plus $20x, or $100x) is at least equal to the amount of the dividends ($95x). *See* paragraph (b)(2) of this section. As a result, US1 is not allowed a deduction under section 245A(a) for the $95x hybrid dividend and the rules of section 245A(d) (disallowance of foreign tax credits and deductions) apply. *See* paragraph (b)(1) of this section. Paragraphs (g)(1)(iii)(A) through (D) of this section describe the determinations under this section.

(A) The $10x of NIDs allowed to FX under Country X tax law in year 1 are hybrid deductions of FX for year 1. *See* paragraph (d)(2)(i) of this section. The $10x of NIDs is allocated equally to each of Share A and Share B, because the hybrid deduction is with respect to equity and the shares have an equal value. *See* paragraph (d)(3) of this section. Thus, $5x of the NIDs is allocated to each of Share A and Share B for year 1. For the reasons described in paragraph (g)(1)(ii)(A) of this section, the entire $80x Hybrid Instrument Deduction is allocated to Share A. Therefore, at the end of year 1, US1's hybrid deduction accounts with respect to Share A and Share B are $85x and $5x, respectively.

(B) Similarly, the $10x of NIDs allowed to FX under Country X tax law in year 2 are hybrid deductions of FX for year 2, and $5x of the NIDs is allocated to each of Share A and Share B for year 2. *See* paragraphs (d)(2)(i) and (d)(3) of this section. Thus, at the

end of year 2 (and before the adjustments described in paragraph (d)(4)(i)(B) of this section), US1's hybrid deduction account with respect to Share A is $90x ($85x plus $5x) and with respect to Share B is $10x ($5x plus $5x). *See* paragraph (d)(4)(i) of this section.

(C) Because at the end of year 2 (and before the adjustments described in paragraph (d)(4)(i)(B) of this section) the sum of US1's hybrid deduction accounts with respect to Share A and Share B ($100x, calculated as $90x plus $10x) is at least equal to the aggregate $95x of year 2 dividends, the entire $95x of dividends are hybrid dividends. *See* paragraph (b)(2) of this section.

(D) At the end of year 2, US1's hybrid deduction accounts with respect to Share A and Share B are decreased by the amount of hybrid deductions in the accounts that gave rise to a hybrid dividend or tiered hybrid dividend during year 2. *See* paragraph (d)(4)(i)(B) of this section. A total of $95x of hybrid deductions in the accounts gave rise to a hybrid dividend during year 2. For the hybrid deduction account with respect to Share A, $85.5x in the account is considered to have given rise to a hybrid deduction (calculated as $95x multiplied by $90x/$100x). *See id.* For the hybrid deduction account with respect to Share B, $9.5x in the account is considered to have given rise to a hybrid deduction (calculated as $95x multiplied by $10x/$100x). *See id.* Thus, following these adjustments, at the end of year 2, US1's hybrid deduction account with respect to Share A is $4.5x ($90x less $85.5x) and with respect to Share B is $0.5x ($10x less $9.5x).

(iv) *Alternative facts—deduction in branch country*—(A) *Facts.* The facts are the same as in paragraph (g)(1)(i) of this section, except that for Country X tax purposes Share A is treated as equity (and thus the Hybrid Instrument Deduction does not exist and under Country X tax law FX is not allowed a deduction for the $30x distributed in year 2 with respect to Share A). However, FX has a branch in Country Z that gives rise to a taxable presence under Country Z tax law, and for Country Z tax purposes Share A is treated as indebtedness and Share B is treated as equity. Also, during year 1, for Country Z tax purposes, FX accrues $80x of interest to US1 with respect to Share A and is allowed an $80x interest deduction with respect to its Country Z branch income. Moreover, for Country Z tax purposes, the $30x distribution with respect to Share A in year 2 represents a payment of interest for which a deduction was already allowed (and thus FX is not allowed an additional deduction for the amount), and the $30x distribution with respect to Share B in year 2 is treated as a dividend (for which no deduction is allowed).

(B) *Analysis.* The $80x interest deduction allowed to FX under Country Z tax law (a relevant foreign tax law) with respect to its Country Z branch income is a hybrid deduction of FX for year 1. *See* paragraphs (d)(2)(i) and (f)(4) of this section. For reasons similar to those discussed in paragraph (g)(1)(ii) of this section, at the end of year 2 (and before the adjustments described in paragraph (d)(4)(i)(B) of this section), US1's hybrid deduction accounts with respect to Share A and Share B are $80x and $0, respectively, and the sum of the accounts is $80x. Accordingly, the entire $60x of the year 2 dividend is a hybrid dividend. *See* paragraph (b)(2) of this section. Further, for the reasons described in paragraph (g)(1)(ii)(D) of this section, at the end of year 2 and taking into account the adjustments under paragraph (d)(4)(i)(B) of this section, US1's hybrid deduction account with respect to Share A is $20x ($80x less $60x) and with respect to Share B is $0.

(2) Example 2. Tiered hybrid dividend rule; tax benefit equivalent to a deduction—(i) *Facts.* US1 holds all the stock of FX, and FX holds all 100 shares of stock of FZ (the ''FZ shares''), which have an equal value. The FZ shares are treated as equity for Country Z tax purposes. During year 2, FZ distributes $10x to FX with respect to each of the FZ shares, for a total of $1,000x. The $1,000x is treated as a dividend for U.S. and Country Z tax purposes, and is not deductible for Country Z tax purposes. If FX were a domestic corporation, then, but for section 245A(e) and this section, FX would be allowed a deduction under section 245A(a) for the $1,000x. Under Country Z tax law, 75% of the corporate income tax paid by a Country Z corporation with respect to a dividend distribution is refunded to the corporation's shareholders (regardless of where such shareholders are tax residents) upon a dividend distribution by the corporation. The corporate tax rate in Country Z is 20%. With respect to FZ's distributions, FX is allowed a refundable tax credit of $187.5x. The $187.5x refundable tax credit is calculated as $1,250x (the amount of pre-tax earnings that funded the distribution, determined as $1,000x (the amount of the distribution) divided by 0.8 (the percentage of pre-tax earnings that a Country Z corporation retains after paying Country Z corporate tax)) multiplied by 0.2 (the Country Z corporate tax rate) multiplied by 0.75 (the percentage of the Country Z tax credit). Under Country Z tax law, FX is not subject to Country Z withholding tax (or any other tax) with respect to the $1,000x dividend distribution.

(ii) *Analysis.* $937.5x of the $1,000x of dividends received by FX from FZ during year 2 is a tiered hybrid dividend, because the sum of FX's hybrid deduction accounts with respect to each of its shares of FZ stock at the end of year 2 is $937.5x. *See* paragraphs (b)(2) and (c)(2) of this section. As a result, the $937.5x tiered hybrid dividend is treated for purposes of section 951(a)(1)(A) as subpart F income of FX and US1 must include in gross income its pro rata share of such subpart F income, which is $937.5x. *See* paragraph (c)(1) of this section. In addition, the rules of section 245A(d) (disallowance of foreign tax credits and deductions) apply with respect to US1's inclusion. *Id.* Paragraphs (g)(2)(ii)(A) through (C) of this section describe the determinations under this section. The characterization of the FZ stock for Country X tax purposes (or for purposes of any other foreign tax law) does not affect this analysis.

(A) The $187.5x refundable tax credit allowed to FX under Country Z tax law (a relevant foreign tax law) is equivalent to a $937.5x deduction, calculated as $187.5x (the amount of the credit) divided by 0.2 (the Country Z corporate tax rate). The $937.5x is a hybrid deduction of FZ because it is allowed to FX (a person related to FZ), it relates to or results from amounts distributed with respect to instruments issued by FZ and treated as stock for U.S. tax purposes, and it has the effect of causing the earnings that funded the distributions to not be included in income under Country Z tax law. *See* paragraph (d)(2)(i) of this section. $9.375x of the hybrid deduction is allocated to each of the FZ shares, calculated as $937.5x (the amount of the hybrid deduction) multiplied by 1/100 (the value of each FZ share relative to the value of all the FZ shares). *See* paragraph (d)(3) of this section. The result would be the same if FX were instead a tax resident of Country Z (and not Country X) and under Country Z tax law FX were to not include the $1,000x in income (because, for example, Country Z tax law provides Country Z resident corporations a 100% exclusion or dividends received deduction with respect to dividends received from a resident corporation). *See* paragraph (d)(2)(i) of this section.

(B) Thus, at the end of year 2, and before the adjustments described in paragraph (d)(4)(i)(B) of this section, the sum of FX's hybrid deduction accounts with respect to each of its shares of FZ stock is $937.5x, calculated as $9.375x (the amount in each account) multiplied by 100 (the number of accounts). *See* paragraph (d)(4)(i) of this section. Accordingly, $937.5x of the $1,000x dividend received by FX from FZ during year 2 is a tiered hybrid dividend. *See* paragraphs (b)(2) and (c)(2) of this section.

(C) Lastly, at the end of year 2, each of FX's hybrid deduction accounts with respect to its shares of FZ is decreased by the $9.375x in the account that gave rise to a hybrid dividend or tiered hybrid dividend during year 2. *See* paragraph (d)(4)(i)(B) of this section. Thus, following these adjustments, at the end of year 2, each of FX's hybrid deduction accounts with respect to its shares of FZ stock is $0, calculated as $9.375x (the amount in the account before the adjustments described in paragraph (d)(4)(i)(B) of this section) less $9.375x (the adjustment described in paragraph (d)(4)(i)(B) of this section with respect to the account).

(iii) *Alternative facts—imputation system that taxes shareholders.* The facts are the same as in paragraph (g)(2)(i) of this section, except that under Country Z tax law the $1,000 dividend to FX is subject to a 30% gross basis withholding tax, or $300x, and the $187.5x refundable tax credit is applied against and reduces the withholding tax to $112.5x. The $187.5x refundable tax credit provided to FX is not a hybrid deduction because FX was subject to Country Z withholding tax of $300x on the $1,000x dividend (such withholding tax being greater than the $187.5x credit). *See* paragraph (d)(2)(i) of this section.

(h) *Applicability date.* This section applies to distributions made after December 31, 2017.

■ **Par. 3.** Sections 1.267A–1 through 1.267A–7 are added to read as follows:

§ 1.267A–1 Disallowance of certain interest and royalty deductions.

(a) *Scope.* This section and §§ 1.267A–2 through 1.267A–5 provide rules regarding when a deduction for any interest or royalty paid or accrued is disallowed under section 267A. Section 1.267A–2 describes hybrid and branch arrangements. Section 1.267A–3 provides rules for determining income inclusions and provides that certain amounts are not amounts for which a deduction is disallowed. Section 1.267A–4 provides an imported mismatch rule. Section 1.267A–5 sets forth definitions and special rules that apply for purposes of section 267A. Section 1.267A–6 illustrates the application of section 267A through examples. Section 1.267A–7 provides applicability dates.

(b) *Disallowance of deduction.* This paragraph (b) sets forth the exclusive circumstances in which a deduction is disallowed under section 267A. Except as provided in paragraph (c) of this section, a specified party's deduction for any interest or royalty paid or accrued (the amount paid or accrued with respect to the specified party, a *specified payment*) is disallowed under section 267A to the extent that the specified payment is described in this paragraph (b). *See also* § 1.267A–5(b)(5) (treating structured payments as specified payments). A specified payment is described in this paragraph (b) to the extent that it is—

(1) A disqualified hybrid amount, as described in § 1.267A–2 (hybrid and branch arrangements);

(2) A disqualified imported mismatch amount, as described in § 1.267A–4 (payments offset by a hybrid deduction); or

(3) A specified payment for which the requirements of the anti-avoidance rule of § 1.267A–5(b)(6) are satisfied.

(c) *De minimis exception.* Paragraph (b) of this section does not apply to a specified party for a taxable year in which the sum of the specified party's interest and royalty deductions (determined without regard to this section) is less than $50,000. For purposes of this paragraph (c), specified parties that are related (within the meaning of § 1.267A–5(a)(14)) are treated as a single specified party.

§ 1.267A–2 Hybrid and branch arrangements.

(a) *Payments pursuant to hybrid transactions*—(1) *In general.* If a specified payment is made pursuant to a hybrid transaction, then, subject to § 1.267A–3(b) (amounts included or includible in income), the payment is a disqualified hybrid amount to the extent that—

(i) A specified recipient of the payment does not include the payment in income, as determined under § 1.267A–3(a) (to such extent, a *no-inclusion*); and

(ii) The specified recipient's no-inclusion is a result of the payment being made pursuant to the hybrid transaction. For this purpose, the specified recipient's no-inclusion is a result of the specified payment being made pursuant to the hybrid transaction to the extent that the no-inclusion would not occur were the specified recipient's tax law to treat the payment as interest or a royalty, as applicable. *See* § 1.267A–6(c)(1) and (2).

(2) *Definition of hybrid transaction.* The term *hybrid transaction* means any transaction, series of transactions, agreement, or instrument one or more payments with respect to which are treated as interest or royalties for U.S. tax purposes but are not so treated for purposes of the tax law of a specified recipient of the payment. Examples of a hybrid transaction include an instrument a payment with respect to which is treated as interest for U.S. tax purposes but, for purposes of a specified recipient's tax law, is treated as a distribution with respect to equity or a return of principal. In addition, a specified payment is deemed to be made pursuant to a hybrid transaction if the taxable year in which a specified recipient recognizes the payment under its tax law ends more than 36 months after the end of the taxable year in which the specified party would be allowed a deduction for the payment under U.S. tax law. *See also* § 1.267A–6(c)(8). Further, a specified payment is not considered made pursuant to a hybrid transaction if the payment is a disregarded payment, as described in paragraph (b)(2) of this section.

(3) *Payments pursuant to securities lending transactions, sale-repurchase transactions, or similar transactions.* This paragraph (a)(3) applies if a specified payment is made pursuant to a repo transaction and is not regarded under a foreign tax law but another amount connected to the payment (the *connected amount*) is regarded under such foreign tax law. For this purpose, a *repo transaction* means a transaction one or more payments with respect to which are treated as interest (as defined in § 1.267A–5(a)(12)) or a structured payment (as defined in § 1.267A–5(b)(5)(ii)) for U.S. tax purposes and that is a securities lending transaction or sale-repurchase transaction (including as described in § 1.861–2(a)(7)), or other similar transaction or series of related transactions in which legal title to property is transferred and the property (or similar property, such as securities of the same class and issue) is reacquired or expected to be reacquired. For example, this paragraph (a)(3) applies if a specified payment arising from characterizing a repo transaction of stock in accordance with its substance (that is, characterizing the specified payment as interest) is not regarded as such under a foreign tax law but an amount consistent with the form of the transaction (such as a dividend) is regarded under such foreign tax law. When this paragraph (a)(3) applies, the determination of the identity of a specified recipient of the specified payment under the foreign tax law is made with respect to the connected amount. In addition, if the specified recipient includes the connected amount in income (as determined under § 1.267A–3(a), by treating the connected amount as the specified payment), then the amount of the specified recipient's no-inclusion with respect to the specified payment is correspondingly reduced. *See* § 1.267A–6(c)(2). Further, the principles of this paragraph (a)(3) apply to cases similar to repo transactions in which a foreign tax law does not characterize the transaction in accordance with its substance.

(b) *Disregarded payments*—(1) *In general.* Subject to § 1.267A–3(b) (amounts included or includible in income), the excess (if any) of the sum of a specified party's disregarded payments for a taxable year over its dual inclusion income for the taxable year is a disqualified hybrid amount. *See* § 1.267A–6(c)(3) and (4).

(2) *Definition of disregarded payment.* The term *disregarded payment* means a specified payment to the extent that, under the tax law of a tax resident or taxable branch to which the payment is made, the payment is not regarded (for example, because under such tax law it is a disregarded transaction involving a single taxpayer or between group members) and, were the payment to be regarded (and treated as interest or a royalty, as applicable) under such tax law, the tax resident or taxable branch would include the payment in income, as determined under § 1.267A–3(a). In addition, a disregarded payment includes a specified payment that, under the tax law of a tax resident or taxable branch to which the payment is made, is a payment that gives rise to a deduction or similar offset allowed to the tax resident or taxable branch (or group of entities that include the tax resident or taxable branch) under a foreign consolidation, fiscal unity, group relief, loss sharing, or any similar

regime. Moreover, a disregarded payment does not include a deemed branch payment, or a specified payment pursuant to a repo transaction or similar transaction described in paragraph (a)(3) of this section.

(3) *Definition of dual inclusion income.* With respect to a specified party, the term *dual inclusion income* means the excess, if any, of—

(i) The sum of the specified party's items of income or gain for U.S. tax purposes, to the extent the items of income or gain are included in the income of the tax resident or taxable branch to which the disregarded payments are made, as determined under § 1.267A–3(a) (by treating the items of income or gain as the specified payment); over

(ii) The sum of the specified party's items of deduction or loss for U.S. tax purposes (other than deductions for disregarded payments), to the extent the items of deduction or loss are allowable (or have been or will be allowable during a taxable year that ends no more than 36 months after the end of the specified party's taxable year) under the tax law of the tax resident or taxable branch to which the disregarded payments are made.

(4) *Payments made indirectly to a tax resident or taxable branch.* A specified payment made to an entity an interest of which is directly or indirectly (determined under the rules of section 958(a) without regard to whether an intermediate entity is foreign or domestic) owned by a tax resident or taxable branch is considered made to the tax resident or taxable branch to the extent that, under the tax law of the tax resident or taxable branch, the entity to which the payment is made is fiscally transparent (and all intermediate entities, if any, are also fiscally transparent).

(c) *Deemed branch payments*—(1) *In general.* If a specified payment is a deemed branch payment, then the payment is a disqualified hybrid amount if the tax law of the home office provides an exclusion or exemption for income attributable to the branch. *See* § 1.267A–6(c)(4).

(2) *Definition of deemed branch payment.* The term *deemed branch payment* means, with respect to a U.S. taxable branch that is a U.S. permanent establishment of a treaty resident eligible for benefits under an income tax treaty between the United States and the treaty country, any amount of interest or royalties allowable as a deduction in computing the business profits of the U.S. permanent establishment, to the extent the amount is deemed paid to the home office (or other branch of the home office) and is not regarded (or otherwise taken into account) under the home office's tax law (or the other branch's tax law). A deemed branch payment may be otherwise taken into account for this purpose if, for example, under the home office's tax law a corresponding amount of interest or royalties is allocated and attributable to the U.S. permanent establishment and is therefore not deductible.

(d) *Payments to reverse hybrids*—(1) *In general.* If a specified payment is made to a reverse hybrid, then, subject to § 1.267A–3(b) (amounts included or includible in income), the payment is a disqualified hybrid amount to the extent that—

(i) An investor of the reverse hybrid does not include the payment in income, as determined under § 1.267A–3(a) (to such extent, a *no-inclusion*); and

(ii) The investor's no-inclusion is a result of the payment being made to the reverse hybrid. For this purpose, the investor's no-inclusion is a result of the specified payment being made to the reverse hybrid to the extent that the no-inclusion would not occur were the investor's tax law to treat the reverse hybrid as fiscally transparent (and treat the payment as interest or a royalty, as applicable). *See* § 1.267A–6(c)(5).

(2) *Definition of reverse hybrid.* The term *reverse hybrid* means an entity (regardless of whether domestic or foreign) that is fiscally transparent under the tax law of the country in which it is created, organized, or otherwise established but not fiscally transparent under the tax law of an investor of the entity.

(3) *Payments made indirectly to a reverse hybrid.* A specified payment made to an entity an interest of which is directly or indirectly (determined under the rules of section 958(a) without regard to whether an intermediate entity is foreign or domestic) owned by a reverse hybrid is considered made to the reverse hybrid to the extent that, under the tax law of an investor of the reverse hybrid, the entity to which the payment is made is fiscally transparent (and all intermediate entities, if any, are also fiscally transparent).

(e) *Branch mismatch payments*—(1) *In general.* If a specified payment is a branch mismatch payment, then, subject to § 1.267A–3(b) (amounts included or includible in income), the payment is a disqualified hybrid amount to the extent that—

(i) A home office, the tax law of which treats the payment as income attributable to a branch of the home office, does not include the payment in income, as determined under § 1.267A–3(a) (to such extent, a *no-inclusion*); and

(ii) The home office's no-inclusion is a result of the payment being a branch mismatch payment. For this purpose, the home office's no-inclusion is a result of the specified payment being a branch mismatch payment to the extent that the no-inclusion would not occur were the home office's tax law to treat the payment as income that is not attributable a branch of the home office (and treat the payment as interest or a royalty, as applicable). *See* § 1.267A–6(c)(6).

(2) *Definition of branch mismatch payment.* The term *branch mismatch payment* means a specified payment for which the following requirements are satisfied:

(i) Under a home office's tax law, the payment is treated as income attributable to a branch of the home office; and

(ii) Either—

(A) The branch is not a taxable branch; or

(B) Under the branch's tax law, the payment is not treated as income attributable to the branch.

(f) *Relatedness or structured arrangement limitation.* A specified recipient, a tax resident or taxable branch to which a specified payment is made, an investor, or a home office is taken into account for purposes of paragraphs (a), (b), (d), and (e) of this section, respectively, only if the specified recipient, the tax resident or taxable branch, the investor, or the home office, as applicable, is related (as defined in § 1.267A–5(a)(14)) to the specified party or is a party to a structured arrangement (as defined in § 1.267A–5(a)(20)) pursuant to which the specified payment is made.

§ 1.267A–3 Income inclusions and amounts not treated as disqualified hybrid amounts.

(a) *Income inclusions*—(1) *General rule.* For purposes of section 267A, a tax resident or taxable branch includes in income a specified payment to the extent that, under the tax law of the tax resident or taxable branch—

(i) It includes (or it will include during a taxable year that ends no more than 36 months after the end of the specified party's taxable year) the payment in its income or tax base at the full marginal rate imposed on ordinary income; and

(ii) The payment is not reduced or offset by an exemption, exclusion, deduction, credit (other than for withholding tax imposed on the payment), or other similar relief particular to such type of payment.

Examples of such reductions or offsets include a participation exemption, a dividends received deduction, a deduction or exclusion with respect to a particular category of income (such as income attributable to a branch, or royalties under a patent box regime), and a credit for underlying taxes paid by a corporation from which a dividend is received. A specified payment is not considered reduced or offset by a deduction or other similar relief particular to the type of payment if it is offset by a generally applicable deduction or other tax attribute, such as a deduction for depreciation or a net operating loss. For this purpose, a deduction may be treated as being generally applicable even if it is arises from a transaction related to the specified payment (for example, if the deduction and payment are in connection with a back-to-back financing arrangement).

(2) *Coordination with foreign hybrid mismatch rules.* Whether a tax resident or taxable branch includes in income a specified payment is determined without regard to any defensive or secondary rule contained in hybrid mismatch rules, if any, under the tax law of the tax resident or taxable branch. For this purpose, a defensive or secondary rule means a provision of hybrid mismatch rules that requires a tax resident or taxable branch to include an amount in income if a deduction for the amount is not disallowed under applicable tax law.

(3) *Inclusions with respect to reverse hybrids.* With respect to a tax resident or taxable branch that is an investor of a reverse hybrid, whether the investor includes in income a specified payment made to the reverse hybrid is determined without regard to a distribution from the reverse hybrid (or right to a distribution from the reverse hybrid triggered by the payment).

(4) *De minimis inclusions and deemed full inclusions.* A preferential rate, exemption, exclusion, deduction, credit, or similar relief particular to a type of payment that reduces or offsets 90 percent or more of the payment is considered to reduce or offset 100 percent of the payment. In addition, a preferential rate, exemption, exclusion, deduction, credit, or similar relief particular to a type of payment that reduces or offsets 10 percent or less of the payment is considered to reduce or offset none of the payment.

(b) *Certain amounts not treated as disqualified hybrid amounts to extent included or includible in income*—(1) *In general.* A specified payment, to the extent that but for this paragraph (b) it would be a disqualified hybrid amount (such amount, a *tentative disqualified hybrid amount*), is reduced under the rules of paragraphs (b)(2) through (4) of this section, as applicable. The tentative disqualified hybrid amount, as reduced under such rules, is the disqualified hybrid amount. *See* § 1.267A–6(c)(3) and (7).

(2) *Included in income of United States tax resident or U.S. taxable branch.* A tentative disqualified hybrid amount is reduced to the extent that a specified recipient that is a tax resident of the United States or a U.S. taxable branch takes the tentative disqualified hybrid amount into account in its gross income.

(3) *Includible in income under section 951(a)(1).* A tentative disqualified hybrid amount is reduced to the extent that the tentative disqualified hybrid amount is received by a CFC and includible under section 951(a)(1) (determined without regard to properly allocable deductions of the CFC and qualified deficits under section 952(c)(1)(B)) in the gross income of a United States shareholder of the CFC. However, the tentative disqualified hybrid amount is reduced only if the United States shareholder is a tax resident of the United States or, if the United States shareholder is not a tax resident of the United States, then only to the extent that a tax resident of the United States would take into account the amount includible under section 951(a)(1) in the gross income of the United States shareholder.

(4) *Includible in income under section 951A(a).* A tentative disqualified hybrid amount is reduced to the extent that the tentative disqualified hybrid amount increases a United States shareholder's pro rata share of tested income (within the meaning of section 951A(c)(2)(A)) with respect to a CFC, reduces the shareholder's pro rata share of tested loss (within the meaning of section 951A(c)(2)(B)) of the CFC, or both. However, the tentative disqualified hybrid amount is reduced only if the United States shareholder is a tax resident of the United States or, if the United States shareholder is not a tax resident of the United States, then only to the extent that a tax resident of the United States would take into account the amount that increases the United States shareholder's pro rata share of tested income with respect to the CFC, reduces the shareholder's pro rata share of tested loss of the CFC, or both.

§ 1.267A–4 Disqualified imported mismatch amounts.

(a) *Disqualified imported mismatch amounts.* A specified payment (to the extent not a disqualified hybrid amount, as described in § 1.267A–2) is a disqualified imported mismatch amount to the extent that, under the set-off rules of paragraph (c) of this section, the income attributable to the payment is directly or indirectly offset by a hybrid deduction incurred by a tax resident or taxable branch that is related to the specified party (or that is a party to a structured arrangement pursuant to which the payment is made). For purposes of this section, any specified payment (to the extent not a disqualified hybrid amount) is referred to as an *imported mismatch payment*; the specified party is referred to as an *imported mismatch payer*; and a tax resident or taxable branch that includes the imported mismatch payment in income (or a tax resident or taxable branch the tax law of which otherwise prevents the imported mismatch payment from being a disqualified hybrid amount, for example, because under such tax law the tax resident's no-inclusion is not a result of hybridity) is referred to as the *imported mismatch payee*. *See* § 1.267A–6(c)(8), (9), and (10).

(b) *Hybrid deduction.* A hybrid deduction means, with respect to a tax resident or taxable branch that is not a specified party, a deduction allowed to the tax resident or taxable branch under its tax law for an amount paid or accrued that is interest (including an amount that would be a structured payment under the principles of § 1.267A–5(b)(5)(ii)) or royalty under such tax law (regardless of whether or how such amounts would be recognized under U.S. law), to the extent that a deduction for the amount would be disallowed if such tax law contained rules substantially similar to those under §§ 1.267A–1 through 1.267A–3 and 1.267A–5. In addition, with respect to a tax resident that is not a specified party, a hybrid deduction includes a deduction allowed to the tax resident with respect to equity, such as a notional interest deduction. Further, a hybrid deduction for a particular accounting period includes a loss carryover from another accounting period, to the extent that a hybrid deduction incurred in an accounting period beginning on or after December 20, 2018 comprises the loss carryover.

(c) *Set-off rules*—(1) *In general.* In the order described in paragraph (c)(2) of this section, a hybrid deduction directly or indirectly offsets the income attributable to an imported mismatch payment to the extent that, under paragraph (c)(3) of this section, the payment directly or indirectly funds the hybrid deduction.

(2) *Ordering rules.* The following ordering rules apply for purposes of determining the extent that a hybrid deduction directly or indirectly offsets income attributable to imported mismatch payments.

(i) First, the hybrid deduction offsets income attributable to a factually-related imported mismatch payment that directly or indirectly funds the hybrid deduction. For this purpose, a *factually-related imported mismatch payment* means an imported mismatch payment that is made pursuant to a transaction, agreement, or instrument entered into pursuant to the same plan or series of related transactions that includes the transaction, agreement, or instrument pursuant to which the hybrid deduction is incurred.

(ii) Second, to the extent remaining, the hybrid deduction offsets income attributable to an imported mismatch payment (other than a factually-related imported mismatch payment) that directly funds the hybrid deduction.

(iii) Third, to the extent remaining, the hybrid deduction offsets income attributable to an imported mismatch payment (other than a factually-related imported mismatch payment) that indirectly funds the hybrid deduction.

(3) *Funding rules.* The following funding rules apply for purposes of determining the extent that an imported mismatch payment directly or indirectly funds a hybrid deduction.

(i) The imported mismatch payment directly funds a hybrid deduction to the extent that the imported mismatch payee incurs the deduction.

(ii) The imported mismatch payment indirectly funds a hybrid deduction to the extent that the imported mismatch payee is allocated the deduction.

(iii) The imported mismatch payee is allocated a hybrid deduction to the extent that the imported mismatch payee directly or indirectly makes a funded taxable payment to the tax resident or taxable branch that incurs the hybrid deduction.

(iv) An imported mismatch payee indirectly makes a funded taxable payment to the tax resident or taxable branch that incurs a hybrid deduction to the extent that a chain of funded taxable payments exists connecting the imported mismatch payee, each intermediary tax resident or taxable branch, and the tax resident or taxable branch that incurs the hybrid deduction.

(v) The term *funded taxable payment* means, with respect to a tax resident or taxable branch that is not a specified party, a deductible amount paid or accrued by the tax resident or taxable branch under its tax law, other than an amount that gives rise to a hybrid deduction. However, a funded taxable payment does not include an amount deemed to be an imported mismatch payment pursuant to paragraph (f) of this section.

(vi) If, with respect to a tax resident or taxable branch that is not a specified party, a deduction or loss that is not incurred by the tax resident or taxable branch is directly or indirectly made available to offset income of the tax resident or taxable branch under its tax law, then, for purposes of this paragraph (c), the tax resident or taxable branch to which the deduction or loss is made available and the tax resident or branch that incurs the deduction or loss are treated as a single tax resident or taxable branch. For example, if a deduction or loss of one tax resident is made available to offset income of another tax resident under a tax consolidation, fiscal unity, group relief, loss sharing, or any similar regime, then the tax residents are treated as a single tax resident for purposes of paragraph (c) of this section.

(d) *Calculations based on aggregate amounts during accounting period.* For purposes of this section, amounts are determined on an accounting period basis. Thus, for example, the amount of imported mismatch payments made by an imported mismatch payer to a particular imported mismatch payee is equal to the aggregate amount of all such payments made by the payer during the accounting period.

(e) *Pro rata adjustments.* Amounts are allocated on a pro rata basis if there would otherwise be more than one permissible manner in which to allocate the amounts. Thus, for example, if multiple imported mismatch payers make an imported mismatch payment to a particular imported mismatch payee, the amount of such payments exceeds the hybrid deduction incurred by the payee, and the payments are not factually-related imported mismatch payments, then a pro rata portion of each payer's payment is considered to directly fund the hybrid deduction. *See* § 1.267A–6(c)(9).

(f) *Certain amounts deemed to be imported mismatch payments for certain purposes.* For purposes of determining the extent that income attributable to an imported mismatch payment is directly or indirectly offset by a hybrid deduction, an amount paid or accrued by a tax resident or taxable branch that is not a specified party is deemed to be an imported mismatch payment (and such tax resident or taxable branch and a specified recipient of the amount, determined under § 1.267A–5(a)(19), by treating the amount as the specified payment, are deemed to be an imported mismatch payer and an imported mismatch payee, respectively) to the extent that—

(1) The tax law of such tax resident or taxable branch contains hybrid mismatch rules; and

(2) Under a provision of the hybrid mismatch rules substantially similar to this section, the tax resident or taxable branch is denied a deduction for all or a portion of the amount. *See* § 1.267A–6(c)(10).

§ 1.267A–5 Definitions and special rules.

(a) *Definitions.* For purposes of §§ 1.267A–1 through 1.267A–7 the following definitions apply.

(1) The term *accounting period* means a taxable year, or a period of similar length over which, under a provision of hybrid mismatch rules substantially similar to § 1.267A–4, computations similar to those under that section are made under a foreign tax law.

(2) The term *branch* means a taxable presence of a tax resident in a country other than its country of residence under either the tax resident's tax law or such other country's tax law.

(3) The term *branch mismatch payment* has the meaning provided in § 1.267A–2(e)(2).

(4) The term *controlled foreign corporation* (or *CFC*) has the meaning provided in section 957.

(5) The term *deemed branch payment* has the meaning provided in § 1.267A–2(c)(2).

(6) The term *disregarded payment* has the meaning provided in § 1.267A–2(b)(2).

(7) The term *entity* means any person (as described in section 7701(a)(1), including an entity that under §§ 301.7701–1 through 301.7701–3 of this chapter is disregarded as an entity separate from its owner) other than an individual.

(8) The term *fiscally transparent* means, with respect to an entity, fiscally transparent with respect to an item of income as determined under the principles of § 1.894–1(d)(3)(ii) and (iii), without regard to whether a tax resident (either the entity or interest holder in the entity) that derives the item of income is a resident of a country that has an income tax treaty with the United States.

(9) The term *home office* means a tax resident that has a branch.

(10) The term *hybrid mismatch rules* means rules, regulations, or other tax guidance substantially similar to section 267A, and includes rules the purpose of which is to neutralize the deduction/no-inclusion outcome of hybrid and branch mismatch arrangements. Examples of such rules would include rules based

on, or substantially similar to, the recommendations contained in OECD/G–20, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2: 2015 Final Report* (October 2015), and OECD/G–20, *Neutralising the Effects of Branch Mismatch Arrangements, Action 2: Inclusive Framework on BEPS* (July 2017).

(11) The term *hybrid transaction* has the meaning provided in § 1.267A–2(a)(2).

(12) The term *interest* means any amount described in paragraph (a)(12)(i) or (ii) of this section (as adjusted by amounts described in paragraph (a)(12)(iii) of this section) that is paid or accrued, or treated as paid or accrued, for the taxable year or that is otherwise designated as interest expense in paragraph (a)(12)(i) or (ii) of this section (as adjusted by amounts described in paragraph (a)(12)(iii) of this section).

(i) *In general.* Interest is an amount paid, received, or accrued as compensation for the use or forbearance of money under the terms of an instrument or contractual arrangement, including a series of transactions, that is treated as a debt instrument for purposes of section 1275(a) and § 1.1275–1(d), and not treated as stock under § 1.385–3, or an amount that is treated as interest under other provisions of the Internal Revenue Code (Code) or the regulations under 26 CFR part 1. Thus, for example, interest includes—

(A) Original issue discount (OID);

(B) Qualified stated interest, as adjusted by the issuer for any bond issuance premium;

(C) OID on a synthetic debt instrument arising from an integrated transaction under § 1.1275–6;

(D) Repurchase premium to the extent deductible by the issuer under § 1.163–7(c);

(E) Deferred payments treated as interest under section 483;

(F) Amounts treated as interest under a section 467 rental agreement;

(G) Forgone interest under section 7872;

(H) De minimis OID taken into account by the issuer;

(I) Amounts paid or received in connection with a sale-repurchase agreement treated as indebtedness under Federal tax principles; in the case of a sale-repurchase agreement relating to tax-exempt bonds, however, the amount is not tax-exempt interest;

(J) Redeemable ground rent treated as interest under section 163(c); and

(K) Amounts treated as interest under section 636.

(ii) *Swaps with significant nonperiodic payments*—(A) *Non-cleared swaps.* A swap that is not a cleared swap and that has significant nonperiodic payments is treated as two separate transactions consisting of an on-market, level payment swap and a loan. The loan must be accounted for by the parties to the contract independently of the swap. The time value component associated with the loan, determined in accordance with § 1.446–3(f)(2)(iii)(A), is recognized as interest expense to the payor.

(B) [Reserved]

(C) *Definition of cleared swap.* The term *cleared swap* means a swap that is cleared by a derivatives clearing organization, as such term is defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a), or by a clearing agency, as such term is defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), that is registered as a derivatives clearing organization under the Commodity Exchange Act or as a clearing agency under the Securities Exchange Act of 1934, respectively, if the derivatives clearing organization or clearing agency requires the parties to the swap to post and collect margin or collateral.

(iii) *Amounts affecting the effective cost of borrowing that adjust the amount of interest expense.* Income, deduction, gain, or loss from a derivative, as defined in section 59A(h)(4)(A), that alters a person's effective cost of borrowing with respect to a liability of the person is treated as an adjustment to interest expense of the person. For example, a person that is obligated to pay interest at a floating rate on a note and enters into an interest rate swap that entitles the person to receive an amount that is equal to or that closely approximates the interest rate on the note in exchange for a fixed amount is, in effect, paying interest expense at a fixed rate by entering into the interest rate swap. Income, deduction, gain, or loss from the swap is treated as an adjustment to interest expense. Similarly, any gain or loss resulting from a termination or other disposition of the swap is an adjustment to interest expense, with the timing of gain or loss subject to the rules of § 1.446–4.

(13) The term *investor* means, with respect to an entity, any tax resident or taxable branch that directly or indirectly (determined under the rules of section 958(a) without regard to whether an intermediate entity is foreign or domestic) owns an interest in the entity.

(14) The term *related* has the meaning provided in this paragraph (a)(14). A tax resident or taxable branch is related to a specified party if the tax resident or taxable branch is a related person within the meaning of section 954(d)(3), determined by treating the specified party as the ''controlled foreign corporation'' referred to in that section and the tax resident or taxable branch as the ''person'' referred to in that section. In addition, for these purposes, a tax resident that under §§ 301.7701–1 through 301.7701–3 of this chapter is disregarded as an entity separate from its owner for U.S. tax purposes, as well as a taxable branch, is treated as a corporation. Further, for these purposes neither section 318(a)(3), nor § 1.958–2(d) or the principles thereof, applies to attribute stock or other interests to a tax resident, taxable branch, or specified party.

(15) The term *reverse hybrid* has the meaning provided in § 1.267A–2(d)(2).

(16) The term *royalty* includes amounts paid or accrued as consideration for the use of, or the right to use—

(i) Any copyright, including any copyright of any literary, artistic, scientific or other work (including cinematographic films and software);

(ii) Any patent, trademark, design or model, plan, secret formula or process, or other similar property (including goodwill); or

(iii) Any information concerning industrial, commercial or scientific experience, but does not include—

(A) Amounts paid or accrued for after-sales services;

(B) Amounts paid or accrued for services rendered by a seller to the purchaser under a warranty;

(C) Amounts paid or accrued for pure technical assistance; or

(D) Amounts paid or accrued for an opinion given by an engineer, lawyer or accountant.

(17) The term *specified party* means a tax resident of the United States, a CFC (other than a CFC with respect to which there is not a United States shareholder that owns (within the meaning of section 958(a)) at least ten percent (by vote or value) of the stock of the CFC), and a U.S. taxable branch. Thus, an entity that is fiscally transparent for U.S. tax purposes is not a specified party, though an owner of the entity may be a specified party. For example, in the case of a payment by a partnership, a domestic corporation or a CFC that is a partner of the partnership is a specified party whose deduction for its allocable share of the payment is subject to disallowance under section 267A.

(18) The term *specified payment* has the meaning provided in § 1.267A–1(b).

(19) The term *specified recipient* means, with respect to a specified payment, any tax resident that derives the payment under its tax law or any taxable branch to which the payment is

attributable under its tax law. The principles of § 1.894–1(d)(1) apply for purposes of determining whether a tax resident derives a specified payment under its tax law, without regard to whether the tax resident is a resident of a country that has an income tax treaty with the United States. There may be more than one specified recipient with respect to a specified payment.

(20) The term *structured arrangement* means an arrangement with respect to which one or more specified payments would be a disqualified hybrid amount (or a disqualified imported mismatch amount) if the specified payment were analyzed without regard to the relatedness limitation in § 1.267A–2(f) (or without regard to the language ''that is related to the specified party'' in § 1.267A–4(a)) (either such outcome, a *hybrid mismatch*), provided that either paragraph (a)(20)(i) or (ii) of this section is satisfied. A *party to a structured arrangement* means a tax resident or taxable branch that participates in the structured arrangement. For this purpose, an entity's participation in a structured arrangement is imputed to its investors.

(i) The hybrid mismatch is priced into the terms of the arrangement.

(ii) Based on all the facts and circumstances, the hybrid mismatch is a principal purpose of the arrangement. Facts and circumstances that indicate the hybrid mismatch is a principal purpose of the arrangement include—

(A) Marketing the arrangement as tax-advantaged where some or all of the tax advantage derives from the hybrid mismatch;

(B) Primarily marketing the arrangement to tax residents of a country the tax law of which enables the hybrid mismatch;

(C) Features that alter the terms of the arrangement, including the return, in the event the hybrid mismatch is no longer available; or

(D) A below-market return absent the tax effects or benefits resulting from the hybrid mismatch.

(21) The term *tax law* of a country includes statutes, regulations, administrative or judicial rulings, and treaties of the country. When used with respect to a tax resident or branch, tax law refers to—

(i) In the case of a tax resident, the tax law of the country or countries where the tax resident is resident; and

(ii) In the case of a branch, the tax law of the country where the branch is located.

(22) The term *taxable branch* means a branch that has a taxable presence under its tax law.

(23) The term *tax resident* means either of the following:

(i) A body corporate or other entity or body of persons liable to tax under the tax law of a country as a resident. For this purpose, a body corporate or other entity or body of persons may be considered liable to tax under the tax law of a country as a resident even though such tax law does not impose a corporate income tax. A body corporate or other entity or body of persons may be a tax resident of more than one country.

(ii) An individual liable to tax under the tax law of a country as a resident. An individual may be a tax resident of more than one country.

(24) The term *United States shareholder* has the meaning provided in section 951(b).

(25) The term *U.S. taxable branch* means a trade or business carried on in the United States by a tax resident of another country, except that if an income tax treaty applies, the term means a permanent establishment of a tax treaty resident eligible for benefits under an income tax treaty between the United States and the treaty country. Thus, for example, a U.S. taxable branch includes a U.S. trade or business of a foreign corporation taxable under section 882(a) or a U.S. permanent establishment of a tax treaty resident.

(b) *Special rules.* For purposes of §§ 1.267A–1 through 1.267A–7, the following special rules apply.

(1) *Coordination with other provisions.* Except as otherwise provided in the Code or in regulations under 26 CFR part 1, section 267A applies to a specified payment after the application of any other applicable provisions of the Code and regulations under 26 CFR part 1. Thus, the determination of whether a deduction for a specified payment is disallowed under section 267A is made with respect to the taxable year for which a deduction for the payment would otherwise be allowed for U.S. tax purposes. See, for example, sections 163(e)(3) and 267(a)(3) for rules that may defer the taxable year for which a deduction is allowed. *See also* § 1.882–5(a)(5) (providing that provisions that disallow interest expense apply after the application of § 1.882–5). In addition, provisions that characterize amounts paid or accrued as something other than interest or royalty, such as § 1.894–1(d)(2), govern the treatment of such amounts and therefore such amounts would not be treated as specified payments.

(2) *Foreign currency gain or loss.* Except as set forth in this paragraph (b)(2), section 988 gain or loss is not taken into account under section 267A. Foreign currency gain or loss recognized with respect to a specified payment is taken into account under section 267A to the extent that a deduction for the specified payment is disallowed under section 267A, provided that the foreign currency gain or loss is described in § 1.988–2(b)(4) (relating to exchange gain or loss recognized by the issuer of a debt instrument with respect to accrued interest) or § 1.988–2(c) (relating to items of expense or gross income or receipts which are to be paid after the date accrued). If a deduction for a specified payment is disallowed under section 267A, then a proportionate amount of foreign currency loss under section 988 with respect to the specified payment is also disallowed, and a proportionate amount of foreign currency gain under section 988 with respect to the specified payment reduces the amount of the disallowance. For this purpose, the proportionate amount is the amount of the foreign currency gain or loss under section 988 with respect to the specified payment multiplied by the amount of the specified payment for which a deduction is disallowed under section 267A.

(3) *U.S. taxable branch payments*—(i) *Amounts considered paid or accrued by a U.S. taxable branch.* For purposes of section 267A, a U.S. taxable branch is considered to pay or accrue an amount of interest or royalty equal to—

(A) The amount of interest or royalty allocable to effectively connected income of the U.S. taxable branch under section 873(a) or 882(c)(1), as applicable; or

(B) In the case of a U.S. taxable branch that is a U.S. permanent establishment of a treaty resident eligible for benefits under an income tax treaty between the United States and the treaty country, the amount of interest or royalty deductible in computing the business profits attributable to the U.S. permanent establishment, if such amounts differ from the amounts allocable under paragraph (b)(3)(i)(A) of this section.

(ii) *Treatment of U.S. taxable branch payments*—(A) *Interest.* Interest considered paid or accrued by a U.S. taxable branch of a foreign corporation under paragraph (b)(3)(i) of this section is treated as a payment directly to the person to which the interest is payable, to the extent it is paid or accrued with respect to a liability described in § 1.882–5(a)(1)(ii)(A) (resulting in directly allocable interest) or with respect to a U.S. booked liability, as defined in § 1.882–5(d)(2). If the amount of interest allocable to the U.S. taxable branch exceeds the interest paid or

accrued on its U.S. booked liabilities, the excess amount is treated as paid or accrued by the U.S. taxable branch on a pro-rata basis to the same persons and pursuant to the same terms that the home office paid or accrued interest for purposes of the calculations described in paragraph (b)(3)(i) of this section, excluding any interest treated as already paid directly by the branch.

(B) *Royalties.* Royalties considered paid or accrued by a U.S. taxable branch under paragraph (b)(3)(i) of this section are treated solely for purposes of section 267A as paid or accrued on a pro-rata basis by the U.S. taxable branch to the same persons and pursuant to the same terms that the home office paid or accrued such royalties.

(C) *Permanent establishments and interbranch payments.* If a U.S. taxable branch is a permanent establishment in the United States, rules analogous to the rules in paragraphs (b)(3)(ii)(A) and (B) of this section apply with respect to interest and royalties allowed in computing the business profits of a treaty resident eligible for treaty benefits. This paragraph (b)(3)(ii)(C) does not apply to interbranch interest or royalty payments allowed as deduction under certain U.S. income tax treaties (as described in § 1.267A–2(c)(2)).

(4) *Effect on earnings and profits.* The disallowance of a deduction under section 267A does not affect whether or when the amount paid or accrued that gave rise to the deduction reduces earnings and profits of a corporation.

(5) *Application to structured payments*—(i) *In general.* For purposes of section 267A and the regulations under section 267A as contained in 26 CFR part 1, a structured payment (as defined in paragraph (b)(5)(ii) of this section) is treated as a specified payment.

(ii) *Structured payment.* A structured payment means any amount described in paragraphs (b)(5)(ii)(A) or (B) of this section (as adjusted by amounts described in paragraph (b)(5)(ii)(C) of this section).

(A) *Certain payments related to the time value of money (structured interest amounts)*—(*1*) *Substitute interest payments.* A substitute interest payment described in § 1.861–2(a)(7).

(*2*) *Certain amounts labeled as fees*—(*i*) *Commitment fees.* Any fees in respect of a lender commitment to provide financing if any portion of such financing is actually provided.

(*ii*) [Reserved]

(*3*) *Debt issuance costs.* Any debt issuance costs subject to § 1.446–5.

(*4*) *Guaranteed payments.* Any guaranteed payments for the use of capital under section 707(c).

(B) *Amounts predominately associated with the time value of money.* Any expense or loss, to the extent deductible, incurred by a person in a transaction or series of integrated or related transactions in which the person secures the use of funds for a period of time, if such expense or loss is predominately incurred in consideration of the time value of money.

(C) *Adjustment for amounts affecting the effective cost of funds.* Income, deduction, gain, or loss from a derivative, as defined in section 59A(h)(4)(A), that alters a person's effective cost of funds with respect to a structured payment described in paragraph (b)(5)(ii)(A) or (B) of this section is treated as an adjustment to the structured payment of the person.

(6) *Anti-avoidance rule.* A specified party's deduction for a specified payment is disallowed to the extent that both of the following requirements are satisfied:

(i) The payment (or income attributable to the payment) is not included in the income of a tax resident or taxable branch, as determined under § 1.267A–3(a) (but without regard to the de minimis and full inclusion rules in § 1.267A–3(a)(3)).

(ii) A principal purpose of the plan or arrangement is to avoid the purposes of the regulations under section 267A.

§ 1.267A–6 Examples.

(a) *Scope.* This section provides examples that illustrate the application of §§ 1.267A–1 through 1.267A–5.

(b) *Presumed facts.* For purposes of the examples in this section, unless otherwise indicated, the following facts are presumed:

(1) US1, US2, and US3 are domestic corporations that are tax residents solely of the United States.

(2) FW, FX, and FZ are bodies corporate established in, and tax residents of, Country W, Country X, and Country Z, respectively. They are not fiscally transparent under the tax law of any country.

(3) Under the tax law of each country, interest and royalty payments are deductible.

(4) The tax law of each country provides a 100 percent participation exemption for dividends received from non-resident corporations.

(5) The tax law of each country, other than the United States, provides an exemption for income attributable to a branch.

(6) Except as provided in paragraphs (b)(4) and (5) of this section, all amounts derived (determined under the principles of § 1.894–1(d)(1)) by a tax resident, or attributable to a taxable branch, are included in income, as determined under § 1.267A–3(a).

(7) Only the tax law of the United States contains hybrid mismatch rules.

(c) *Examples*—(1) *Example 1. Payment pursuant to a hybrid financial instrument*—(i) *Facts.* FX holds all the interests of US1. FX holds an instrument issued by US1 that is treated as equity for Country X tax purposes and indebtedness for U.S. tax purposes (the FX–US1 instrument). On date 1, US1 pays $50x to FX pursuant to the instrument. The amount is treated as an excludible dividend for Country X tax purposes (by reason of the Country X participation exemption) and as interest for U.S. tax purposes.

(ii) *Analysis.* US1 is a specified party and thus a deduction for its $50x specified payment is subject to disallowance under section 267A. As described in paragraphs (c)(1)(ii)(A) through (C) of this section, the entire $50x payment is a disqualified hybrid amount under the hybrid transaction rule of § 1.267A–2(a) and, as a result, a deduction for the payment is disallowed under § 1.267A–1(b)(1).

(A) US1's payment is made pursuant to a hybrid transaction because a payment with respect to the FX–US1 instrument is treated as interest for U.S. tax purposes but not for purposes of Country X tax law (the tax law of FX, a specified recipient that is related to US1). *See* § 1.267A–2(a)(2) and (f). Therefore, § 1.267A–2(a) applies to the payment.

(B) For US1's payment to be a disqualified hybrid amount under § 1.267A–2(a), a no-inclusion must occur with respect to FX. *See* § 1.267A–2(a)(1)(i). As a consequence of the Country X participation exemption, FX includes $0 of the payment in income and therefore a $50x no-inclusion occurs with respect to FX. *See* § 1.267A–3(a)(1). The result is the same regardless of whether, under the Country X participation exemption, the $50x payment is simply excluded from FX's taxable income or, instead, is reduced or offset by other means, such as a $50x dividends received deduction. *See id.*

(C) Pursuant to § 1.267A–2(a)(1)(ii), FX's $50x no-inclusion gives rise to a disqualified hybrid amount to the extent that it is a result of US1's payment being made pursuant to the hybrid transaction. FX's $50x no-inclusion is a result of the payment being made pursuant to the hybrid transaction because, were the payment to be treated as interest for Country X tax purposes, FX would include $50x in income and, consequently, the no-inclusion would not occur.

(iii) *Alternative facts—multiple specified recipients.* The facts are the same as in paragraph (c)(1)(i) of this section, except that FX holds all the interests of FZ, which is fiscally transparent for Country X tax purposes, and FZ holds all of the interests of US1. Moreover, the FX–US1 instrument is held by FZ (rather than by FX) and US1 makes its $50x payment to FZ (rather than to FX); the payment is derived by FZ under its tax law and by FX under its tax law and, accordingly, both FZ and FX are specified recipients of the payment. Further, the

payment is treated as interest for Country Z tax purposes and FZ includes it in income. For the reasons described in paragraph (c)(1)(ii) of this section, FX's no-inclusion causes the payment to be a disqualified hybrid amount. FZ's inclusion in income (regardless of whether Country Z has a low or high tax rate) does not affect the result, because the hybrid transaction rule of § 1.267A–2(a) applies if any no-inclusion occurs with respect to a specified recipient of the payment as a result of the payment being made pursuant to the hybrid transaction.

(iv) *Alternative facts—preferential rate.* The facts are the same as in paragraph (c)(1)(i) of this section, except that for Country X tax purposes US1's payment is treated as a dividend subject to a 4% tax rate, whereas the marginal rate imposed on ordinary income is 20%. FX includes $10x of the payment in income, calculated as $50x multiplied by 0.2 (.04, the rate at which the particular type of payment (a dividend for Country X tax purposes) is subject to tax in Country X, divided by 0.2, the marginal tax rate imposed on ordinary income). *See* § 1.267A–3(a)(1). Thus, a $40x no-inclusion occurs with respect to FX ($50x less $10x). The $40x no-inclusion is a result of the payment being made pursuant to the hybrid transaction because, were the payment to be treated as interest for Country X tax purposes, FX would include the entire $50x in income at the full marginal rate imposed on ordinary income (20%) and, consequently, the no-inclusion would not occur. Accordingly, $40x of US1's payment is a disqualified hybrid amount.

(v) *Alternative facts—no-inclusion not the result of hybridity.* The facts are the same as in paragraph (c)(1)(i) of this section, except that Country X has a pure territorial regime (that is, Country X only taxes income with a domestic source). Although US1's payment is pursuant to a hybrid transaction and a $50x no-inclusion occurs with respect to FX, FX's no-inclusion is not a result of the payment being made pursuant to the hybrid transaction. This is because if Country X tax law were to treat the payment as interest, FX would include $0 in income and, consequently, the $50x no-inclusion would still occur. Accordingly, US1's payment is not a disqualified hybrid amount. *See* § 1.267A–2(a)(1)(ii). The result would be the same if Country X instead did not impose a corporate income tax.

(2) *Example 2. Payment pursuant to a repo transaction*—(i) *Facts.* FX holds all the interests of US1, and US1 holds all the interests of US2. On date 1, US1 and FX enter into a sale and repurchase transaction. Pursuant to the transaction, US1 transfers shares of preferred stock of US2 to FX in return for $1,000x paid from FX to US1, subject to a binding commitment of US1 to reacquire those shares on date 3 for an agreed price, which represents a repayment of the $1,000x plus a financing or time value of money return reduced by the amount of any distributions paid with respect to the preferred stock between dates 1 and 3 that are retained by FX. On date 2, US2 pays a $100x dividend on its preferred stock to FX. For Country X tax purposes, FX is treated as owning the US2 preferred stock and therefore is the beneficial owner of the dividend. For U.S. tax purposes, the transaction is treated as a loan from FX to US1 that is secured by the US2 preferred stock. Thus, for U.S. tax purposes, US1 is treated as owning the US2 preferred stock and is the beneficial owner of the dividend. In addition, for U.S. tax purposes, US1 is treated as paying $100x of interest to FX (an amount corresponding to the $100x dividend paid by US2 to FX). Further, the marginal tax rate imposed on ordinary income under Country X tax law is 25%. Moreover, instead of a participation exemption, Country X tax law provides its tax residents a credit for underlying foreign taxes paid by a non-resident corporation from which a dividend is received; with respect to the $100x dividend received by FX from US2, the credit is $10x.

(ii) *Analysis.* US1 is a specified party and thus a deduction for its $100x specified payment is subject to disallowance under section 267A. As described in paragraphs (c)(2)(ii)(A) through (D) of this section, $40x of the payment is a disqualified hybrid amount under the hybrid transaction rule of § 1.267A–2(a) and, as a result, $40x of the deduction is disallowed under § 1.267A–1(b)(1).

(A) Although US1's $100x interest payment is not regarded under Country X tax law, a connected amount (US2's dividend payment) is regarded and derived by FX under such tax law. Thus, FX is considered a specified recipient with respect to US1's interest payment. *See* § 1.267A–2(a)(3).

(B) US1's payment is made pursuant to a hybrid transaction because a payment with respect to the sale and repurchase transaction is treated as interest for U.S. tax purposes but not for purposes of Country X tax law (the tax law of FX, a specified recipient that is related to US1), which does not regard the payment. *See* § 1.267A–2(a)(2) and (f). Therefore, § 1.267A–2(a) applies to the payment.

(C) For US1's payment to be a disqualified hybrid amount under § 1.267A–2(a), a no-inclusion must occur with respect to FX. *See* § 1.267A–2(a)(1)(i). As a consequence of Country X tax law not regarding US1's payment, FX includes $0 of the payment in income and therefore a $100x no-inclusion occurs with respect to FX. *See* § 1.267A–3(a). However, FX includes $60x of a connected amount (US2's dividend payment) in income, calculated as $100x (the amount of the dividend) less $40x (the portion of the connected amount that is not included in Country X due to the foreign tax credit, determined by dividing the amount of the credit, $10x, by 0.25, the tax rate in Country X). *See id.* Pursuant to § 1.267A–2(a)(3), FX's inclusion in income with respect to the connected amount correspondingly reduces the amount of its no-inclusion with respect to US1's payment. Therefore, for purposes of § 1.267A–2(a), FX's no-inclusion with respect to US1's payment is considered to be $40x ($100x less $60x). *See* § 1.267A–2(a)(3).

(D) Pursuant to § 1.267A–2(a)(1)(ii), FX's $40x no-inclusion gives rise to a disqualified hybrid amount to the extent that FX's no-inclusion is a result of US1's payment being made pursuant to the hybrid transaction. FX's $40x no-inclusion is a result of US1's payment being made pursuant to the hybrid transaction because, were the sale and repurchase transaction to be treated as a loan from FX to US1 for Country X tax purposes, FX would include US1's $100x interest payment in income (because it would not be entitled to a foreign tax credit) and, consequently, the no-inclusion would not occur.

(iii) *Alternative facts—structured arrangement.* The facts are the same as in paragraph (c)(2)(i) of this section, except that FX is a bank that is unrelated to US1. In addition, the sale and repurchase transaction is a structured arrangement and FX is a party to the structured arrangement. The result is the same as in paragraph (c)(2)(ii) of this section. That is, even though FX is not related to US1, it is taken into account with respect to the determinations under § 1.267A–2(a) because it is a party to a structured arrangement pursuant to which the payment is made. *See* § 1.267A–2(f).

(3) *Example 3. Disregarded payment*—(i) *Facts.* FX holds all the interests of US1. For Country X tax purposes, US1 is a disregarded entity of FX. During taxable year 1, US1 pays $100x to FX pursuant to a debt instrument. The amount is treated as interest for U.S. tax purposes but is disregarded for Country X tax purposes as a transaction involving a single taxpayer. During taxable year 1, US1's only other items of income, gain, deduction, or loss are $125x of gross income and a $60x item of deductible expense. The $125x item of gross income is included in FX's income, and the $60x item of deductible expense is allowable for Country X tax purposes.

(ii) *Analysis.* US1 is a specified party and thus a deduction for its $100x specified payment is subject to disallowance under section 267A. As described in paragraphs (c)(3)(ii)(A) and (B) of this section, $35x of the payment is a disqualified hybrid amount under the disregarded payment rule of § 1.267A–2(b) and, as a result, $35x of the deduction is disallowed under § 1.267A–1(b)(1).

(A) US1's $100x payment is not regarded under the tax law of Country X (the tax law of FX, a related tax resident to which the payment is made) because under such tax law the payment is a disregarded transaction involving a single taxpayer. *See* § 1.267A–2(b)(2) and (f). In addition, were the tax law of Country X to regard the payment (and treat it as interest), FX would include it in income. Therefore, the payment is a disregarded payment to which § 1.267A–2(b) applies. *See* § 1.267A–2(b)(2).

(B) Under § 1.267A–2(b)(1), the excess (if any) of US1's disregarded payments for taxable year 1 ($100x) over its dual inclusion income for the taxable year is a disqualified hybrid amount. US1's dual inclusion income for taxable year 1 is $65x, calculated as $125x (the amount of US1's gross income that is included in FX's income) less $60x (the amount of US1's deductible expenses, other than deductions for disregarded payments, that are allowable for Country X tax purposes). *See* § 1.267A–2(b)(3). Therefore, $35x is a disqualified hybrid amount ($100x less $65x). *See* § 1.267A–2(b)(1).

(iii) *Alternative facts—non-dual inclusion income arising from hybrid transaction.* The

facts are the same as in paragraph (c)(3)(i) of this section, except that US1 holds all the interests of FZ (a CFC) and US1's only item of income, gain, deduction, or loss during taxable year 1 (other than the $100x payment to FX) is $80x paid to US1 by FZ pursuant to an instrument treated as indebtedness for U.S. tax purposes and equity for Country X tax purposes (the US1–FZ instrument). In addition, the $80x is treated as interest for U.S. tax purposes and an excludible dividend for Country X tax purposes (by reason of the Country X participation exemption). Paragraphs (c)(3)(iii)(A) and (B) of this section describe the extent to which the specified payments by FZ and US1, each of which is a specified party, are disqualified hybrid amounts.

(A) The hybrid transaction rule of § 1.267A–2(a) applies to FZ's payment because such payment is made pursuant to a hybrid transaction, as a payment with respect to the US1–FZ instrument is treated as interest for U.S. tax purposes but not for purposes of Country X's tax law (the tax law of FX, a specified recipient that is related to FZ). As a consequence of the Country X participation exemption, an $80x no-inclusion occurs with respect to FX, and such no-inclusion is a result of the payment being made pursuant to the hybrid transaction. Thus, but for § 1.267A–3(b), the entire $80x of FZ's payment would be a disqualified hybrid amount. However, because US1 (a tax resident of the United States that is also a specified recipient of the payment) takes the entire $80x payment into account in its gross income, no portion of the payment is a disqualified hybrid amount. *See* § 1.267A–3(b)(2).

(B) The disregarded payment rule of § 1.267A–2(b) applies to US1's $100x payment to FX, for the reasons described in paragraph (c)(3)(ii)(A) of this section. In addition, US1's dual inclusion income for taxable year 1 is $0 because, as a result of the Country X participation exemption, no portion of FZ's $80x payment to US1 (which is derived by FX under its tax law) is included in FX's income. *See* §§ 1.267A–2(b)(3) and 1.267A–3(a). Therefore, the entire $100x payment from US1 to FX is a disqualified hybrid amount, calculated as $100x (the amount of the payment) less $0 (the amount of dual inclusion income). *See* § 1.267A–2(b)(1).

(4) *Example 4. Payment allocable to a U.S. taxable branch*—(i) *Facts.* FX1 and FX2 are foreign corporations that are bodies corporate established in and tax residents of Country X. FX1 holds all the interests of FX2, and FX1 and FX2 file a consolidated return under Country X tax law. FX2 has a U.S. taxable branch (''USB''). During taxable year 1, FX2 pays $50x to FX1 pursuant to an instrument (the ''FX1–FX2 instrument''). The amount paid pursuant to the instrument is treated as interest for U.S. tax purposes but, as a consequence of the Country X consolidation regime, is treated as a disregarded transaction between group members for Country X tax purposes. Also during taxable year 1, FX2 pays $100x of interest to an unrelated bank that is not a party to a structured arrangement (the instrument pursuant to which the payment is made, the ''bank-FX2 instrument''). FX2's only other item of income, gain, deduction, or loss for taxable year 1 is $200x of gross income. Under Country X tax law, the $200x of gross income is attributable to USB, but is not included in FX's income because Country X tax law exempts income attributable to a branch. Under U.S. tax law, the $200x of gross income is effectively connected income of USB. Further, under section 882, $75x of interest is, for taxable year 1, allocable to USB's effectively connected income. USB has neither liabilities that are directly allocable to it, as described in § 1.882–5(a)(1)(ii)(A), nor booked liabilities, as defined in § 1.882–5(d)(2).

(ii) *Analysis.* USB is a specified party and thus any interest or royalty allowable as a deduction in determining its effectively connected income is subject to disallowance under section 267A. Pursuant to § 1.267A–5(b)(3)(i)(A), USB is treated as paying $75x of interest, and such interest is thus a specified payment. Of that $75x, $25x is treated as paid to FX1, calculated as $75x (the interest allocable to USB under section 882) multiplied by ⅓ ($50x, FX2's payment to FX1, divided by $150x, the total interest paid by FX2). *See* § 1.267A–5(b)(3)(ii)(A). As described in paragraphs (c)(4)(ii)(A) and (B) of this section, the $25x of the specified payment treated as paid by USB to FX1 is a disqualified hybrid amount under the disregarded payment rule of § 1.267A–2(b) and, as a result, a deduction for that amount is disallowed under § 1.267A–1(b)(1).

(A) USB's $25x payment to FX1 is not regarded under the tax law of Country X (the tax law of FX1, a related tax resident to which the payment is made) because under such tax law the payment is a disregarded transaction between group members. *See* § 1.267A–2(b)(2) and (f). In addition, were the tax law of Country X to regard the payment (and treat it as interest), FX1 would include it in income. Therefore, the payment is a disregarded payment to which § 1.267A–2(b) applies. *See* § 1.267A–2(b)(2).

(B) Under § 1.267A–2(b)(1), the excess (if any) of USB's disregarded payments for taxable year 1 ($25x) over its dual inclusion income for the taxable year is a disqualified hybrid amount. USB's dual inclusion income for taxable year 1 is $0. This is because, as a result of the Country X exemption for income attributable to a branch, no portion of USB's $200x item of gross income is included in FX2's income. *See* § 1.267A–2(b)(3). Therefore, the entire $25x of the specified payment treated as paid by USB to FX1 is a disqualified hybrid amount, calculated as $25x (the amount of the payment) less $0 (the amount of dual inclusion income). *See* § 1.267A–2(b)(1).

(iii) *Alternative facts—deemed branch payment.* The facts are the same as in paragraph (c)(4)(i) of this section, except that FX2 does not pay any amounts during taxable year 1 (thus, it does not pay the $50x to FX1 or the $100x to the bank). However, under an income tax treaty between the United States and Country X, USB is a U.S. permanent establishment and, for taxable year 1, $25x of royalties is allowable as a deduction in computing the business profits of USB and is deemed paid to FX2. Under Country X tax law, the $25x is not regarded. Accordingly, the $25x is a specified payment that is a deemed branch payment. *See* §§ 1.267A–2(c)(2) and 1.267A–5(b)(3)(i)(B). The entire $25x is a disqualified hybrid amount for which a deduction is disallowed because the tax law of Country X provides an exclusion or exemption for income attributable to a branch. *See* § 1.267A–2(c)(1).

(5) *Example 5. Payment to a reverse hybrid*—(i) *Facts.* FX holds all the interests of US1 and FY, and FY holds all the interests of FV. FY is an entity established in Country Y, and FV is an entity established in Country V. FY is fiscally transparent for Country Y tax purposes but is not fiscally transparent for Country X tax purposes. FV is fiscally transparent for Country X tax purposes. On date 1, US1 pays $100x to FY. The amount is treated as interest for U.S. tax purposes and Country X tax purposes.

(ii) *Analysis.* US1 is a specified party and thus a deduction for its $100x specified payment is subject to disallowance under section 267A. As described in paragraphs (c)(5)(ii)(A) through (C) of this section, the entire $100x payment is a disqualified hybrid amount under the reverse hybrid rule of § 1.267A–2(d) and, as a result, a deduction for the payment is disallowed under § 1.267A–1(b)(1).

(A) US1's payment is made to a reverse hybrid because FY is fiscally transparent under the tax law of Country Y (the tax law of the country in which it is established) but is not fiscally transparent under the tax law of Country X (the tax law of FX, an investor that is related to US1). *See* § 1.267A–2(d)(2) and (f). Therefore, § 1.267A–2(d) applies to the payment. The result would be the same if the payment were instead made to FV. *See* § 1.267A–2(d)(3).

(B) For US1's payment to be a disqualified hybrid amount under § 1.267A–2(d), a no-inclusion must occur with respect to FX. *See* § 1.267A–2(d)(1)(i). Because FX does not derive the $100x payment under Country X tax law (as FY is not fiscally transparent under such tax law), FX includes $0 of the payment in income and therefore a $100x no-inclusion occurs with respect to FX. *See* § 1.267A–3(a).

(C) Pursuant to § 1.267A–2(d)(1)(ii), FX's $100x no-inclusion gives rise to a disqualified hybrid amount to the extent that it is a result of US1's payment being made to the reverse hybrid. FX's $100x no-inclusion is a result of the payment being made to the reverse hybrid because, were FY to be treated as fiscally transparent for Country X tax purposes, FX would include $100x in income and, consequently, the no-inclusion would not occur. The result would be the same if Country X tax law instead viewed US1's payment as a dividend, rather than interest. *See* § 1.267A–2(d)(1)(ii).

(iii) *Alternative facts—inclusion under anti-deferral regime.* The facts are the same as in paragraph (c)(5)(i) of this section, except that, under a Country X anti-deferral regime, FX includes in its income $100x attributable to the $100x payment received by FY. If under the rules of § 1.267A–3(a) FX includes the entire attributed amount in income (that is, if FX includes the amount in its income at the full marginal rate imposed on ordinary

income and the amount is not reduced or offset by certain relief particular to the amount), then a no-inclusion does not occur with respect to FX. As a result, in such a case, no portion of US1's payment would be a disqualified hybrid amount under § 1.267A–2(d).

(iv) *Alternative facts—multiple investors.* The facts are the same as in paragraph (c)(5)(i) of this section, except that FX holds all the interests of FZ, which is fiscally transparent for Country X tax purposes; FZ holds all the interests of FY, which is fiscally transparent for Country Z tax purposes; and FZ includes the $100x payment in income. Thus, each of FZ and FX is an investor of FY, as each directly or indirectly holds an interest of FY. *See* § 1.267A–5(a)(13). A no-inclusion does not occur with respect to FZ, but a $100x no-inclusion occurs with respect to FX. FX's no-inclusion is a result of the payment being made to the reverse hybrid because, were FY to be treated as fiscally transparent for Country X tax purposes, then FX would include $100x in income (as FZ is fiscally transparent for Country X tax purposes). Accordingly, FX's no-inclusion is a result of US1's payment being made to the reverse hybrid and, consequently, the entire $100x payment is a disqualified hybrid amount.

(v) *Alternative facts—portion of no-inclusion not the result of hybridity.* The facts are the same as in paragraph (c)(5)(i) of this section, except that the $100x is viewed as a royalty for U.S. tax purposes and Country X tax purposes, and Country X tax law contains a patent box regime that provides an 80% deduction with respect to certain royalty income. If the payment would qualify for the Country X patent box deduction were FY to be treated as fiscally transparent for Country X tax purposes, then only $20x of FX's $100x no-inclusion would be the result of the payment being paid to a reverse hybrid, calculated as $100x (the no-inclusion with respect to FX that actually occurs) less $80x (the no-inclusion with respect to FX that would occur if FY were to be treated as fiscally transparent for Country X tax purposes). *See* § 1.267A–3(a). Accordingly, in such a case, only $20x of US1's payment would be a disqualified hybrid amount.

(6) Example 6. Branch mismatch payment—(i) *Facts.* FX holds all the interests of US1 and FZ. FZ owns BB, a Country B branch that gives rise to a taxable presence in Country B under Country Z tax law but not under Country B tax law. On date 1, US1 pays $50x to FZ. The amount is treated as a royalty for U.S. tax purposes and Country Z tax purposes. Under Country Z tax law, the amount is treated as income attributable to BB and, as a consequence of County Z tax law exempting income attributable to a branch, is excluded from FZ's income.

(ii) *Analysis.* US1 is a specified party and thus a deduction for its $50x specified payment is subject to disallowance under section 267A. As described in paragraphs (c)(6)(ii)(A) through (C) of this section, the entire $50x payment is a disqualified hybrid amount under the branch mismatch rule of § 1.267A–2(e) and, as a result, a deduction for the payment is disallowed under § 1.267A–1(b)(1).

(A) US1's payment is a branch mismatch payment because under Country Z tax law (the tax law of FZ, a home office that is related to US1) the payment is treated as income attributable to BB, and BB is not a taxable branch (that is, under Country B tax law, BB does not give rise to a taxable presence). *See* § 1.267A–2(e)(2) and (f). Therefore, § 1.267A–2(e) applies to the payment. The result would be the same if instead BB were a taxable branch and, under Country B tax law, US1's payment were treated as income attributable to FZ and not BB. *See* § 1.267A–2(e)(2).

(B) For US1's payment to be a disqualified hybrid amount under § 1.267A–2(e), a no-inclusion must occur with respect to FZ. See § 1.267A–2(e)(1)(i). As a consequence of the Country Z branch exemption, FZ includes $0 of the payment in income and therefore a $50x no-inclusion occurs with respect to FZ. *See* § 1.267A–3(a).

(C) Pursuant to § 1.267A–2(e)(1)(ii), FZ's $50x no-inclusion gives rise to a disqualified hybrid amount to the extent that it is a result of US1's payment being a branch mismatch payment. FZ's $50x no-inclusion is a result of the payment being a branch mismatch payment because, were the payment to not be treated as income attributable to BB for Country Z tax purposes, FZ would include $50x in income and, consequently, the no-inclusion would not occur.

(7) Example 7. Reduction of disqualified hybrid amount for certain amounts includible in income—(i) *Facts.* US1 and FW hold 60% and 40%, respectively, of the interests of FX, and FX holds all the interests of FZ. Each of FX and FZ is a CFC. FX holds an instrument issued by FZ that it is treated as equity for Country X tax purposes and as indebtedness for U.S. tax purposes (the FX–FZ instrument). On date 1, FZ pays $100x to FX pursuant to the FX–FZ instrument. The amount is treated as a dividend for Country X tax purposes and as interest for U.S. tax purposes. In addition, pursuant to section 954(c)(6), the amount is not foreign personal holding company income of FX. Further, under section 951A, the payment is included in FX's tested income. Lastly, Country X tax law provides an 80% participation exemption for dividends received from nonresident corporations and, as a result of such participation exemption, FX includes $20x of FZ's payment in income.

(ii) *Analysis.* FZ, a CFC, is a specified party and thus a deduction for its $100x specified payment is subject to disallowance under section 267A. But for § 1.267A–3(b), $80x of FZ's payment would be a disqualified hybrid amount (such amount, a ''tentative disqualified hybrid amount''). *See* §§ 1.267A–2(a) and 1.267A–3(b)(1). Pursuant to § 1.267A–3(b), the tentative disqualified hybrid amount is reduced by $48x. *See* § 1.267A–3(b)(4). The $48x is the tentative disqualified hybrid amount to the extent that it increases US1's pro rata share of tested income with respect to FX under section 951A (calculated as $80x multiplied by 60%). *See id.* Accordingly, $32x of FZ's payment ($80x less $48x) is a disqualified hybrid amount under § 1.267A–2(a) and, as a result, $32x of the deduction is disallowed under § 1.267A–1(b)(1).

(iii) *Alternative facts—United States shareholder not a tax resident of the United States.* The facts are the same as in paragraph (c)(7)(i) of this section, except that US1 is a domestic partnership, 90% of the interests of which are held by US2 and the remaining 10% of which are held by a foreign individual that is a nonresident alien (as defined in section 7701(b)(1)(B)). As is the case in paragraph (c)(7)(ii) of this section, $48x of the $80x tentative disqualified hybrid amount increases US1's pro rata share of the tested income of FX. However, US1 is not a tax resident of the United States. Thus, the $48x reduces the tentative disqualified hybrid amount only to the extent that the $48x would be taken into account by a tax resident of the United States. *See* § 1.267A–3(b)(4). US2 (a tax resident of the United States) would take into account $43.2x of such amount (calculated as $48x multiplied by 90%). Thus, $36.8x of FZ's payment ($80x less $43.2x) is a disqualified hybrid amount under § 1.267A–2(a). *See id.*

(8) Example 8. Imported mismatch rule—direct offset—(i) *Facts.* FX holds all the interests of FW, and FW holds all the interests of US1. FX holds an instrument issued by FW that is treated as equity for Country X tax purposes and indebtedness for Country W tax purposes (the FX–FW instrument). FW holds an instrument issued by US1 that is treated as indebtedness for Country W and U.S. tax purposes (the FW–US1 instrument). In accounting period 1, FW pays $100x to FX pursuant to the FX–FW instrument. The amount is treated as an excludible dividend for Country X tax purposes (by reason of the Country X participation exemption) and as interest for Country W tax purposes. Also in accounting period 1, US1 pays $100x to FW pursuant to the FW–US1 instrument. The amount is treated as interest for Country W and U.S. tax purposes and is included in FW's income. The FX–FW instrument was not entered into pursuant to the same plan or series of related transactions pursuant to which the FW–US1 instrument was entered into.

(ii) *Analysis.* US1 is a specified party and thus a deduction for its $100x specified payment is subject to disallowance under section 267A. The $100x payment is not a disqualified hybrid amount. In addition, FW's $100x deduction is a hybrid deduction because it is a deduction allowed to FW that results from an amount paid that is interest under Country W tax law, and were Country X law to have rules substantially similar to those under §§ 1.267A–1 through 1.267A–3 and 1.267A–5, a deduction for the payment would be disallowed (because under such rules the payment would be pursuant to a hybrid transaction and FX's no-inclusion would be a result of the hybrid transaction). *See* §§ 1.267A–2(a) and 1.267A–4(b). Under § 1.267A–4(a), US1's payment is an imported mismatch payment, US1 is an imported mismatch payer, and FW (the tax resident that includes the imported mismatch payment in income) is an imported mismatch payee. The imported mismatch payment is a disqualified imported mismatch amount to the extent that the income attributable to the payment is directly or indirectly offset by the hybrid deduction incurred by FX (a tax

resident that is related to US1). *See* § 1.267A–4(a). Under § 1.267A–4(c)(1), the $100x hybrid deduction directly or indirectly offsets the income attributable to US1's imported mismatch payment to the extent that the payment directly or indirectly funds the hybrid deduction. The entire $100x of US1's payment directly funds the hybrid deduction because FW (the imported mismatch payee) incurs at least that amount of the hybrid deduction. *See* § 1.267A–4(c)(3)(i). Accordingly, the entire $100x payment is a disqualified imported mismatch amount under § 1.267A–4(a) and, as a result, a deduction for the payment is disallowed under § 1.267A–1(b)(2).

(iii) *Alternative facts—long-term deferral.* The facts are the same as in paragraph (c)(8)(i) of this section, except that the FX–FW instrument is treated as indebtedness for Country X and Country W tax purposes, and FW does not pay any amounts pursuant to the instrument during accounting period 1. In addition, under Country W tax law, FW is allowed to deduct interest under the FX–FW instrument as it accrues, whereas under Country X tax law FX does not recognize income under the FX–FW instrument until interest is paid. Further, FW accrues $100x of interest during accounting period 1, and FW will not pay such amount to FX for more than 36 months after the end of the accounting period. The results are the same as in paragraph (c)(8)(ii) of this section. That is, FW's $100x deduction is a hybrid deduction, *see* §§ 1.267A–2(a), 1.267A–3(a), and 1.267A–4(b), and the income attributable to US1's $100x imported mismatch payment is offset by the hybrid deduction for the reasons described in paragraph (c)(8)(ii) of this section. As a result, a deduction for the payment is disallowed under § 1.267A–1(b)(2).

(iv) *Alternative facts—notional interest deduction.* The facts are the same as in paragraph (c)(8)(i) of this section, except that the FX–FW instrument does not exist and thus FW does not pay any amounts to FX during accounting period 1. However, during accounting period 1, FW is allowed a $100x notional interest deduction with respect to its equity under Country W tax law. Pursuant to § 1.267A–4(b), FW's notional interest deduction is a hybrid deduction. The results are the same as in paragraph (c)(8)(ii) of this section. That is, the income attributable to US1's $100x imported mismatch payment is offset by FW's hybrid deduction for the reasons described in paragraph (c)(8)(ii) of this section. As a result, a deduction for the payment is disallowed under § 1.267A–1(b)(2).

(v) *Alternative facts—foreign hybrid mismatch rules prevent hybrid deduction.* The facts are the same as in paragraph (c)(8)(i) of this section, except that the tax law of Country W contains hybrid mismatch rules and under such rules FW is not allowed a deduction for the $100x that it pays to FX on the FX–FW instrument. The $100x paid by FW therefore does not give rise to a hybrid deduction. *See* § 1.267A–4(b). Accordingly, because the income attributable to US1's payment is not directly or indirectly offset by a hybrid deduction, the payment is not a disqualified imported mismatch amount. Therefore, a deduction for the payment is not disallowed under § 1.267A–2(b)(2).

(9) Example 9. Imported mismatch rule—indirect offsets and pro rata allocations—(i) *Facts.* FX holds all the interests of FZ, and FZ holds all the interests of US1 and US2. FX has a Country B branch that, for Country X and Country B tax purposes, gives rise to a taxable presence in Country B and is therefore a taxable branch (''BB''). Under the Country B-Country X income tax treaty, BB is a permanent establishment entitled to deduct expenses properly attributable to BB for purposes of computing its business profits under the treaty. BB is deemed to pay a royalty to FX for the right to use intangibles developed by FX equal to cost plus y%. The deemed royalty is a deductible expense properly attributable to BB under the Country B-Country X income tax treaty. For Country X tax purposes, any transactions between BB and X are disregarded. The deemed royalty amount is equal to $80x during accounting period 1. In addition, an instrument issued by FZ to FX is properly reflected as an asset on the books and records of BB (the FX–FZ instrument). The FX–FZ instrument is treated as indebtedness for Country X, Country Z, and Country B tax purposes. In accounting period 1, FZ pays $80x pursuant to the FX–FZ instrument; the amount is treated as interest for Country X, Country Z, and Country B tax purposes, and is treated as income attributable to BB for Country X and Country B tax purposes (but, for Country X tax purposes, is excluded from FX's income as a consequence of the Country X exemption for income attributable to a branch). Further, in accounting period 1, US1 and US2 pay $60x and $40x, respectively, to FZ pursuant to instruments that are treated as indebtedness for Country Z and U.S. tax purposes; the amounts are treated as interest for Country Z and U.S. tax purposes and are included in FZ's income for Country Z tax purposes. Lastly, neither the instrument pursuant to which US1 pays the $60x nor the instrument pursuant to which US2 pays the $40x was entered into pursuant to a plan or series of related transactions that includes the transaction or agreement giving rise to BB's deduction for the deemed royalty.

(ii) *Analysis.* US1 and US2 are specified parties and thus deductions for their specified payments are subject to disallowance under section 267A. Neither of the payments is a disqualified hybrid amount. In addition, BB's $80x deduction for the deemed royalty is a hybrid deduction because it is a deduction allowed to BB that results from an amount paid that is treated as a royalty under Country B tax law (regardless of whether a royalty deduction would be allowed under U.S. law), and were Country B tax law to have rules substantially similar to those under §§ 1.267A–1 through 1.267A–3 and 1.267A–5, a deduction for the payment would be disallowed because under such rules the payment would be a deemed branch payment and Country X has an exclusion for income attributable to a branch. *See* §§ 1.267A–2(c) and 1.267A–4(b). Under § 1.267A–4(a), each of US1's and US2's payments is an imported mismatch payment, US1 and US2 are imported mismatch payers, and FZ (the tax resident that includes the imported mismatch payments in income) is an imported mismatch payee. The imported mismatch payments are disqualified imported mismatch amounts to the extent that the income attributable to the payments is directly or indirectly offset by the hybrid deduction incurred by BB (a taxable branch that is related to US1 and US2). *See* § 1.267A–4(a). Under § 1.267A–4(c)(1), the $80x hybrid deduction directly or indirectly offsets the income attributable to the imported mismatch payments to the extent that the payments directly or indirectly fund the hybrid deduction. Paragraphs (c)(9)(ii)(A) and (B) of this section describe the extent to which the imported mismatch payments directly or indirectly fund the hybrid deduction.

(A) Neither US1's nor US2's payment directly funds the hybrid deduction because FZ (the imported mismatch payee) did not incur the hybrid deduction. *See* § 1.267A–4(c)(3)(i). To determine the extent to which the payments indirectly fund the hybrid deduction, the amount of the hybrid deduction that is allocated to FZ must be determined. *See* § 1.267A–4(c)(3)(ii). FZ is allocated the hybrid deduction to the extent that it directly or indirectly makes a funded taxable payment to BB (the taxable branch that incurs the hybrid deduction). *See* § 1.267A–4(c)(3)(iii). The $80x that FZ pays pursuant to the FX–FZ instrument is a funded taxable payment of FZ to BB. *See* § 1.267A–4(c)(3)(v). Therefore, because FZ makes a funded taxable payment to BB that is at least equal to the amount of the hybrid deduction, FZ is allocated the entire amount of the hybrid deduction. *See* § 1.267A–4(c)(3)(iii).

(B) But for US2's imported mismatch payment, the entire $60x of US1's imported mismatch payment would indirectly fund the hybrid deduction because FZ is allocated at least that amount of the hybrid deduction. *See* § 1.267A–4(c)(3)(ii). Similarly, but for US1's imported mismatch payment, the entire $40x of US2's imported mismatch payment would indirectly fund the hybrid deduction because FZ is allocated at least that amount of the hybrid deduction. *See id.* However, because the sum of US1's and US2's imported mismatch payments to FZ ($100x) exceeds the hybrid deduction allocated to FZ ($80x), pro rata adjustments must be made. *See* § 1.267A–4(e). Thus, $48x of US1's imported mismatch payment is considered to indirectly fund the hybrid deduction, calculated as $80x (the amount of the hybrid deduction) multiplied by 60% ($60x, the amount of US1's imported mismatch payment to FZ, divided by $100x, the sum of the imported mismatch payments that US1 and US2 make to FZ). Similarly, $32x of US2's imported mismatch payment is considered to indirectly fund the hybrid deduction, calculated as $80x (the amount of the hybrid deduction) multiplied by 40% ($40x, the amount of US2's imported mismatch payment to FZ, divided by $100x, the sum of the imported mismatch payments that US1 and US2 make to FZ). Accordingly, $48x of US1's imported mismatch payment, and $32x of US2's imported mismatch payment, is a disqualified imported mismatch amount under § 1.267A–4(a) and,

as a result, a deduction for such amounts is disallowed under § 1.267A–1(b)(2).

(iii) *Alternative facts—loss made available through foreign group relief regime.* The facts are the same as in paragraph (c)(9)(i) of this section, except that FZ holds all the interests in FZ2, a body corporate that is a tax resident of Country Z, FZ2 (rather than FZ) holds all the interests of US1 and US2, and US1 and US2 make their respective $60x and $40x payments to FZ2 (rather than to FZ). Further, in accounting period 1, a $10x loss of FZ is made available to offset income of FZ2 through a Country Z foreign group relief regime. Pursuant to § 1.267A–4(c)(3)(vi), FZ and FZ2 are treated as a single tax resident for purposes of § 1.267A–4(c) because a loss that is not incurred by FZ2 (FZ's $10x loss) is made available to offset income of FZ2 under the Country Z group relief regime. Accordingly, the results are the same as in paragraph (c)(9)(ii) of this section. That is, by treating FZ and FZ2 as a single tax resident for purposes of § 1.267A–4(c), BB's hybrid deduction offsets the income attributable to US1's and US2's imported mismatch payments to the same extent as described in paragraph (c)(9)(ii) of this section.

(10) Example 10. Imported mismatch rule—ordering rules and rule deeming certain payments to be imported mismatch payments—(i) *Facts.* FX holds all the interests of FW, and FW holds all the interests of US1, US2, and FZ. FZ holds all the interests of US3. FX advances money to FW pursuant to an instrument that is treated as equity for Country X tax purposes and indebtedness for Country W tax purposes (the FX–FW instrument). In a transaction that is pursuant to the same plan pursuant to which the FX–FW instrument is entered into, FW advances money to US1 pursuant to an instrument that is treated as indebtedness for Country W and U.S. tax purposes (the FW–US1 instrument). In accounting period 1, FW pays $125x to FX pursuant to the FX–FW instrument; the amount is treated as an excludible dividend for Country X tax purposes (by reason of the Country X participation exemption regime) and as deductible interest for Country W tax purposes. Also in accounting period 1, US1 pays $50x to FW pursuant to the FW–US1 instrument; US2 pays $50x to FW pursuant to an instrument treated as indebtedness for Country W and U.S. tax purposes (the FW–US2 instrument); US3 pays $50x to FZ pursuant to an instrument treated as indebtedness for Country Z and U.S. tax purposes (the FZ–US3 instrument); and FZ pays $50x to FW pursuant to an instrument treated as indebtedness for Country W and Country Z tax purposes (FW–FZ instrument). The amounts paid by US1, US2, US3, and FZ are treated as interest for purposes of the relevant tax laws and are included in the respective specified recipient's income. Lastly, neither the FW–US2 instrument, the FW–FZ instrument, nor the FZ–US3 instrument was entered into pursuant to a plan or series of related transactions that includes the transaction pursuant to which the FX–FW instrument was entered into.

(ii) *Analysis.* US1, US2, and US3 are specified parties (but FZ is not a specified party, see § 1.267A–5(a)(17)) and thus deductions for US1's, US2's, and US3's specified payments are subject to disallowance under section 267A. None of the specified payments is a disqualified hybrid amount. Under § 1.267A–4(a), each of the payments is thus an imported mismatch payment, US1, US2, and US3 are imported mismatch payers, and FW and FZ (the tax residents that include the imported mismatch payments in income) are imported mismatch payees. The imported mismatch payments are disqualified imported mismatch amounts to the extent that the income attributable to the payments is directly or indirectly offset by FW's $125x hybrid deduction. *See* § 1.267A–4(a) and (b). Under § 1.267A–4(c)(1), the $125x hybrid deduction directly or indirectly offsets the income attributable to the imported mismatch payments to the extent that the payments directly or indirectly fund the hybrid deduction. Paragraphs (c)(10)(ii)(A) through (C) of this section describe the extent to which the imported mismatch payments directly or indirectly fund the hybrid deduction and are therefore disqualified hybrid amounts for which a deduction is disallowed under § 1.267A–1(b)(2).

(A) First, the $125x hybrid deduction offsets the income attributable to US1's imported mismatch payment, a factually-related imported mismatch payment that directly funds the hybrid deduction. *See* § 1.267A–4(c)(2)(i). The entire $50x of US1's payment directly funds the hybrid deduction because FW (the imported mismatch payee) incurs at least that amount of the hybrid deduction. *See* § 1.267A–4(c)(3)(i). Accordingly, the entire $50x of the payment is a disqualified imported mismatch amount under § 1.267A–4(a).

(B) Second, the remaining $75x hybrid deduction offsets the income attributable to US2's imported mismatch payment, a factually-unrelated imported mismatch payment that directly funds the remaining hybrid deduction. § 1.267A–4(c)(2)(ii). The entire $50x of US2's payment directly funds the remaining hybrid deduction because FW (the imported mismatch payee) incurs at least that amount of the remaining hybrid deduction. *See* § 1.267A–4(c)(3)(i). Accordingly, the entire $50x of the payment is a disqualified imported mismatch amount under § 1.267A–4(a).

(C) Third, the $25x remaining hybrid deduction offsets the income attributable to US3's imported mismatch payment, a factually-unrelated imported mismatch payment that indirectly funds the remaining hybrid deduction. *See* § 1.267A–4(c)(2)(iii). The imported mismatch payment indirectly funds the remaining hybrid deduction to the extent that FZ (the imported mismatch payee) is allocated the remaining hybrid deduction. § 1.267A–4(c)(3)(ii). FZ is allocated the remaining hybrid deduction to the extent that it directly or indirectly makes a funded taxable payment to FW (the tax resident that incurs the hybrid deduction). § 1.267A–4(c)(3)(iii). The $50x that FZ pays to FW pursuant to the FW–FZ instrument is a funded taxable payment of FZ to FW. § 1.267A–4(c)(3)(v). Therefore, because FZ makes a funded taxable payment to FW that is at least equal to the amount of the remaining hybrid deduction, FZ is allocated the remaining hybrid deduction. § 1.267A–4(c)(3)(iii). Accordingly, $25x of US3's payment indirectly funds the $25x remaining hybrid deduction and, consequently, $25x of US3's payment is a disqualified imported mismatch amount under § 1.267A–4(a).

(iii) *Alternative facts—amount deemed to be an imported mismatch payment.* The facts are the same as in paragraph (c)(10)(i) of this section, except that US1 is not a domestic corporation but instead is a body corporate that is only a tax resident of Country E (hereinafter, ''FE'') (thus, for purposes of this paragraph (c)(10)(iii), the FW–US1 instrument is instead issued by FE and is the ''FW–FE instrument''). In addition, the tax law of Country E contains hybrid mismatch rules and, under a provision of such rules substantially similar to § 1.267A–4, FE is denied a deduction for the $50x it pays to FW under the FW–FE instrument. Pursuant to § 1.267A–4(f), the $50x that FE pays to FW pursuant to the FW–FE instrument is deemed to be an imported mismatch payment for purposes of determining the extent to which the income attributable to US2's and US3's imported mismatch payments is offset by FW's hybrid deduction. The results are the same as in paragraphs (c)(10)(ii)(B) and (C) of this section. That is, by treating the $50x that FE pays to FW as an imported mismatch payment, FW's hybrid deduction offsets the income attributable to US2's and US3's imported mismatch payments to the same extent as described in paragraphs (c)(10)(ii)(B) and (C) of this section.

(iv) *Alternative facts—amount deemed to be an imported mismatch payment not treated as a funded taxable payment.* The facts are the same as in paragraph (c)(10)(i) of this section, except that FZ holds its interests of US3 indirectly through FE, a body corporate that is only a tax resident of Country E (hereinafter, ''FE''), and US3 makes its $50x payment to FE (rather than to FZ); US3's $50x payment is treated as interest for Country E tax purposes and FE includes the payment in income. In addition, during accounting period 1, FE pays $50x of interest to FZ pursuant to an instrument and such amount is included in FZ's income. Further, the tax law of Country E contains hybrid mismatch rules and, under a provision of such rules substantially similar to § 1.267A–4, FE is denied a deduction for $25x of the $50x it pays to FZ, because under such provision $25x of the income attributable to FE's payment is considered offset against $25x of FW's hybrid deduction. With respect to US1 and US2, the results are the same as described in paragraphs (c)(10)(ii)(A) and (B) of this section. However, no portion of US3's payment is a disqualified imported mismatch amount. This is because the $50x that FE pays to FZ is not considered to be a funded taxable payment, because under a provision of Country E's hybrid mismatch rules that is substantially similar to § 1.267A–4, FE is denied a deduction for a portion of the $50x. *See* § 1.267A–4(c)(3)(v) and (f). Therefore, there is no chain of funded taxable payments connecting US3 (the imported mismatch payer) and FW (the tax resident that incurs the hybrid deduction); as a result, US3's payment does not indirectly

fund the hybrid deduction. *See* § 1.267A–4(c)(3)(ii) through (iv).

§ 1.267A–7 Applicability dates.

(a) *General rule.* Except as provided in paragraph (b) of this section, §§ 1.267A–1 through 1.267A–6 apply to taxable years beginning after December 31, 2017.

(b) *Special rules.* Sections 1.267A–2(b), (c), (e), 1.267A–4, and 1.267A–5(b)(5) apply to taxable years beginning on or after December 20, 2018. In addition, § 1.267A–5(a)(20) (defining structured arrangement), as well as the portions of §§ 1.267A–1 through 1.267A–3 that relate to structured arrangements and that are not otherwise described in this paragraph (b), apply to taxable years beginning on or after December 20, 2018.

■ **Par. 4.** Section 1.1503(d)–1 is amended by:

■ 1. In paragraph (b)(2)(i), removing the word ''and''.

■ 2. In paragraph (b)(2)(ii), removing the second period and adding in its place ''; and''.

■ 3. Adding paragraph (b)(2)(iii).

■ 4. Redesignating paragraph (c) as paragraph (d).

■ 5. Adding new paragraph (c).

■ 6. In the first sentence of newly-redesignated paragraph (d)(2)(ii), removing the language ''(c)(2)(i)'' and adding the language ''(d)(2)(i)'' in its place.

The additions read as follows:

§ 1.1503(d)–1 Definitions and special rules for filings under section 1503(d).

* * * * *

(b) * * *

(2) * * *

(iii) A domestic consenting corporation (as defined in § 301.7701–3(c)(3)(i) of this chapter), as provided in paragraph (c)(1) of this section. *See* § 1.1503(d)–7(c)(41).

* * * * *

(c) *Treatment of domestic consenting corporation as a dual resident corporation*—(1) *Rule.* A domestic consenting corporation is treated as a dual resident corporation under paragraph (b)(2)(iii) of this section for a taxable year if, on any day during the taxable year, the following requirements are satisfied:

(i) Under the tax law of a foreign country where a specified foreign tax resident is tax resident, the specified foreign tax resident derives or incurs (or would derive or incur) items of income, gain, deduction, or loss of the domestic consenting corporation (because, for example, the domestic consenting corporation is fiscally transparent under such tax law).

(ii) The specified foreign tax resident bears a relationship to the domestic consenting corporation that is described in section 267(b) or 707(b). *See* § 1.1503(d)–7(c)(41).

(2) *Definitions.* The following definitions apply for purposes of this paragraph (c).

(i) The term *fiscally transparent* means, with respect to a domestic consenting corporation or an intermediate entity, fiscally transparent as determined under the principles of § 1.894–1(d)(3)(ii) and (iii), without regard to whether a specified foreign tax resident is a resident of a country that has an income tax treaty with the United States.

(ii) The term *specified foreign tax resident* means a body corporate or other entity or body of persons liable to tax under the tax law of a foreign country as a resident.

* * * * *

■ **Par. 5.** Section 1.1503(d)–3 is amended by adding the language ''or (e)(3)'' after the language ''paragraph (e)(2)'' in paragraph (e)(1), and adding paragraph (e)(3) to read as follows:

§ 1.1503(d)–3 Foreign use.

* * * * *

(e) * * *

(3) *Exception for domestic consenting corporations.* Paragraph (e)(1) of this section will not apply so as to deem a foreign use of a dual consolidated loss incurred by a domestic consenting corporation that is a dual resident corporation under § 1.1503(d)–1(b)(2)(iii).

§ 1.1503(d)–6 [Amended]

■ **Par. 6.** Section 1.1503(d)–6 is amended by:

■ 1. Removing the language ''a foreign government'' and ''a foreign country'' in paragraph (f)(5)(i), and adding the language ''a government of a country'' and ''the country'' in their places, respectively.

■ 2. Removing the language ''a foreign government'' in paragraph (f)(5)(ii), and adding the language ''a government of a country'' in its place.

■ 3. Removing the language ''the foreign government'' in paragraph (f)(5)(iii), and adding the language ''a government of a country'' in its place.

■ **Par. 7.** Section 1.1503(d)–7 is amended by redesignating Examples 1 through 40 as paragraphs (c)(1) through (40), respectively, and adding paragraph (c)(41) to read as follows:

§ 1.1503(d)–7 Examples.

* * * * *

(c) * * *

(41) Example 41. Domestic consenting corporation—treated as dual resident corporation—(i) *Facts.* FSZ1, a Country Z entity that is subject to Country Z tax on its worldwide income or on a residence basis and is classified as a foreign corporation for U.S. tax purposes, owns all the interests in DCC, a domestic eligible entity that has filed an election to be classified as an association. Under Country Z tax law, DCC is fiscally transparent. For taxable year 1, DCC's only item of income, gain, deduction, or loss is a $100x deduction and such deduction comprises a $100x net operating loss of DCC. For Country Z tax purposes, FSZ1's only item of income, gain, deduction, or loss, other than the $100x loss attributable to DCC, is $60x of operating income.

(ii) *Result.* DCC is a domestic consenting corporation because by electing to be classified as an association, it consents to be treated as a dual resident corporation for purposes of section 1503(d). *See* § 301.7701–3(c)(3) of this chapter. For taxable year 1, DCC is treated as a dual resident corporation under § 1.1503(d)–1(b)(2)(iii) because FSZ1 (a specified foreign tax resident that bears a relationship to DCC that is described in section 267(b) or 707(b)) derives or incurs items of income, gain, deduction, or loss of DCC. *See* § 1.1503(d)–1(c). FSZ1 derives or incurs items of income, gain, deduction, or loss of DCC because, under Country Z tax law, DCC is fiscally transparent. Thus, DCC has a $100x dual consolidated loss for taxable year 1. *See* § 1.1503(d)–1(b)(5). Because the loss is available to, and in fact does, offset income of FSZ1 under Country Z tax law, there is a foreign use of the dual consolidated loss in year 1. Accordingly, the dual consolidated loss is subject to the domestic use limitation rule of § 1.1503(d)–4(b). The result would be the same if FSZ1 were to indirectly own its DCC stock through an intermediate entity that is fiscally transparent under Country Z tax law, or if an individual were to wholly own FSZ1 and FSZ1 were a disregarded entity. In addition, the result would be the same if FSZ1 had no items of income, gain, deduction, or loss, other than the $100x loss attributable to DCC.

(iii) *Alternative facts—DCC not treated as a dual resident corporation.* The facts are the same as in paragraph (c)(41)(i) of this section, except that DCC is not fiscally transparent under Country Z tax law and thus under Country Z tax law FSZ1 does not derive or incur items of income, gain, deduction, or loss of DCC. Accordingly, DCC is not treated as a dual resident corporation under § 1.1503(d)–1(b)(2)(iii) for year 1 and, consequently, its $100x net operating loss in that year is not a dual consolidated loss.

(iv) *Alternative facts—mirror legislation.* The facts are the same as in paragraph (c)(41)(i) of this section, except that, under provisions of Country Z tax law that constitute mirror legislation under § 1.1503(d)–3(e)(1) and that are substantially similar to the recommendations in Chapter 6 of OECD/G–20, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2: 2015 Final Report* (October 2015), Country Z tax law prohibits the $100x loss attributable to DCC from offsetting FSZ1's income that is not also subject to U.S. tax. As is the case in

paragraph (c)(41)(ii) of this section, DCC is treated as a dual resident corporation under § 1.1503(d)–1(b)(2)(iii) for year 1 and its $100x net operating loss is a dual consolidated loss. Pursuant to § 1.1503(d)–3(e)(3), however, the dual consolidated loss is not deemed to be put to a foreign use by virtue of the Country Z mirror legislation. Therefore, DCC is eligible to make a domestic use election for the dual consolidated loss.

■ **Par. 8.** Section 1.1503(d)–8 is amended by removing the language ''§ 1.1503(d)–1(c)'' and adding in its place the language ''§ 1.1503(d)–1(d)'' wherever it appears in paragraphs (b)(3)(i) and (iii), and adding paragraphs (b)(6) and (7) to read as follows:

§ 1.1503(d)–8 Effective dates.

* * * * *

(b) * * *

(6) *Rules regarding domestic consenting corporations.* Section 1.1503(d)–1(b)(2)(iii), (c), and (d), as well § 1.1503(d)–3(e)(1) and (e)(3), apply to determinations under §§ 1.1503(d)–1 through 1.1503(d)–7 relating to taxable years ending on or after December 20, 2018. For taxable years ending before December 20, 2018, see §§ 1.1503(d)–1(c) (previous version of § 1.1503(d)–1(d)) and 1.1503(d)–3(e)(1) (previous version of § 1.1503(d)–3(e)(1)) as contained in 26 CFR part 1 revised as of April 1, 2018.

(7) *Compulsory transfer triggering event exception.* Sections 1.1503(d)–6(f)(5)(i) through (iii) apply to transfers that occur on or after December 20, 2018. For transfers occurring before December 20, 2018, *see* § 1.1503(d)–6(f)(5)(i) through (iii) as contained in 26 CFR part 1 revised as of April 1, 2018. However, taxpayers may consistently apply § 1.1503(d)–6(f)(5)(i) through (iii) to transfers occurring before December 20, 2018.

■ **Par. 9.** Section 1.6038–2 is amended by adding paragraphs (f)(13) and (14) and adding a sentence at the end of paragraph (m) to read as follows:

§ 1.6038–2 Information returns required of United States persons with respect to annual accounting periods of certain foreign corporations beginning after December 31, 1962.

* * * * *

(f) * * *

(13) *Amounts involving hybrid transactions or hybrid entities under section 267A.* If for the annual accounting period, the corporation pays or accrues interest or royalties for which a deduction is disallowed under section 267A and the regulations under section 267A as contained in 26 CFR part 1, then Form 5471 (or successor form) must contain such information about the disallowance in the form and manner and to the extent prescribed by the form, instruction, publication, or other guidance published in the Internal Revenue Bulletin.

(14) *Hybrid dividends under section 245A.* If for the annual accounting period, the corporation pays or receives a hybrid dividend or a tiered hybrid dividend under section 245A and the regulations under section 245A as contained in 26 CFR part 1, then Form 5471 (or successor form) must contain such information about the hybrid dividend or tiered hybrid dividend in the form and manner and to the extent prescribed by the form, instruction, publication, or other guidance published in the Internal Revenue Bulletin.

* * * * *

(m) *Applicability dates.* * * * Paragraphs (f)(13) and (14) of this section apply with respect to information for annual accounting periods beginning on or after December 20, 2018.

■ **Par. 10.** Section 1.6038–3 is amended by:

■ 1. Adding paragraph (g)(3).

■ 2. Redesignating the final paragraph (1) of the section as paragraph (l), revising the paragraph heading for newly-designated paragraph (l), and adding a sentence to the end of newly-designated paragraph (l).

The additions and revision read as follows:

§ 1.6038–3 Information returns required of certain United States persons with respect to controlled foreign partnerships (CFPs).

* * * * *

(g) * * *

(3) *Amounts involving hybrid transactions or hybrid entities under section 267A.* In addition to the information required pursuant to paragraphs (g)(1) and (2) of this section, if, during the partnership's taxable year for which the Form 8865 is being filed, the partnership paid or accrued interest or royalties for which a deduction is disallowed under section 267A and the regulations under section 267A as contained in 26 CFR part 1, the controlling fifty-percent partners must provide information about the disallowance in the form and manner and to the extent prescribed by Form 8865 (or successor form), instruction, publication, or other guidance published in the Internal Revenue Bulletin.

* * * * *

(l) *Applicability dates.* * * * Paragraph (g)(3) of this section applies for taxable years of a foreign partnership beginning on or after December 20, 2018.

■ **Par. 11.** Section 1.6038A–2 is amended by adding paragraph (b)(5)(iii) and adding a sentence at the end of paragraph (g) to read as follows:

§ 1.6038A–2 Requirement of return.

* * * * *

(b) * * *

(5) * * *

(iii) If, for the taxable year, a reporting corporation pays or accrues interest or royalties for which a deduction is disallowed under section 267A and the regulations under section 267A as contained in 26 CFR part 1, then the reporting corporation must provide such information about the disallowance in the form and manner and to the extent prescribed by Form 5472 (or successor form), instruction, publication, or other guidance published in the Internal Revenue Bulletin.

* * * * *

(g) * * * Paragraph (b)(5)(iii) of this section applies with respect to information for annual accounting periods beginning on or after December 20, 2018.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 12.** The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 13.** Section 301.7701–3 is amended by revising the sixth sentence of paragraph (a) and adding paragraph (c)(3) to read as follows:

§ 301.7701–3 Classification of certain business entities.

(a) *In general.* * * * Paragraph (c) of this section provides rules for making express elections, including a rule under which a domestic eligible entity that elects to be classified as an association consents to be subject to the dual consolidated loss rules of section 1503(d).

* * * * *

(c) * * *

(3) *Consent to be subject to section 1503(d)*—(i) *Rule.* A domestic eligible entity that elects to be classified as an association consents to be treated as a dual resident corporation for purposes of section 1503(d) (such an entity, a *domestic consenting corporation*), for any taxable year for which it is classified as an association and the condition set forth in § 1.1503(d)–1(c)(1) of this chapter is satisfied.

(ii) *Transition rule—deemed consent.* If, as a result of the applicability date relating to paragraph (c)(3)(i) of this section, a domestic eligible entity that is classified as an association has not

consented to be treated as a domestic consenting corporation pursuant to paragraph (c)(3)(i) of this section, then the domestic eligible entity is deemed to consent to be so treated as of its first taxable year beginning on or after December 20, 2019. The first sentence of this paragraph (c)(3)(ii) does not apply if the domestic eligible entity elects, on or after December 20, 2018 and effective before its first taxable year beginning on or after December 20, 2019, to be classified as a partnership or disregarded entity such that it ceases to be a domestic eligible entity that is classified as an association. For purposes of the election described in the second sentence of this paragraph (c)(3)(ii), the sixty month limitation under paragraph (c)(1)(iv) of this section is waived.

(iii) *Applicability date.* The sixth sentence of paragraph (a) of this section and paragraph (c)(3)(i) of this section apply to a domestic eligible entity that on or after December 20, 2018 files an election to be classified as an association (regardless of whether the election is effective before December 20, 2018). Paragraph (c)(3)(ii) of this section applies as of December 20, 2018.

* * * * *

Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement.

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Part IV

Department of Labor

Employee Benefits Security Administration

Proposed Exemptions From Certain Prohibited Transaction Restrictions; Notices

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of Proposed Exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). If granted, these proposed exemptions allow designated parties to engage in transactions that would otherwise be prohibited provided the conditions stated there in are met. This notice includes the following proposed exemptions: D–11924, The Les Schwab Tire Centers of Washington, Inc., the Les Schwab Tire Centers of Boise, Inc., and the Les Schwab Tire Centers of Portland, Inc.; D–11918, Seventy Seven Energy Inc. Retirement & Savings Plan; D–11940, Tidewater Savings and Retirement Plan; and D–11947, Principal Life Insurance Company (PLIC) and its Affiliates.

DATES: All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, by February 11, 2019.

ADDRESSES: Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

All written comments and requests for a hearing (at least three copies) should be sent via mail to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, U.S. Department of Labor, 200 Constitution Avenue NW, Suite 400, Washington, DC 20210. *Attention:* Application No._ stated in each Notice of Proposed Exemption or via private delivery service or courier to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, U.S. Department of Labor, 122 C St. NW, Suite 400, Washington, DC 20001. *Attention:* Application No._ stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via email or FAX. Any such comments or requests should be sent either by email to: *e-OED@dol.gov,* by FAX to (202) 693–8474, or online through *http://www.regulations.gov* by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1515, 200 Constitution Avenue NW, Washington, DC 20210.

WARNING: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines.

SUPPLEMENTARY INFORMATION:

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department, unless otherwise stated in the Notice of Proposed Exemption, within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[1] Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

The Les Schwab Tire Centers of Washington, Inc. (Les Schwab Washington), the Les Schwab Tire Centers of Boise, Inc. (Les Schwab Boise), and the Les Schwab Tire Centers of Portland, Inc. (Les Schwab Portland), (collectively, with their Affiliates, Les Schwab or the Applicant) Located in Aloha, Oregon; Boise, Idaho; Centralia, Washington; and Other Locations [Application No. D–11924].

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA), and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[2] If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1) and 406(b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(A), 4975(c)(1)(D) and 4975(c)(1)(E) of the Code, shall not apply to the sales (each a ''Sale'' or collectively, the ''Sales'') by the Les Schwab Profit Sharing Retirement Plan (the Plan) of the parcels of real property described herein (each, a ''Parcel'' or collectively, the ''Parcels'') to the Applicant, where the Applicant is a party in interest with respect to the Plan, provided that certain conditions are satisfied.

Summary of Facts and Representations[3]

Background

1. Les Schwab Tire Centers (together with its affiliates, Les Schwab) was founded by its namesake in 1952 in Prineville, Oregon, in order to sell tires, batteries and other automotive equipment, and provide vehicle maintenance services. There are now approximately 482 Les Schwab tire and automotive service centers located primarily in the Northwest and with over $1.7 billion in annual sales. Their

[1] The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

[2] For purposes of this proposed exemption, references to the provisions of Title I of the Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of the Code.

[3] The Summary of Facts and Representations is based solely on the representations of the Applicant and does not reflect the views of the Department, unless indicated otherwise.

facilities are located in Alaska, Washington, Oregon, Montana, Nevada, Utah, California, Colorado, and Idaho.

2. Les Schwab is comprised of 13 distinct legal entities. Certain entities are ''S'' corporations. The 13 entities constitute various controlled groups but do not constitute a single controlled group. The Form 5500 Annual Report for the Plan is filed as a multiple employer plan. The thirteen entities do include Les Schwab Washington, Les Schwab Idaho, Les Schwab Portland, and Les Schwab Warehouse Center, Inc. (the Warehouse Center).

3. All entities within the Les Schwab controlled groups are owned by Alan Schwab, Diana Tomseth, Julie Waibel, and Leslie Tuftin (or by trusts for the benefit of such individuals and/or their children). Mr. Schwab and Ms. Tomseth are siblings, and Ms. Waibel and Ms. Tuftin are siblings. These four individuals are the grandchildren of Les Schwab and they are also currently employees of the Warehouse Center and board members of Les Schwab. The Applicant states that each of these four individuals is a Plan participant, as well as an owner-employee because they each own more than 5 percent of the stock of Les Schwab.[4]

4. The Plan is a qualified multiple-employer, defined contribution profit-sharing plan located in Bend, Oregon. The Plan is sponsored by the Warehouse Center. Thirteen employers, including Les Schwab Washington, Les Schwab Idaho, and Les Schwab Portland participate in the Plan. As of December 31, 2017, the Plan had 7,444 participants and beneficiaries. Also, as of December 31, 2017, the Plan had total assets of $730,454,671. The Applicant states that the Plan is the sole retirement plan available for Les Schwab employees.

5. The Administrative and Investment Committee of the Plan (the Committee) has the sole discretionary investment authority over the Plan and is a named fiduciary. The Committee has the exclusive right and discretionary authority to control, manage and operate the Plan. This includes the authority to direct the investment of the Plan's assets and to appoint and remove the Plan's Trustees and investment managers.

The Committee consists of seven trustees (the Trustees), who include executives and officers of Les Schwab. The Trustees are appointed by the Chief Executive Officer of the Warehouse Center. All of the Trustees are employees of the Warehouse Center, and some are officers of the Warehouse Center and Les Schwab Washington, Les Schwab Idaho and Les Schwab Portland.

Parcel Purchases

6. Over time, the Plan purchased twenty-six parcels of real property (collectively, the Parcels). As described below, following the purchases, the Plan entered into leases with various Les Schwab entities.[5] These Parcels of real property were then improved by the construction of buildings that were paid for by the Les Schwab entities or the Plan. Under the terms of the leases, the Les Schwab entities or the Plan retained title to these buildings.

The Applicant asserts that the Plan was initially motivated to purchase and lease the Parcels to Les Schwab as a means to provide a secure return on the Plan's investments. In this regard, the Plan had intimate knowledge of Les Schwab's business success and creditworthiness, and determined that leasing the Parcels to Les Schwab was a prudent investment decision.

7. On October 6, 2015, the Department issued a notice of final exemption in connection with the sale by the Plan to the Applicant of five Parcels of real property.[6] The Applicant seeks a similar individual exemption for the Sales of 19 Parcels on which Les Schwab leases the Parcels from the Plan and operates tire centers through an affiliate.[7] Given that Les Schwab has retained title to the buildings that have been constructed on some of the Parcels, pursuant to the terms of the relevant leases, in some instances, the purchases do not involve the buildings themselves. Each Parcel that is the subject of the proposed Sales is described below in further detail.

The Aloha Parcel

8. The Plan purchased a 1.97-acre parcel of property, located at 19100 SW Shaw Street in Aloha, Oregon (the Aloha Parcel), from an unrelated party in October 1986, for a total purchase price of $300,194.

The Plan and Les Schwab Portland entered into a lease of the Aloha Parcel (the Aloha Parcel Lease), on January 1, 1987, with the Plan as landlord, and Les Schwab Portland, as tenant. Effective as of its renewal term commencing January 1, 2014, the monthly rent is $14,453 per month.

In March 1988, the Plan completed the construction of two general automotive buildings and the canopy, for a total cost of $614,824. Les Schwab Portland then constructed a third general automotive building for a cost of $171,968.

The Aloha Parcel Lease includes a purchase option under which Les Schwab Portland has the right to purchase the Aloha Parcel. Pursuant to the terms of the Aloha Parcel Lease, the applicable option price is based on the greater of $300,194 plus the landlord's total cost of improvements, or the fair market value of the Aloha Parcel, as determined by the corresponding independent appraisal discussed in paragraph 31 (the Independent Appraisal). Les Schwab Portland now seeks to exercise its option to purchase the Aloha Parcel from the Plan.

The Boise Broadway Parcel

9. On February 13, 1990, the Plan purchased 1.66 acres of land, located at 2045 Broadway Avenue in Boise, Idaho (the Boise Broadway Parcel), from an unrelated party, for a total purchase price, including closing costs, of $398,085.

On June 1, 1990, the Plan and Les Schwab Tire Centers of Boise, Idaho (Les Schwab Boise) entered into a ground lease of the Boise Broadway Parcel (the Boise Broadway Parcel Lease), with the Plan, as landlord, and Les Schwab Boise, as tenant. On May 1, 1991, Les Schwab Boise opened a retail tire store facility on the Boise Broadway Property in a building that it had constructed for $437,061. Effective as of

[4] The term ''owner-employee'' is defined under section 408(d) of the Act to include persons as defined in section 401(c)(3) of the Code, such as an employee who owns the entire interest in an unincorporated trade or business, or in the case of a partnership, a partner who owns more than 10 percent of either the capital interest or profits interest of such partnership. The term ''owner-employee'' also includes, in relevant part, (a) a shareholder-employee, which is an employee or officer of an S corporation who owns more than 5 percent of the outstanding stock of such corporation; (b) a member of the family of such owner-employee; or (c) a corporation in which such shareholder-employee owns, directly or indirectly, 50% or more of the total combined voting power of all classes of voting stock of a corporation or 50% or more of the total value of all classes of stock of such corporation.

[5] The Applicant represents that these leases are exempt under section 408(e) of the Act. Section 408(e) of the Act provides, in pertinent part, that the restrictions of sections 406 and 407 of the Act shall not apply to the acquisition, sale or lease by a plan of qualifying employer real property if—(a) such acquisition, sale, or lease is for adequate consideration; (b) no commission is charged with respect thereto; and (c) the plan is an eligible individual account plan.

[6] See PTE 2015–18, 80 FR 60503 (October 6, 2015).

[7] Les Schwab represents that, in addition to the five parcels covered by PTE 2015–18 and the 19 parcels covered by this proposed exemption, the Plan owns a parcel in Aberdeen, Washington (the Aberdeen Parcel) and a parcel in Moscow, Idaho (the Moscow Parcel). With respect to the Aberdeen Parcel, Les Schwab represents that the Applicant has not made a business decision on whether Les Schwab Washington will purchase the property. Les Schwab represents that, with respect to the Moscow Parcel, the option to purchase the property from the Plan is not yet exercisable.

the lease renewal term of January 1, 2016, the monthly rent is $6,163 per month.

The Boise Broadway Parcel Lease includes a purchase option under which Les Schwab Boise has the right to purchase the Boise Broadway Parcel. Pursuant to the terms of the Boise Broadway Parcel Lease, the applicable option price is based on the greater of $398,085, plus the landlord's total cost of improvements, or the fair market value of the Boise Broadway Parcel, as determined by the Independent Appraisal. Les Schwab Boise now seeks to exercise its option to purchase the Boise Broadway Parcel from the Plan.

The Boise State Street Parcel

10. On May 12, 1978, the Plan purchased 1.41 acres of real property located at 6520 West State Street in Boise, Idaho (the Boise State Street Parcel) from an unrelated party. The total purchase price for the Boise State Street Parcel was $238,600. The Boise State Street Parcel is comprised of: (a) Two buildings: A 7,000 square foot retail store building, and a 6,400 square foot building housing a shop warehouse; and (b) two canopy areas, of 1,920 square feet and 1,400 square feet, that are attached to the retail store building.

On April 1, 1981, the Plan and Les Schwab Boise entered into a ground lease of a portion of the Boise State Street Parcel, with the Plan as landlord, and Les Schwab Boise, as tenant (the Boise State Street Parcel Lease). The Plan purchased additional land in 1988, which was added to the leased premises. The additional land was used for the construction of a brake and alignment center to expand Les Schwab Boise's business. The cost of the additional land was $42,185. The Plan in 1988 constructed a brake and alignment building on recently-purchased land for $137,198. The Plan made improvements to the roof system in 1989, for which the Plan paid $10,807. Effective as of its lease renewal term of August 1, 2017, the monthly rent for the Boise State Street Parcel is $11,977.

The Boise State Street Parcel Lease includes a purchase option under which Les Schwab Boise has the right to purchase the Boise State Street Parcel. Pursuant to the terms of the Boise State Street Parcel Lease, the applicable option price is based on the greater of $103,900 plus the landlord's total cost of improvements, or the fair market value of the Boise State Street Parcel, as determined by the Independent Appraisal. Les Schwab Boise now seeks to exercise its option to purchase the Boise State Street Parcel from the Plan.

The Centralia Parcel

11. On June 18, 1987, the Plan purchased a 1.06 acre parcel of real property consisting of vacant land located at 1211 Harrison Avenue in Centralia, Washington (the Centralia Parcel) from an unrelated party, for a total purchase price, including closing costs of $139,909.

On October 1, 1987, the Plan, as landlord, leased the Centralia Parcel to Les Schwab Washington, as tenant, under the provisions of a ground lease (the Centralia Parcel Lease). In 1988, Les Schwab Washington completed the construction of a building and improvements that were suitable for the operation of a retail tire store and other commercial purposes, at its own expense, for a total cost of $347,378. Since January 1, 2014, Les Schwab Washington has been paying the Plan $1,860 per month under the Centralia Parcel Lease.

The Centralia Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Centralia Parcel. Pursuant to the terms of the Centralia Parcel Lease, the applicable option price is based on the greater of $139,909, or the fair market value of the Centralia Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Centralia Parcel from the Plan.

The Chehalis Parcel

12. On April 21, 1980, the Plan purchased a 44,615 square foot parcel of real property located at 36 N Market Boulevard in Chehalis, Washington, including the land and a building (the Chehalis Parcel), from an unrelated party, for a total purchase price of $200,000.

On June 1, 1980, the Plan, as landlord, entered into a lease of the Chehalis Parcel (the Chehalis Parcel Lease) with Les Schwab Washington, as tenant, which commenced on September 1, 1980. Pursuant to the current Chehalis Parcel Lease, since August 1, 2017, Les Schwab Washington pays the Plan monthly rent of $10,487.

The Plan constructed, at its own expense, two buildings and related improvements on the Chehalis Parcel that were suitable for the operation of a retail tire store and other purposes by Les Schwab Washington. The cost of the building and improvements was $286,947.

The Chehalis Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Chehalis Parcel. Pursuant to the terms of the Chehalis Parcel Lease, the applicable option price is based on: The greater of (a) $120,000 plus the Plan's total cost of improvements made on the Chehalis Parcel, or (b) the fair market value of Chehalis Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Chehalis Parcel from the Plan.

The Ellensburg Parcels

13. In August 1977, Les Schwab Washington purchased approximately 71,438 square feet of land located at 1206 South Canyon Road, Ellensburg, Washington from unrelated parties for $80,000. Les Schwab Washington then subdivided the land into three parcels: Ellensburg Parcel #1, Ellensburg Parcel #2, and Ellensburg Parcel #3. Because Les Schwab Washington retained Ellensburg Parcel #3, and subsequently sold it to an unrelated party, the property and lease descriptions below pertain solely to Ellensburg Parcels #1 and #2, which are together referred to herein as the ''Ellensburg Parcels.''

In December 1979, Les Schwab Washington and the Plan entered into a sale and leaseback arrangement, whereby Les Schwab Washington sold Ellensburg Parcel #1 to the Plan for $108,600. Effective January 1, 1980, the Plan entered into a lease with Les Schwab Washington (the Ellensburg Parcel #1 Lease). The Plan paid $214,567 to construct a building and related improvements suitable for the retail tire store and other purposes. Les Schwab Washington has been paying the Plan $7,503 per month since January 1, 2016.

With respect to Ellensburg Parcel #2, which shares the same street address as Ellensburg Parcel #1, the Applicant represents that Les Schwab Washington constructed a small general purpose commercial building (an alignment center) thereon for $85,834. The building was subsequently incorporated into the Ellensburg Parcel #1 Leases.

The Ellensburg Parcel #1 Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Ellensburg Parcels. Under the terms of the Ellensburg Parcel #1 Lease, the option price will be the greater of $425,232 plus the landlord's total cost of improvements, or the fair market value of the Ellensburg Parcels, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise the option to purchase the Ellensburg Parcels from the Plan.

The Independence Parcel

14. In December 1979, the Plan purchased a 53,000-square foot parcel of

property located at 1710 Monmouth Avenue, Independence, Oregon (the Independence Parcel), consisting of land and a building from Les Schwab Portland for $301,149.

On January 1, 1980, the Plan began leasing the Independence Parcel to Les Schwab Portland, under the provisions of a written lease (the Independence Parcel Lease). Les Schwab Portland has been paying the Plan $6,984 per month since January 1, 2016.

The Independence Parcel Lease includes a purchase option under which Les Schwab Portland has the right to purchase the Independence Parcel. Pursuant to the terms of the Independence Parcel Lease, the applicable option price is based on the greater of $329,197 plus the landlord's total cost of improvements, or the fair market value of the Independence Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Independence Parcel from the Plan.

The Lakewood Parcel

15. On May 31, 1988, the Plan purchased two parcels of land, located at 3809 Steilacoom Boulevard SW, Tacoma, Washington (with the additions described below, the Lakewood Parcel), and totaling 43,050 square feet, from unrelated parties, for $200,388. On June 1, 1988, the Plan entered into a ground lease of one of the parcels with Les Schwab Washington, for an initial monthly rent of $1,336 (the Lakewood Parcel Lease).

In January 1989, the Plan purchased an additional 11,760 square foot parcel of land, from unrelated parties, for $59,033. Furthermore, in 2002, the Plan purchased a 12,000 square foot tract of land on the Lakewood Parcel, from unrelated parties, for $85,596. In 2005, the Plan purchased 7,730 square feet of land from unrelated parties, for $126,480. Since January 1, 2014, the monthly rent for the Lakewood Parcel has been $5,429.

The Lakewood Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Lakewood Parcel. Pursuant to the terms of the Lakewood Parcel Lease, the applicable option price is based on the greater of $200,388, plus the landlord's total cost of improvements, or the fair market value of the Lakewood Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Lakewood Parcel from the Plan.

The Longview Parcel

16. On December 18, 1979, Les Schwab Washington purchased 1.89 acres of land located at 1420 Industrial Way in Longview, Washington (the Longview Parcel) from an unrelated party for $86,350. On May 14, 1981, Les Schwab Washington sold the Longview Parcel to the Plan for $90,704.

On May 14, 1981, the Plan and Les Schwab Washington entered into a commercial lease of the land comprising the Longview Parcel, with the Plan as landlord, and Les Schwab Washington, as tenant (the Longview Parcel Lease). Since August 1, 2017, the monthly rent has been $13,979.

In 1981, the Plan completed improvements on the Longview Parcel that included a 14,830 square foot retail tire store costing $267,902. Other improvements were funded and constructed by the Plan in 1983, at an expense of $70,174, and in 1986, at an expense of $88,773, for a 3,600 square foot warehouse building.

The Longview Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Longview Parcel. Pursuant to the terms of the Longview Parcel Lease, the applicable option price is based on the greater of $90,704 plus the landlord's total cost of improvements, or the fair market value of the Longview Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Longview Parcel from the Plan.

The Marysville Parcels

17. On July 24, 1984, the Plan purchased 61,346 square feet of land located at 8405 State Avenue, Marysville, Washington (Marysville Parcel A) from an unrelated party, for a total contract price of $235,287. Pursuant to a ground lease dated August 1, 1984, the Plan began leasing the land ''as is'' to Les Schwab Washington (the Marysville Parcel Lease). Les Schwab Washington subsequently completed construction of a retail store at its own cost in 1985.

The Plan acquired 26,136 square feet of additional land (Marysville Parcel B)[8] in March 1999 for a price of $160,125. Marysville Parcel B was added to the Marysville Parcel Lease, effective June 15, 1999. Since August 1, 2014, the monthly rent charged by the Plan to Les Schwab Washington was $6,229.

The Marysville Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Marysville Parcels. Pursuant to the terms of the Marysville Parcel Lease, the applicable option price is based on the greater of $398,564, or the fair market value of the Marysville Parcels, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Marysville Parcels from the Plan.

The North Bend Parcel

18. On June 3, 1988, the Plan purchased land located at 610 E North Bend Way, North Bend, Washington (the North Bend Parcel) from an unrelated party for $200,364. On September 1, 1988, the Plan and Les Schwab Washington entered into a ground lease of the land comprising the North Bend Parcel, with the Plan as landlord, and Les Schwab Washington, as tenant (the North Bend Parcel Lease).

In 1991, Les Schwab Washington opened a 3,500-square-foot retail tire store facility on the North Bend Parcel that it had constructed for $878,000. Since January 1, 2014, the monthly rent charged to Les Schwab Washington has been $2,578.

The North Bend Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the North Bend Parcel. Pursuant to the terms of the North Bend Parcel Lease, the applicable option price is based on the greater of $200,364 plus Landlord's total cost of improvements, or the fair market value of the North Bend Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the North Bend Parcel from the Plan.

The Oregon City Parcels

19. In October 1980, the Plan purchased two parcels of land. The first parcel comprised of 41,951 square feet of land (Oregon City Parcel #1), and the second parcel comprised of 42,757 square feet of land (Oregon City Parcel #2), located at 1625 Beavercreek Road, Oregon City, Oregon, from an unrelated third party for $250,000. In July 1984, the Plan sold Oregon City Parcel #2 to Les Schwab Portland for $151,000.

On November 1, 1981, the Plan and Les Schwab Portland entered into a ground lease of the land comprising Oregon City Parcel #1, with the Plan, as landlord, and Les Schwab Portland, as tenant (the Oregon City Parcel #1 Lease).

In 1982, Les Schwab Portland opened a 7,850-square-foot retail tire store facility on Oregon City Parcel #1 that it

[8] Marysville Parcel A and Marysville Parcel B are together referred to herein as the ''Marysville Parcels.''

had constructed for $366,000. Since August 1, 2017, the monthly rent charged to Les Schwab Portland increased to $4,470.

The Oregon City Parcel #1 Lease includes a purchase option under which Les Schwab Portland has the right to purchase Oregon City Parcel #1. Pursuant to the terms of the Oregon City Parcel #1 Lease, the applicable option price is based on the greater of $136,500, or the fair market value of Oregon City Parcel #1, as determined by the Independent Appraisal. Les Schwab Portland now seeks to exercise its option to purchase Oregon City Parcel #1 from the Plan.

The Pullman Parcel

20. In November 1981, the Plan purchased 0.77 acres of land, located at 160 SE Bishop Boulevard in Pullman, Washington (the Pullman Parcel), from an unrelated party for a total purchase price of $75,704.

On November 10, 1981, the Plan and Les Schwab Washington entered into a ground lease of the land comprising the Pullman Parcel, with the Plan, as landlord, and Les Schwab Washington, as tenant (the Pullman Parcel Lease). In 1987, Les Schwab Washington opened a 7,300-square-foot retail tire store facility on the Pullman Parcel that it had constructed for $345,000. Since August 1, 2017, the monthly rent charged to Les Schwab Washington has been $3,356.

The Pullman Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Pullman Parcel. Pursuant to the terms of the Pullman Parcel Lease, the applicable option price is based on the greater of $80,704, or the fair market value of the Pullman Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Pullman Parcel from the Plan.

The Silverton Parcel

21. In November 1986, the Plan purchased 1.18 acres of land, located at 911 North 1st Street in Silverton, Oregon (the Silverton Parcel), from an unrelated party for a total purchase price of $50,739.

On March 1, 1987, the Plan and Les Schwab Portland entered into a ground lease of the land comprising the Silverton Parcel, with the Plan, as landlord, and Les Schwab Portland, as tenant (the Silverton Parcel Lease).

As agreed upon under the Silverton Parcel Lease, in 1987, the Plan constructed a tire store facility on the Silverton Parcel, for a total cost of $307,725. In 1992 the Plan funded additional improvements on the Silverton Parcel at a cost of $153,276. Since January 1, 2013, the monthly rent charged to Les Schwab Portland has been $7,900.

The Silverton Parcel Lease includes a purchase option under which Les Schwab Portland has the right to purchase the Silverton Parcel. Pursuant to the terms of the Silverton Parcel Lease, the applicable option price is based on the greater of $50,730 plus the landlord's total cost of improvements, or the fair market value of the Silverton Parcel, as determined by the Independent Appraisal. Les Schwab Portland now seeks to exercise its option to purchase the Silverton Parcel from the Plan.

The Snohomish Parcel

22. In March 1992, the Plan purchased 1.01 acres of land located at 711 Avenue D, Snohomish, Washington, from an unrelated party for an aggregate purchase price of $614,534. In January 1993, the Plan purchased approximately 0.07 acres of land adjacent to the initial tract for $46,800, also from an unrelated party. For purposes of this proposed exemption, both tracts of land are referred to herein as the ''Snohomish Parcel.''

On July 1, 1992, the Plan and Les Schwab Washington entered into a ground lease with the Plan of the initial tract of land comprising the Snohomish Parcel (the Snohomish Parcel), with the Plan as landlord, and Les Schwab Washington, as tenant.

In 1993, Les Schwab Washington opened a 14,300-square-foot retail tire store facility on the Snohomish Parcel that it had constructed for $825,000. Since January 1, 2013, the monthly rent charged to Les Schwab Washington has been $7,283.

The Snohomish Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Snohomish Parcel. Pursuant to the terms of the Snohomish Parcel Lease, the applicable option price is based on the greater of $614,534, plus the landlord's total cost of improvements, or the fair market value of the Snohomish Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Snohomish Parcel from the Plan.

The Spanaway Parcel

23. In January 1985, the Plan purchased 0.97 acres of land located at 16819 Pacific Avenue South, Spanaway, Washington (the Spanaway Parcel) from an unrelated third party for an aggregate purchase price of $283,340. In July 1990, the Plan purchased a 14,100 square foot parcel next to the initial parcel from an unrelated third party for $45,743. In May 1999, the Plan purchased an additional 8,000 square foot parcel from an unrelated third party for $58,000. The three land parcels totaling 1.48 acres comprise the Spanaway property (the Spanaway Parcel). On February 1, 1985, the Plan and Les Schwab Washington entered into a ground lease of the land comprising the initial parcel (the Spanaway Parcel Lease), with the Plan, as landlord, and Les Schwab Washington, as tenant.

In late 1985, Les Schwab Washington opened a 15,000-spare-foot retail tire store facility on the Spanaway Parcel that it had constructed for $406,000. Since August 1, 2015, the monthly rent charged to Les Schwab Washington has been $6,615.

The Spanaway Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Spanaway Parcel. Pursuant to the terms of the Spanaway Parcel Lease, the applicable option price is based on the greater of $329,083, or the fair market value of the Spanaway Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Spanaway Parcel from the Plan.

The Spokane Parcel

24. In November 1981, the Plan purchased 0.88 acres of land, located at 8103 North Division Street, Spokane, Washington (the Spokane Parcel), from an unrelated third party for an aggregate purchase price of $205,000.

On November 10, 1981, the Plan and Les Schwab Washington entered into a ground lease of the land comprising the Spokane Parcel, with the Plan, as landlord, and Les Schwab Washington, as tenant (the Spokane Parcel Lease).

In 1982, Les Schwab Washington opened a 7,400-square-foot retail tire store facility on the Spokane Parcel that it had constructed for $263,000. Since August 1, 2012, the monthly rent to Les Schwab Washington has been $5,175.

The Spokane Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Spokane Parcel. Pursuant to the terms of the Spokane Parcel Lease, the applicable option price is based on the greater of $205,172, or the fair market value of the Spokane Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Spokane Parcel from the Plan.

The Vancouver Andresen Parcel

25. On October 12, 1989, the Plan purchased 0.78 acres of land located at 2420 NE Andresen Road, Vancouver, Washington (the Vancouver Andresen Parcel), from an unrelated third party for an aggregate purchase price of $245,265.

On January 1, 1990, the Plan and Les Schwab Washington entered into a ground lease of the land comprising the Vancouver Andresen Parcel (the Vancouver Andresen Parcel Lease), with the Plan, as landlord, and Les Schwab Washington, as tenant.

In 1991, Les Schwab Washington opened a 10,300-square-foot retail tire store facility on the Vancouver Andresen Parcel that it had constructed for $557,000. Since January 1, 2015, the monthly rent charged to Les Schwab Washington has been $3,671.

The Vancouver Andresen Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Vancouver Andresen Parcel. Pursuant to the terms of the Vancouver Andresen Parcel Lease, the applicable option price is based on the greater of $245,264, or the fair market value of the Vancouver Andresen Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Vancouver Andresen Parcel from the Plan.

The Vancouver Cascade Park Parcel

26. On August 26, 1981, the Plan purchased 0.69 acres of land located at 216 SE 118th Avenue, Vancouver, Washington (the Vancouver Cascade Park Parcel), from an unrelated third party for an aggregate purchase price of $156,300.

On July 1, 1983, the Plan and Les Schwab Washington entered into a ground lease of the land comprising the Vancouver Cascade Park Parcel (the Vancouver Cascade Park Parcel Lease), with the Plan, as landlord, and Les Schwab Washington, as tenant.

In late 1983, Les Schwab Washington opened a 13,000-square-foot retail tire store facility on the Vancouver Cascade Park Parcel that it had constructed for $304,000. Since January 1, 2015, the monthly rent charged to Les Schwab Washington has been $3,765.

The Vancouver Cascade Park Parcel Lease includes a purchase option under which Les Schwab Washington has the right to purchase the Vancouver Cascade Park Parcel. Pursuant to the terms of the Vancouver Cascade Park Parcel Lease, the applicable option price is based on the greater of $156,300, or the fair market value of the Vancouver Cascade Park Parcel, as determined by the Independent Appraisal. Les Schwab Washington now seeks to exercise its option to purchase the Vancouver Cascade Park Parcel from the Plan.

Terms of the Sales

27. Each Sale must be a one-time transaction for cash. At the time of the Sales, the Plan will receive no less than the fair market value of each Parcel, as determined by the Appraisers, whose current Appraisals will be updated on the date of the Sales. In this regard, to the extent the terms of any lease allow a Sale price that is greater than a Parcel's fair market value, then the price received by the Plan for such Parcel will equal such greater Sale price. In addition, the Applicant represents that the Plan will not pay any costs, including brokerage commissions, fees, appraisal costs, or any other expenses associated with the Sales. Further, the terms and conditions of each Sale will be at least as favorable to the Plan as those obtainable in an arm's-length transaction with an unrelated party. Finally, a qualified independent fiduciary will represent the interests of the Plan with respect to each Sale. Among other things, such independent fiduciary will monitor each sale throughout its duration, review and approve the methodology and ultimate valuation determination of the qualified independent appraiser (the Independent Appraiser), and determine, on behalf of the Plan, whether it is prudent to proceed with the transaction.

The Independent Fiduciary

28. Les Schwab represents that American Realty Advisors (ARA) of Glendale, California was retained to serve as a qualified independent fiduciary (the Independent Fiduciary) to the Plan for purposes of evaluating and approving the Sales. ARA represents that it is an investment manager of institutional quality commercial real estate portfolios with 529 investors and over $8.7 billion in assets under management as of June 30, 2018. ARA is one of the largest privately-held real estate investment management firms in the United States and has been providing real estate investment management for over 28 years.

ARA represents that it qualifies as an independent fiduciary under the Department's Prohibited Transaction Exemption Procedures (see 29 CFR 2570, October 27, 2011, at 29 CFR 2570.34(d)).[9] ARA states that it acknowledges, understands, and accepts its duties under ERISA and is acting as the Independent Fiduciary to the Plan in relation to the exemption application. Further, ARA represents that it is authorized by the Plan to take all appropriate actions to safeguard the interests of the Plan and will, during the pendency of the Sales: (a) Monitor the Sales on behalf of the Plan; (b) ensure that the Sales remain in the interests of the Plan and, if not, take any appropriate actions available under the particular circumstances; and (c) enforce compliance with all conditions and obligations imposed on any party dealing with the Plan with respect to each transaction.

ARA represents that it does not have any relationship with the parties involved in the proposed transaction, beyond its role as the Independent Fiduciary.

As part of its Independent Fiduciary duties and responsibilities, ARA completed the following tasks: (a) Toured each of the Parcels and inspected comparable land sales, as outlined in each of the appraisals CBRE, Inc. (CBRE) completed for each Parcel (the Independent Appraisals); (b) engaged the Independent Appraisers and instructed them with respect to the objectives of each Independent Appraisal, the specific nuances of the Parcel leases between Les Schwab and the Plan (the Leases), and the valuation process, taking into account the questions posed by the Department during its review of the exemption application in connection with its granting of PTE 2015–18; (c) reviewed the Independent Appraisals; (d) reviewed the annual audited financial statements for the Plan from 1980 to the present to assess the treatment of the Leases by the auditor and obtained additional documentation from Les Schwab in support of the rental payments made under the Leases; (e) reviewed and summarized the terms and conditions of the Leases and relevant amendments; (f) researched additional questions posed by the Department; and (g) reviewed the composition of the existing real estate portfolio of the Plan and the Plan's Statement of Investment Policy dated September 1, 2015. Further, the Independent Fiduciary examined

[9] 29 CFR 2570.34(d) requires that an Independent Fiduciary provide to the Department, under penalty of perjury: (1) A summary of the Independent Fiduciary's qualifications to serve in such capacity; (2) a description of any relationship between the Independent Fiduciary and a party in interest with respect to the transaction or its affiliates; (3) an acknowledgement by the Independent Fiduciary of its duties and responsibilities under ERISA in acting as a fiduciary on behalf of the plan; and (4) the percentage of the Independent Fiduciary's current revenue that is derived from any party in interest involved in the transaction or its affiliates.

whether the Plan received rental income on a timely basis under the Leases, and reviewed audited financial statements for the Plan prepared by PriceWaterhouse Coopers and Roberts, McMains, Sellman & Co. for the years 1981–2015.

The Independent Fiduciary represents that it will represent the interests of the Plan in the proposed Sales. In so doing, the Independent Fiduciary will: (a) Determine whether it is prudent to go forward with each Sale; (b) negotiate, review, and approve the terms and conditions of each Sale; (c) monitor and manage the Sales on behalf of the Plan throughout their duration, taking any appropriate actions it deems necessary to safeguard the interests of the Plan.

The Independent Fiduciary Reports

29. ARA submitted to the Department its reports, dated September 8, 2016 (the Independent Fiduciary Reports), that document ARA's analysis of the proposed Sale for each Parcel and ARA's recommendations for the Plan.

In the Independent Fiduciary Reports, ARA represents that the Sales are the most favorable option for the Plan and its participants and beneficiaries, because the improvements have significant age and limited future value (in addition to the current value of the underlying land), to anyone other than Les Schwab.

ARA concludes that the Leases between the Plan and the applicable Les Schwab affiliates with their rental rates and Consumer Price Index (CPI) adjustments are consistent with market terms and conditions at the time the Leases were negotiated and are consistent of similar transactions between unrelated parties. ARA also concludes that the appraised values of the Parcels as presented within the Independent Appraisals are accurate reflections of current market conditions and form the basis for establishing fair market prices for the Sales.

Further, ARA notes that the Plan's real estate holdings as outlined by the 2015 audited statement are approximately 14.7% of the total assets of the Plan and are just below the parameters of the Plan's Statement of Investment Policy dated January 1, 2015. The proposed Sales of the Parcels, in addition to the recent January 2016 sale of the Lacey, Renton, Bothell, Sandy and Twin Falls Parcels, would reduce the real estate holdings of the Plan to approximately 10.8% of the total assets of the Plan. This falls below the investment threshold but would modestly increase the liquidity of the Plan. The Investment Policy Statement establishes the policy range for real estate and other real assets within a range of 15% and 25% of the portfolio. The Sales results in a real estate allocation that is under the policy range but would allow the Plan to continue its diversification strategy away from directly owned real estate toward real estate assets with greater liquidity, increased diversification and decreased liability risk.

ARA also represents, in the Independent Fiduciary Reports, that it has reviewed audited financial statements of the Plan, as noted above, for the years 1981 through 2015, unaudited financial statements to the end of February 2016, the Plan records of rental income received from the present back to 1995, and the scheduled rent for all of the leases individually from inception to the present. ARA states that there is no reason to conclude that the lessees owe the Plan any additional rent related the failure of either party to comply with the terms and conditions of the Leases.

Further, ARA concludes, in the Independent Fiduciary Reports, that the Sales are administratively feasible and would be fairly routine executions for an experienced real estate investment manager. ARA represents that it will: (a) Monitor and manage the proposed transactions on behalf of the Plan; (b) take any appropriate actions to safeguard the interests of the Plan; (c) represent the interests of the Plan in the proposed Sales; and (d) negotiate, review, and approve the terms and conditions of the proposed Sales.

The Independent Appraisers

30. The Applicant represents that the appraisals of the Parcels were conducted by Whitney Haucke, David Adamson, Jeff Grose, Katriina White, and Kevin Nguyen of CBRE. (Ms. Haucke, Mr. Adamson, Mr. Grose, Ms. White, and Mr. Nguyen are referred to herein as the ''Independent Appraisers.'') Ms. Haucke, Mr. Adamson, Mr. Grose, and Mr. Nguyen are Certified General Real Estate Appraisers in the areas where the Parcels are located, and they are all Members of the Appraisal Institute. Ms. White is a Registered Real Estate Appraiser Trainee in the State of Washington. The Independent Appraisers also have experience in appraising residential properties, vacant land, and commercial properties.

Pursuant to its Appraisal Engagement Letter, CBRE was retained to perform, among other things, the following tasks, on behalf of the Plan: (a) Provide a fair market valuation of the Parcels using commercially acceptable methods of valuation for unrelated third party transactions; (b) explain whether or not, in the Independent Appraisers' opinion, the Plan has received adequate consideration from the Leases; and (c) opine on whether the proper CPI was used for the rent increases for each Parcel. The Applicant represents that the appraisal work completed by CBRE produced fees from Les Schwab to CBRE of $98,250 in 2016 and $0.00 in 2017. According to CBRE's 2017 10K filing, its 2016 gross revenue was $13.09 billion and its 2017 gross revenue was $14.21 billion. As such, CBRE's revenue from the Les Schwab appraisal work was less than 2% of its revenue for 2016 and 2017.

The Independent Appraisals

31. In valuing the Parcels, the Independent Appraisers applied the Sales Comparison Approach and the Income Capitalization Approach to valuation. As represented by the Independent Appraisers, the Sales Comparison Approach is typically used for retail sites that are feasible for either immediate or near-term development. The Income Capitalization Approach, according to the Independent Appraisers, reflects the property's income-producing capabilities, and is based on the assumption that value is created by the expectation of benefits to be derived in the future. The Independent Appraisers did not use the Cost Approach to valuation because they did not consider this methodology to be applicable in the estimation of market value due to age of the improvements and lack of depreciation data for the Parcels.

a. *The Aloha Parcel Appraisal.* The Independent Appraisers used the Sales Comparison Approach and the Income Capitalization Approach methodologies in determining the fair market value of the Aloha Parcel. Based on the Sales Comparison Approach, the Independent Appraisers evaluated eight properties, which included fee simple or leased fee sales or listings of comparable properties. The Independent Appraisers determined that the fee simple sales comparables indicated an adjusted range of $131 per square foot to $149 per square foot, at an average of $136 per square foot. According to the Independent Appraisers, the Sales Comparison Approach yielded a value of $135 per square foot, which when multiplied by the actual square footage of the Aloha Parcel (16,700 square feet), equaled a fair market value of $2,250,000 for the Aloha Parcel as of April 1, 2016.

In employing the Income Capitalization Approach, the Independent Appraisers noted that there

were no rents of buildings or facilities similar to the subject property. Therefore, the Independent Appraisers expanded their search for comparable rental properties, regionally, and they evaluated six rental property comparables. After reviewing the rental incomes and operating expenses of these properties, the Independent Appraisers determined that, under the Income Capitalization Approach, the Independent Appraisers concluded that the fair market value of the Aloha Parcel was $129 per square foot, or $2,150,721, rounded to $2,150,000 as of April 1, 2016.

The Independent Appraisers determined that the Sales Comparison Approach should be given primary consideration in the reconciliation process. As such, the Independent Appraisers determined the fair market value of the Aloha Parcel as of April 1, 2016, was $2,250,000.

b. *The Boise Broadway Parcel Appraisal.* The Independent Appraisers used the Sales Comparison Approach to value the Boise Broadway Parcel. The Independent Appraisers evaluated six prior sales and one pending sale. Based on the Sales Comparison Approach and evaluating land sale comparables, the Independent Appraisers derived a fair market value for the Boise Broadway Parcel of $13 per square foot, which when multiplied by the actual square footage of the Boise Broadway Parcel (72,310 square feet) equaled a fair market value of $940,000 as of April 1, 2016.

c. *The Boise State Street Parcel Appraisal.* The Boise State Street Appraisal provides that the Independent Appraisers employed the Sales Comparison Approach and Income Capitalization Approach to value the Boise State Street Parcel. In using the Sales Comparison Approach, the Independent Appraisers evaluated two prior fee simple sales, two pending fee simple sales, two prior leased fee sales, and two pending leased fee sales. The Independent Appraisers determined that, based on the Sales Comparison Approach, evaluating the land sale comparables derived a fair market value for the Boise State Street Parcel of $2,100,000 as of April 1, 2016.

In using the Income Capitalization Approach, the Independent Appraisers evaluated five lease comparables and one comparable listing for a lease. After reviewing the rental incomes and operating expenses of the six comparables, the Appraiser determined that, under the Income Capitalization Approach, the fair market value of the Boise State Street Parcel is $2,060,000 as of April 1, 2016.

The Independent Appraisers determined that both methodologies should be given equal emphasis, and determined the fair market value of the Boise State Street Parcel as of April 1, 2016, to be $2,090,000.

d. *The Centralia Parcel Appraisal.* The Independent Appraisers used the Sales Comparison Approach to value the Centralia Parcel. The Independent Appraisers evaluated three prior sales and one listing. The Independent Appraisers determined that, based on the Sales Comparison Approach, evaluating the land sale comparables derived a fair market value for the Centralia Parcel of $8.01 per square foot, which when multiplied by the actual square footage of the Centralia Parcel (46,200 square feet) equaled a fair market value of $370,000, as of April 1, 2016.

e. *The Chehalis Parcel Appraisal.* The Independent Appraisers employed the Sales Comparison Approach and Income Capitalization Approach to value the Chehalis Parcel. In using the Sales Comparison Approach, the Independent Appraisers evaluated five prior sales and one pending sale, and determined the fair market value of the Chehalis Parcel to be $1,150,000, as of April 1, 2016.

In using the Income Capitalization Approach, the Independent Appraisers evaluated five lease comparables. After reviewing the rental incomes and operating expenses of the five comparables, the Independent Appraisers determined the fair market value of the Chehalis Parcel to be $1,100,000 as of April 1, 2016.

The Independent Appraisers noted that market participants are analyzing properties based on their income generating capability. As such, the income capitalization approach was given primary emphasis in the final value estimate. Thus, based on the Income Capitalization Approach, the Independent Appraisers determined the fair market value of the Chehalis Parcel was $1,100,000 as of April 1, 2016.

f. *The Ellensburg Parcels Appraisal.* The Independent Appraisers employed the Sales Comparison Approach and Income Capitalization Approach to value the Ellensburg Parcels. In using the Sales Comparison Approach, the Independent Appraisers evaluated five prior sales and one sale listing. The Independent Appraisers determined that evaluating the land sale comparables derived a fair market value after adjustments for the Ellensburg Parcels of $1,080,000 as of April 1, 2016.

In using the Income Capitalization Approach, the Independent Appraisers evaluated six lease comparables. After reviewing the rental incomes and operating expenses of the six comparables, the Independent Appraisers determined that, under the Income Capitalization Approach, the fair market value of the Ellensburg Parcels was $1,096,990, rounded to $1,100,000, as of April 1, 2016.

The Independent Appraisers noted that market participants were analyzing properties based on their income-generating capability. As such, the Income Capitalization Approach was given primary emphasis in the final value estimate. Thus, based on the Income Capitalization Approach, the Independent Appraisers determined the fair market value of the Ellensburg Parcels was $1,100,000 as of April 1, 2016.

g. *The Independence Parcel Appraisal.* The Independent Appraisers employed the Sales Comparison Approach and Income Capitalization Approach to value the Independence Parcel. In using the Sales Comparison Approach, the Independent Appraisers evaluated four prior fee simple sales and four prior leased fee sales of comparable parcels. The Independent Appraisers calculated the value of the Independence Parcel to be $990,000, as of April 1, 2016.

In using the Income Capitalization Approach, the Independent Appraisers evaluated six lease comparables. After reviewing the rental incomes and operating expenses of the six comparables, the Independent Appraisers determined that, under the Income Capitalization Approach, the fair market value of the Independence Parcel was $918,034 as of April 1, 2016 ($920,000, if rounded).

After giving more weight to the Sales Comparison Approach, the Independent Appraisers concluded that the Independence Parcel had a fair market value of $990,000 as of April 1, 2016.

h. *The Lakewood Parcel Appraisal.* The Independent Appraisers employed the Sales Comparison Approach to value the Lakewood Parcel. They valued Parcels A and B and Parcels C and D, comprising the Lakewood Parcel, using different comparables. With respect to Parcels A and B, the Independent Appraisers evaluated four comparable land sales and one land sale listing that was current at the time of the valuation. The Independent Appraisers determined that the fair market value for Parcels A and B was $600,000 as of April 1, 2016.

With respect to the valuation of Parcels C and D, the Independent Appraisers evaluated four comparable land sales and one land sale listing that

was current at the time of the valuation. The Independent Appraisers determined that the fair market values of Parcel C and Parcel D were $21,000 and $44,000, respectively, as of April 1, 2016.

i. *The Longview Parcel Appraisal.* The Independent Appraisers used the Sales Comparison Approach and Income Capitalization Approach to value the Longview Parcel. In using the Sales Comparison Approach, the Independent Appraisers evaluated sales of eight comparable properties, four representing fee simple sales, and four representing leased fee sales, and determined that the fair market value of the Longview Parcel was $2,385,000, rounded to $2,400,000, as of April 1, 2016.

Using the Income Capitalization Approach, the Independent Appraisers evaluated six lease comparables. After reviewing the rental incomes and operating expenses of the six comparables, the Independent Appraisers determined that, under the Income Capitalization Approach, the fair market value of the Longview Parcel was $2,373,521, rounded to $2,370,000, as of April 1, 2016.

After giving more weight to the Income Capitalization Approach, the Independent Appraisers concluded that the Independence Parcel had a fair market value of $2,385,000 as of April 1, 2016.

j. *The Marysville Parcels Appraisal.* The Independent Appraisers valued the Marysville Parcel using the Sales Comparison Approach. With respect to both Marysville Parcels A and B, the Independent Appraisers evaluated four similar sale-listings in the area and determined that the fair market values of Marysville Parcel A and Parcel B were $740,000 and $265,000, respectively, as of April 1, 2016.

k. *The North Bend Parcel Appraisal.* The Independent Appraisers valued the North Bend Parcel using the Sales Comparison Approach. The Independent Appraisers evaluated four prior sales. The Appraisers determined that the fair market value of the North Bend Parcel was $1,220,000, as of April 1, 2016.

l. *The Oregon City Parcel Appraisal.* The Independent Appraisers used the Sales Comparison Approach to value the Oregon City Parcel. The Independent Appraisers evaluated two prior sales, one pending sale of a single parcel, and one pending sale of two adjacent parcels. The Appraisers determined that the fair market value of the Oregon City Parcel was $600,000 as of April 1, 2016.

m. *The Pullman Parcel Appraisal.* The Independent Appraisers used the Sales Comparison Approach to value the Pullman Parcel. The Independent Appraiser evaluated six prior land sales of similar parcels, based on zoning and intended uses. The Independent determined that the fair market value of the Pullman Parcel was $575,000 as of April 1, 2016.

n. *The Silverton Parcel Appraisal.* The Independent Appraisers valued the Silverton Parcel using the Sales Comparison Approach and the Income Capitalization Approach. In using the Sales Comparison Approach, the Independent Appraisers evaluated sales of eight comparable properties, four representing fee simple sales, and four representing leased fee sales. The Independent Appraisers determined the fair market value of the Silverton Parcel was $1,451,000, rounded to $1,450,000, as of April 1, 2016.

Using the Income Capitalization Approach, the Independent Appraisers evaluated six lease comparables. After reviewing the rental incomes and operating expenses of the six comparables, the Independent Appraisers determined that the fair market value of the Silverton Parcel was $1,375,895, rounded to $1,380,000, as of April 1, 2016.

After giving more weight to the Income Capitalization Approach, the Independent Appraisers concluded that the Silverton Parcel had a fair market value of $1,415,000 as of April 1, 2016.

o. *The Snohomish Parcel Appraisal.* The Independent Appraisers used the Sales Comparison Approach to value the Snohomish Parcel. The Independent Appraisers evaluated four prior land sales of similar parcels, based on zoning and intended uses. The Independent Appraisers determined that the fair market value of the Snohomish Parcel was $590,000, rounded, as of April 1, 2016.

p. *The Spanaway Parcel Appraisal.* The Independent Appraisers valued the Spanaway Parcel using the Sales Comparison Approach. The Independent Appraisers evaluated five similar sale-listings in the area. The Independent Appraisers determined the fair market value of the Spanaway Parcel to be approximately $540,000, rounded, as of April 1, 2016.

q. *The Spokane Parcel Appraisal.* The Independent Appraisers used the Sales Comparison Approach to value the Spokane Parcel. The Independent Appraisers evaluated five prior land sales of similar parcels, based on zoning and intended uses. The Independent Appraisers determined the fair market value of the Spokane Parcel to be $725,000, rounded, as of April 1, 2016.

r. *The Vancouver Andresen Parcel Appraisal.* The Independent Appraisers valued the Vancouver Andresen Parcel using the Sales Comparison Approach. The Independent Appraisers evaluated five similar sale-listings in the area, which included two under contract/offer sales. The Independent Appraisers determined the fair market value of the Vancouver Andresen Parcel to be $450,000, rounded, as of April 1, 2016.

s. *The Vancouver Cascade Park Parcel Appraisal.* The Independent Appraisers used the Sales Comparison Approach to value the Vancouver Cascade Park Parcel. The Independent Appraisers evaluated three prior sales and two pending sales. The Independent Appraisers determined the fair market value of the Vancouver Cascade Park Parcel to be $390,000 as of April 1, 2016.

Analysis

31. The Applicant represents that the statutory exemption under ERISA section 408(e) is not available for the proposed transactions due to the application of section 408(d)(l)(C) of the Act, which provides that the statutory exemption under section 408(e) of the Act will not apply to a transaction in which a plan sells any property to a corporation in which an owner-employee with respect to the plan owns, directly or indirectly, 50% or more of the total combined voting power of all classes of stock entitled to vote or 50% or more of the total value of shares of all classes of stock of the corporation.

The Applicant notes that section 408(d)(2)(A) of the Act provides that a ''shareholder-employee'' will be treated as an owner-employee. Further, the Applicant states that section 408(d)(3) of the Act provides that a ''shareholder-employee'' is an employee or officer of an ''S'' corporation who owns more than 5% of the outstanding stock of the corporation on any day during the taxable year of such corporation. According to the Applicant, both Julie Waibel and Leslie Tuftin own more than 5% of S corporations that are within the various controlled groups with employees that participate in the Plan. As such, due to their ownership interest in these S corporations, the Applicant asserts that Ms. Waibel and Ms. Tuftin are owner-employees with respect to the Plan.

The Applicant represents that because Ms. Waibel and Ms. Tuftin are owner-employees, and each is deemed to own 50% or more of the total combined voting power of all classes of the S corporations' stock entitled to vote,

section 408(d)(l)(C) of the Act precludes the reliance upon section 408(e) of the Act with respect to the Sales.

Section 406(a)(l)(A) of the Act prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he or she knows or should know that such transaction constitutes a direct or indirect sale, exchange, or lease of any property between the plan and a party in interest. Therefore, the proposed transactions would constitute prohibited transactions under section 406(a)(l)(A) of the Act because the Plan would be selling real property to parties in interest and disqualified persons with respect to the Plan.

Section 406(a)(l)(D) of the Act prohibits a fiduciary with respect to a plan to cause the plan to engage in a transaction if the fiduciary knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any asset of the plan. The Applicant represents that the proposed transactions would violate section 406(a)(l)(D) of the Act because the Plan will transfer Plan assets to parties in interest and disqualified persons with respect to the Plan.

In addition, section 406(b)(1) of the Act prohibits a fiduciary from dealing with the assets of a plan in his own interest or for his own account. Section 406(b)(2) of the Act prohibits a fiduciary, with respect to a plan, from acting in a transaction involving the plan on behalf of a party whose interests are adverse to those of the plan or of its participants and beneficiaries. As described above, the Trustees and the Committee are fiduciaries of the Plan. The Trustees are also comprised of certain executive officers of Les Schwab, including officers of the Warehouse Center, Les Schwab Washington, Les Schwab Idaho, and Les Schwab Portland, and are appointed by the Chief Executive Officer of the Warehouse Center, the Plan sponsor.

The proposed Sales of the Parcels by the Plan to Les Schwab would involve a violation of section 406(b)(1) of the Act because Les Schwab, as a Plan fiduciary, would be dealing with the assets of the Plan for its own interest or own account. Les Schwab, as a Plan fiduciary, in effecting the Sales to itself, is acting on behalf of itself and of the Plan in violation of section 406(b)(2) of the Act.

Statutory Findings

32. The Department has tentatively determined that the requested exemption is administratively feasible because: (a) The Sales are one-time transactions for cash; and (b) the price paid by Les Schwab to the Plan for each Parcel will be no less than the fair market value of each Parcel (exclusive of the buildings or other improvements paid for by Les Schwab, to which Les Schwab retains title), as determined by the Independent Appraisers in separate Independent Appraisals that are updated on the date of each Sale.

The Department has tentatively determined that the proposed exemption is in the interest of the Plan because: (a) The Sales will allow the Plan to diversify its holdings and invest the proceeds from the Sales in more productive investments; (b) the Plan will not incur any transaction costs in connection with such Sales; (c) the Sales will not be subject to any financing contingencies because Les Schwab will make a one-time, lump-sum, cash payment on the closing date for each respective Parcel; and (d) the Sales will eliminate ongoing appraisal fees, administrative costs, and legal responsibilities that are associated with the Plan's continuing ownership of the Parcels.

The Department has tentatively determined that the proposed exemption is protective of the participants and beneficiaries because the Independent Fiduciary will represent the interests of the Plan's participants and beneficiaries with respect to: (a) The decision to sell the Parcels to the Applicant; (b) the terms and execution of the Sales; and (c) the selection of the Independent Appraiser. In addition, the Applicant states that the Independent Fiduciary will determine whether the transactions are prudent and in the best interest of the participants and beneficiaries, including whether or not the terms and conditions of the Sales are equivalent to an arm's-length transaction with an unrelated party. Finally, the Applicant states that the Independent Appraisers will appraise the fair market value of the Parcels as of the transaction date and ensure that the Plan receives adequate consideration, based on appropriate appraisal methodologies used by the Independent Appraisers in Independent Appraisals that will be updated on the date of each Sale.

Summary

33. In summary, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for an exemption under section 408(a) of ERISA, provided that the conditions described below are satisfied.

Proposed Exemption

Section I. Covered Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1) and 406(b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(A), 4975(c)(1)(D) and 4975(c)(1)(E) of the Code, shall not apply to the sales (the Sales) by the Les Schwab Profit Sharing Retirement Plan (the Plan) of the following parcels of real property (each, a ''Parcel'' and collectively, the ''Parcels'') to the Applicant:

(a) The Parcel located at 19100 SW Shaw Street, Aloha, Oregon;

(b) The Parcel located at 2045 Broadway Avenue, Boise, Idaho;

(c) The Parcel located at 6520 W State Street, Boise, Idaho;

(d) The Parcel located at 1211 Harrison Avenue, Centralia, Washington;

(e) The Parcel located at 36 N Market Boulevard, Chehalis, Washington;

(f) The Parcels located at 1206 Canyon Road, Ellensburg, Washington;

(g) The Parcel located at 1710 Monmouth Avenue, Independence, Oregon;

(h) The Parcel located at 3809 Steilacoom Boulevard SW, Lakewood, Washington;

(i) The Parcel located at 1420 Industrial Way, Longview, Washington;

(j) The Parcel located at 8405 State Avenue, Marysville, Washington;

(k) The Parcel located at 610 E. North Bend Way, North Bend, Washington;

(l) The Parcel located at 1625 Beavercreek Road, Oregon City, Oregon;

(m) The Parcel located at 160 SE Bishop Boulevard, Pullman, Washington;

(n) The Parcel located at 911 N 1st Street, Silverton, Oregon;

(o) The Parcel located at 711 Avenue D, Snohomish, Washington;

(p) The Parcel located at 16819 Pacific Avenue S, Spanaway, Washington;

(q) The Parcel located at 8103 N Division Street, Spokane, Washington;

(r) The Parcel located at 2420 NE Andresen Road, Vancouver, Washington; and

(s) The Parcel located at 216 SE 118th Avenue, Vancouver, Washington; where the Applicant is a party in interest with respect to the Plan, provided that the conditions set forth in Section II of this proposed exemption are met.

Section II. General Conditions

(a) The price paid by Les Schwab to the Plan for each Parcel is no less than the fair market value of each Parcel

(exclusive of the buildings or other improvements paid for by Les Schwab, to which Les Schwab retains title), as determined by qualified independent appraisers (the Independent Appraisers), working for CBRE, Inc., in separate appraisal reports (the Independent Appraisals) that are updated on the date of each Sale.

(b) Each Sale is a one-time transaction for cash.

(c) The Plan does not pay any costs, including brokerage commissions, fees, appraisal costs, or any other expenses associated with each Sale.

(d) The Independent Appraisers determine the fair market value of their assigned Parcel, on the date of the Sale, using commercially accepted methods of valuation for unrelated third-party transactions, taking into account the following considerations:

(1) The fact that a lease between Les Schwab and the Plan is a ground lease and not a standard commercial lease;

(2) The assemblage value of the Parcel, where applicable;

(3) Any special or unique value the Parcel holds for Les Schwab; and

(4) Any instructions from the qualified independent fiduciary (the Independent Fiduciary) regarding the terms of the Sale, including the extent to which the Independent Appraiser should consider the effect that Les Schwab's option to purchase a Parcel would have on the fair market value of the Parcel.

(e) The Independent Fiduciary represents the interests of the Plan with respect to each Sale, and in doing so:

(1) Determines that it is prudent to go forward with each Sale;

(2) Approves the terms and conditions of each Sale;

(3) Reviews and approves the methodology used by the Independent Appraiser and ensures that such methodology is properly applied in determining the Parcel's fair market value on the date of each Sale;

(4) Reviews and approves the determination of the purchase price; and

(5) Monitors each Sale throughout its duration on behalf of the Plan for compliance with the general terms of the transaction and with the conditions of this exemption, if granted, and takes any appropriate actions to safeguard the interests of the Plan and its participants and beneficiaries.

(f) The terms and conditions of each Sale are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

Notice to Interested Parties

The persons who may be interested in the publication in the **Federal Register** of the Notice of Proposed Exemption (the Notice) include all individuals who are participants and beneficiaries in the Plan. It is represented that all such interested persons will be notified of the publication of the Notice by first class mail to each such interested person's last known address within fifteen (15) days of publication of the Notice in the **Federal Register**. Such mailing will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(a)(2), which will advise all interested persons of their right to comment on and/or to request a hearing. All written comments or hearing requests must be received by the Department from interested persons within forty-five (45) days of the publication of this proposed exemption in the **Federal Register**.

All comments will be made available to the public.

Warning: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: Scott Ness of the Department, telephone (202) 693–8561. (This is not a toll-free number.)

Seventy Seven Energy Inc. Retirement & Savings Plan, (the Plan or the Applicant), Located in Oklahoma City, OK, [Application No. D–11918].

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 46637, 66644, October 27, 2011). If the exemption is granted, the restrictions of sections 406(a)(1)(E), 406(a)(2),and 407(a)(1)(A) of the Act shall not apply, effective August 1, 2016 through April 20, 2017, to: (1) The acquisition by participant accounts in the Plan (the Plan Accounts) of warrants (the Warrants) issued by Seventy Seven Energy, Inc. (SSE), the Plan sponsor, in connection with SSE's bankruptcy; and (2) the holding of the Warrants by the Plan, provided that certain conditions set forth below are met.

Summary of Facts and Representations

Background

1. SSE (or the Applicant) is an Oklahoma-based company that offers drilling, pressure-pumping, oilfield rental tools and trucking services. On June 30, 2014, SSE became an independent, publicly-traded company by separating from Chesapeake Energy Corporation (CHK) in a series of transactions (the Spin-Off). Prior to the Spin-Off, SSE was an Oklahoma limited liability company operating under the name ''Chesapeake Oilfield Operating, L.L.C.'' (COO), and an indirect, wholly-owned subsidiary of CHK. As a result of the Spin-Off, approximately 5,200 employees of COO and its subsidiaries became employees of SSE.

2. The Plan, which provides for participant-directed investments, is a defined contribution plan that was created by SSE for the exclusive benefit of SSE employee-participants and their beneficiaries, as well as for SSE affiliates that have adopted the Plan. The Plan is intended to qualify under sections 401(a), 401(k) and 4975(e)(7) of the Internal Revenue Code of 1986, as amended (the Code). The trust created under the Plan is intended to be exempt under section 501(a) of the Code.

The Plan was established, effective July 1, 2014, as the result of a spin-off from the Chesapeake Energy Corporation Savings and Incentive Stock Bonus Plan (the CHK Plan.) At that time, $196,210,229 in assets was transferred from the CHK Plan to the Plan. As of August 1, 2016, the Plan had total assets of approximately $72,786,235 and 2,450 participants. On July 31, 2016, the Plan held 3,571,255 shares of SSE common stock (Old SSE Common Stock) that was valued at $393,012.66, and represented approximately 0.54% of the fair market value of the assets of the Plan. The shares of Old SSE Common Stock were allocated to the individual accounts (Plan Accounts) of 2,228 participants and held in a stock fund (the Stock Fund) within the Plan.[10]

The Plan's directed trustee (the Trustee) and recordkeeper is Delaware Charter Guarantee & Trust Company of Wilmington, Delaware, which conducts business under the trade name ''Principal Trust Company.''

3. SSE's Administrative Committee formerly served as the administrator and

[10] The Applicant represents that after 2015, SSE ceased making employer matching contributions to the Plan of Old SSE Common Stock due to the financial condition of SSE.

named fiduciary for the Plan. However, in connection with the merger (the Merger) of SSE with Patterson-UTI Energy, Inc. (Patterson-UTI) and Pyramid Merger Sub, Inc. (Merger Sub), effective as of April 20, 2017, the Plan administrator and named fiduciary was changed to the Seventy Seven Energy LLC 401(k) Plan Committee (the Committee).

The Reorganization Plan

4. On May 9, 2016, SSE and all of its wholly-owned subsidiaries entered into an Amended and Restated Restructuring Support Agreement with certain lenders, which set forth a ''pre-packaged'' or pre-negotiated plan of reorganization (the Reorganization Plan). Also, on this date, SSE started soliciting creditors.

On May 12, 2016, the Reorganization Plan was revised and executed to add certain noteholders as signatories and to provide the noteholders with nominal concessions. On June 7, 2016, the revised Reorganization Plan, was filed with the U.S. Bankruptcy Court for the District Court of Delaware (the Bankruptcy Court), under Chapter 11 of Title I of the U.S. Bankruptcy Code (the Bankruptcy Code).[11] After the Reorganization Plan was accepted by a sufficient number of creditors and was confirmed by the Bankruptcy Court during the Chapter 11 cases, a reorganized SSE emerged from bankruptcy on August 1, 2016 (the Emergence Date).[12]

The Warrants

5. On the Emergence Date, the Warrants were issued to SSE shareholders, including the Plan Accounts, in accordance with the Reorganization Plan by Computershare Inc. (Computershare), a Delaware corporation, and its wholly-owned subsidiary, Computershare Trust Company, N.A., a federally-chartered trust company (CTS), both of which served in the capacity as the ''Warrant Agent.'' (Neither Computershare nor CTS is affiliated with SSE.)

The Warrants were: (a) Registered pursuant to Section 12(g) the U.S. Securities Exchange Act of 1934 (the Exchange Act), and the rules and regulations promulgated thereunder; and (b) exempt from registration under the U.S. Securities Act of 1933, as amended, pursuant to Section 1145 of the Bankruptcy Code.

Neither the Trustee nor SSE's Administrative Committee had any involvement with the bankruptcy proceedings or the decision to issue the 5-year Warrants (the Series B Warrants) and the 7-year warrants (the Series C Warrants) to shareholders in connection with the emergence of SSE from bankruptcy. The Plan was in the same position as the other holders of Old SSE Common Stock. Thus the Warrants were issued to the Plan Accounts on the same basis that they were issued to all other shareholders of Old SSE Common Stock.

6. Each shareholder of Old SSE Common Stock received 0.05004 5-Year Warrants (the Series B Warrants) and 0.05560 7-Year Warrants (the Series C Warrants), to replace their shares of Old SSE Common Stock. Accordingly, 2,875,814 Series B Warrants and 3,195,352 Series C Warrants were distributed to all shareholders of Old SSE Common Stock as of the Emergence Date, with 178,703 of the Series B Warrants and 198,560 of the Series C Warrants received by the Plan with respect to 2,230 Plan participants. The Trustee allocated the Warrants to the Plan Accounts based upon the share positions held by the Accounts of Old SSE Common Stock within the Stock Fund. The Applicant states that Plan participants were not allowed by the Trustee to purchase additional Warrants, as there was no market for the Warrants.

Under the Warrant Agreement, each shareholder of Old SSE Common Stock, including the Plan's Stock Fund, received a pro rata share of Series B Warrants and Series C Warrants to replace Old SSE Common Stock prior to the Emergence Date. The Warrants could be exercised for post-emergence common stock of SSE (New SSE Common Stock). Based on the number of Warrants issued by the reorganized SSE, each Series B Warrant and each Series C Warrant could be exercised for one share of New SSE Common Stock, having a par value $0.01 per share, at an exercise price of $69.08 per share for each Series B Warrant, and $86.93 per share for each Series C Warrant. The Warrants could be exercised during the period beginning on the date of the Warrant Agreement and ending on the five-year or seven-year anniversary of the date of the Warrant Agreement.

7. Upon the exercise of a Warrant, SSE would not be required to issue any fractional shares of New SSE Common Stock. Instead, SSE would be required to round up to the nearest whole share the number of shares of New SSE Common Stock designated in the applicable Exercise Notice. The Warrant Agreement provided that payment of the exercise price could be made at the option of the holder of the Warrants either: (a) Through a net share settlement; or (b) by paying or submitting payment for the exercise price.[13]

8. According to the Applicant, the Warrants could be sold, assigned, transferred, pledged, encumbered, or in any other manner transferred or disposed of, in whole or in party in accordance with the terms of the Warrant Agreement and all applicable laws. In this regard, the Applicant represents that the Plan had the right to sell the Warrants allocated to the Plan Accounts at any time prior to the Warrants' expiration date, in the same manner as other holders of the Warrants.

All decisions regarding the exercise or sale of the Warrants acquired by the Plan Accounts in connection with the Reorganization Plan could be made only by the individual Plan participants in whose Accounts the Warrants were allocated, in accordance with the terms of the Warrant Agreement, as well as in accordance with the respective provisions of the Plan and the regulations pertaining to the individually-directed investment of such accounts. According to the Applicant, if no action was taken by a Plan participant to exercise or sell the Warrants, then the Warrants would expire at the end of their respective term.

9. The Warrants were described to Plan participants in frequently-asked questions (FAQs) regarding the Reorganization Plan, which the Applicant states were posted to SSE's website on or about May 18, 2016, and taken down from the website on or before October 1, 2016. The Applicant represents that SSE's CEO sent an initial

[11] The Applicant represents that none of the changes between the May 9, 2016 and May 12, 2016 versions of the Reorganization Plan had any effect on the terms of the Warrants.

[12] The Applicant represents that the Old SSE Common Stock was able to be traded until the Emergence Date. In addition, the Applicant confirms that the Trustee and Plan participants were able to trade the Old SSE Common Stock in their accounts up until the Emergence Date when the stock was replaced by the Warrants.

[13] Following the Emergence Date, the Applicant states that SSE and the Trustee were working together to set up a system and procedures to facilitate the exercise or sale of the Warrants. However, the Applicant states that these procedures were not finalized prior to the Merger of SSE with Patterson-UTI. The Applicant states that upon the closing of the Merger on April 20, 2017 (the Merger Date), all of the Warrants were cancelled, rendering the completion of the system and procedures for exercising and/or selling the Warrants moot. However, the Applicant states that it is its understanding that at all times during the period that the Warrants were held by the Plan (from the Emergence Date to the Merger Date), both classes of Warrants (the Series B Warrants and the Series C Warrants) held by the Plan were underwater. Thus, the Applicant states that none of the Warrants would have been exercised from a practical standpoint.

email to all employees with a link to the FAQs on or about May 18, 2016, followed by a second email with a link to updated FAQs on or about August 1, 2016.

According to the Applicant, as of October 17, 2016, New SSE Common Stock was not traded on a national securities exchange, but was instead traded over-the-counter. Although the Bankruptcy Court authorized 22,000,000 shares of New SSE Common Stock to be issued under the Reorganization Plan, former shareholders of Old SSE Common Stock received Warrants, but they did not receive any shares of New SSE Common Stock.

The Applicant also represents that the value of SSE as of the Emergence Date was anticipated to be $345,000,000. However, based on this projected market value, the Applicant states that the imputed fair market value per share of New SSE Common Stock was only approximately $15.68 per share.[14] Therefore, the Applicant represents that as of October 17, 2016, the Warrants were ''underwater.''

The Merger

10. On December 12, 2016, SSE entered into an Agreement and Plan of Merger (the Merger Agreement) with Patterson-UTI and Merger Sub. The Merger was effective on April 20, 2017 (the Merger Date). Pursuant to the Merger Agreement, the Warrants were treated in accordance with the terms of the Warrant Agreement. Holders of the Warrants were provided a notice of the merger at least fifteen days prior to the effective time of the Merger. Any Warrants that were not exercised immediately prior to the effective time of the Merger expired, and all rights of the Warrant holders ceased.

The Merger's Effect on the Warrants

11. Because the Warrants were underwater, all Warrants expired (unexercised) immediately prior to the Merger Date. The Applicant represents that when the Committee decided to keep New SSE Common Stock as an investment option under the Plan, knowing that New SSE Common Stock would be converted into Warrants, the Committee was of the view that this was in the participants' interest as it potentially allowed the participants to participate in the appreciation of New SSE Common Stock. While ultimately this potential was not realized, the Applicant does not believe that this result should be considered in hindsight.

In this regard, the Applicant represents that SSE and the Trustee set up a system and procedures to facilitate the exercise of the Warrants or the sale of the Warrants (if the Warrants had become listed on a market, which they were not). However, these plans were not finalized prior to the announcement of the Merger with Patterson-UTI because, upon closing of the Merger on April 20, 2017, the Warrants were cancelled.

Merger-Related Litigation

12. According to the Applicant, several SSE shareholder and Warrant holder plaintiffs filed class action lawsuits against SSE in connection with the Merger.[15]

In this regard,

- On February 22, 2017, an SSE shareholder challenged the disclosures made in connection with the Merger against SSE and the members of SSE's Board of Directors (the Board) in the United States District Court for the Western District of Oklahoma (the Oklahoma District Court), and alleged inadequacies in the Merger price, the process leading up to it, and claimed that the Joint Proxy Statement/Prospectus filed in connection with the merger failed to disclose certain material information. Based on these allegations, the shareholder sought to enjoin the shareholder vote on the Merger unless and until SSE disclosed the allegedly omitted material information summarized above. On February 26, 2018, the Oklahoma District Court entered an order awarding the shareholder's counsel $128,354.50 in attorneys' fees and expenses. The parties subsequently settled for an amount less than the Oklahoma District Court's award.
- On March 31, 2017, a shareholder of Series B and Series C Warrants, filed a class action lawsuit against SSE, Patterson-UTI and Merger Sub in the U. S. District Court for the Southern District of New York (the New York District Court), alleging: (a) That SSE had breached the Warrant Agreement; and (b) tortious interference with the Warrant Agreement by Patterson-UTI and Merger Sub. Based on these allegations, the Warrant holder sought to enjoin the cancelation of SSE's Series A, Series B, and Series C Warrants in connection with the proposed Merger on February 6, 2018. The New York District Court dismissed the Warrant holder's complaint and struck the Warrant holder's amended complaint. On March 6, 2018, Warrant holder filed a notice of appeal of the dismissal. According to the Applicant, the parties have reached an agreement to resolve the matter and are working to prepare and finalize a formal settlement agreement.
- On April 7, 2017, an SSE shareholder filed a class action lawsuit challenging the disclosures made in connection with the Merger against SSE and the members of SSE's Board. The lawsuit in was filed in the Court of Chancery of the State of Delaware (the Delaware Chancery Court), and alleged that SSE's Board had breached its fiduciary duties by failing to disclose in the Joint Proxy Statement/Prospectus filed in connection with the merger certain material information. Based on these allegations, the Warrant holder sought to enjoin damages if the Merger was consummated. On July 20, 2017, the Warrant holder filed a notice and proposed order voluntarily dismissing the action, and on July 21, 2017, the Delaware Chancery Court signed the order dismissing the action.
- On April 10, 2017, an SSE shareholder filed a class action lawsuit, challenging the disclosures made in connection with the Merger against SSE, the members of SSE's Board, Patterson-UTI, and Merger Sub in the Delaware Chancery Court. On July 20, 2017, the shareholder filed a notice and proposed order voluntarily dismissing the action, and on July 21, 2017, the Delaware Chancery Court dismissed the action.
- On February 24, 2017, an SSE shareholder filed a class action lawsuit on behalf of herself and others, alleging that the Plan's investment in, or retention of, a stock fund invested in CHK stock amounted to a breach of fiduciary duty under ERISA. On June 26, 2017, defendants, representing SSE's Administrative Committee and the Trustee filed respective motions to dismiss the shareholder's complaint for failure to state a claim and the motions have been fully briefed. As of this time, the parties are awaiting the Court's decision on the defendants' motions to dismiss.

Analysis

13. The Applicant has requested retroactive exemptive relief that is effective for the period, August 1, 2016 through April 20, 2017, from sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act.[16] Section 406(a)(1)(E) of the Act prohibits the acquisition, on behalf of a plan, of any ''employer security in violation of section 407(a) of the Act.''

[14] The Applicant states that New SSE Common Stock was not traded on an exchange on October 17, 2016 and so the Applicant has no market price for the stock on that date. The Applicant is not aware that a specific value was calculated for SSE as of the Emergence Date. As a result, the Applicant provided an imputed value based on the anticipated value of SSE as of the Emergence Date, which was intended to show that the warrants were underwater.

[15] See Maria Comeaux et al. v. Seventy Seven Energy, Inc. et al., Case No. CIV–5:17–191M, U.S. District Court for the Western District of Oklahoma; Garud Sudarsan et al. v. Seventy Seven Energy, Inc. et al. Case No. 1:17–cv–02342, U.S. District Court for the Southern District of New York; Mainard Gael et al. v. Seventy Seven Energy, Inc. et al., Case No. 2017–0266, Court of Chancery of the State of Delaware; Louis Scarantino et al. v. Seventy Seven Energy, Inc. et al., Case No. 2017–0278, Court of Chancery of the State of Delaware; and, Kathleen J. Myers v. Administrative Committee, Seventy Seven Energy, Inc. Retirement and Savings Plan, et al., Case No. CIV–17–200–D, United States District Court for the Western District of Oklahoma.

[16] The Applicant states that, although the Warrants constitute ''employer securities,'' as defined under section 407(d)(1) of the Act, they do not satisfy the definition of ''qualifying employer securities'' as defined under section 407(d)(5) of the Act because they are not ''stock,'' ''marketable securities,'' or ''interests in a publicly-traded partnership.''

Section 406(a)(2) of the Act prohibits a fiduciary who has authority or discretion to control or manage the assets of a plan to permit the plan to hold any ''employer security'' that violates section 407(a) of the Act. Section 407(a)(1)(A) of the Act provides that a plan may not acquire or hold an ''employer security'' which is not a ''qualifying employer security.'' Therefore, the acquisition and holding by the Plan Accounts of the Warrants constitute prohibited transactions in violation of the Act.

Statutory Findings

14. SSE represents the proposed exemption is administratively feasible because Old SSE Common Stock held by the Plan was automatically converted into the Warrants. In addition, SSE represents that the proposed exemption is in the interests of the Plan and participants because the Plan held shares of Old SSE Common Stock on the date the Warrants were issued pursuant to the Reorganization Plan. Therefore, SSE represents that the Plan acquired the Warrants automatically in the same manner as all other shareholders of Old SSE Common Stock. SSE also states that neither the Plan nor the Plan's fiduciaries took any action to cause the shares of Old SSE Common Stock to be replaced with the Warrants and were not part of, and did not participate in, the bankruptcy process or the Reorganization Plan.

SSE represents that the exemption is protective of the rights of the Plan participants because: (a) The issuance of the Warrants, which was the result of the Reorganization Plan, occurred without any participation on the part of the Plan; (b) Plan participants were treated similarly to all other holders of Old SSE Common Stock under the Reorganization Plan; (c) the Trustee did not allow Plan participants to exercise the Warrants held by their Plan Accounts because the fair market value of New SSE Common Stock did not, at any time prior to the date that the Warrants expired, exceed the exercise price of the Warrants; and (d) the Plan did not pay any fees or commissions with respect to the acquisition or holding of the Warrants.

Summary

15. Given the conditions described below, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for an exemption under section 408(a) of the Act.

Proposed Exemption Operative Language

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 46637, 66644, October 27, 2011). If the exemption is granted, the restrictions of sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act shall not apply, effective August 1, 2016 through April 20, 2017, to: (1) The acquisition by participant-directed accounts (the Accounts) in the Plan of certain warrants (the Warrants), issued by Seventy Seven Energy, Inc. (SSE), the Plan sponsor, in connection with SSE's bankruptcy; and (2) the holding of the Warrants by the Plan, provided that the following conditions were or would have been met:

(a) The Plan acquired the Warrants automatically in connection with the Reorganization Plan, under which all holders of Old SSE Common Stock, including the Plan, were treated in the same manner;

(b) The Plan acquired the Warrants without any unilateral action on its part;

(c) The Plan did not pay any fees or commissions in connection with the acquisition or holding of the Warrants;

(d) Had the Warrants not expired unexercised, all decisions regarding the exercise or sale of the Warrants acquired by the Plan would have been made by the Plan participants in whose Plan Accounts the Warrants were allocated, in accordance with the terms of the Warrant Agreement and in accordance with the Plan provisions and regulations pertaining to the individually-directed investment of the Plan Accounts; and

(e) The Plan trustee did not allow Plan participants to exercise the Warrants held by their Plan Accounts because the fair market value of New SSE Common Stock did not, at any time prior to the date that the Warrants expired, exceed the exercise price of the Warrants.

Effective Date: If granted, this proposed exemption will be effective as of August 1, 2016 through April 20, 2017.

Notice to Interested Persons

SSE will provide notice of the proposed exemption to all interested persons, including all participants in the Plan, former employees with vested account balances in the Plan, all retirees and beneficiaries currently receiving benefits from the Plan, all employers with employees participating in the Plan, all unions with members participating in the Plan (of which there are none), and all Plan fiduciaries, by first class mail, within 10 days of the date of publication of the notice of proposed exemption in the **Federal Register**. The notice will include a copy of the proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which will inform interested persons of their right to comment with respect to the proposed exemption. Comments regarding the proposed exemption are due within 40 days of the date of publication of the notice of pendency in the **Federal Register**. *All comments will be made available to the public.*

Warning: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but do not submit information that you consider to be confidential, or otherwise protected (such as social security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: Ms. Anna Mpras Vaughan of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

Tidewater Savings and Retirement Plan (the Plan), Located in New Orleans, LA, [Application No. D–11940].

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended, (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011). If the proposed exemption is granted, the restrictions of sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act will not apply, effective July 31, 2017, to: (1) The acquisition, by certain participant-directed accounts (the Accounts) in the Plan, of Series A Warrants and Series B Warrants (together, the Equity Warrants), issued by Tidewater Inc., the Plan sponsor and a party in interest with respect to the Plan; and (2) the holding of the Equity Warrants by the Accounts, provided the conditions set forth below in Section I are met.

Summary of Facts and Representations [17]

Background

1. Tidewater (the Applicant) is a publicly-traded international petroleum service company headquartered in New Orleans, Louisiana. Tidewater operates a fleet of ships, providing vessels and marine services to the offshore petroleum industry.

2. Tidewater sponsors the Plan, a defined contribution profit-sharing plan with approximately 565 participants and $89,496,494 total assets, as of March 31, 2018. Generally, all employees are eligible to make employee pre-tax contributions to the Plan and receive matching contributions. Prior to January 1, 2016, the matching contributions were in Tidewater common stock.

3. Bank of America, N.A. serves as the directed trustee of the Plan. The Plan is administered by the Employee Benefits Committee (the Committee), whose eight members are appointed by Tidewater. The Committee members are also Tidewater officers.

Tidewater's Bankruptcy and Plan of Reorganization

4. On May 11, 2017, Tidewater reached an agreement with certain of its creditors to support a restructuring under the terms of a prepackaged plan of reorganization. On May 12, 2017, Tidewater provided notice to Plan participants and employees in the form of memoranda explaining Tidewater's Restructuring Support Agreement with lenders and noteholders.

On May 17, 2017, Tidewater and certain subsidiaries filed voluntary petitions for reorganization in the United States Bankruptcy Court for the District of Delaware (the Bankruptcy Court) seeking relief under the provisions of Chapter 11 of Title 11 of the United States Code (the Bankruptcy Cases).

On July 17, 2017, the Bankruptcy Court issued a written order (the Confirmation Order) confirming the Second Amended Joint Prepackaged Chapter 11 Plan of Reorganization of the Affiliated Debtors (the Prepackaged Plan). On July 31, 2017 (the Effective Date), the Prepackaged Plan became effective in accordance with its terms and Tidewater emerged from the Bankruptcy Cases.

5. As of the Effective Date, all shares of Tidewater's pre-bankruptcy common stock (the Old Common Stock) were cancelled, and those stockholders of Tidewater received, in the aggregate, 1.5 million shares of the New Common Stock, which represented 5% of the pro forma common equity in the reorganized Tidewater. In addition, holders of the Old Common Stock received approximately: 0.0516 Series A Warrants for each share of the Old Common Stock the shareholder previously owned, and 0.0558 Series B Warrants for each share of the Old Common Stock the shareholder previously owned. Further, the Series A Warrants and the Series B Warrants entitled each shareholder to purchase one share of the New Common Stock for $57.06 and $62.28, respectively. Unless terminated earlier, each Equity Warrant has a six year duration.

Effect of the Prepackaged Plan on the Plan

6. The Applicant represents that on June 30, 2017, Plan participants held approximately 277,716 shares of the Old Common Stock. On July 31, 2017, when Tidewater emerged from bankruptcy, these shares were cancelled and, in consideration, Plan participants received approximately 8,800 shares of the New Common Stock and approximately 29,800 Equity Warrants to purchase additional shares of the New Common Stock. The New Common Stock and the Equity Warrants, which are traded on the New York Stock Exchange (the NYSE), were held in the Plan's trust (the Trust), and managed by Bank of America Merrill Lynch (Merrill Lynch), an unrelated party.

Sale of the Equity Warrants

7. The Applicant represents that the Committee met on multiple occasions to monitor the Equity Warrants. On November 1, 2017, Committee members proposed that it would be prudent to direct Merrill Lynch to liquidate the Equity Warrants held by the Plan. Each sale transaction would be for cash, and no sale would enrich the Plan fiduciaries. As structured by the Committee, the sale of the Equity Warrants would be for no less than the fair market value of the Equity Warrants as traded on the NYSE. Also, Plan participants would not be charged a commission or fee in connection with the sales. Further, the Committee would authorize the sale of the Equity Warrants through the Merrill Lynch trading desk.[18]

8. The Applicant represents that Plan participants received notice, dated November 7, 2017, regarding the Committee's decision to sell the Equity Warrants. Plan participants were informed that: (a) Derivative investments, like the Equity Warrants, were not typically part of a retirement plan's holdings; and (b) these investments only had a value for a specified period of time (*i.e.,* six years in the case of the Equity Warrants). Plan participants were also informed that the Committee had elected to sell the Equity Warrants on the NYSE in three tranches over a six month period to minimize the impact on the market price of these securities. Plan participants were told that the sale proceeds would be reinvested in their individual accounts under the Plan (the Plan Accounts), with the cash invested in accordance with the Plan participant's current investment allocation.

With the exception of those Plan participants who were reporting persons under SEC Rule 16(b), Plan participants could elect to sell their Equity Warrants at any time by contacting a Merrill Lynch representative or direct the investment change at the Plan's website. The sale of Equity Warrants was not restricted to the six month period (November 9, 2017 to May 9, 2018), but participants were told that the positions would be liquidated in lots by the end of the six month time frame. According to the Applicant, twenty Plan participants sold a total of 116.001 Equity Warrants between August 24, 2017 and April 25, 2018, for an aggregate sales price of $323.81 and $240.88, respectively. The final tranche of the Equity Warrants was sold on May 11, 14, and 15, 2018.

Exemptive Relief Requested/Analysis

9. The Applicant has requested retroactive exemptive relief that is effective as of July 31, 2017, the date the Plan Accounts acquired the Equity Warrants, and requests exemptive relief from sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act.[19] Section 406(a)(1)(E) of the Act prohibits the

[17] The Summary of Facts and Representations is based on the Applicant's representations, unless indicated otherwise.

[18] The Applicant represents that the services provided by Merrill Lynch in connection with the sale of the Equity Warrants would be exempt under section 408(b)(2) of the Act. However, the Department is not opining on whether the conditions, as set forth in section 408(b)(2) of the Act and the Department's regulations, pursuant to 29 CFR 2550.408(b)(2) were satisfied. In addition, the Department is not providing exemptive relief in connection with the sale of the Equity Warrants in blind transactions to unrelated parties in open market transactions on the NYSE beyond that provided under section 408(b)(2) and 29 CFR 2550.408(b)(2).

[19] The Applicant states that, although the Equity Warrants constitute ''employer securities,'' as defined under section 407(d)(1) of the Act, they do not satisfy the definition of ''qualifying employer securities'' as defined under section 407(d)(5) of the Act because they are not ''stock,'' ''marketable securities,'' or ''interests in a publicly-traded partnership.''

acquisition, on behalf of a plan, of any ''employer security in violation of section 407(a) of the Act.'' Section 406(a)(2) of the Act prohibits a fiduciary who has authority or discretion to control or manage the assets of a plan to permit the plan to hold any ''employer security'' that violates section 407(a) of the Act. Section 407(a)(1)(A) of the Act provides that a plan may not acquire or hold an ''employer security'' which is not a ''qualifying employer security.'' Therefore, the acquisition and holding by the Plan Accounts of the Equity Warrants constitute prohibited transactions in violation of the Act.[20]

Statutory Findings

10. The Applicant represents that the proposed exemption with respect to the Equity Warrants is administratively feasible because all shareholders of Tidewater, Inc., including the Plan, were, and will be treated in the same manner with respect to any acquisition, holding and exercise or other disposition of the Equity Warrants.

11. The Applicant represents that the proposed exemption is in the interests of the Plan and participants because: (a) Plan participants were treated in the same manner as other stockholders; (b) Plan participants could acquire shares of the New Common Stock for their Plan Accounts by exercising their purchase rights under the Equity Warrants; (c) Plan participants could direct Merrill Lynch to sell the Equity Warrants, at any time on the NYSE; and (d) Plan participants were notified when the Committee approved the sale of the Equity Warrants.

12. The Applicant represents that the proposed exemption is protective of the rights of Plan participants and beneficiaries because the Equity Warrants could be sold by Merrill Lynch on the NYSE, at the direction of either the Plan participants or the Committee. Further, the Applicant represents that the Plan did not pay any fees or commissions with respect to the acquisition or holding of the Equity Warrants.

Summary

13. Given the conditions described below, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for an exemption under section 408(a) of the Act.

Proposed Exemption Operative Language

Section I. Covered Transactions

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended, (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011). If the proposed exemption is granted, the restrictions of sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act will not apply, effective July 31, 2017, to: (1) The acquisition in the Tidewater Savings and Retirement Plan (the Plan), by the participant-directed accounts (the Accounts) of certain participants, of Series A Warrants and Series B Warrants (collectively, the Equity Warrants) of Tidewater, Inc. (Tidewater), the Plan sponsor and a party in interest with respect to the Plan; and (2) the holding of the Equity Warrants by the Accounts, provided that the conditions set forth in Section II below are or were satisfied.

Section II. Conditions for Relief

(a) The acquisition of the Equity Warrants by the Accounts of Plan participants occurred in connection with Tidewater's bankruptcy proceeding;

(b) The Equity Warrants were acquired pursuant to, and in accordance with, provisions under the Plan for individually-directed investments of the Accounts by the individual participants in the Plan, a portion of whose Accounts in the Plan held shares of old Tidewater common stock (the Old Common Stock);

(c) Each shareholder of the Old Common Stock, including each Account of an affected Plan participant, was issued the same proportionate shares of the Equity Warrants based on the number of shares of the Old Common Stock held by the shareholder as of July 31, 2017;

(d) All holders of the Equity Warrants, including the Accounts, were treated in a like manner;

(e) The decisions with regard to the acquisition, holding or disposition of the Equity Warrants by an Account were made by each Plan participant whose Account received the Equity Warrants;

(f) The Accounts did not pay any brokerage fees, commissions, or other fees or expenses to any related broker in connection with the acquisition and holding of the Equity Warrants, nor did the Accounts pay any brokerage fees or commissions in connection with the sale of the Equity Warrants;

(g) Each sale transaction involving the Equity Warrants was for cash, and no sale would enrich the Plan fiduciaries;

(h) Plan participants could: (1) Acquire shares of the New Common Stock for their Plan Accounts by exercising their purchase rights under the Equity Warrants; or (2) direct Merrill Lynch to sell the Equity Warrants held in their Accounts, at any time; and

(i) Plan participants were notified when the Committee approved the sale of the Equity Warrants.

Effective Date: This proposed exemption, if granted, will be effective for the period beginning July 31, 2017, and ending whenever the Equity Warrants are exercised by Plan participants or they expire.

Notice to Interested Persons

Notice of the proposed exemption (the Notice) will be provided by Tidewater to interested persons within fifteen (15) days of publication in the **Federal Register**. Tidewater will provide the Notice to Plan participants who are affected by the cancellation of the Old Common Stock and the issuance of the New Common Stock and the Equity Warrants. The Notice will be provided to Plan participants by: (1) First class U.S. mail to the last known address of these individuals, or (2) electronic delivery to each shipping vessel Tidewater operates and posting on bulletin boards. The Notice will contain a copy of the Notice, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within forty-five (45) days of the publication of the Notice in the **Federal Register**. All comments will be made available to the public.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: Blessed Chuksorji-Keefe of the Department, telephone (202) 693–8567. (This is not a toll-free number.)

[20] The Applicant represents that the receipt, by the Plan Accounts, of the New Common Stock from Tidewater as the result of the cancellation of the Plan's shares of the Old Common Stock is covered by the statutory exemption under section 408(e) of the Act. The Department is not expressing an opinion herein on whether the acquisition by the Plan Accounts of New Common Stock is statutorily exempt under section 408(e) of the Act.

Principal Life Insurance Company (PLIC) and its Affiliates (collectively, Principal or the Applicant), Located in Des Moines, IA, [Application No. D–11947].

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[21] If the proposed exemption is granted, the restrictions of sections 406(a)(l)(D), 406(b)(l), and section 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(l)(D) and (E) of the Code, shall not apply, to the direct or indirect acquisition, holding, and disposition of common stock issued by Principal Financial Group, Inc. (PFG), and/or common stock issued by an affiliate of PFG (together, the Principal Stock), by index funds (Index Funds) and model-driven funds (Model-Driven Funds) that are managed by PLIC, an indirectly wholly-owned subsidiary of PFG, or an affiliate of PLIC (collectively, Principal), in which client plans of Principal invest, provided that the conditions in Sections II and III are met.

Summary of Facts and Representations

The Parties

1. PLIC is an indirect, wholly-owned subsidiary of PFG. As a stock life insurance company domiciled in Iowa, PLIC provides recordkeeping, administrative, and investment management services to plans.

2. PFG is a publicly-traded company that is incorporated in Delaware. PFG offers businesses, individuals, and institutional clients a wide range of financial products and services, including retirement, asset management, and insurance through a diverse family of financial services companies. As of December 31, 2017, PFG had $669 billion in total assets under management and 22.8 million customers, worldwide.

The Funds

3. Principal maintains, or may in the future maintain, insurance company separate accounts, separately-managed accounts, collective trusts, or other investment funds, accounts, or portfolios that: (a) Will hold plan assets, as defined in section 3(42) of the Act and 29 CFR 2510.3–101; and (b) are designed to track a Standard & Poor's (S&P) or other third-party index (the Index Funds). Principal manages, or will manage, the Index Funds' assets as a fiduciary under the Act.

The Index Funds currently managed by Principal include three pooled insurance company separate accounts that directly invest in equity securities that mirror, and replicate the investment performance of, Indexes maintained by S&P. The Index Funds presently consist of: (a) The Principal LargeCap S&P 500 Index Separate Account (the LargeCap Separate Account); (b) the Principal MidCap S&P 400 Index Separate Account (the MidCap Separate Account); and (c) the Principal SmallCap S&P 600 Index Separate Account (the SmallCap Separate Account). The Index Funds also include the Principal Total Market Stock Index Separate Account (the Total Market Separate Account), a pooled insurance company separate account that mirrors and replicates the investment performance of the S&P Supercomposite 1500 Index by investing in the LargeCap Separate Account, the Mid-Cap Separate Account, and the SmallCap Separate Account.

As of July 31, 2017, 20,632 plans participated in the Large Cap Separate Account; 14,839 plans participated in the Mid-Cap Separate Account; 15,901 plans participated in the SmallCap Separate Account; and 522 plans participated in the Total Market Separate Account. Also, as of July 31, 2017, the total plan assets invested in the Index Funds were as follows: The Large Cap Separate Account—$20,016,535,718; the Mid-Cap Separate Account—$5,559,742,215; the SmallCap Separate Account—$4,293,584,718; and the Total Market Separate Account—$122,178,926.

The Index Funds are managed by PLIC. The LargeCap Separate Account, the MidCap Separate Account and the SmallCap Separate Account are subadvised by Principal Global Investors LLC, an affiliate. The Total Market Separate Account is subadvised by Principal Financial Advisors, Inc., another affiliate.

4. According to the Applicant, Principal may, in the future, maintain insurance company separate accounts, separately-managed accounts, collective trusts, or other investment funds, accounts, or portfolios that hold plan assets. These investment vehicles are designed to invest in securities, of which the identity and the amount would be determined by a computer model that is based on prescribed, objective criteria using independent, third-party data to transform an independently-maintained index that would not be within Principal's control (the Model-Driven Funds). The Applicant represents that Principal would manage the assets of the Model-Driven Funds as a fiduciary under the Act.[22]

Investing in Principal Stock

5. Although PFG Stock is included in the S&P 500 Index, the LargeCap Separate Account does not currently hold any PFG Stock. However, the Applicant represents that it intends to invest the LargeCap Separate Account in PFG Stock to track the performance of the S&P 500 Index more closely. The Applicant states that, if the S&P were to remove PFG Stock from the S&P 500 Index and include it in the S&P 400 Index or the S&P 600 Index, PLIC would invest the corresponding Index Fund in PFG Stock.

6. The Applicant represents that the Total Market Separate Account does not indirectly hold any PFG Stock through the Total Market Account's investments in the three underlying separate accounts: The LargeCap Separate Account, the MidCap Separate Account, and the SmallCap Separate Account. However, the Applicant states, if one of the underlying Index Funds were to hold PFG Stock, the Total Market Separate Account would indirectly hold PFG Stock.

In addition, the Applicant represents that if Principal establishes a new Index Fund or Model-Driven Fund, and if PFG Stock or the stock of an affiliate of PFG (collectively, Principal Stock) is included in the relevant Index, Principal intends to invest the assets of the Index Fund or the Model-Driven Fund in Principal Stock. The Applicant states that, similar to the Total Market Separate Account, a newly-established Index Fund may indirectly invest in Principal Stock through another Index Fund. Although only PFG Stock is currently publicly-traded, the Applicant represents that Principal intends to invest both Index Funds and Model-Driven Funds in the common stock of an affiliate of PFG, if due to a corporate reorganization or other action, the common stock is included in the relevant Index.

[21] For purposes of this proposed exemption, references to the provisions of section 406 of Title I of the Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[22] Unless otherwise noted, the Index Funds and the Model-Driven Funds are collectively referred to herein as ''the Funds.''

7. The Applicant represents that the acquisition or disposition of Principal Stock will be for the sole purpose of maintaining strict quantitative conformity with the Index upon which the Index Fund or Model-Driven Fund is based and not for the purpose of benefitting Principal. Each Index must be, among other things, created and maintained by an organization independent of Principal.

8. The Applicant represents that it intends to invest the LargeCap Separate Account in PFG Stock in order to track more closely the performance of the S&P 500 Index. The Applicant states that, if S&P were to remove PFG Stock from the S&P 500 Index and include it in the S&P 400 Index or the S&P 600 Index, PLIC would invest the corresponding Index Fund in PFG Stock. The Applicant also states that the Total Market Separate Account will indirectly invest in PFG Stock if one of the Index Funds, in which the Total Market Account invests, were to invest in PFG Stock. The Applicant further represents that, even though currently the only Index Funds or Model-Driven Funds in existence are those referenced above, and the only Principal Stock is PFG Stock, the proposed exemption would cover: (a) Any future Index Fund that directly or indirectly invests in any Principal Stock; and (b) any future Model-Driven Fund that invests in any Principal Stock.

9. The Applicant represents that the proposed exemption is necessary to allow Funds holding ''plan assets'' to purchase and hold Principal Stock in order to replicate the capitalization-weighted or other specified composition of Principal Stock in an independently-maintained third-party index used by an Index Fund, or to achieve the transformation of an Index used to create a portfolio for a Model-Driven Fund.[23] The Applicant represents that the inclusion or exclusion of Principal Stock from an Index and the weighting or changes to the weighting of Principal Stock in an Index are based on data, criteria, and methodology determined by the organization that creates and maintains the Index, which cannot be varied by PLIC. The Applicant represents that changes in the weighting of Principal Stock in an Index Fund or Model-Driven Fund would occur when there is a change in factors underlying the applicable weighting methodology. Changes in Index weightings are, for the most part, triggered by corporate actions, such as buying back shares, issuing more shares or acquiring another company for stock.

In addition, the Applicant represents that there will be instances, once the proposed exemption is granted, when Principal Stock will be added to an Index on which a Fund is based, or will be added to a Fund portfolio which seeks to track an Index that includes Principal Stock. In these instances, acquisitions of Principal Stock will be necessary to bring the Fund's holdings of Principal Stock either to its capitalization-weighted or other specified composition in the Index, as determined by an independent organization maintaining the Index, or to the correct weighting for the Stock, as determined by a computer model that has been used to transform the Index. If the Index Fund or Model-Driven Fund holds ''plan assets,'' all acquisitions of Principal Stock by the Fund must comply with the ''Buy-up'' condition set forth in Section II(b) of this proposed exemption.[24]

Independent Fiduciary (Independent Fiduciary) Appointment

10. The Applicant states that, in the case of a Buy-up, if the necessary number of shares of Principal Stock cannot be acquired within ten (10) business days from the date of the event that causes the particular Index Fund or Model-Driven Fund to require Principal Stock, PLIC, or another affiliated fund manager (the Affiliated Fund Manager) will appoint an Independent Fiduciary to design acquisition procedures and monitor PLIC's, or the Affiliated Fund Manager's compliance with these procedures. The Applicant represents that Institutional Shareholder Services, Inc. (ISS) is expected to serve as the Independent Fiduciary with respect to the transactions.

The Applicant represents that the Independent Fiduciary and its principals will be completely independent from PLIC and its affiliates. The Applicant represents that the Independent Fiduciary will be experienced in developing and operating investment strategies for individual and collective investment vehicles that track third-party indices. Furthermore, the Applicant states that the Independent Fiduciary will not act as the broker for any purchases or sales of Principal Stock and will not receive any commissions as a result of this initial acquisition program. The Applicant notes that the Independent Fiduciary will have, as its primary goal, the development of trading procedures that minimize the market impact of purchases made pursuant to the initial acquisition program by the Index Funds or Model-Driven Funds.

The Applicant represents that under the trading procedures established by the Independent Fiduciary, the trading activities will be conducted in a low-profile, mechanical, non-discretionary manner and would involve a number of small purchases over the course of each day, randomly timed. The Applicant also represents that this program will allow PLIC, or other Affiliated Fund Manager, to acquire the necessary shares of Principal Stock for the Index Funds or Model-Driven Funds with minimum impact on the market, and in a manner that will be in the best interests of any employee benefit plans that participate in these Funds.

The Applicant represents that the Independent Fiduciary will also be required to monitor PLIC's or other Affiliated Fund Manager's compliance with the trading program and procedures developed for the initial acquisition of Principal Stock.

The Applicant represents that, during the course of any initial acquisition program, the Independent Fiduciary will be required to review the activities weekly to determine compliance with the trading procedures and notify PLIC, or other Affiliated Fund Manager, should any non-compliance be detected. The Applicant represents that the Independent Fiduciary must consult with PLIC, or other Affiliated Fund Manager, and must approve in advance any alteration of the trading procedures should the trading procedures need modifications due to unforeseen events or consequences.

Future Fund Transactions

11. The Applicant represents that subsequent to initial acquisitions pursuant to a Buy-up, all aggregate daily purchases of Principal Stock by the Index Funds and Model-Driven Funds will not exceed, on any particular day, the greater of: (a) Fifteen (15) percent of the average daily trading volume for the Principal Stock occurring on the applicable exchange and automated trading system for the previous five (5)

[23] The Applicant is not requesting any relief from sections 406 or 407(a) of the Act in connection of the acquisition and holding of Principal Stock by any employee benefit plans established and maintained by the Applicant or its affiliates for its own employees that invest in Index Funds or Model-Driven Funds. In this regard, these transactions are covered by the statutory exemption under section 408(e) of the Act, if the conditions of this statutory exemption are met.

[24] The Applicant anticipates that, generally, acquisitions of Principal Stock by an Index Fund or a Model-Driven Fund in a ''Buy-up'' will occur within ten (10) business days from the date of the event that causes the particular Fund to require the addition of Principal Stock. The Applicant does not anticipate that the amounts of Principal Stock acquired by any Index Fund or Model-Driven Fund in a ''Buy-up'' will be significant.

business days; [25] or (b) fifteen (15) percent of the trading volume for Principal Stock occurring on the applicable exchange and automated trading system on the date of the transaction, as determined by the best available information for the trades that occurred on this date.

12. The Applicant represents that all future transactions by the Index Funds and Model-Driven Funds involving Principal Stock, which do not occur in connection with a Buy-up of the Stock by an Index Fund or a Model-Driven Fund will be either: (a) Entered into on a principal basis with a broker-dealer that is registered under the 1934 Act, and thereby subject to regulation by the SEC; (b) effected on an automated trading system operated by a broker-dealer independent of PLIC subject to regulation by the SEC, or on an automated trading system operated by a recognized securities exchange which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; or (c) effected through a recognized securities exchange (as defined in Section III(i) of this proposed exemption, so long as the broker is acting on an agency basis.[26]

13. All future acquisitions and dispositions of Principal Stock by Index Funds or Model-Driven Funds maintained by PLIC or its affiliates also will not involve any purchases from or sales to PLIC (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets in the fund (unless the transaction by the fund with this party in interest would otherwise be subject to an exemption), other than on a blind basis through an exchange or automated trading system, where the identity of each counterparty is not known to the other.

14. The Applicant represents that, for purposes of future acquisitions and holdings of Principal Stock by Index Funds and Model-Driven Funds, if the proposed exemption is granted, Principal Stock will constitute no more than five (5) percent of any independent third-party index on which the investments of an Index Fund or Model-Driven Fund are based. The Applicant represents that, with respect to an Index's specified composition of particular stocks in its portfolio, future Index Funds or Model-Driven Funds may track an Index where the appropriate weighting for stocks listed in the Index is not capitalization-weighted.

As such, the Applicant states that Index Funds and Model-Driven Funds maintained by PLIC and its affiliates may track Indexes where the selection of a particular stock by the Index, and the amount of stock to be included in the Index, is not established based on the market capitalization of the corporation issuing the stock.

The Applicant also represents that since an independent organization may choose to create an Index where there are other Index weightings for stocks comprising the Index, the proposed exemption should allow for Principal Stock to be acquired by an Index Fund or Model-Driven Fund in the amounts that are specified by the particular Index, subject to the other restrictions imposed by this proposed exemption.

The Applicant represents that in all instances, acquisitions or dispositions of Principal Stock by an Index Fund or a Model-Driven Fund will be for the sole purpose of maintaining strict quantitative conformity with the relevant Index upon which the Index Fund is based or, in the case of a Model-Driven Fund, a modified version of the Index, as created by a computer model based on prescribed objective criteria and third-party data.

Plan Fiduciary Consent To Fund Investments

15. With respect to any plan holding an interest in an Index Fund or Model-Driven Fund that intends to start investing in Principal Stock, the Applicant represents that before Principal Stock is purchased directly or indirectly by the Index Fund or Model-Driven Fund, Principal will provide the independent plan fiduciary (the Independent Plan Fiduciary) with a notice through email. The email will state that if the Independent Plan Fiduciary does not indicate disapproval of investments in Principal Stock within sixty (60) days from the date of the email, then the Independent Plan Fiduciary will be deemed to have consented to the investment in Principal Stock. The Department is adding requirements regarding Principal's delivery of the email, as described in paragraph 19.

In addition, the Applicant represents that in the event the Independent Plan Fiduciary disapproves of the investment, plan assets invested in the Index Fund or Model-Driven Fund will be withdrawn, and the proceeds will be processed, as directed by the Independent Plan Fiduciary. The timing of the withdrawal will be as follows:

- With respect to a plan that is not an individual account plan within the meaning of section 3(34) of the Act, the plan's assets will be withdrawn within five (5) days from when the Independent Plan Fiduciary notifies the Applicant of its disapproval of investment in Principal Stock.
- With respect to an individual account plan within the meaning of section 3(34) of the Act, the Applicant will work with the Independent Plan Fiduciary to ensure the timing of withdrawal of the plan's assets from an Index Fund or Model-Driven Fund complies with any participant notification requirement that may be applicable to the plan under the Department's regulation at 29 CFR 2550.404a–5. This regulation generally requires that plan participants be notified at least thirty (30) days in advance of a change in any designated investment alternative available under the plan. (See 29 CFR 2550.404a–5(c)(ii). The Applicant anticipates that the plan's assets will be withdrawn from the Index Fund or Model-Driven Fund within sixty (60) days from the time the Independent Plan Fiduciary notifies Principal of its disapproval of investment in Principal Stock.

For new plan investors in an Index Fund or Model-Driven Fund, the Applicant represents that the Independent Plan Fiduciary will affirmatively consent to the investment in Principal Stock by executing a written subscription or similar agreement for the Index Fund or Model-Driven Fund that contains the appropriate approval language. However, if the Independent Plan Fiduciary does not specifically approve language in the agreement allowing the investment of plan assets in Funds which hold or may hold Principal Stock, then no investment will be made.

Voting of Principal Stock

17. The Applicant will appoint an independent fiduciary that will direct the voting of Principal Stock held by the Funds. The Applicant expects that ISS, the Independent Fiduciary, will serve in this capacity. The Applicant will provide the Independent Fiduciary with all necessary information regarding the Funds that hold Principal Stock, the amount of Principal Stock held by the Funds on the record date for shareholder meetings of the Applicant, and all proxy and consent materials with respect to Principal Stock. The Independent Fiduciary will maintain records with respect to its activities as an Independent Fiduciary on behalf of

[25] The Department notes that ERISA's fiduciary responsibility provisions would apply to the manager's selection of a trading venue, including an automated trading system, to effect purchases and sales of Principal Stock on behalf of its managed Index and Model-Driven Funds.

[26] PTE 86–128, 51 FR 41686 (November 18, 1986), as amended at 67 FR 64137 (October 17, 2002), provides a class exemption, under certain conditions, permitting persons who serve as fiduciaries for employee benefit plans to effect or execute securities transactions on behalf of the plans. The Department expresses no opinion on whether the conditions of this class exemption would be satisfied.

the Funds, including the number of shares of Principal Stock voted, the manner in which they were voted, and the rationale for the vote. The Independent Fiduciary will supply the Applicant with this information after each shareholder meeting. The Independent Fiduciary will be required to acknowledge that it will be acting as a fiduciary with respect to the plans that invest in the Funds that own Principal Stock, when voting Principal Stock.

Request for Exemptive Relief

18. The Applicant requests an administrative exemption from the Department with respect to the direct or indirect acquisition, holding, and disposition of Principal Stock by Index and Model-Driven Funds that are managed by Principal, in which client plans invest. Section 406(a)(l)(D) of the Act prohibits the use by, or for the benefit of, a party in interest of any assets of a plan, including plan assets held by an Index Fund or a Model-Driven Fund.

The Applicant represents that as the current or future Fund Manager of an Index Fund or Model-Driven Fund, PLIC or an affiliate is (or will become) a party in interest with respect to plans investing in the Index Fund or Model-Driven Fund under sections 3(14)(A) and 3(14)(B) of the Act. The Applicant also represents that the issuer of Principal Stock, such as PFG, is a party in interest with respect to a plan, under section 3(14)(E) of the Act, as the direct or indirect corporate parent of the Fund Manager. According to the Applicant, the acquisition, holding, or disposition of Principal Stock by an Index Fund or a Model-Driven Fund (including an indirect acquisition, holding, or disposition of Principal Stock by an Index Fund through its investment in another Index Fund) would involve the Fund Manager's use of plan assets by or for the benefit of its own interest and/or the interest of another Principal entity, in violation of section 406(a)(l)(D) of the Act.

18. In addition, section 406(b)(l) of the Act prohibits a fiduciary from dealing with the assets of the plan in its own interest or for its own account. Section 406(b)(2) of the Act prohibits a fiduciary from acting in any transaction involving a plan on behalf of a party whose interests are adverse to the interests of the plan. The Applicant represents that a Fund Manager's direct or indirect acquisition, holding, or disposition of Principal Stock as an Index Fund or Model-Driven Fund investment would violate section 406(b)(l) and section 406(b)(2) of the Act due to the Fund Manager's affiliation with the issuer of the Principal Stock. Therefore, the Applicant requests exemptive relief from section 406(b)(1) and section 406(b)(2) of the Act.

Statutory Findings

19. The Department has tentatively determined that the proposed exemption is administratively feasible. Among other things, an Independent Plan Fiduciary must authorize the investment of the plan's assets in an Index Fund or a Model-Driven Fund which directly or indirectly purchases and/or holds Principal Stock. Also, prior to the direct or indirect purchase of Principal Stock by an Index Fund or a Model-Driven Fund, Principal must provide the Independent Plan Fiduciary with an email notice stating that if the Independent Plan Fiduciary does not indicate disapproval of investments in Principal Stock within sixty (60) days of the email, the Independent Plan Fiduciary will be deemed to have consented to the investment in Principal Stock. The Department is requiring that: (1) Principal obtains from such Independent Plan Fiduciary prior consent in writing to the receipt by such Independent Plan Fiduciary of such disclosure via electronic email; (2) Such Independent Plan Fiduciary has provided to Principal a valid email address; and (3) The delivery of such electronic email to such Independent Plan Fiduciary is provided by Principal in a manner consistent with the relevant provisions of the Department's regulations at 29 CFR 2520.104b–1(c) (substituting the word ''Principal'' for the word ''administrator'' as set forth therein, and substituting the phrase ''Independent Plan Fiduciary'' for the phrase ''the participant, beneficiary or other individual'' as set forth therein).

Furthermore, in the event the Independent Plan Fiduciary disapproves of the investment, plan assets invested in the Index Fund or Model-Driven Fund will be withdrawn and the proceeds processed as directed by the Independent Plan Fiduciary.

For new plan investors in an Index Fund or Model-Driven Fund, Independent Plan Fiduciaries must consent to the investment in Principal Stock through execution of a subscription or similar agreement for the Index Fund or Model-Driven Fund that contains the appropriate approval language.

20. The Department has tentatively determined that the proposed exemption is in the interests of plans invested in the Index Funds and Model-Driven Funds. The exemption is intended to allow Index Funds to track the performance of independently-maintained, third-party Indexes more closely. Furthermore, with respect to Model-Driven Fund plan investors, the investment in Principal Stock by Model-Driven Funds will allow the Funds to match, more closely, the performance of portfolios selected by computer models that are based on prescribed objective criteria and use independent third-party data to transform an independently-maintained third-party Index.

21. The Department has tentatively determined that the proposed exemption is protective of the rights of the plans investing in Index Funds and Model-Driven Funds, and their participants and beneficiaries. In this regard: (a) Each Index Fund and Model-Driven Fund will be based on a securities index that is created and maintained by an organization independent of Principal; (b) the acquisition or disposition of Principal Stock will be for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Index Fund or Model-Driven Fund is based; (c) all initial purchases of Principal Stock will occur through a recognized U.S. securities exchange or through an automated trading system operated by a broker-dealer independent of Principal or by a recognized U.S. securities exchange; and (d) subsequent purchases of Principal Stock will also occur as direct, arm's length transactions with broker-dealers independent of Principal, thereby ensuring that the purchases of Principal Stock occur at market price.

The requested exemption contains conditions on the timing and size of purchase transactions designed to preclude possible market price manipulations. Specifically, the proposed exemption requires that no more than five (5) percent of the total amount of Principal Stock, that is issued and outstanding at any time, is held in the aggregate by Index and Model-Driven Funds managed by PLIC or a Principal affiliate. Furthermore, Principal Stock must constitute no more than five (5) percent of any independent, third-party Index on which the investments of an Index Fund or Model-Driven Fund are based.

22. Finally, an Independent Plan Fiduciary must authorize the investment of the plan's assets in an Index Fund or Model-Driven Fund which will directly or indirectly purchase and/or hold Principal Stock. Further, on any matter for which shareholders of Principal Stock are required or permitted to vote, PLIC or the respective Principal affiliate will cause the Principal Stock held by an Index Fund or Model-Driven Fund to be

voted as determined by an Independent Fiduciary.

Summary

23. Given the conditions described below, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for an exemption under section 408(a) of the Act.

Proposed Exemption

Section I. Covered Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(l)(D), 406(b)(l), and section 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(l)(D) and (E) of the Code, shall not apply to the direct or indirect acquisition, holding, and disposition of common stock issued by Principal Financial Group, Inc. (PFG), and/or common stock issued by an affiliate of PFG (together, the Principal Stock), by index funds (Index Funds) and model-driven funds (Model-Driven Funds) that are managed by Principal Life Insurance Company (PLIC), an indirectly wholly-owned subsidiary of PFG, or an affiliate of PLIC (collectively, Principal), in which client plans of Principal invest, provided that the conditions of Sections II and III are met.

Section II. Exemption for the Acquisition, Holding and Disposition of Principal Stock

(a) The acquisition or disposition of Principal Stock is for the sole purpose of maintaining strict quantitative conformity with the relevant Index upon which the Index Fund or Model-Driven Fund is based, and does not involve any agreement, arrangement or understanding regarding the design or operation of the Fund acquiring Principal Stock that is intended to benefit Principal or any party in which Principal may have an interest;

(b) Whenever Principal Stock is initially added to an Index on which an Index Fund or Model-Driven Fund is based, or initially added to the portfolio of an Index Fund or Model-Driven Fund (or added to the portfolio of an underlying Index Fund in which another Index Fund invests), all purchases of Principal Stock pursuant to a Buy-up (as defined in Section III(d)) occur in the following manner:

(1) Purchases are from one or more brokers or dealers;

(2) Based on the best available information, purchases are not the opening transaction for the trading day;

(3) Purchases are not effected in the last half hour before the scheduled close of the trading day;

(4) Purchases are at a price that is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from non-affiliated brokers;

(5) Aggregate daily purchases do not exceed, on any particular day, the greater of: (i) Fifteen (15) percent of the aggregate average daily trading volume for the security occurring on the applicable exchange and automated trading system for the previous five business days, or (ii) fifteen (15) percent of the trading volume for the security occurring on the applicable exchange and automated trading system on the date of the transaction, as determined by the best available information for the trades occurring on that date;

(6) All purchases and sales of Principal Stock occur either: (i) On a recognized U.S. securities exchange (as defined in Section IV(j) below), (ii) through an automated trading system (as defined in Section IV(b) below) operated by a broker-dealer independent of Principal that is registered under the Securities Exchange Act of 1934 (the 1934 Act), and thereby subject to regulation by the Securities and Exchange Commission (the SEC), which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) through an automated trading system that is operated by a recognized U.S. securities exchange, pursuant to the applicable securities laws, and provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; and

(7) If the necessary number of shares of Principal Stock cannot be acquired within ten (10) business days from the date of the event which causes the particular Fund to require Principal Stock, Principal appoints a fiduciary, which is independent of Principal (the Independent Fiduciary), to design acquisition procedures and monitor compliance with these procedures;

(c) For transactions subsequent to a Buy-Up, all aggregate daily purchases of Principal Stock by the Funds do not exceed on any particular day the greater of:

(1) Fifteen (15) percent of the average daily trading volume for Principal Stock occurring on the applicable exchange and automated trading system for the previous five (5) business days, or

(2) Fifteen (15) percent of the trading volume for Principal Stock occurring on the applicable exchange and automated trading system on the date of the transaction, as determined by the best available information for the trades that occurred on this date;

(d) All transactions in Principal Stock not otherwise described above in Section II(b) are either:

(1) Entered into on a principal basis in a direct, arm's length transaction with a broker-dealer, in the ordinary course of its business, where the broker-dealer is independent of Principal and is registered under the 1934 Act, and thereby subject to regulation by the SEC;

(2) Effected on an automated trading system operated by a broker-dealer independent of Principal that is subject to regulation by either the SEC or another applicable regulatory authority, or an automated trading system, as defined in Section IV(b), operated by a recognized U.S. securities exchange which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; or

(3) Effected through a recognized U.S. securities exchange, as defined in Section IV(j), so long as the broker is acting on an agency basis;

(e) No purchases or sales of Principal Stock by a Fund involve purchases from, or sales to, Principal (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund (unless the transaction by the Fund with the party in interest would otherwise be subject to an exemption). However, this condition would not apply to purchases or sales on an exchange or through an automated trading system (described in paragraphs (on a blind basis where the identity of the counterparty is not known);

(f) No more than five (5) percent of the total amount of Principal Stock, that is issued and outstanding at any time, is held in the aggregate by Index and Model-Driven Funds managed by Principal;

(g) Principal Stock constitutes no more than five (5) percent of any independent third-party Index on which the investments of an Index Fund or Model-Driven Fund are based;

(h) A fiduciary of a plan which is independent of Principal (the Independent Plan Fiduciary, as defined in Section IV(k)) authorizes the investment of the plan's assets in an Index Fund or Model-Driven Fund which directly or indirectly purchases and/or holds Principal Stock. With respect to any plan holding an interest in an Index Fund or Model-Driven Fund that intends to start investing in

Principal Stock, before Principal Stock is purchased directly or indirectly by the Index Fund or Model-Driven Fund, Principal will provide the Independent Plan Fiduciary with a notice through email stating that if the plan fiduciary does not indicate disapproval of investments in Principal Stock within sixty (60) days, then the Independent Plan Fiduciary will be deemed to have consented to the investment in Principal Stock. In this regard: (1) Principal must obtain from such Independent Plan Fiduciary prior consent in writing to the receipt by such Independent Plan Fiduciary of such disclosure via electronic email; (2) Such Independent Plan Fiduciary must have provided to Principal a valid email address; and (3) The delivery of such electronic email to such Independent Plan Fiduciary is provided by Principal in a manner consistent with the relevant provisions of the Department's regulations at 29 CFR 2520.104b–1(c) (substituting the word ''Principal'' for the word ''administrator'' as set forth therein, and substituting the phrase ''Independent Plan Fiduciary'' for the phrase ''the participant, beneficiary or other individual'' as set forth therein). In the event that the Independent Plan Fiduciary disapproves of the investment, plan assets invested in the Index Fund or Model-Driven Fund will be withdrawn and the proceeds processed, as directed by the Independent Plan Fiduciary. For new plan investors in an Index Fund or Model-Driven Fund, Independent Plan Fiduciaries for the plans will consent to the investment in Principal Stock through execution of a subscription or similar agreement for the Index Funds or Model-Driven Fund that contains the appropriate approval language; and

(i) On any matter for which shareholders of Principal Stock are required or permitted to vote, Principal will cause the Principal Stock held by an Index Fund or Model-Driven Fund to be voted, as determined by the Independent Fiduciary.

Section III. General Conditions

(a) Principal maintains or causes to be maintained for a period of six (6) years from the date of the transactions, the records necessary to enable the persons described in paragraph (b) of this Section III to determine whether the conditions of this exemption have been met, except that: (1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Principal, the records are lost or destroyed prior to the end of the six year period, and (2) no party in interest, other than Principal, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b) below.

(b)(1) Except as provided in paragraph (b)(2) of this Section III and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (a) of this Section III are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service or the SEC;

(B) Any fiduciary of a plan participating in an Index Fund or Model-Driven Fund, who has authority to acquire or dispose of the interests of the plan, or any duly authorized employee or representative of the fiduciary;

(C) Any contributing employer to any plan participating in an Index Fund or Model-Driven Fund or any duly authorized employee or representative of the employer; and

(D) Any participant or beneficiary of any plan participating in an Index Fund or Model-Driven Fund, or a representative of the participant or beneficiary; and

(2) None of the persons described in subparagraphs (B) through (D) of this Section III(b)(1) shall be authorized to examine trade secrets of Principal or commercial or financial information which are considered confidential.

Section IV. Definitions

(a) An ''affiliate'' of Principal includes:

(1) Any person, directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with the person;

(2) Any officer, director, employee or relative of the person, or partner of any the person; and

(3) Any corporation or partnership of which the person is an officer, director, partner or employee;

(b) The term ''automated trading system'' means an electronic trading system that functions in a manner intended to simulate a securities exchange by electronically matching orders on an agency basis from multiple buyers and sellers, such as an ''alternative trading system'' within the meaning of the SEC's Reg. ATS (17 CFR part 242.300), as this definition may be amended from time to time, or an ''automated quotation system'' as described in Section 3(a)(5l)(A)(ii) of the 1934 Act (15 U.S.C. 8c(a)(5 l)(A)(ii));

(c) The term ''Buy-up'' means an initial acquisition of Principal Stock by an Index Fund or Model-Driven Fund which is necessary to bring the Fund's holdings of Principal Stock either to its capitalization-weighted or other specified composition in the relevant index (the Index), as determined by the independent organization maintaining the Index, or to its correct weighting as determined by the model which has been used to transform the Index;

(d) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(e) The term ''Fund'' means an Index Fund (as described in Section IV(a)) or a Model-Driven Fund (as described in Section III(b))

(f) The term ''Index'' means a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities, but only if:

(1) The organization creating and maintaining the Index is:

(A) Engaged in the business of providing financial information, evaluation, advice, or securities brokerage services to institutional clients; or

(B) A publisher of financial news or information; or

(C) A public stock exchange or association of securities dealers; and

(2) The Index is created and maintained by an organization independent of Principal; and

(3) The Index is a generally-accepted standardized index of securities which is not specifically tailored for the use of Principal;

(g) The term ''Index Fund'' means any investment fund, trust, insurance company separate account, separately managed account, or portfolio, sponsored, maintained, trusteed, or managed by Principal, in which one or more investors invest, and:

(1) Which is designed to track the rate of return, risk profile and other characteristics of an independently-maintained securities index, as described in Section IV(c) below, by either: (i) Investing directly in the same combination of securities which compose the Index or in a sampling of the securities, based on objective criteria and data, or (ii) investing in one or more other Index Funds to indirectly invest in the same combination of securities which compose the Index, or in a sampling of the securities based on objective criteria and data;

(2) For which all assets held outside of any liquidity buffer are invested without Principal using its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold, and the liquidity buffer, if any, does not hold any Principal Stock;

(3) That contains ''plan assets'' subject to the Act;

(4) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund, which is intended to benefit Principal or any party in which Principal may have an interest.

(h) The term ''Model-Driven Fund'' means any investment fund, trust, insurance company separate account, separately managed account, or portfolio, sponsored, maintained, trusteed, or managed by Principal, in which one or more investors invest, and:

(1) For which all assets held outside of any liquidity buffer consist of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third-party data, not within the control of Principal, to transform an independently-maintained Index, as defined in Section IV(c) below, and the liquidity buffer, if any, does not hold any Principal Stock;

(2) That contains ''plan assets'' subject to the Act; and

(3) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund or the utilization of any specific objective criteria which is intended to benefit Principal or any party in which Principal may have an interest;

(i) The term ''Principal'' refers to Principal Life Insurance Company, its indirect parent and holding company, Principal Financial Group, Inc., and any current or future affiliate, as defined above in Section IV(a);

(j) The term ''recognized U.S. securities exchange'' means a U.S. securities exchange that is registered as a ''national securities exchange'' under Section 6 of the 1934 Act (15 U.S.C. 78f), as this definition may be amended from time to time, which performs with respect to securities the functions commonly performed by a stock exchange within the meaning of definitions under the applicable securities laws (*e.g.,* 17 CFR part 240.3b–16); and

(k) The term ''Independent Plan Fiduciary'' means a fiduciary of a plan, where such fiduciary is independent of and unrelated to Principal. The Independent Plan Fiduciary will not be deemed to be independent of and unrelated to Principal if:

(1) Such Independent Plan Fiduciary, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with Principal;

(2) Such Independent Plan Fiduciary, or any officer, director, partner, employee, or relative of such Independent Plan Fiduciary, is an officer, director, partner, or employee of Principal (or is a relative of such person); or

(3) Such Independent Plan Fiduciary, directly or indirectly, receives any compensation or other consideration for his or her personal account in connection with any transaction described in this proposed exemption.

Notice to Interested Persons

Notice of the proposed exemption will be given to all fiduciaries of plans invested in the Index Funds within 30 days of the publication of the notice of proposed exemption in the **Federal Register**, by electronic mail to the last known email address of all fiduciaries. Principal will also publish the notice on a website through which plan fiduciaries communicate with Principal. The notice will contain a copy of the notice of proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on the pending exemption. Written comments are due within 45 days of the publication of the notice of proposed exemption in the **Federal Register**.

All comments will be made available to the public.

Warning: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: Scott Ness of the Department, telephone (202) 693–8561. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 20th day of December, 2018.

Lyssa Hall,

Director, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2018–28091 Filed 12–27–18; 8:45 am]

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Federal Register

Vol. 83, No. 248

Friday, December 28, 2018

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Presidential Documents	
Executive orders and proclamations	**741–6000**
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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
66555–67032 27
67033–67676 28

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
No. 2019–06 of December 7, 2018 66555

5 CFR

211 63041
531 63042

6 CFR

Ch. I 63775
5 66557

7 CFR

12 63046
66 65814
205 66559
210 63775
215 63775
220 63775
226 63775
400 66574
457 63383
800 66583
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, 66585
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, 66644
590 65111

11 CFR

104 66590
109 66590
111 66596

Proposed Rules:
100 62282
112 62283

12 CFR

4 67033
19 66599
25 66601
30 66604
109 66599
195 66601
208 67033
211 67033
228 66601
252 64023
337 67033
345 66601
347 67033
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
325.....67149
329.....66024
Ch. VII.....65924
Ch. X.....64036
1030.....63431
1254.....65575

13 CFR

Proposed Rules:
121.....62516
124.....62516
125.....62516
126.....62516
127.....62516
129.....62516

14 CFR

21.....65485
23.....66607
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, 66609, 66612, 67036, 67038, 67043, 67049
71.....62451, 62453, 63402, 63403, 63405, 63406, 63407, 63409, 63567, 64239, 64241, 64242, 64244, 64245, 64247, 64248, 64249, 64250, 64252, 64736, 65080, 65486, 66095, 67053, 67055, 67056, 67057, 67059
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, 67155, 67156, 67158
61.....65316
71.....63447, 63449, 63601, 63603, 64490, 64491, 65113, 66646, 67160, 67162, 67163, 67165
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
404.....66615
449.....66615

Proposed Rules:
160.....63450
210.....65601
230.....65601
239.....65601
240.....65601
243.....65601
249.....65601

18 CFR

8.....67060
141.....67060
284.....62242

19 CFR

4.....67069
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
573.....66618
882.....66103
860.....64443

Proposed Rules:
15.....64752
50.....65322
73.....64045
312.....65322
314.....64299
600.....63817
601.....64299
812.....65322
860.....63127
1308.....67166

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, 66647, 67171, 67490, 67612
301.....67612

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
4071.....67073
4302.....67073

Proposed Rules:
Ch. I.....64053
1910.....63745

31 CFR

148.....65509, 66618
270.....65297
317.....65298
358.....65298

32 CFR

199.....63574
701.....62249

Proposed Rules:
199.....65323
220.....64768
1701.....67172

33 CFR

100.....62249, 66128
117.....62250, 64023, 64024, 65081, 65299, 66131, 66621
165.....62251, 62253, 62256, 62258, 62259, 62710, 63059, 63416, 63578, 63804, 64744, 65083, 65085, 65521, 65523, 65225, 66131, 66623, 66625, 67074, 67075, 67077, 67079, 67081
334.....64024

Proposed Rules:
110.....65609
117.....65326
165.....64771
328.....67174
334.....64053

34 CFR

Proposed Rules:
Ch. II.....66655
Ch. VI.....66181

37 CFR

6.....62711
201.....63061, 66627
202.....66627
203.....63061
210.....63061
211.....66627
212.....66627
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, 66630
68.....62268
70.....64285
80.....63703
81.....62269, 66631
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, 66658
55.....62283
60.....65423, 65617
62.....66209
70.....65115
81.....66200
110.....67174
112.....67174
116.....67174
117.....67174
122.....67174
131.....64059
147.....62536
232.....67174
258.....66210
271.....63461, 65116
281.....65117
300.....63146, 67174
302.....67174
401.....67174
721.....63460
1552.....65328

42 CFR

413.....67082
414.....67082
416.....67083
419.....67083

Proposed Rules:
405.....62778
422.....66661
423.....62778
488.....65331

43 CFR

Proposed Rules:
2.....67175

44 CFR

64 .....62494, 64030, 67094, 67095

45 CFR

153.....63419
156.....62496
1230.....67096
2551.....64635
2552.....64635
2553.....64635
2554.....67096

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, 67098
20.....63098
22.....66145
32.....67098
36.....63581
51.....66146, 67098
61.....67098
63.....66147
69.....67098
73.....65551, 66635
74.....65551
76.....66149
87.....63806
96.....63076

Proposed Rules:
1.....66661
2.....67180
15.....64506
25.....67180
73.....66661

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
3019.....67123
3052.....67123

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
817.....66662
852.....66662

49 CFR

270.....63106
367.....67124
383.....62503, 65564
384.....62503
390.....62505
555.....66158
655.....63812

Proposed Rules:
571.....66228
1002.....66229
1312.....66229

50 CFR

17.....67131
218.....66846
300.....62732
622 .....62508, 62735, 63813, 64032, 64480, 64748, 66635
635 .....62512, 65571, 67140
648 .....64257, 64481, 64482, 65313, 65574, 66160, 66161, 67142
660 .....62269, 63587, 63970, 64293, 66636, 66638
665.....63428
679 .....62514, 64034, 65107, 65108, 67143, 67144

Proposed Rules:
17 .....62778, 65127, 67185, 67190
217.....64078
300.....66665
622.....62555
648.....66234
679.....62794, 62815

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List December 26, 2018

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